

THE HON'BLE DR. JUSTICE B.SIVA SANKARA RAO

CIVIL REVISION PETITION No.1940 OF 2018

ORDER:

The revision is arisen out of the dismissal order in I.A.No.183 of 2018 for appointment of an Advocate Commissioner, under Order 26 Rule 9 r/w Section 75 CPC, pending disposal of the CMA No.112 of 2017, maintained by the said petitioner/defendant against the temporary injunction order in I.A.No.299 of 2014, dated 14.09.2017, in the pending suit for bare injunction filed by two plaintiffs against the two defendants in O.S.No.2214 of 2014 in relation to the plaint schedule property of A and B schedules viz., Municipal No.9-4-139/90/B, part of Plot No.90 in Survey No.248, schedule A is 200 square yards and schedule B is 245 square yards, within the boundaries described respectively of one is to the East/West, of the other as the case may be. The plaintiff placed reliance on two documents for the A and B schedules supra bearing Registered Nos.3718/2014, dated 17.10.2014 and 3706/2014, dated 21.10.2014, as purchased from the earlier so called owners.

2. The claim of the defendant in opposing the plaintiffs suit for injunction and pending disposal of the suit, the temporary injunction application in I.A.No.299 of 2014 is that the so called Door No.9-4-137/90/B for the plaint A and B schedule properties self-same mentioned is a nonest and the

second defendant is the owner of the property with its correct door number is 9-4-136/76 covered by the above description of the plaint schedule self-same and the second defendant already maintained O.S.No.1394 of 2015, on the file of the IX Junior Civil Judge, for permanent injunction and there was an *ex parte* decree against the self-same plaintiffs herein, that was exhibited in the temporary injunction application order, of the gift deed as Ex.R1 and the decree and judgment as Exs.R15 and R18, which are among Exs.R1 to R18, on behalf of the defendants and Exs.P1 to P12 on behalf of the plaintiffs, including the two sale deeds of 2014 supra are Exs.P1 and P2.

3. The suit schedule in O.S.No.1394 of 2015 shows the door number supra 9-4-136/76 of an area of 433 square yards and West and North shows as road and East and South as neighbours property and even in the present plaint schedule of O.S.No.2214 of 2014, southern boundary is shown as neighbours property and northern boundary shown as road and if A and B schedule taken as contiguous, the western most also shown as road and eastern most as neighbours plot No.90.

4. As referred supra in the present plaint schedule of O.S.No.2214 of 2014, the description is for door No.9-4-137/90/B for the A and B schedule, extents of

200+245 square yards as lying in plot No.90, whereas eastern most boundary also shown as neighbours plot No.90.

5. The plaintiffs claim, in referring to the 2014 two documents, mainly the defendants claim in referring to the 1995 registered document Ex.R1 gift settlement deed. The contest of the defendants is that the defendants are in possession of the property referring to the boundaries covered by the plaint schedule, however, plaintiffs given a wrong door number as if situated in door No.9-4-139/90/B, though it is exactly situated of the plaint and decree schedule in O.S.No.1394 of 2015 of door No.9-4-136/76 of 433 square yards and they are residing therein. Thus, the very identity of the property for localization is exactly in dispute. In fact, the revision petitioners/appellants to the C.M.A.No.112 of 2017 supra as defendants also placed reliance among Exs.R1 to R18, Exs.R10 and R11 to say that the so-called door number of plaintiffs of 9-4-137/90/B is nonest for such a door number not located of its existence. Anyhow, there is no further necessity to go into the merits of the matter covered by the impugned order of the lower court in I.A.No.299 of 2014, granting temporary injunction pending disposal of the permanent injunction suit, on 14.09.2017, since subject matter of C.M.A.No.112 of 2017 before the learned IX Additional Chief Judge, City Civil Court, Hyderabad; but for to decide whether the impugned dismissal of the commission petition pending appeal C.M.A.No.112 of 2017 by

the lower appellate court is not sustainable and this Court, while sitting in revision, can interfere.

6. The facts no way require repetition.

7. Heard both sides at length.

8. Perused the provisions drawn attention of the Court covered by Order 26 Rule 9, Sections 75, 94 and 151 of CPC and the propositions placed reliance including that of the Apex Court in ***Haryana Waqf Board v. Shanti Sarup and Others***¹, Single Judge expressions of this Court including one in ***Chukka Venkatadri and another v. Mallavarapu Mahalakshamma and others***², that was in fact referred in the impugned order of the lower court, where it is categorically observed particularly referring from the judgment of the Allahabad High Court in ***Gajraj and others v. Ramadhar and others***³, that even an appellate court can appoint an advocate commissioner and it is not the power confined to the trial court alone, whenever there necessity rises invoking Order 26 Rule 9 CPC including in an application under Order 41 Rule 27 CPC. Referring to the said expression of the Allahabad High Court in ***Chukka Venkatadri's case (supra 2)***, that was referred in the impugned order of the lower court, appellate court appointed an advocate commissioner, the facts therein how far

¹ (2008) 8 SCC 671

² 2006 (3) ALD 87

³ AIR 1975 All. 406

applicable need not be considered herein, but for to say, on principle that the power of appointment of a commissioner in a pending civil *lis* is not confined as a power to the trial court as that can be exercised even by the appellate court including in a pending civil miscellaneous appeal. Law is fairly settled in fact that court also can *suo motu* appoint an advocate commissioner including in an injunction petition without even at request of parties, where it feels just and necessary for purpose of elucidating the matters in controversy.

9. This Court in ***Bandi Samuel and another v. Medida Nageswara Rao***⁴, including by referring to the expression of the Apex Court placed reliance of ***Haryana Waqf Board's case (supra 1)*** and several other expressions of this Court and other High Courts in detail observed the scope of the provisions of Sections 75 and Order 26 Rule 9 and Section 94 and 151 of CPC on the power of the Court to appoint advocate commissioner. Paras 6 to 20 relevant for the purpose are reproduced herein, since, all the decisions placed reliance by both parties are practically referred in the expression *supra* in the undermentioned paras, with no further need of repetition.

“6. Appointment of Commissioner in terms of part III i.e. matter “**Incidental proceedings**” of CPC is provided by section 75 of the Code.

“**75. Power of court to issue commissions:**– Subject to such conditions and limitations as may be prescribed, the Court may issue a commission–(a) to examine any person; (b) to make a local investigation; (c) to examine or adjust accounts; or (d) to

⁴ CDJ 2016 APHC 619

make a partition; (e) **to hold a scientific, technical, or expert investigation**; (f) to conduct sale of property which is subject to speedy and natural decay and which is in the custody of the Court pending the determination of the suit; (g) to perform any ministerial act. With this, Section 75, it would be appropriate now to refer Order XXVI Rule 9 of CPC, which provides appointment of **“Commissioner for local investigation.”**

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.

8. No doubt an Advocate-Commissioner cannot be appointed for making an enquiry about factum of possession of the property in dispute, which is nothing, but fishing of information and not elucidating any matter in dispute.

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.

10. In **Bandaru Mutyalu Vs. Palli Appalaraju**⁵, it was held that in situations where there is controversy as to identification, location or measurement of the land, 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 and the object of local investigation under Order XXVI, Rule 9 of the Code which cannot be belittled for that conclusion placed reliance upon **Sanjay Son of Namdeo Khandare Vs. Saheb Rao Kachru Khandare**⁶; **Ponnusamy Pandaram Vs. The Salem Vaiyappamalai Jangamar Sangam**⁷; **Mahendranath Panda Vs. Purnanada & Others**⁸; **C.Veeranna v. C.Venkatachalam**⁹ and **Savitramma v. B.Changa Reddy**¹⁰.

11. In **J. Satyasri Rambabu Vs. A. Anasuya**¹¹, this Court at paragraph No.6 held as under: It is no doubt true that the Courts are normally reluctant to appoint a Commissioner for noting physical features of the suit schedule property, particularly in a suit for injunction

⁵ 2013 (6) ALT 26

⁶ 2001(4) CCC 416 (Bom)

⁷ AIR 1986 Madras 33

⁸ AIR 1988 Orissa 248

⁹ 1958 ALT 792=AIR 1959 AP 170

¹⁰ 1988 (1) ALT 353

¹¹ 2005 (6) ALD-389

since the same would amount to collecting evidence in favour of one of the parties. However, there is absolutely no reason to hold that it is a hard and fact rule. Having regard to the facts and circumstances of the case and particularly whenever the Court prima facie finds that there is an attempt on the part of one of the parties to alter the physical features of the suit property and it is necessary to take note of the same, it is always open to the Court to appoint a Commissioner for inspection of such property.

12. In **Mallikarjuna Srinivasa Gupta Vs. K.Sheshirekha**¹², in which case, a suit was filed for declaration of title and an application was filed contending that the defendant therein encroached a portion of the site. The stand of the defendant therein was that he has not encroached any portion of the site as alleged by the plaintiff. In the circumstances, this Court held as follows: “By mere looking into the sale deed or the lay out, it is not possible to determine the rights, unless it is verified whether any portion of the building is constructed in Plot No.62. Therefore, it is essential to consider the request of the petitioner for appointment of Advocate Commissioner for the purpose mentioned therein.

13. In **Varala Ramachandra Reddy Vs. Mekala Yadi Reddy and others**¹³, it was held that an Advocate Commissioner can be appointed in an injunction suit for local inspection of the suit site and to demarcate the suit schedule property with the help of the Surveyor.

14. In **Shaik Zareena Kasam v. Patan Sadab Khan**¹⁴, this Court at paragraph No.10 held as under: Whenever 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, the recitals of the documents may not reveal the true facts and

¹² 2006 (3) ALD 362

¹³ 2010 (4) ALD 198

¹⁴ 2011 (4) ALD 231

measuring of land on the spot by a Surveyor may become necessary. It was also held referring to **Mallikarjuna Srinivasa Gupta** and **Varala Ramachandra Reddy** supra, that if there is some delay in filing the application to appoint an Advocate Commissioner and if there are some laches on the part of one party, the Court may impose reasonable costs.

15. In **Donadulu Uma Devi v. Girika Katamaiah @ Basaiah**¹⁵ it was held AT PARA 12 that when there is a dispute or issue with regards to identity of a property in a 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.

16. In **K. Dayanand And Another vs P. Sampath Kumar- CRP No.3760 of 2014, DT.11-11-2014**, after considering the dicta observed in the rulings reported in **G. Nagabhushanam Vs. T.Eswaramma**¹⁶; **Thalla Sulochana Vs. Thalla Issac and Another**¹⁷; **Yenugonda Bal Reddy Vs. Manemma and Others**¹⁸; **Dammalapati Satyanarayana & Others Vs. Datta Venkata Ramabhadra Raju @ D.V.R. Raju and Others**¹⁹; **J. Satyasri Rambabu supra**; **Shaik Zareena Kasam supra**; **ECE Industries Limited Vs. S.P. Real Estate Developers Private Limited & Others**²⁰; 1997 (1) A.P.L.J. 61 (SN); **Varala Ramachandra Reddy Vs. Mekala Yadi Reddy & Others**²¹; **Haryana Waqf Board and others Vs. Shanti Sarup and others**²² and **Donadulu Uma Devi supra**, it was held that there is no absolute bar on appointment of Commissioner in a suit for injunction also as per the law laid down in the above referred judgments nor the

¹⁵ 2013 (1) ALT 548

¹⁶ 2009 (2) ALD 238

¹⁷ 2012 (3) ALD 384

¹⁸ 2011 (2) ALD 472

¹⁹ 2006 (4) ALD 675

²⁰ (2009) 12 SCC 773

²¹ 2010 (4) ALD 198

²² 2008 (8) SCC 671

provisions of Section 75 and Order XXVI Rule 9 do impose such a prohibition.

17. The Supreme Court in **Gurunath Manohar Pavaskar & others vs. Nagesh Siddappa Navalgund and others**²³, has held that the learned trial Judge may appoint an Advocate-Commissioner for the purpose of taking measurement and demarcation of the disputed suit land.

18. The Supreme Court in **Haryana Waqf Board supra**, at paragraphs 4 to 8 held as under: "Admittedly, in this case, an application was filed under Order 26 Rule 9 of the Code of Civil Procedure which was rejected by the trial Court but in view of the fact that it was a case of demarcation of the disputed land, it was appropriate for the Court to direct the investigation by appointing a Local Commissioner under Order 26 Rule 9 CPC.

19. **Coming to evidentiary value of Advocate-Commissioner's report:** A party can countermand the evidence of Commissioner's report by letting in other evidence. A Local examination by Commissioner can only report on existing facts and not how they came about, as per decision of **Hon'ble Supreme Court in Lekh Raj V. Muni Lal and others**²⁴.

20. In **Bandaru Mutyalu supra** referring to the Division Bench expression of this Court in **C.Veeranna supra**, that was placed reliance by another Single Judge Bench expression of **Savitramma supra** that in turn placed reliance to the conclusion in saying there is no principle of law or rule or provision that in a suit for bare injunction, no commissioner can be appointed to measure and demarcate the property so also even at the initial stage before commencement of trial, leave about even an ex parte advocate commissioner can be appointed as held by the Division Bench (supra) with no notice even required for such appointment, but for referring to Order XXVI Rule 18,

²³ CDJ 2007 SC 1339

²⁴ (2001) 2 SCC 762

requirement of notice only for execution of the warrant by the commissioner appointed even ex parte and thereby, all depends upon the discretion of the Court from the factual matrix of each case of any necessity to consider either on the request of plaintiff or on the request of the defendant or defendants as the case may be. In **Jammi Venkatakrishna Rao Vs. J.V.H. Ravindranath**²⁵, commissioner was held to be appointed to note down existing physical features which is not fishing of information. In **Jajala Mariadas and Another Vs. Bodhala Aroghyam**²⁶, it was observed referring to the facts therein of the suit claim relating to perpetual injunction and recovery of possession by declaration of title by removal of the so called encroachment of 91 square feet out of that B schedule property and injunction restraining interference for delivery in saying plaintiff and defendant are neighbours and defendant said to have encroached that portion of the land belonging to the plaintiff. Evidence in this regard of encroachment would only be available on the spot and no amount of oral evidence would establish the fact and for that conclusion referred the earlier expressions in relation to the nature of lis and requirement of localization of the disputed property under encroachment or otherwise, where demarcation of the disputed property is involved it is a fit case for appointment of Advocate Commissioner, as held by the Apex Court in **Haryana Waqf Board supra**, and same was followed in **Smt. Donadulu Uma Devi supra** and there is no time limit for appointment of Advocate Commissioner as even an ex parte Advocate Commissioner for localization and noting of physical features can be appointed at the time of filing suit and delay in filing is otherwise not a ground to negate. It was ultimately in saying evidence to prove allegation of encroachment is of a peculiar nature which is available on the spot and if Advocate Commissioner is not appointed

²⁵ 2015 (5) ALD 429

²⁶ 2016 (1) ALT 134

grave prejudice would be caused and allowed that application.”

10. From the above, it is very clear of if any enquiry conducted as to who is in possession by collecting oral evidence that is fishing out information which is not contemplated and for which purpose a commissioner cannot be appointed is crystal clear. In fact, if a particular person is in possession or not to determine by court if that particular person is at the house and the household items are there with utensils etc., the noting of physical features about a particular person is there and the household utensils showing a person is residing there, if noted, that is not a bar as it cannot be called as fishing of information but for elucidating the matter in dispute. In fact, for that, once local investigation is required, a commissioner can be appointed as very section 75(b) speaks power of court to issue commission to make a local investigation and same is elaborated including from the very wording of Order 26 Rule 9 CPC saying a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute.

11. Thus, if any matter in dispute, to elucidate the same, commissioner can be appointed to make or conduct a local investigation is sanctioned by law by virtue of the very statutory provision and any decision contra to it with any loose reference without exact reference to the provisions cannot be taken of any binding nature on this Court being hit

by the principle of *sub silentio*. In ***Haryana Waqf Board*** expression also, the Apex Court clearly laid down that commissioner can be appointed in the facts of that case for demarcation purpose of the land in dispute. So there must be showing of existence of a dispute and requirement of investigation and that investigation requirement is for purpose of elucidating said matter in dispute.

12. Once it is crystal clear, the facts above are also crystal clear. Whether the plaintiffs under the guise of door No.9-4-137/90/B for the A and B schedule properties of 200+245 square yards, one contiguous to the other on the East and West, from the contest of defendant in saying there is no such door number and what they claimed is for his suit schedule property of O.S.No.1394 of 2015 of 433 square yards with door No.9-4-136/76. The lower appellate court, even by accepting the power of court in an appeal to appoint a commissioner particularly referring to ***Chukka Venkatadri's case*** at Para 3 of the order, however, stated at Para 5 saying advocate commissioner cannot be appointed to gather evidence, though the very wording of Section 75(b) and Order 26 Rule 9 of CPC provides: for purpose of local investigation, commissioner can be appointed for purpose of elucidating the matter in dispute. The Para 6 conclusion of the lower appellate court saying the parties can prove any manipulation of the municipal door number by the plaintiffs from the contest of defendant by summoning the records and cannot

seek appointment of an advocate commissioner to note down persons in possession, which amounts to gathering evidence is thereby untenable and baseless, in view of the above.

13. Hence, the impugned order of the lower court dismissing the application for appointment of a commissioner is unsustainable and set aside and the lower appellate court by virtue of this order shall name an advocate commissioner for the I.A.No.183 of 2018 of the lower court is allowed, with a direction to the lower appellate court to name and fix the fees of an advocate commissioner for purpose of visiting the property to identify the property covered by the plaint schedule in O.S.No.1394 of 2015 and the plaint schedule in O.S.No.2214 of 2014 (present one) with reference to the Ex.R1 gift deed and Ex.A1 and A2 sale deeds and also by summoning the municipal property assessment register and other records with reference to the door numbers for its location and note down all existing physical features in relation thereto and submit report by answering work memos given if any.

14. Accordingly and with the above directions, the civil revision petition is allowed. Miscellaneous petitions pending consideration, if any, in this revision case shall stand closed in consequence. There shall be no order as to costs.

DR.B.SIVA SANKARA RAO, J

02.04.2018
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