

**HONOURABLE SRI JUSTICE P.NAVEEN RAO**

**CIVIL REVISION PETITION NO.4819 OF 2018**

**Date: 27.11.2018**

Between:

Makireddi Venkateswara Rao s/o. late Rajalu,  
Aged 44 years, Cultivation, r/o.D.No.2-110/4,  
Near Ramalayam, Velampeta, Jatlapalem village,  
Pentapadu Mandal, W.G. district.

.....Petitioner/petitioner/  
plaintiff

and

Kudulla Srinivasa Rao s/o. Satyanarayana,  
Aged 46 years, Cultivation, R/o.2-74/1,  
Ramalayam Street, Jatlapalem village,  
Pentapadu Mandal, West Godavari district.

.....Respondent/Respondent/  
defendant



The Court made the following:

**HONOURABLE SRI JUSTICE P.NAVEEN RAO**  
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**ORDER:**

Heard learned counsel for petitioner/plaintiff Sri S Subba Reddy and none appeared for respondent though notice was served.

2. I have bestowed my earnest consideration on the submissions made by learned counsel for petitioner/plaintiff and the decisions cited at the Bar.

3. Plaintiff is the petitioner. Plaintiff filed O.S.No.213 of 2017 pending in the Court of Principal Junior Civil Judge, Tadepalligudem praying to declare that the plaintiff is absolute owner of plaint "A" schedule A, A1, A2, D1 as marked in the plaint plan, which is part of plaint "B" schedule property and consequential relief of vacant possession of the same after evicting the defendant. During the pendency of the above suit, plaintiff filed I.A.No.797 of 2017 under Order XXVI Rule 9 read with Section 151 of C.P.C., to appoint Advocate-Commissioner. Plaintiff sought jumbo prayer calling upon Advocate-Commissioner to note down the physical features of plaint schedule property; to note down high handed transplantation of paddy crop in plaint "A" schedule property; measure the plaint "A" and "B" schedule properties as well as respondent land basing on the respective title deeds, link documents on both sides as well as field measurement book with the help of Mandal Surveyor to determine the extent of lands as well as the encroachment of plaint "A" schedule land by the respondent and to file his report with such measurements and plan. The said application was rejected by order dated 09.04.2018, against which this revision is preferred.

4. According to plaintiff, his father purchased Ac.1.21 cents forming part of plaint "B" schedule property falling in Sy.No.182/4 (Ac.0.28 cents); 184/3 (Ac.0.32 cents) and 184/2 (Ac.0.61 cents). After the demise of his father, by virtue of family settlement, this portion of property has fallen to the share of plaintiff and he is in possession and enjoyment of said property. Plaintiff alleges that defendant purchased Ac.0.72 cents of land on the Western side of plaint "A" schedule property through registered sale deed dated 31.05.2017. He alleges that under the guise of purchase of said extent of land, he encroached the land of plaintiff to an extent of Ac.0.11 cents, transplanted paddy in high handed manner. The disputed extent of land is described in plaint "A" schedule to an extent of Ac.0.11 cents forming part of total extent of land described in schedule 'B' property.

5. In the counter affidavit filed on behalf of defendant, he denied the allegations of plaintiff. According to defendant, plaintiff is falsely claiming Ac.0.11 cents of land. According to defendant, same extent of land was owned by Munagala Venkateswara Rao, from whom defendant purchased and who claimed to be the vendor of father of plaintiff. According to defendant, though plaintiff has no manner of right on the land to an extent of Ac.0.11 cents forming part of schedule "A" property, he falsely got corrected in the registered partition deed changing the survey number and under the guise of said corrected settlement deed, he falsely claiming the land though does not belong to him. According to defendant, boundaries of the property purchased by the defendant and that of the plaintiff do not match. He denied the title claimed by the plaintiff on the said extent of land.

6. As noticed from the prayer sought in the suit, it is seen that there is a dispute between plaintiff and the defendant to an extent of land described in plaint "A" schedule and plaintiff sought declaration that he is the absolute owner and to grant vacant possession of said extent of land. In other words, trial Court is required to grant declaration of ownership and in the event of granting such declaration to grant possession of the extent of land described in schedule "A" of the plaint.

7. The question for consideration, in the facts of this case is, whether trial Court erred in not granting order appointing Advocate-Commissioner ?

8. Under Order XXVI Rule 9 CPC, Commissioner can be appointed for elucidating any matter in dispute. It vests wide discretion in the trial Court. *Per se*, there is no prescription in what circumstances the Commissioner can be appointed and it is left to the discretion of the Trial Court, in the given facts of a case, to appoint a Commissioner. It can be exercised at any stage of the suit. Further, there is no absolute bar to appoint Advocate-Commissioner even in a suit for injunction. However, such discretion has to be exercised in judicious manner. While exercising such discretion Court has to consider nature of suit, rival stands of parties and in the facts of the case, whether it is desirable to appoint Advocate-Commissioner. However, what is to be noted is terms/words employed in Rule 9, such as '*requisite*', '*proper for the purpose of elucidating any matter in dispute*'. These words/terms give enough guidance to the trial Court. Plethora of precedent decisions elucidate this aspect.

9. Scrutiny of claim to appoint Advocate-Commissioner can be more rigid when such request is made at early stage of the suit. It is to be noted that the appointment of Advocate-Commissioner is primarily intended to come to the aid of trial Court in appreciating real controversy between parties and to come to correct conclusion on the *lis* involved. Thus, it is for the trial Court to assess the facts and to decide whether Advocate-Commissioner can be appointed, more so at the initial stage of the suit. In what circumstances such discretion can be exercised depends on facts of the given case.

10. Ordinarily, trial Court exercises such discretion after evidence of respective parties is recorded as by then the Court has enough comprehension on respective claims, but there is no clarity on location of the subject property, whereas knowing exact location would assist the Court to come to correct conclusion. While exercising such discretion, Court has to ensure that local inspection is for the purpose of elucidating any matter in dispute, is necessary to have effective resolution of dispute and report of Commissioner would assist the Court in appreciating the issue in proper perspective, but Court should not allow a party to litigation to gather evidence in the guise of seeking appointment of Commissioner to inspect and localize the property. It is not in dispute that report of Advocate-Commissioner can never be the basis to decide the *lis* in a suit nor Commissioner can be appointed to gather evidence to prove the case of the parties.

11. In the decision of this Court in CRP No.501 of 2013, learned single Judge made general observations on the scope of power to appoint Advocate-Commissioner under Order XXVI Rule 9 CPC. The Court observed that such Commissioner should not be

appointed to gather evidence, which is the burden on the respective parties by adducing independent evidence. Similar view was expressed by Madras High Court in **T.K.Krishnamurthy v. Tamil Nadu Water and Drainage Board, rep.by its Senior Engineer & another**<sup>1</sup>.

12. As noted earlier, the prayer in I.A., is far wider than simple case of noting down the physical features, but requires enquiry into the rival claims in the suit. On the one hand, plaintiff claims that schedule "A" property was also purchased by his father and he succeeded to the entire extent including schedule "A" property forming part of schedule "B" property as part of settlement arrived at within the family, whereas according to defendant, schedule "A" property was never owned by the father of plaintiff and by virtue of amended settlement subsequently registered, plaintiff is falsely claiming schedule "A" property though it does not belong to him. Thus, as rightly observed by learned Trial Judge issue in the suit is primarily on nature of possession of disputed extent of property than the boundary dispute or identification of property in issue.

13. In the facts of this case, I do not see any error in the decision of trial Court rejecting the application to appoint Advocate-Commissioner. However, this order do not come in the way of filing application to appoint Advocate-commissioner by either party to the suit, if so warranted at a later stage of the suit. Civil Revision Petition is accordingly dismissed. Pending miscellaneous petitions shall stand closed.

**JUSTICE P.NAVEEN RAO**

Date: 27.11.2018  
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<sup>1</sup> CDJ 2006 MHC 1911

**HONOURABLE SRI JUSTICE P.NAVEEN RAO**



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