

**THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY**

**CIVIL REVISION PETITION No. 4997 OF 2018**

**ORDER:**

The petitioners-plaintiffs filed suit O.S.No. 166 of 2012 on the file of the Court of Additional Senior Civil Judge, Kadapa (for short, 'the Court below'), against the respondents-defendants for declaration of title over plaint schedule property and also to deliver vacant possession of the same. In the said suit, the petitioners filed I.A.No. 1095 of 2017 under Order XXVI Rule 9 read with Section 151 of CPC for appointment of an advocate commissioner, contending that the respondents are not having any right over the suit schedule property and they encroached the same illegally; that respondent No. 1 purchased the land in survey No. 707/1 under registered document bearing No. 951/1997 dated 22-02-1997 and basing on that document, he is claiming right over the property; that while the plaint schedule property is situated in survey No. 707/2, the land of respondent No. 1 is situated in survey No. 707/1; that originally, the land in survey No. 707 was sub-divided into 707/1 and 707/2 and now the respondents are denying the title of the petitioners and that therefore it is just and necessary to localize and fix the property by conducting survey based on respective documents of both parties. Respondent No. 2 remained *ex parte* and respondent No. 1 alone filed counter denying the material allegations *inter alia* contending that the petitioners have to prove their case independently in a suit for declaration of title; that the suit schedule property originally belongs to Government and therefore the petitioners are estopped to seek the relief of declaration of right and title over the suit schedule property and that if really there is a boundary dispute between the parties, the present application is

unnecessary and therefore sought for dismissal of the petition. The Court below dismissed the petition by order dated 25-01-2018.

2. Assailing the order passed by the Court below, the petitioners filed the present revision under Article 227 of the Constitution of India on the ground that when there is a dispute with regard to boundary, Court has to appoint an advocate commissioner and similarly where there is a dispute with regard to encroachment, Court has to appoint an advocate commissioner to decide the real controversy between the parties with regard to such encroachment but the Court below failed to consider the real dispute between the parties and thereby committed an error in dismissing the petition and therefore requested to appoint an advocate commissioner.

3. At the hearing, Sri G.Ramesh Babu, learned counsel for the petitioners, while reiterating the grounds urged in the petition, has placed reliance on the judgment of the Apex Court in ***Haryana Waqf Board Vs. Shanti Sarup and others***<sup>1</sup> and the judgment of this Court in ***Jajula Koteswar Rao Vs. Ravulapalli Masthan Rao***<sup>2</sup> in support of his contentions.

4. It is an undisputed fact that the petitioners filed the above suit for declaration of title and consequential relief of recovery of possession alleging that the petitioners are the owners of the suit schedule property described in the schedule annexed to the plaint within four boundaries. According to the allegations made in the plaint, respondent No. 2 purchased property, on western side of plaint schedule property shown as ABCDEFG in the plaint plan, under registered sale deed bearing document No. 951 of 1997 dated 22-02-1997 in survey No. 707/1 in an extent of Ac. 2.29 cents of Vutukuru Revenue Village,

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<sup>1</sup> (2008) 8 SCC 671

<sup>2</sup> 2016 (1) ALT 134

C.K. Dinne Mandal and the property described in the schedule annexed to the plaint is clear and it is situated in survey No. 707/2 of an extent of Ac. 0.45 cents within the four boundaries mentioned in the plaint plan. Therefore, the petitioners are claiming right in the land of an extent of Ac. 0.45 cents within the four boundaries mentioned in the schedule in terms of Order VII Rule 3 of CPC. When the petitioners are certain about the property, question of identification of the same with the help of surveyor and fixing boundaries *etc.*, does not arise. Learned counsel for the petitioners has contended that there is an encroachment of property to an extent of Ac. 0.45 cents. When the total property the petitioners purchased is Ac. 0.45 cents and it is described in the schedule, question of identification of the same does not arise and similarly question of noting physical features does not arise for the reason that physical features are never in dispute even according to the petitioners and the respondents. In the absence of any dispute with regard to identity of the property and physical features, appointment of an advocate commissioner for the above purposes is useless. Learned counsel for the petitioners has contended that when there is a dispute with regard to boundary, Court has to appoint an advocate commissioner and placed reliance on the judgment of the Apex Court in ***Haryana Waqf Board*** (1<sup>st</sup> *supra*). In the facts of the above judgment, the plaintiffs sought relief for demarcation and fixing boundaries of the property whereas in the present facts, the petitioners filed suit for declaration of title and to deliver vacant possession. Therefore, the principle laid down in the above judgment has no application to the present facts of the case. Learned counsel has also placed reliance ***Jajula Koteswar Rao*** (2<sup>nd</sup> *supra*), wherein this Court held that when there is an allegation of encroachment of land, appointment of an advocate commissioner to visit suit schedule property and take measurements is just and necessary. Turning to the

case on hand, the petitioners contended that respondent No. 2 encroached the suit schedule property in an extent of Ac. 0.45 cents within specific boundaries whereas respondent No. 2 is claiming to be in possession as owner in view of the purchase while contending that it is Government land. When the suit is filed for declaration of title and consequential relief of recover of possession, it is for the plaintiffs to prove their independent title to the property besides dispossession of the property to claim consequential relief of recovery of possession. When the petitioners made a specific allegation that respondent No. 2 encroached Ac. 0.45 cents and the said property is described in the schedule with specific boundaries to identify the same as required under Order VII Rule 3 of CPC, question of appointing an advocate commissioner does not arise. In the facts of the above judgment, there is a dispute with regard to extent of encroachment but here there is no such dispute. Consequently, the principle laid down in the above judgment cannot be applied to the present facts of the case.

5. Having considered the facts and circumstances of the case, more particularly about the clarity in the schedule annexed to the plaint and the petitioners claimed declaration of title to the property and consequential relief of recovery of possession, appointment of an advocate commissioner for identification of the property with reference to the boundaries based on sale deeds of respective parties is nothing but collection of evidence at this stage when trial is pending. Therefore, I am not inclined to interfere with the order passed by the Court below at this stage. Consequently, the petition deserves to be dismissed. However, the petitioners may renew their request after completion of trial and if the Court below finds that commissioner's report assists it in arriving at a just conclusion, it may pass appropriate orders to decide the real controversy between the parties.

6. With the above observation, the civil revision petition is dismissed.  
Pending miscellaneous petitions, if any, shall stand dismissed in consequence.

Date: 28-09-2018.

JSK

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**M.SATYANARAYANA MURTHY, J.**

