

HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

CIVIL REVISION PETITION No.7034 OF 2017

ORDER :

This Civil Revision Petition is filed by respondent/plaintiff against order dated 04.12.2017 in I.A.No.210 of 2017 in O.S.No.51 of 2014, wherein and whereby the application of the petitioners/Defendants filed under Order 26 Rule 9 of CPC to appoint an Advocate Commissioner to note down the physical features of the properties of the petitioners and respondents with reference to all the documents and to measure the sites of the petitioners and respondents with the assistance of Mandal Surveyor as per FMB and relevant R.S number etc., and to file their report was allowed.

Learned counsel for the revision petitioners submits that the suit filed for injunction in respect of plaint schedule described as ABCD and the suit is for injunction simplicitor. He submits that ordinarily an appointment of Advocate Commissioner is not required in a suit for injunction. He submits that in the present case the existence of suit schedule lane i.e., ABCD lane is not disputed by the petitioners/defendants in IA.No.210/2017 in the written statement and in fact, they admitted about the existence of ABCD passage. He further submits that the only dispute is whether the subject passage is exclusively enjoyed by the respondents/plaintiffs or whether the petitioners/ defendants claims right of easementary through ABCD lane and that when the existence of ABCD lane is not in dispute, the question of appointment of Advocate Commissioner to note down the physical features at the schedule

properties, house structures of the petitioners as well as respondents and existence of common passage and measuring of the same does not arise at all. He submits that the prayer in the application filed by the respondents/plaintiffs is beyond the relief sought in the main suit. He also submits that the suit is filed in the year 2014 and the application for appointment of Advocate Commissioner is filed in the year 2017 only to collect the evidence, which is impermissible. In support of his contention, he relied on the judgment reported in **Rajinder & Co. v. Union of India and others¹** and **J.Venkateswar Rao v. Vijaya Lakshmi²**.

On the other hand learned counsel for the respondents/plaintiffs in revision while reiterating the averments in the averments in the counter filed along with vacate petition in I.A.No.1 of 2018, submits that the Court below ordered for appointment of Advocate Commissioner only for the purpose of measuring the physical features of the suit schedule property with the help of Mandal Surveyor based on the FMB books but not for collecting evidence.

The respondents/plaintiffs filed the suit O.S.No.51 of 2014 with the following prayer.

“13. Therefore, the plaintiff prays that the Hon’ble Court may be pleased to pass a decree in favour of the plaintiffs and against the Defendants

A. For permanent injunction restraining the Defendants or their followers or their relatives or their workers etc. from ever interfering into the peaceful possession and enjoyment of the plaintiffs and the schedule site and not to interfere into the plaint schedule site and not to occupy or farm gravel in the suit site i.e., ABCD in plaint plan site by force by the defendants.

B. and costs of the suit”

The petitioners/defendants filed written statement, wherein it is stated at paragraph 13 as follows:

¹ (2000) 6 Supreme Court Cases 506

² 2017 (5) ALD 13

“13. This Defendant respectfully submits that there is a passage width of 4 yards on the eastern side of the plaintiffs’ house and house site since times immemorial. The defendants and their predecessors have been continuously using the said ABCD passage without let-up shown in the plaint plan for ingress and egress to reach their houses from the southern side panchayath Road. The defendants have every right of easement of necessity in the suit passage.....

The prayer in I.A.No.210 of 2017 in O.S.No.51 of 2014 is as follows:

“that the Hon’ble Court may be pleased to appoint an Advocate/ Commissioner to note down the existing physical features at the schedule properties, respective houses or structures of the petitioners as well as the Respondents, existence of the 4 yards width common passage, panchayat road etc., and measure the schedule property, properties of the petitioners as well as the respondents with the assistance of Mandal Surveyor as per FMB and also as per the relevant R.S No. etc., to determine the existing facts on the ground, for the interest of justice, else we will suffer irreparable loss and injury.”

A perusal of the prayer in the Plaint as well as in the Interlocutory order goes to show that the respondents/plaintiffs are claiming exclusive right over ABCD passage and the petitioners/defendants in revision are disputing the same and in fact they are claiming easementary right over the subject ABCD passage. In those circumstances, it is not known as to why the prayer of the respondents in revision was allowed. The Court below observed that by appointment of Advocate Commissioner, no prejudice would be caused to the petitioners/defendants. But appointment of an Advocate Commissioner is required for the purpose of assisting the Court in adjudication of the suit between the parties. But when the existence of ABCD lane is not in dispute and when the petitioners/defendants claimed easementary right over the same, it is for them to prove the same. That apart, in a suit for injunction, the burden heavily lies on the respondents/plaintiffs in revision to prove that they are in exclusive possession of the suit schedule lane. In a suit for injunction, though there is no bar for

appointment of an Advocate Commissioner to note down the physical features of the property, but in the present case, existence of suit property is not in dispute but the claim of petitioner appears that he is claiming easementary rights. This Court in **J.Venkateswar**

Rao v. Vijaya Lakshmi (supra) held as follows:

“20.In the present case, the respondent herein is not disputing the identity of the property, whereas, the defendant/petitioner herein is disputing identity of the property with reference to boundaries. Therefore, the burden is on the defendant to prove that the property, which the petitioner is claiming, is different from the property based on the boundaries. But the petitioner cannot entrust the task of identifying his own property to Advocate Commissioner when he is certain about the property in dispute based on boundaries, survey numbers and plot numbers.

21. This Court in an identical situation in *Batchu Narayana Rao v. Batchu Venkata Narasimha Rao*, 2010 (5) ALD 83; *Koduru Sesa Reddy v. Gottigundala Venkata Rami Reddy and others*, 2006 (1) ALD 372 and *Yenugonda Bal Reddy v. Manemma and others*, 2011 (2) ALD 472; held that a Commissioner cannot be appointed for collection of evidence in a suit for declaration and permanent injunction or in a suit for injunction simplicitor, to note down the physical features of the land as it amounts to collection of evidence.....”

In view of law laid down in the aforesaid decision, when once there is no dispute with regard to identity of the property and boundaries by the petitioner, there is no question of appointment of Advocate Commissioner for identifying his own property.

In view of above facts and circumstances, this Civil Revision Petition is allowed setting aside the Order dated 04.12.2017 in I.A.No.210 of 2017 in O.S.No.51 of 2014 on the file of Principal Junior Civil Judge, Tadepalligudem. There shall be no order as to costs. As a sequel thereto, miscellaneous petitions, if any, pending in this Civil Revision Petition, shall stand closed.

A.RAJASHEKER REDDY, J

06.04.2018

kvs

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Date: 06.04.2018

kvs