

HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

Civil Revision Petition No.2088 of 2017

ORDER:

The challenge in this revision at the instance of the petitioner/plaintiff is the order dated 08.03.2017 in I.A.No.184 of 2016 in O.S.No.155 of 2012 passed by the Junior Civil Judge, Mydukur, appointing the Advocate Commissioner to note down the physical features and measure the petition schedule property with the help of Mandal Surveyor.

2) The parties in this revision are referred as they were arrayed before the trial Court.

3 a) The plaintiff filed the suit—O.S.No.155 of 2012 seeking permanent injunction against the defendants in respect of plaint schedule open site in an extent of Ac.0-20cents covered by Sy.No.1342 of Onipenta village fields of Mydukur Mandal. His case briefly is that his paternal grand father late Khajipeta Mohiddin Sab of Onipenta village purchased Ac.1-25 cts in Sy.No.1342 and he got four sons and plaintiff is the son of Silar Saheb. The plaintiff's father and uncles sold away Ac.1-05 cts to one Muriki Munaiah under registered sale deed dated 17.06.1940 and retained the remaining Ac.0-20cts. During the oral partition, the said Ac.0-20 cts was allotted to the share of plaintiff's father and he gifted the same to plaintiff. While-so, Ac.1-05 cts is concerned, Muriki Munaiah sold the same to Sahebgari Peeran Saheb

under registered sale deed dated 14.11.1946 and the said Sahebgari Peeran Saheb sold the same to Bollavaram Mahammad Sab under registered sale deed dated 28.03.1962 and thereafter the said Bollavaram Mahammad Sab sold out the said land to Panwala Mahaboob Sab and Panwala Peeran Sab under two registered sale deeds dated 27.06.1966 and 27.07.1966. The defendants are the legal heirs of the said two purchasers. It is the case of plaintiff that defendants have been trying to interfere with the plaintiff's peaceful possession and enjoyment of the plaint schedule property. Hence, the suit.

b) The defendants case is that Panwala Mahaboob Saheb and his two brothers namely Panwala Hussain Peera and Panwala Peeran Saheb purchased an extent of Ac.1-05 cts under two registered sale deeds dated 27.06.1966 and 27.07.1966 from Bollavaram Mahammad Sab. The defendants, who are their heirs, are enjoying the said property and plaintiff has nothing to do with the same. Due to increase in the market value of the plaint schedule property, plaintiff instituted a false suit.

4 a) The defendants applied to the revenue department for measurement of the suit property as well as their property in Sy.No.1342. Accordingly, Mandal Surveyor surveyed the property and concluded that there was no land in an extent of Ac.0-20 cts and only Ac.0-03 cts was available on the ground. The plaintiff knows very well but he filed the suit claiming that the plaint schedule site is in an extent of Ac.0-20 cts. With those contentions, the defendants filed I.A.No.184 of 2016 to appoint an Advocate Commissioner to measure the suit land

and to note down the physical features with the help of Mandal Surveyor.

b) The plaintiff opposed the said petition. The trial Court allowed the petition observing that, for knowing the details about the disputed land and to ascertain the real facts and to render just decision, appointment of Commissioner was just and necessary.

Hence the CRP.

5) Heard arguments of Sri G.Ramachandra Reddy, learned counsel for petitioner/plaintiff and Sri V.R.Reddy Kovvuri, learned counsel for respondents 1, 3 to 5/defendants.

6) Severely criticising the impugned order of the trial Court, learned counsel for plaintiff would submit that the suit is one for permanent injunction in respect of plaint schedule vacant site and admittedly there is no identification problem because the defendants did not question the boundaries or survey number of the property. They are only questioning the extent saying that the suit property is in an extent of Ac.0-03cts but not Ac.0-20 cts and their further contention is that the plaintiff is trying to meddle with their property of Ac.1-05 cts purchased by Panwala Mahaboob Saheb and Panwala Peeran Saheb. Learned counsel further argued that in a case of this nature, the burden is on the plaintiff to establish that the property shown in the plaint schedule is, indeed, in an extent of Ac.0-20 cts and he got title and possession over the same. This can be established during the trial. Similarly, the defendants also can

establish their contention that the suit property is only in an extent of Ac.0-03cts but not Ac.0-20cts by letting in evidence. Therefore, the actual extent of the suit property can be known only after full-fledged trial but not at this inceptional stage where the trial has just begun. Therefore, at this stage, he would submit, appointment of Commissioner is quite unwarranted. If after the trial, the Court entertains any doubt with regard to the extent, it may appoint an Advocate Commissioner either *suo moto* or on the application of either party. He placed reliance on the decision reported in *Arvind Kumar Agarwal vs. M/s. Legend Estates (P) Ltd*¹ and prayed to allow the CRP.

7) Per contra, learned counsel for defendants would submit that there is a serious dispute about the extent of the plaint schedule site and already Mandal Surveyor, Mydukur, surveyed the suit property and reported to Mandal Tahsildar to the effect that the actual extent of the plaint schedule site is only Ac.0-03 cts and to establish the same and to show that the plaintiff in the garb of the suit, trying to encroach into their site, the defendants filed commission petition and the same was rightly allowed by the trial Court and there are no merits in the CRP and the same may be dismissed. He relied upon the following decisions to buttress his contention that when there is a dispute regarding identification, physical features etc, of the suit property, a Commissioner can be appointed at any stage:

¹ 2015 (1) Law Summary 199

(i) *Shaik Zareena Kasam vs. Patan Sadab Khan and others*²

(ii) *Nambada Varaha Narasimhulu vs. Karanam Dalamma & others*³

8) The point for determination is:

“Whether there are merits in this CRP to allow?”

9) **POINT**: As can be seen, both parties agree that the Panwala Mahaboob Saheb and Panwala Peeran Saheb purchased Ac.1-05 cts of land from Bollavaram Mahaboob Saheb under two registered sale deeds dated 27.06.1966 and 27.07.1966. The case of plaintiff is that the said Ac.1-05 cts of land was originally part of Ac.1-25 cts in Sy.No.1342 purchased by his paternal grandfather and out of the said land, he sold Ac.1-05 cts and it ultimately changed hands and came in possession of Panwala Mahaboob Saheb and Panwala Peeran Saheb. It is also the case of plaintiff that remaining Ac.0-20cts of land was retained by his paternal grandfather and on his death, his father and paternal uncles succeeded the said property and in an oral partition, his father got the said property to his share and he gifted the same to plaintiff. The defendants would contend that as per the survey got conducted by them through Mandal Surveyor, the plaint schedule property is only in an extent of Ac.0-03 cts but the plaintiff is falsely claiming Ac.0-20 cts and trying to encroach into their property.

10) In a case of this nature, no doubt the burden lies on the plaintiff to establish that the extent of suit land is Ac.0-20 cts and the same has been

² 2011 (4) ALD 231

³ 2014 (4) ALD 610

in his possession and enjoyment by the date of suit. However, that does not mean that defendants have no right to establish that remaining extent of the plaint schedule property after selling Ac.1-05 cts is only Ac.0-03 cts on ground but not Ac.0-20 cts. As already stated supra, what can be culled out from the respective contentions is that there is a serious dispute about the actual extent of the plaint schedule vacant site. When there is a dispute regarding the physical features, boundaries, extent etc., of the suit property, it is trite law that the Court can appoint an Advocate Commissioner to localise the suit property and such a local inspection can be done with the help of a qualified surveyor, if necessary, for, in such circumstances, the Court cannot adjudicate upon the real controversy only with the help of oral and documentary evidence without having the comprehension over the physical condition of the subject property. In *Shaik Zareena Kasam's* case(2 supra) and *Nambada Varaha Narasimhulu's* case (3 supra) cited by learned counsel for respondents, this aspect was discussed and held that when there is a dispute regarding boundaries or physical features of the property or any allegation of encroachment as narrated by one party and disputed by another party, the facts have to be physically verified because recitals of the documents may not reveal the true facts and measuring of the land on the spot by surveyor may become necessary.

11) The next question that would arise is at what stage, the Advocate Commissioner can be appointed. In the aforesaid two decisions, it appears that the Commissioner was appointed during the trial stage.

That apart, we have few more judgments on this aspect. In *N.Savitramma and others vs. B.Changa Reddy*⁴, His Lordship M.Jagannadha Rao, J (as he then was) observed thus:

“Para 15: The question as to when a commissioner could be appointed, should be with the wide discretion of the trial court, but it cannot be said that no commissioner could be appointed before the issues are framed or the evidence is led. Decided cases which are binding on me, hold that a commissioner could be appointed even ex-parte.”

In the same lines, a learned Single Judge of this Court M.S.Ramachandra Rao, J, in *Badana Mutyalu and Badana Laxminarayana vs. Palli Appalaraju*⁵ observed thus:

“Para 18: So it has been held that either party to the suit could have a Commissioner appointed even before the trial. In view of the above decisions, I hold that in situations where there is controversy as to identification, location or measurement of the land (emphasis supplied), local investigation should be done at an early stage so that the parties are aware of the report of the Commissioner and go to trial prepared. The party against whom the report may have gone may choose to adduce evidence in rebuttal.”

So it is clear from above precedential jurisprudence that when there is a dispute regarding the identity, physical features, boundaries, extent of the subject property, an Advocate Commissioner can be appointed to make a local inspection of the suit property, if necessary, with the aid of a surveyor and such an Advocate Commissioner can be

⁴ 1988(1) APLJ (HC) 45 = MANU/AP/0444/1987

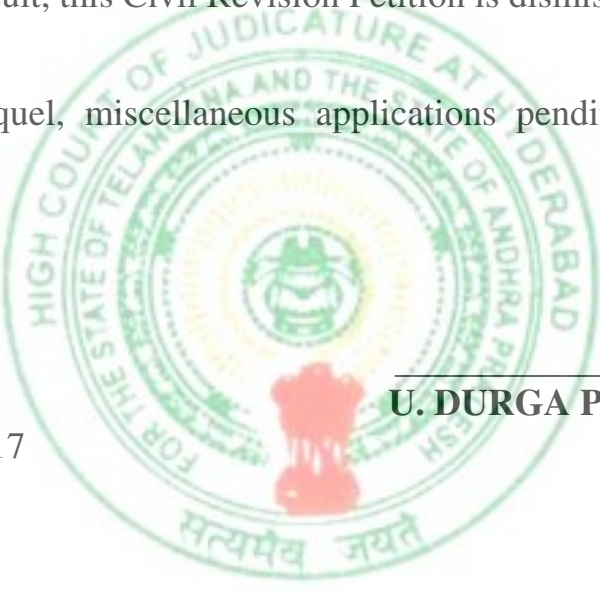
⁵ 2013(5) ALD 376 = 2013(6) ALT 26

appointed at any appropriate stage at the discretion of the trial Court. Ofcourse it is again a trite law that a Commissioner shall not be appointed to garner the evidence for a particular party. Such is not the case in the instant matter. I have gone through the decision in *Arvind Kumar Agarwal*'s case (1 supra). The earlier decisions which have consistently held about the appointment of Commissioner at any appropriate stage of the matter, were not placed before the learned Judge. In that view, the same is not followed in this case.

12) In the result, this Civil Revision Petition is dismissed. No costs.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

Date: 12.09.2017
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U. DURGA PRASAD RAO, J