

THE HON' BLE SRI JUSTICE GUDISEVA SHYAM PRASAD

CIVIL REVISION PETITION No. 2733 of 2018

ORDER:

This civil revision petition, under Article 227 of the Constitution of India, is arising out of the order and decree dated 09.01.2018 in I.A.No.192 of 2017 in O.S.No.107 of 2017 passed by the Senior Civil Judge, Sathupally, Khammam District.

The revision petitioner is respondent No.1/defendant No.1 in I.A.No.192 of 2017 in O.S.No.107 of 2017 filed by respondent Nos.1 to 4/plaintiffs for appointment of advocate commissioner for local investigation to note down the physical features of the property and fix boundaries to the suit schedule property with the assistance of Inspector of Land Surveyor, Khammam. The Court below allowed the said application vide impugned order dated 09.01.2018 holding as under:

*"... Therefore, on perusal of record, it reveals that there are sub numbers to the Sy.No.85, Garlapadu Village and with the assistance of Inspector of Land Surveyor to fix the boundary stones. Sri G. Deena Dayal Reddy, Advocate, is appointed as Commissioner to survey and demark and fixed the boundary stone to the survey number of Sy.No.82 of Garlapadu Revenue Village with assistance of Inspector of land Surveyor and the Advocate fee fixed at Rs.3,000/-, but report."*

The above said order is under challenge in this revision petition.

Heard learned counsel for the petitioner/defendant No.1 and the learned counsel for respondent Nos.1 to 4 / plaintiffs.

Leaned counsel for the petitioner submits that respondent Nos.1 to 4 filed suit for declaration and injunction. He would submit that there is no dispute with regard to the identity of subject property and the only dispute is with regard to the

identity of sub-numbers to Survey No.85 of Garlapadu Village, therefore, the appointment of advocate commissioner by the Court below is not in accordance with law.

Opposing the said submission, learned counsel for respondent Nos.1 to 4 submits that to identify the sub-numbers to Sy.No.85 of Garlapadu Village, the Court below has rightly appointed the advocate commissioner to survey and demarcate and to fix the boundary stone to Survey No.82 of Garlapadu Revenue village, with the assistance of Inspector of Land Surveyor.

Admittedly, the suit is filed by respondent Nos.1 to 4 for declaration of title and permanent injunction. From the rival submissions of the learned counsel for respective parties, it is obvious that there is no dispute with regard to the identity of subject property and the only dispute is with regard to sub-numbers to Sy.No.85 of Garlapadu Village. However, the Court below has appointed the advocate commissioner to survey the land and fix the boundary stones, which does not appear to be proper and reasonable. When there is no dispute with regard to identity of subject land, the Court below ought not to have appointed the advocate commissioner to survey the land and fix boundary stones to the schedule property in Sy.No.85 and its sub-numbers.

Learned counsel for respondent relied on a Circular in Rc.No.N2/1741/2010 dated 18.05.2010 and submitted that the scope of demarcation work contemplated in BS0 34 A para 20 is strictly confined to showing on ground the notified boundaries as existing in survey records which are in force. It is argued that the Advocate Commissioner cannot base on revenue records for taking measurements of the land in view of BS0 34 A 20 referred above. It is further argued that when there is no

dispute with regard to identity of land, Advocate Commissioner cannot be appointed to measure the land, as it amounts to collection of evidence for the petitioner. Therefore, the order of the trial Court appointing advocate commissioner for measurement of land and fixing boundaries is liable to be set aside.

The learned counsel for petitioner submits that in the light of catena of decisions of the Hon' ble Supreme Court, an advocate commissioner can be appointed to measure the land and for localization. The trial Court has therefore appointed the advocate commissioner for the said purpose. The counsel placed reliance on a decision of this Court in Civil Revision Petition No.3760 of 2014 and argued that in the present case also, an advocate commissioner can be appointed, referring to para 23 of the judgment which reads as under:

*"In Donadulu Uma Devi v. Girika Katamaiah @ Basaiah'*

*7. These observations or findings of the Supreme Court clearly mandate 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.*

*8. Therefore the appointment of a commissioner in that context is not against the ambit of Order XXVI Rule 9 CPC which is relevant here. This provision contemplates "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."*

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<sup>1</sup> 2013 (1) ALT 548

9. *By virtue of this 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 a local investigation to be 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. There is no restriction with regards to the appointment of a person to carry out such local investigation for the purposes noted therein. This includes impliedly the power of the Court to appoint a commissioner to visit such property and get it surveyed and also noted its physical features taking help from a qualified surveyor subject to necessary requirement.*

10. *Thereby the statute permits in that context collection of required evidence in that behalf by way of visiting the property demarcating it and localizing it and also just noting the physical features thereon subject to the limitations enumerated in the order. So the Court shall fully utilize this provision when the implementation of it is needed for proper disposal of the proceedings before it. Generally a report filed by such a person or commissioner with regards to those aspects is taken into consideration for the purpose of deciding an issue before a Court in respect of which such commission is carried out unless for reasons to be recorded that is set aside and another commissioner is appointed in that behalf. Prevention of collection of such evidence is definitely against the purport of this statutory provision which thereby cannot be permitted. 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. The availment of the provision may be disallowed if that results in causing prejudice or loss to a party or lead to recording of evidence which cannot and should not be done by the commissioner one way or the other. Mostly what the commissioners so appointed do and report consequently in the cases of this nature will not affect the rights of the parties to the litigation owing to the fact that the determination of their rights could only be on the basis of necessary oral and documentary evidence they adduce before the Court which cannot be done by way of appointing commissioners to localize their properties or note their physical features as required which can be used as an aid to achieve the main object. Therefore, it is always encouraging to see that such localization is carried out at the beginning of corresponding litigation only.*

11. *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. By that reason no differentiation can be made while entertaining the plea of demarcation of the properties concerned."*

In the above judgment, this Court felt necessity of appointment of Commissioner for establishing identity of property. In the present case, the learned counsel for petitioner submitted that there is no dispute with regard to the identity of property. The dispute is only with regard to sub-survey number of Survey No.84. When there is no dispute with regard to identity of land, if an advocate commissioner is appointed, it amounts to collection of evidence for a party. If the petitioner intends to prove that there is a sub-survey number to Survey No.84, he may take the help of a Surveyor and get the land measured and may file the report of the surveyor in his evidence to prove that there is a sub-survey number in the land.

Therefore, this Court is of the considered view that an advocate commissioner cannot be appointed to gather or collect evidence for any party. The burden is on the party who is claiming that he is the owner of the property to prove his case by producing evidence. The Courts cannot appoint advocate commissioner for creating or gathering evidence for the parties, when there is no dispute with regard to the identity of the property.

However, since the counsel for both sides have no objection for noting down the physical features of the land, the advocate commissioner appointed by the trial Court may inspect the land and note down its physical features and submit his report. The petitioner may take the assistance of a surveyor on his own expenditure and get the land measured as per land survey records BS0 34 A para 20 circular referred

above, and may file the report of the surveyor in his evidence to prove his case. As the learned counsel for respondent has objected for the appointment of advocate commissioner by Court, contending that it amounts to collection of evidence for the petitioner, the petitioner, as per the land and survey records rules and circular orders, may get the disputed land measured by a Surveyor, if he so desires to get the land measured, and file the report of surveyor in his evidence.

With the above observations, this Civil Revision Petition is disposed of by modifying the order of the trial Court to the extent indicated above. No order as to costs. Miscellaneous petitions, if any pending, shall stand closed.

**07<sup>th</sup> September, 2018**

**Note:** Issue C.C by 10.09.2018

B/o

MSR / Ksm

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**GUDISEVA SHYAM PRASAD, J**



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