

HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

CIVIL REVISION PETITION No.238 OF 2018

ORDER :

This Civil Revision Petition is filed by the petitioner/respondent against order dated 29.12.2017 in I.A.No.414 of 2017 in A.T.C.No.9 of 2017, wherein the Court below appointed an Advocate Commissioner to inspect the total land of Ac.23.02 cents in RS No.326 of Chinnayagudem Village including the plaint schedule property and to mark the plaint schedule property and land of late A.Suryakanthamma and to execute the warrant with the help of survey knowing person or Mandal Surveyor and to file report.

2. Learned counsel for the revision petitioner Sri N.Subba Rao submits that ATC No.9 of 2017 is filed by the sole respondent against the revision petitioner stating that the petitioner was re-inducted into suit schedule land as tenant. He submits that already injunction was granted not to cut the trees and not to alienate the suit schedule property and that at this stage there is no need to appoint an Advocate Commissioner to inspect the suit schedule property. He also submits that the petitioner filed counter on 08.01.2018 after impugned order is passed and without considering the same, police aid was also granted on 09.01.2018 and that at any rate, demarcation can be ordered after ATC is allowed.

3. On the other hand, Sri M.R.S.Srinivas, learned counsel for the respondent submits that there is nothing wrong in appointing

an Advocate Commissioner, even without issuing notice to the revision petitioner and same is permissible. He submits that since there is an allegation that this respondent has removed the bund between the land of the petitioner and the petitioner's vendor, unless an Advocate Commissioner is appointed and its physical features are noted down, the state of affairs will not be remained, if notice is ordered and Advocate Commissioner is appointed some time later. In support of his contention, he relied on the judgments reported in **N.Savitramma v. B.Changa Reddy**¹, **Mundladinne Gopal Reddy v. P.Ramachandra Reddy**² and **Bandi Samuel v. Medida Nageswara Rao**³.

4. In this case, it is to be seen that an Advocate Commissioner was appointed to inspect the suit schedule property and also to mark the plaint schedule property. Since there is an allegation that the revision petitioner has removed the bund between the land of the respondent and respondent's vendor, if notice is ordered to be issued to the petitioner before appointing a Commissioner, then there is likelihood of changing the nature of the plaint schedule property, by the petitioner. In **N.Savitramma v. B.Changa Reddy (supra)**, this Court held as follows:

"9. The submission that Commissioner should not be appointed for noting such physical features till after the evidence is led, cannot be accepted. P.N.Ramaswamy, J. pointed out in *In re P.Moosa Kutty* [AIR 1953 Madras P 717] that the very purpose of appointing a Commissioner may sometimes be frustrated, if such appointment is postponed till after the trial. Whether on account of the acts of the opposite party or on account of the natural causes, the physical features obtaining on the land or property as on the date when the plaint is filed, may be obliterated. The learned judge observed: "If a commission is not going to be issued until the defendant appears, most often there will be no point in taking out a commission, because

¹ 1988 (1) A.L.T.353

² 2016 (5) ALT 728

³ 2017 (1) ALT 493

the object of the commission itself would be lost and incriminating circumstances would be obliterated.” The above observations, in my view, are extremely important. Take the case where a plaintiff alleges that a particular bund had been removed or a new wall has been constructed or a channel has been closed suddenly or a new window has been opened or a new fencing has been put up. If the trial in such cases were to take place years after the filing of the suit, it would be difficult to get at the nature of the physical features obtaining on the date of the suit. It has, therefore, been held in several cases that either party to the suit could have a Commissioner appointed even before the trial. It has even been held that a plaintiff could have a Commissioner appointed for local investigation even *ex parte* on the date of the suit. It has been so held by a Division Bench of this Court in C.Veeranna vs. C.Venkatachalam [AIR 1959 A.P P 170= 1958 ALT 792] consisting of P.Chandra Reddy, Offg. CJ (as he then was) and Seshachalapati, J. It was argued before the learned judges that Rule 18 of Order 25 contemplates the issue of notices before the appointment of Commissioner. This contention was rejected and it was held that Rule 18 contemplated the issue of notices after the appointment of a Commissioner, but not before such appointment. There was, therefore, no mandate in the statute that an *ex parte* Commissioner could not be appointed. The learned judges observed:

“Rule 18 contemplates a situation after the appointment of a Commissioner and not before the commission is issued. There is nothing in Rule 9 of warrant a contention that a duty is cast on the Court to issue notice before an order is passed under that rule. It is open to the Court to issue an *ex parte* commissioner if it deems that a local investigation is requisite for the purpose of the suit...” “If the contention of the petitioner, that in every case a notice is to be issued before an order is passed under Order 26, Rule 9 is to be accepted, the very purpose appointing the Commissioner may often be frustrated.”

In taking the above view, the Division Bench quoted with approval the observations of Ramaswamy, J. in Moosa Kutty's case above mentioned. Their Lordships also dissented from the earlier decision of the learned single judge of Madras High Court in Latchan Naidu v. Ramakrishna Ranga Rao [AIR 1934 Madras P. 548]. The above decision of the Division Bench was followed by Manohar Prasad, J (as he then was) in Seetharamappa v. P.Appaiah [AIR 1962 AP P 84=1961 ALT 262].

10. A similar situation may arise in cases covered by Order 39 CPC. The said order provides for local inspection. Rule 7 of Order 39 provides that the Court may on the application of any party to a suit, and on such terms as it thinks fit. (a) make an order for the detention, preservation or inspection of any property which is the subject matter of such suit, or as to which any question may arise therein. Construing the above said provisions, Venkatarama Sastry, J. held on review of the relevant cases in Y.Sambaiah Basavapurna [AIR 1975 AP 15] that even for purposes of Order 39 Rule 7 (1)(a) an *ex parte* Commissioner be appointed.....”

5. In **Bandi Samuel v. Medida Nageswara Rao (supra)**, this Court held as follows:

“7. The object of Order 26 Rule 9 of Civil Procedure Code is not to assist a party to collect evidence where the party can procure the same. An Advocate Commissioner can be appointed under Order XXVI Rule 9 of the Code of Civil Procedure 1908 inter alia for elucidating any matter in dispute. There is some confusion as to in what circumstances an advocate-commissioner is to be appointed in a civil suit. To answer this question, we have to understand the expression of elucidating any matter in dispute in Order 26, Rule 9 of CPC. There are several expressions in this regard. Some are under the impression that no advocate-commissioner is to be appointed in suit for injunction. For example, the claim for injunction made by the plaintiff is based on the plea that there is only one way to his house and that he is being prevented by the defendant from using said way, any amount of evidence in this regard may not help the Court to render a correct finding on this aspect, as evidence in this regard would be available on the spot at the ground/field. So, a situation such as this would definitely fall within the expression of elucidating any matter in dispute to avoid adducing of much oral evidence by consuming time of Court and parties and ultimately with no possibility of practical approach for accurate determination of the lis. No doubt, before appointing an advocate commissioner, Court shall examine pleadings, relief claimed and real controversy between parties. Court has to keep in mind therefrom to decide whether there is an actual necessity to appoint advocate commissioner to decide any real controversy between parties.

9. There are circumstances in which, it is only a Commissioner inspecting the property promptly and recording timely assessment of what obtains relating to the property from threat of changing or obliterating the existing physical features to destroy valuable evidence on ground, could alone assist courts to decide correctly. If such prompt actions are not taken, it may destroy the valuable rights of the parties.”

6. In Mundladinne Gopal Reddy v. P.Ramachandra Reddy

(supra), this Court held as follows:

- “(1) Appointment of Advocate-Commissioner-Even ex parte and without issuing notice to the other side, an Advocate Commissioner can be appointed.
- (2) Appointment of Advocate-Commissioner-It cannot be said that no Commission could be appointed before the issues are framed or evidence is led.
- (3) Appointment of Advocate-Commissioner-The contention that the order appointing a Commissioner even before the evidence is let in is premature and hence, the said order is unsustainable, has no merit.
- (4) Appointment of Advocate-Commissioner-The appointment of an Advocate Commissioner to inspect the schedule lands in the suits and note down the nature of the said lands and the uses to which the lands are being put to, cannot be faulted.
- (5) Appointment of Advocate-Commissioner-The appointment of Commissioner for the said purpose, by no stretch of imagination, can be called as an attempt to gather evidence.”

In view of the law laid down in above judgments, the Court below has always has discretion to appoint an Advocate

Commissioner, even without notice to the other side and even before issues are framed. In view of the same, in the present case, the appointment of Advocate Commissioner without notice to the other side cannot be faulted.

7. Be that as it may, the assertion of the respondent in I.A.No.414 of 2017 in ATC No.9 of 2017 filed for appointment of Commissioner in paragraph 3 of the affidavit is as follows:

“3. The petition schedule land is a redsoil sandy land. The boundary bunds on the western and northern boundaries of petition scheduled land were removed, which fact was noticed by me recently prior to issuance of registered notice. Such bunds can be removed and formed within a span of half of an hour. As I am a resident of Rajahmundry which is about 40 kilometers away from petition schedule land, I cannot watch the property regularly. I reasonably believe that the respondent has recently removed the above said bunds, to include the same in the remaining land of Achanta people i.e., late A.Suryakanthamma and later A.Venkata Apparao.....”

Though learned counsel for the petitioner states that the tenancy between the respondent and petitioner is denied, but in view of assertion of the respondent at para 3 of his affidavit in interlocutory application, no exception can be taken for appointment of an Advocate Commissioner. The Court, below after exercising its discretion, felt that appointment of an Advocate Commissioner is necessary. The learned counsel for the petitioner has not shown what is the prejudice that would be caused if an Advocate Commissioner is appointed. It is also pertinent to note here that after appointment of an Advocate Commissioner, police aid/protection had to be granted by the Court below for execution of the warrant, which also goes to show that petitioner is not in the habit of honouring the Court orders. It is not known as to why

petitioner is shying away and why he is against appointment of an Advocate Commissioner.

8. Having regard to the above facts and circumstances and principles laid down in the above decisions, I do not see any irregularity or illegality in passing the impugned order by the Court below.

Accordingly, the Civil Revision Petition is dismissed. There shall be no order as to costs. As a sequel thereto, miscellaneous petitions, if any, pending shall stand dismissed.

06-02-2018
kvs



A.RAJASHEKER REDDY, J

HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

Civil Revision Petition No.238 OF 2018



kvs