

HONOURABLE SRI JUSTICE N. BALAYOGI

CIVIL REVISION PETITION No. 109 OF 2016

ORDER:

1. This Civil Revision Petition is filed by the defendant in O.S.No.153 of 2012 pending adjudication on the file of learned Junior Civil Judge, Cyberabad, at Hayathnagar, aggrieved by the order dated 11.12.2015 passed in I.A.No. 410 of 2015 whereby an Advocate Commissioner was appointed to measure both the plots of revision petitioner/defendant and respondent/plaintiff with the help of Government Surveyor after giving notice to them and file report.

It is contended by the learned Counsel for the revision petitioner/defendant that the trial Court failed to consider that the plea of the respondent/plaintiff in the I.A. has already been declined by the trial Court. The trial Court did not give positive finding for appointment of Commissioner in a suit for mandatory injunction where Commissioner cannot be appointed for localization and measurement of the property as the same amounts to gathering of evidence.

It is further contended that the revision petitioner/defendant never admitted in his evidence that he has no objection to appoint Advocate Commissioner. The order of the trial Court in appointing the Advocate Commissioner is contrary to the settled legal principles of the Apex Court as well as this Court.

2. The facts in brief are as follows: The respondent/plaintiff filed suit OS.No.153 of 2012 for mandatory injunction. The total extent of both the plots is 1145 square yards. The respondent/plaintiff and his co-owner partitioned the said plot on 24.6.1994 and in the said partition, an extent of 572.5 square yards fell to the share of the respondent/plaintiff. The revision petitioner/defendant encroached into the property of the respondent/plaintiff to an extent of 58 square yards; whereas the case of petitioner/defendant is that he never encroached any extent of respondent/plaintiff's site. In fact the petitioner/defendant occupied the land which he purchased from the person with whom he partitioned.

3. Now the point that arises for determination is

“Whether the order of the trial Court suffers from legal infirmities warranting interference by this Court?”

4. From the petition affidavit, counter affidavit and the impugned order, it is clear that earlier the respondent/plaintiff filed I.A.Nos. 338 of 2014 and 396 of 2012 seeking appointment of an Advocate Commissioner, and the same were dismissed observing that it was not the stage to appoint Advocate Commissioner since evidence was not adduced. Subsequently he filed IA.No. 410 of 2015 seeking the very same relief, which was allowed by the order under revision.

5. It is the case of the respondent/plaintiff that the petitioner/defendant encroached 58 square yards of his property on its western side and that without appointment of Advocate Commissioner, it is highly impossible to bring the true facts into the light as to how much land utilized by the petitioner/defendant.

6. It is pertinent to note that earlier the respondent/plaintiff filed I.A.Nos.396 of 2012 and 338 of 2014 seeking appointment of Advocate Commissioner and the same were dismissed. Thereafter, he filed I.A.No. 410 of 2014 seeking very same relief and the same was allowed. In the counter affidavit filed therein, it is specifically stated that P.W.2 in his cross examination categorically deposed that the land to an extent of 184 square yards towards Northern side of the plot was taken in the road widening and he is not ready to loose his land to an extent of 58 square yards towards Western side of his plot.

The above facts clearly establish that earlier the respondent/plaintiff filed I.A.Nos.326 of 2012 seeking appointment of Advocate Commissioner and the same was dismissed on that ground that the suit was not at the stage of appointment of Advocate Commissioner since the evidence was not adduced. Later he filed IA.No. 338 of 2014 seeking very same relief and the same was dismissed on the ground that trail was not commenced. Thereafter, the respondent/plaintiff filed I.A.No.410 of 2015 and

the same was allowed through the order under revision while observing that the earlier application I.A.No.338 of 2014 was dismissed on the ground that it was not the stage of suit for appointment of Commissioner since trial has not commenced and evidence was not adduced. It is also admitted that 184 square yards towards northern side of plot of the respondent/plaintiff was acquired in the road widening and he is not ready to loose his land to an extent of 58 square yards towards the western side of his plot which was stated to have been encroached by the petitioner/defendant. It is not in dispute that total extent of land is 1145 square yards, out of which, the respondent/plaintiff got 572.5 square yards and the petitioner/defendant got 572.5 square yards.

7. In *Donadulu Uma Devi v. Girika Katamaiah @ Basaiah and others*¹, 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 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

¹ 2013(2) ALD 86

the properties. The same view was reiterated 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.

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

² (2008)8 SCC 671

³ 2014(3) ALD 605

purpose can be issued prior to or after the parties let in their evidence.

9. In the present case, it is clear that total extent of land is 1145 square yards and it is also not in dispute that the respondent/plaintiff is having 572.5 square yards. It is also a fact that 184 square yards towards northern side of the plot of respondent/plaintiff was acquired for road widening and that he is not ready to loss his land to an extent of 58 square yards towards western side which was alleged to have been encroached by the petitioner/defendant. The facts in the present case are similar to the decisions referred to hereinabove. What is emerged herein is that the respondent/plaintiff is claiming the land to an extent of 58 square yards which was alleged to have been encroached by the petitioner/defendant. There is only identity dispute. In the circumstances, if there is no localization of the property in litigation, there will not be proper adjudication of the matter 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 respondent/plaintiff filed I.A.No.410 of 2015 for appointment of Advocate Commissioner to measure and localize both the plots belonging to the petitioner/defendant and respondent/plaintiff with the help of a Government architect/engineer/surveyor and submit his report.

10. The trial Court allowed the application observing the allegation of the respondent/plaintiff that the petitioner/defendant encroached 58 square yards towards western side of his plot. And therefore without appointing an Advocate Commssioner, it is highly impossible to bring true facts into light as to how much land is utilized by the petitioner/defendant. Hence, it is very clear from the finding of the trial Court that there is prima facie material to appoint an Advocate Commissioner and accordingly allowed the application appointing Advocate Commissioner to measure both the plots of the petitioner/defendant and respondent/plaintiff with the help of Government Surveyor after giving notice to them and file report.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

16. In the instant case, the respondent/plaintiff only sought for appointment of Commissioner to measure and localize the plots belonging him and the petitioner/defendant with the help of a Government architect/engineer/surveyor and submit his report. Thus there is only identity dispute, which can be settled. There is no question of collection of any evidence against the interest of the petitioner/defendant. If there is no localization of the property/properties there will not be proper disposal of the suit and thereby 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/identify the properties. It is futile to assert that it 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.

17. In the circumstances, it is necessary to appoint a Commissioner for localizing the property which may be even by taking necessary assistance from a Government Surveyor which will not amount to collecting evidence. The order of the trial Court in appointing the Advocate Commissioner to measure and localize both the plots belonging to the petitioner/defendant and respondent/plaintiff with the help of a Government architect/engineer/surveyor and submit his report is in accordance with the settled law and principles laid down for redressal of the grievance of the parties.

18. For the foregoing discussion, I find no illegality or irregularity in the order of the trial Court and the same does not suffer from any legal infirmities warranting interference.

19. In the result, the Civil Revision Petition is dismissed while confirming the order and decree dated 11.12.2015 passed in I.A.No.410 of 2015 in O.S.No. 153 of 2012 on the file of learned Junior Civil Judge, Cyberabad, at Hayatnagar.

20. Miscellaneous petitions pending consideration if any
in the Civil Revision Petition shall stand closed in consequence.
No order as to costs.

JUSTICE N. BALAYOGI

DATED 26th April, 2018.
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