

HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

CRP No.1106 of 2018

ORDER:

The petitioners are defendants in the suit. The suit OS No.131 of 2017 is filed for a declaration that the plaintiff-1st respondent herein is having 3 ½ feet width and 60 feet length site left for the purpose of ingress and egress for the repair of the wall situated in the western side of the plaintiff schedule property. Parties hereinafter will be referred to as they are arrayed in suit for convenience sake.

2. Pending suit, defendants 1 and 2 filed IA No.596 of 2017, under Order 26, Rule 9 CPC r/w. Section 151 CPC seeking to appoint Advocate Commissioner to inspect the schedule property and measure the property as per the documents and to file report.

3. The said IA was contested by the sole plaintiff by filing counter affidavit. The defendants, in the affidavit filed in support of the interlocutory application averred that the rough plan filed by the plaintiff is not correct as also the boundaries shown in plaintiff schedule. That the plaintiff had wrongly shown the southern boundary on the northern side

and northern boundary on the southern side in the rough plan filed by him. That the plaintiff did not show the respective parties in respect of the schedules the plaint plan and there is no corroboration with the plaint schedule and the rough plan submitted by the plaintiff.

4. In the counter affidavit filed by plaintiff in the said IA, the averments made by the defendants are denied. It was stated that the defendants encroached the site of the plaintiff and proposed to make constructions illegally and; therefore he had to take to legal recourse by filing the present suit and an order of temporary injunction is granted in his favour and the said order is still in existence.

5. The trial Court by the impugned order, dismissed the said IA. Hence this civil revision petition.

6. Sri S. Subba Reddy, learned counsel for the petitioners-defendants submits that the trial Court erred in dismissing the application on a wrong notion that the Commission is sought to be appointed to measure the land in question, and allowing such a relief amounts to collection of evidence. Learned counsel states that the dispute is with regard to identification of the boundaries of the properties in

respective possession of the parties and such a prayer can be allowed in a given case, as the instant one. In support of his contention, decisions of the Supreme Court as well as this Court are relied on. Sri Y. Ramatirtha, learner counsel for the plaintiff, on the other hand, contended that even before adducing any evidence by the defendants in support of the claim, the defendants sought to appoint Advocate Commissioner which is not required at this stage and it amounts to collection of evidence and, therefore, the application was rightly dismissed.

7. It is to be seen that the parties are closely related. 1st defendant is the sister of defendants 2 and 3 and 4th defendant is the brother of the plaintiff. The main grievance of the defendants is that in the plaint plan filed by the plaintiff, the plaint schedule furnished by the plaintiff is not correct and the southern boundary is shown on the northern side and the northern boundary is shown on the southern side and the schedules in the plaint plan are also wrongly shown and ultimately there is no corroboration with the plaint schedule and the rough plan submitted by the plaintiff. The allegation of the plaintiff is that the defendants

encroached the site of the plaintiff and proposed to make constructions in his land. To clinch this controversy and to identify the boundaries and the parties who are in possession of the respective schedules of land in question, the defendants sought for appointment of an Advocate Commissioner, which in the facts and circumstances of the case deserved to be allowed. The suit claim itself is for a declaration of a road of 3 ½ feet width and 60 feet length site for the purpose of ingress and egress and for grant of consequential injunction not to interfere with the plaintiff's right and enjoyment of the said site for ingress and egress for the purpose of repair of the wall situated in the western side of the plaint schedule property. In suit schedule measurement of suit schedule land is given as 120 sq yards. The trial Court without considering the above pleas taken by plaintiff in the affidavit filed in support application by making general observations and without application of mind dismissed application which is not appreciable. The trial Court should have considered the aspect as to whether the appointment of Commissioner, would aid in adjudication of the *lis* in suit.

8. In ***HARYANA WAQF BOARD vs. SHANTI SARUP's*** case the Supreme Court discussed when Commission for making local inspection ought to be made and observed that when the controversy between the parties was regarding demarcation of land, particularly when the parties had adjacent land, appointment of Commission for demarcation of land cannot be denied. To the same effect is the ratio laid down in ***MOHAMMED JAFFER ABDUL QADEER QURESHI vs. AZIZ-UR-REHMAN QURESHI***² wherein it is observed that appointment of Commissioner to visit suit properties to note down fiscal features of suit properties and existence of roads therein and to file a report can be made and by no stretch of imagination, can it be called as an attempt to gather evidence. The other decisions relied on by the learned Counsel for the petitioner are also to the same effect. It is to be seen that when there is a dispute with regard to identification of the boundaries, more so when the dispute pertains to boundaries of the adjacent contesting parties, to resolve the controversy as to know the exact boundaries of the suit schedule property vis-à-vis the adjacent parties in

¹ (2008) 8 SCC 671

² 2016 (3) ALD 38

occupation therein, the report of the Advocate Commissioner will certainly aid the Court in resolving the dispute between the parties. In this case, the defendants who are neighbours claim that the boundaries are wrongly shown. Therefore, appointment of Commission to identify the boundaries of the suit schedule property becomes imminent and the dispute pertains to identification of boundaries and measurement of land and it has to be done at early stage and the report of the Advocate Commissioner will assist the Court. Normally the Advocate Commissioner will record and report to the Court what he observed on field including any objections raised by both the parties. After filing the report of the Commissioner, it is open for the parties to file objections to the Commissioner's report and the party against whom the report goes can adduce rebuttal evidence. Report of the Advocate Commissioner is not an informed decision, but it is only an opinion of the Commissioner and the report is not binding on the Court, unless analyzed with reference to the evidence brought on record by the parties.

9. For all these reasons, the impugned order is set aside and the civil revision petition is allowed consequently the IA

stands allowed. Miscellaneous petitions if any pending shall stand disposed of. There shall no order as to costs.

A.RAJASHEKER REDDY, J

Dated: 05-09-2018.
NRG



THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

CRP No.1106 OF 2018

//WEB//

Date: 05-09-2018



NRG

