

THE HONOURABLE SRI JUSTICE N.BALAYOGI

CIVIL REVISION PETITION No.6192 of 2016

ORDER

This revision is filed aggrieved by the order dated 06.05.2016 in I.A.No.779 of 2015 in O.S.No.386 of 2007 on the file of the Junior Civil Judge, Nalgonda.

2. The petitioners filed the said application to appoint an Advocate Commissioner to measure and demarcate the lands in possession of each pattadar in Sy.No.340 situated at Thondalvai Village of Narketpally Mandal, Nalgonda District. The said application was dismissed by the learned Junior Civil Judge, Nalgonda. Aggrieved by the same, the present revision is filed.

3. The contention of the petitioners is that mere filing of an application for appointment of Advocate Commissioner by the respondents herein in previous suit to note down the physical features will not take away the right of the petitioners to file under the changed circumstances of the case. In the earlier Commission the entire land in Sy.No.340 has not measured and now in view of special statement that the respondents have been in possession of the land purchased by them only, fresh demarcation is necessary. The trial Court erroneously dismissed the petition by finding that the petition is filed at a belated stage. The petitioners further contended that if the Advocate Commissioner is appointed for survey and demarcation of the land with the assistance of Mandal Surveyor, it will not cause any prejudice to the respondents and prayed to the allow the revision petition.

4. Per contra, the respondents contended that the 1st respondent is the owner and possessor of the land to an extent of Acs.4.30 guntas in Sy.No.340 of Thondalvai Village. Earlier, the 1st plaintiff Sathaiah filed O.S.No.291 of 2001 for injunction, wherein the 1st respondent filed I.A.No.1562 of 2004 to appoint Advocate Commissioner for measuring and demarcating the lands. After filing the Commissioner report, the 1st petitioner withdrawn the suit O.S.No.291 of 2001 and filed the present suit O.S.No.386 of 2007 and wherein after closing the evidence, the present application is filed at a belated stage.

5. Now the point that arises for consideration is, whether the order of the trial Court suffered with legal infirmities warranting interference by this Court?

6. The undisputed facts spells out from the contentions of both the parties in the plaint in O.S.No.386 of 2007 are that the total extent of Sy.No.340 is Acs.13.07 guntas. The 1st petitioner has purchased Acs.4.35 guntas in Sy.No.340/5 and he has been in actual possession and enjoyment of the same, whereas the 1st respondent/defendant purchased an extent of Acs.4.30 guntas in same Sy.No.340 about 20 years back.

7. In the year, 2001, the 1st petitioner filed O.S.No.291 of 2001 for injunction against respondent No.1 and wherein the 1st defendant filed I.A.No.1562 of 2004 for appointment of an Advocate Commissioner to demarcate and fix up the boundaries to the lands of the defendants measuring Acs.4.30 guntas in Sy.No.340 with the help of Mandal Surveyor. It is also a fact that the Advocate

Commissioner visited the schedule property on 23.04.2005 and measured the land with the assistance of Mandal Surveyor and filed report on 01.08.2005 along with maps. The said report shows that it has become very difficult for the Advocate Commissioner and Mandal Surveyor to demarcate the property as the entire property was covered with several bushes and toddy trees on the boundary lines. It is also a fact that after filing the Commissioner's report, the petitioners withdrawn O.S.No.291 of 2001 and filed the present suit O.S.No.386 of 2007 for recovery of possession of Acs.2.05 guntas of land in Sy.No.340/5. It is also an admitted fact that the petitioners filed I.A.No.779 of 2015 when the suit was posted for arguments after closing the evidence of both sides.

8. As already discussed above, there is no dispute with regard to the fact that the petitioners purchased Acs.4.35 guntas and the 1st respondent purchased Acs.4.30 guntas out of Acs.13.07 guntas in Sy.No.340. The dispute is mainly with regard to the demarcation of boundaries of the lands acquired by both the parties.

9. Learned counsel for the petitioners relied on a decision reported in ***Donadulu Uma Devi v. Girika Katamaiah @ Basaiah and others***¹, wherein it is held that there is only identity dispute, which can be settled. There is no question of collection of any evidence against the interest of the plaintiff. If there is no localization of the property/properties there will not be proper

¹ 2013(2) ALD 86

disposal of the suit and confusion or ambiguity or uncertainty will prevail in the minds of the parties which is very unhealthy and detrimental to the parties as it leads to unnecessary prolongation of the litigation. Once there is clear demarcation of the property there is every likelihood of effecting compromise between the parties which will enable them to live in peace and tranquility. Apart from that only a qualified surveyor will properly demarcate the properties. The same view was taken in ***Haryana Waqf Board v. Shanti Sarup and others***², under similar circumstances. In that decision, a suit was filed for declaration and injunction in respect of certain property. The Hon'ble Supreme Court on the analysis of the facts and circumstances of the suit observed that the dispute that was raised by the parties before the Court was whether the respondent had encroached upon any land belonging to the appellant Board. Therefore, it cannot be in dispute that the dispute was in respect of the encroachment of the suit land. The observations or findings of the Supreme Court clearly mandate that when there is a dispute or issue with regard to identity of a property in litigation, it is necessary to appoint a Commissioner for localizing the property which may be even by taking necessary assistance from a qualified Surveyor which will not amount to collecting evidence which is prohibited.

10. A similar view was also taken by this High Court in ***Velaga Narayana and others v. Bommakanti Srinivas and others***³,

² (2008)8 SCC 671

³ 2014(3) ALD 605

wherein it was held that where there exists a dispute regarding the identity of suit property, the Court has to necessarily issue a commission with the assistance of a Surveyor, otherwise, it would be highly difficult for the Court to completely and effectively resolve the dispute and issuing such commission would not amount to collection of evidence. Commission for the said purpose can be issued prior to or after the parties let in their evidence.

11. The facts of the present case are similar to the facts of the cases relied on by the petitioners. What is important herein is that the respondents are not at all claiming the suit schedule property. There is only identity dispute. If there is no localization of the property/properties, there will not be proper disposal of the suit and confusion or ambiguity or uncertainty will prevail in the minds of the parties which is very unhealthy and detrimental to the parties as it leads to unnecessary prolongation of the litigation. Therefore, the petitioners herein filed I.A.No.779 of 2015 for appointment of an Advocate Commissioner to measure and demarcate the lands in possession of each pattadar in Sy.No.340 situated at Thondalvai Village of Narketpally Mandal, Nalgonda District. The trial Court dismissed the said application by finding that it was filed at a belated stage, when the suit is posted for arguments, for the purpose of collection of evidence. Hence, it is clear from the findings of the trial Court that the petition is filed at a belated stage only to gather evidence, which is not permissible under law. Earlier, the respondents herein filed I.A.No.1562 of 2004, wherein the Advocate Commissioner was appointed and filed his report in O.S.No.291 of 2001 on 01.08.2005 and he clearly

mentioned in the report that he along with Surveyor started survey of the land from the south-east corner of the suit schedule property but it has become very difficult to demarcate the property as the entire property covered with bushes and toddy trees on the boundary lines. The Mandal Surveyor also expressed his inability to demarcate and fix up the boundaries to the suit schedule property. So, it is clear from the said report that the land to an extent of Acs.4.30 guntas in Sy.No.340 is not demarcated by fixing the boundaries to the land of the 1st respondent.

12. Admittedly in this case, the petitioners filed application under Order 26 Rule 9 CPC which was dismissed by the trial Court but in view of the fact that it was a case of demarcation of the disputed land which was appropriate for the Court to appoint an Advocate Commissioner.

Order 26, Rule 9 of the Civil Procedure Code contemplates that Commissions to make local investigations - In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court. Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

13. By virtue of the said provision, appointment of a Commissioner to visit the suit property and also demarcate the property or properties taking assistance from a qualified Surveyor and also note the physical features of the property in question is qualified. The words incorporated “In any suit in which the Court deals to local investigation to the requisite or proper for the purpose of elucidating any matter in dispute, the Court may issue a Commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court are very important in the present context.

14. It is also a fact that when a person got a right to make use of certain provision of law for proper adjudication of a matter in controversy accordingly he is to be permitted to avail that provision otherwise that becomes redundant.

15. The question of identity of properties involved in litigation will have same bearing irrespective of the nature of the consequential relief sought for be it for granting permanent injunction or declaration or possession etc., as the case may be.

16. Time and again, the Apex Court held that a Commissioner cannot be appointed to gather evidence for and on behalf of any party. It is for the party concerned, to establish its case and the feasibility of appointing a Commissioner will be considered, if the Court feels that inspection and further enquiry is necessary, having regard to the uncertainty, that came into existence, after the trial has progressed to certain extent.

17. In the light of the instant case, the petitioners not only wanted the Commissioner to identify the suit schedule property and fix the boundaries thereof, but also to file a report as to his possession over the land in Acs.4.35 cents in Sy.No.340 of Thondalvai Village and the one in possession of a person who is not a party to the suit. The report on those aspects would become part of the record. It will have its own impact on the rights of other parties and in relation to property which is not the subject matter of the suit.

18. The contention of the respondents that the present petition filed at a belated stage and the trial Court finding that the petition filed at a belated stage, are cannot be sustained in view of the fact that the respondents are not at all claiming the suit schedule property. There is only identity dispute, which can be settled. There is no question of collection of any evidence against the interest of the respondents. If there is no localization of the property/properties there will not be proper disposal of the suit and confusion or ambiguity or uncertainty will prevail in the minds of the parties which is very unhealthy and detrimental to the parties as it leads to unnecessary prolongation of the litigation. Once there is clear demarcation of the property, there is every likelihood of effecting compromise between the parties which will enable them to live in peace and tranquility. Apart from that only a qualified surveyor will properly demarcate the properties. It is futile to assert that that can be done by adducing oral and documentary evidence before the Court because any amount of oral evidence in that behalf is not suffice to do so. On the basis of

oral and documentary evidence to be adduced before the Court necessary relief can be granted in favour of one of the parties but it will be meaningless unless there is clear demarcation of the properties and the litigation in fact ends thereby. The parties approach the Courts for resolving their disputes or for the redressal of their grievances which the Courts have to take care of. Justice cannot be denied or delayed for want of fulfilling certain technicalities.

19. In view of the above observation and findings, I am of the considered view that appointment of Commissioner is mandate. Since there is a dispute with regard to identity of a property and boundary dispute, it is necessary to appoint a Commissioner for localizing the property which may be even by taking necessary assistance from a qualified Mandal Surveyor which will not amount to collecting evidence which is prohibited. The order of the trial Court is perverse, without application of the settled law and the principles laid down for redressal of the grievance of the parties, who come to the Court. Ultimately, the Advocate Commissioner measure, survey and demarcate the boundaries with a qualified Surveyor and it will help in the redressal of the dispute between the parties.

20. Accordingly, the findings recorded by the trial Court in the impugned order that the petition was filed at the belated stage, i.e., at the time of arguments are illegal and suffered with legal infirmities and warrant interference by this Court.

21. Accordingly, the Civil Revision Petition is allowed by setting aside the order dated 06.05.2016 in I.A.No.779 of 2015 in O.S.No.386 of 2007 on the file of the Junior Civil Judge, Nalgonda. The trial Court is directed to appoint a Senior Advocate, who is aware of the survey, as Advocate Commissioner. The Advocate Commissioner shall be assisted by the Mandal Surveyor and he shall complete the survey within a period of three months from the date of receipt of a copy of this order. No costs.

The Miscellaneous Petitions, if any, pending shall stand closed.

Date : 19.04.2018

Note: Issue C.C. in one week
(B/o)
ssp

JUSTICE N.BALAYOGI

