

HONOURABLE SRI JUSTICE P.NAVEEN RAO

CIVIL REVISION PETITION NO.7173 OF 2017

Date: 10.04.2018

Between:

Lekkala Jayapal Reddy s/o. Raghava Reddy,
Aged 59 years, occu: SI of Police, r/o.H.No.2-9-65,
Vikasnagar, Waddepally, Hanamkonda Mandal,
Warangal and another

.....Petitioners

and

Puskoori Saibaba Rao s/o. Amrutha Rao,
Aged 61 yrs., occu: Advocate, r/o.H.No.2-6-1491,
Srinivasa Nagar, Subedari, Hanamkonda,
Warangal district

.....Respondent



The Court made the following:

HONOURABLE SRI JUSTICE P.NAVEEN RAO
CIVIL REVISION PETITION NO.7173 OF 2017

ORDER:

Heard Sri J.Venkateswara Reddy, learned counsel for revision petitioners and Sri M.Ajaya Kumar, learned counsel for respondent.

2. Petitioners are defendants in O.S.No.315 of 2016 pending on the file of Court of II Additional Junior Civil Judge at Warangal. Parties are referred to as arrayed in the suit.

3. Plaintiff filed the suit to grant perpetual injunction restraining the defendants from interfering with peaceful possession and enjoyment over the suit schedule property. The suit schedule property is plot of 183 square yards in Sy.No.89 of Waddepally Revenue village. In I.A.No.231 of 2016 filed by plaintiff, temporary injunction was granted, by order dated 07.04.2016.

4. In the said I.A., plaintiff filed I.A.No.531 of 2016 praying to appoint Advocate-Commissioner to locate the suit schedule property. In paragraph-3 of the affidavit filed in support of I.A., it is stated that suit schedule property is part and parcel of Sy.No.172 (old) corresponding to new Sy.No.89. In paragraph-4, he refers to the contention of defendants that suit schedule property is part and parcel of old Sy.No.172 corresponding to new Sy.No.89, but actually suit schedule property is part and parcel of old Sy.No.176 corresponding to new Sy.No.89. By stating so, he prayed to appoint Advocate-commissioner to locate the suit schedule property for better adjudication of matter.

5. Said plea of plaintiff was opposed. It was contended that no revenue record was filed to show that plaintiff is owner and in possession of land in Sy.No.172 (old). According to defendants, Sy.No.176 (old) is corresponding to new Sy.No.88 and land in Sy.No.176 (old) is intervened by land in Sy.No.175 with existing 60 feet road and is not abutting Sy.No.172 (old). It appears, sketch was also filed. It was also contended that survey was conducted in the year 1999 and the Deputy Inspector of Survey and Land Records filed his inspection report in File No.K2/1451/1999 dated 27.11.1999.

6. The trial Court opined that having regard to the controversy with reference to old survey numbers and corresponding new survey numbers, it is necessary to know where the actual property is situated and whether it is part and parcel of survey No.172 (old) or 176 (old), allowed the application and appointed Advocate-Commissioner for local inspection to locate whether the suit schedule property is situated in Sy.No.172 (old) or 176 (old).

7. Learned counsel for defendants would submit that survey was already conducted in the year 1999 and survey report was available on record. The survey report would clearly indicate that subject property of the defendants is in Sy.No.176 (old) corresponding to new Sy.No.88 and Sy.No.176 is away from Sy.No.172 (old), which now corresponds to Sy.No.89 and as the property of defendants is not abutting to the property claimed by plaintiff, there is no justification to conduct survey. It would amount to collection of evidence and that too at the interlocutory stage. In a suit for perpetual injunction, burden lies on the

plaintiff to prove that he has *prima facie* title and that he is in possession. If the plaintiff is not sure where his property is located, he cannot ask for conducting of inspection by an Advocate-Commissioner. He would further submit that trial Court erred in entertaining the application to conduct survey in an interlocutory application granting injunction. Learned counsel placed reliance on the decision of this Court in **J.Venkateswar Rao Vs. Vijaya Lakshmi**¹.

8. *Per contra*, learned counsel for plaintiff would submit that as the defendants are disputing the correct survey number of land of plaintiff and in the guise of contending that corresponding new survey numbers are different and by creating confusion, the defendants are actually encroaching into the land of plaintiff. He would submit that at any stage of suit proceedings, request to conduct survey can be made and in the facts of the case, trial Court validly exercised discretion to order for survey. In support of his contention, learned counsel placed reliance on the decision in **Bandaru Muthyalu and another vs. Palli Appalaraju**². He would submit that no prejudice would be caused to defendants by localizing the property and on the contrary, would aid the Court in appreciating respective claims.

9. Order XXVI Rule 9 of CPC reads as under:

"Order XXVI Rule 9: 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 mesne profits or damages or annual net profits, the court may issue a commission to such persons it thinks fit directing him to make

¹ 2017 (5) ALD 13

² 2013(5) ALT 26

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".

10. Order XXVI Rule 9 of CPC vests discretion in the trial Court to appoint Commissioner, to record physical features of the suit schedule properties and/or to localize the disputed property, if the trial court is of the opinion that such report is necessary for proper adjudication of the dispute. The highlighted portion of the rule makes it clear that wide discretion is vested in the Court and such power can be exercised at any stage of the suit. However, what is to be noted is terms/words such as 'requisite', 'proper for the purpose of elucidating any matter in dispute' used in the rule. These words/terms give enough guidance to the trial Court. 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 whether it is desirable to appoint Advocate-Commissioner to localize the suit schedule property. Scrutiny can be more rigid when such request is made at early stage of the suit.

11. 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. In what circumstances such discretion can be exercised depends on facts of the given case.

12. On the scope of power to appoint Commissioner and stage at which such power can be exercised by trial Court was considered in several precedent decisions. Few of the decisions are noted hereunder:

13.1. In **P.Moosa Kutty**³, learned single Judge of Madras High Court observed,

“If a commission is not going to be issued until the defendant appears, most often there will be no point in taking out a commission, because the object of the commission itself would be lost and incriminating circumstances would be obliterated”.

13.2. In **N.Savitramma and others vs. B.Changa Reddy**⁴, after extracting the view expressed in **P.Moosa Kutty**, Hon’ble Justice *M.Jagannadha Rao*, as he then was observed,

“The above observations, in my view, are extremely important, Take the case where a plaintiff alleges that a particular bund had been removed or a new wall has been constructed or a channel has been closed suddenly or a new window has been opened or a new fencing has been put up. If the trial in such cases were to take place years after the filling of the suit, it would be difficult to get at the nature of the physical features obtaining on the date of the suit. It has, therefore, been held in several cases that either party to the suit could have a commissioner appointed even before the trial.”

³ AIR 1953 Madras 717

⁴ 1988 *1) APLJ (HC) 45

13.3. In **C.Veeranna v. C.Venkatachalam**⁵, Division Bench of this Court held that it is open to the court to issue even *ex parte* commission if the Court deems that a local investigation is requisite.

13.4. In **N.Savitramma** (supra), it was further stated:

“...it is clear that an Advocate-commissioner could be appointed to make a local investigation either under Or. 26 R 9 or even under Or 39R7(1)(a), if the circumstances of the case deem it necessary for the purpose of noting the physical features of any land or property. Such a commissioner could be appointed *ex-parte* even without notice to the opposite party. However, after appointment of the commissioner notice has to be given by the court as well as the commissioner to the opposite party under Or. 26 R 18 CPC.

xxx

In my view, the above observations of Lakshminarayana Reddy, J. in the two decisions are not only widely stated but also run contrary to the judgment of the division bench of this court in Veeranna's case and two other cases referred to by me I, therefore dissent from the learned judge and follow the Division Bench. Further, to say that it is "unthinkable" that a receiver could be appointed to note the physical features of any property, appears to me to be an extreme view. The plaintiff could, in my view, certainly take the assistance of the court to have the physical features of property noted by an officer of the court namely, an Advocate-commissioner, before the said features are obliterated either by the opposite party or by the vagaries of the nature. If the physical features of the land as on the date of the suit are allowed to be obliterated and a commissioner is to be appointed several years after the filing of the suit or at the end of the trial or during the trial, the very object of getting the best evidence before the court would be frustrated. That would enable the defendants in the suit to take advantage of their might and alter the physical features of the land and also protract the trial till such time that those features were obliterated by lapse of time or by the defendants action to.”

13.5. In **N.Savitramma**, suit was for declaration of title to the plaint schedule property and for permanent injunction. Plaintiff

⁵ AIR 1959 AP 170

alleged that there is no separate fence dividing 39 mango trees on the Northern side belonging to plaintiff and the rest of the mango garden. It is alleged that as there is no fencing defendants are threatening to obstruct plaintiff's enjoyment and that defendants unlawfully cut and carried away mango usufruct. The defendants would contend that plaintiff is nothing to do with plaint schedule property, the entire mango garden forms one single unit surrounded by fence and that there was no mango garden in plaintiff land. The defendants filed application to appoint Commissioner. The trial Court did not agree to appoint Commissioner.

13.6. It is also appropriate to note the observations of this Court in paragraph-15. It reads as under:

"15. The question as to when a commissioner could be appointed, should be with the wide discretion of the trial court, but it cannot be said that no commissioner could be appointed before the issues are framed or the evidence is led. Decided cases which are binding on me, hold that a commissioner could be appointed even ex-parte...."

13.7. In **Bandaru Mutyalu**, suit was filed by respondent for permanent injunction restraining the petitioners from interfering with peaceful possession and enjoyment of "ABCD" marked front yard vacant site. Respondent and petitioners are neighbours and the house of the petitioners is to the North of the property of respondent. I No.173 of 2008 was filed to take measurements of the property mentioned in the registered sale deed. Trial Court allowed the I.A., holding that it is necessary to localize with reference to sale deed of respondent and other title deeds. This Court held,

“19. ... I hold 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. The party against whom the report may have gone may choose to adduce evidence in rebuttal.”

13.8. In CRP No.348 of 2013, the decision relied by the learned counsel for defendants, learned single Judge of this Court reviewed the entire case law on the scope of appointment of Advocate Commissioner to localize the suit schedule property in a suit for bare injunction and held that plaintiff 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. It is held,

“This Court in an identical situation in **Batchu Narayana Rao v. Batchu Venkata Narasimha Rao** [2010 (5) ALD 83]; **Koduru Sesha 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 simpliciter, to note down the physical features of the land as it amounts to collection of evidence. Similar view was expressed by this Court in **Malla Bhaskara Rao and others v. Konchada Ananda Rao**, [1999 (5) ALD 113].

13.9.1. In **Koduru Sesha Reddy v. Gottigundala Venkata Rami Reddy and others**⁶, pursuant to orders in I.A., filed under Order XXVI Rule 9 of Civil Procedure Code, 1908 (CPC), Advocate-Commissioner filed his report noting down the physical features. Later, defendants filed IA for appointment of another Advocate-Commissioner. They pleaded that earlier Advocate-Commissioner was appointed without notice to them and plaintiff mislead the

⁶ 2006 (1) ALD 372

Commissioner at the time of noting down the physical features. Trial Court allowed the I.A. Plaintiff challenged the same in the CRP. The objection raised was, second IA for appointment of second Commissioner is not valid unless the first Commissioner report was set aside by assigning due reasons in support of the decision.

13.9.2. While allowing the CRP, learned single Judge of this Court observed as under:

“8. It hardly needs any emphasis that in a suit for perpetual injunction, it is for the plaintiff to prove that he is in possession of the suit schedule property, as on the date of filing of the suit. The necessity to appoint Commissioner would arise, if only, the evidence, which is already on record, leaves something to be explained further and the Court feels that the best way to go nearer the truth of the matter is by appointing a Commissioner.

(9) xxxxxx

10. Even in such cases, particularly, in suits for perpetual injunction, appointment of a Commissioner to note down the physical features cannot precede the recording of evidence. The parties have to adduce their evidence in support of their respective contentions as to possession. ***The Court would be justified to appoint Commissioner, only if it feels that the evidence on record is not sufficient to record a finding, for the purpose of granting or refusing the relief of injunction. In the instant case, the trial is yet to commence.***

(emphasis supplied)

13.10. In **Batchu Narayana Rao v. Batchu Venkata Narasimha Rao**⁷, suit was instituted praying to grant relief of declaration of title and recovery of possession. Six years after institution of the suit, plaintiff filed IA under Order XXVI Rule 9 of CPC with a prayer to appoint a Commissioner to identify the suit schedule property; to fix the boundaries thereof; to measure the land in his

⁷ 2010 (5) ALD 83

possession and to measure the remaining land in possession of another person. The said application was ordered by the trial Court. Pursuant thereof, Commissioner conducted survey without proper notice. Petitioner filed IA with a prayer to appoint another Advocate-Commissioner. The said IA was dismissed. Petitioner filed another IA in the year 2008 with a similar prayer and the same was also dismissed by referring to the earlier IA, opposing the prayer for grant of appointment of second Commissioner. In this case also, same plea was raised, that unless the first commissioner report was set aside, there cannot be a direction to appoint the second Commissioner. This Court observed that Commissioner cannot be appointed to gather evidence for and on behalf of any party. It is for the party concerned, to establish its case and the feasibility of appointing a Commissioner will be considered, if the Court feels that inspection and further enquiry is necessary, having regard to the uncertainty, that came into existence, after the trial has progressed to certain extent (paragraph 7).

13.11.1. In **Velaga Narayana and others v. Bommakanti Srinivas and others**⁸, suit for bare injunction was instituted. In the year, 2012, plaintiff filed IA for appointment of Commissioner for localizing the plaint schedule land and the same was dismissed on the ground that there was suppression of fact of pending crimes. Plaintiff again filed IA in the year 2013 for appointment of Commissioner to survey the lands in Sy.Nos.257 and 280. Said application was dismissed by the trial Court on the ground that already survey was conducted by the Inspector of Survey and Land Records. However, it appears, in the mean time, the Tahsildar

⁸ 2014 (4) ALT 152

requested the Assistant Director, Survey and Land Records to re-conduct the survey in Sy.Nos.257/D and 280. Plaintiff alleged that Mandal Surveyor without conducting proper survey, wrongly reported that the plots of plaintiffs were in Sy.No.280, whereas those plots were in Sy.No.257/D. However, their IA was dismissed by the trial Court.

13.11.2. This Court held as under:

“13. Under Rule of Order 26 in any suit in which the Court deems a local investigation is necessary or proper for the purpose of elucidating any matter in dispute, it can issue a commission. Though issuing commission is discretionary, the Court has to exercise discretion in an appropriate and judicious manner. The purpose and object of local investigation under Rule 9 is to have the evidence from the spot itself to have a correct and proper understanding of the dispute between the parties. The local investigation report submitted by the commissioner enables the Court to make a correct assessment of evidence on record. When the Court is of the opinion that the material on record requires elucidation, it would be just and reasonable to issue a commission for the said purpose. A commission at the instance of one of the parties to find out as to who is in possession of the property cannot be issued as it enables the party seeking appointment of commissioner to collect or gather evidence. But, where there exists a dispute regarding suit property, the Court has to necessarily issue a commission with the assistance of a surveyor, otherwise, it would be highly difficult for the Court to completely and effectively resolve the dispute and issuing such commission would not amount to collection of evidence. Commission for the said purpose can be issued prior to or after the parties let in their evidence.”

14. It is thus clear from the plethora of precedent decisions that trial Court is vested with ample discretion to appoint

Commissioner to localize the suit schedule property and such appointment can be made at any time. However, depending on the claim in the suit and facts of a case the trial Court must apply its mind before exercising its discretion. It cannot be ordered in a routine manner. It must remind itself to the fact that appointment of Commissioner is to aid the Court in assessing the rival claims and in arriving at just conclusion and is not intended to aid a party to a suit to gather evidence or to subvert process of adjudication.

15. The question for consideration is whether facts of this case warrant appointing Commissioner for conducting survey and identifying the location of the suit schedule land in a particular survey number ?

16. It appears, survey was conducted in the year 1999 and Deputy Surveyor has submitted his report. Specific plea raised by the defendants on this aspect is not controverted by the plaintiff. If survey was already conducted, there is no requirement to conduct a fresh survey to localize the property. There is no whisper by plaintiff on earlier survey and relevancy of fresh physical inspection. Furthermore, advocate-commissioner cannot decide the survey number in which suit schedule land is located. He can only note the physical features of the suit schedule property. The survey report dated 27.11.1999 and survey and land records should disclose the location of land in a survey number and co-relation of old survey number with new survey number.

17. Further, a Suit for injunction pre-supposes identification of property in issue to the understanding of plaintiff and burden is on the plaintiff to establish *prima facie* title to the property and possession. Plaintiff identified his property and described the boundaries of the suit schedule property, extent of land claimed to be owned by him and the survey number in which the suit schedule property is located. He claims to be in possession of said property. If that is so, burden is on him to prove that the description of property in the schedule is validly made and that he is in possession.

18. As rightly pointed out by learned counsel for defendants, in the guise of localizing the suit schedule property, plaintiff is seeking to collect evidence. Further, plaintiff has not explained need to have inspection and survey when a survey report was already prepared on these survey numbers way back in the year 1999. In the facts of this case, trial Court erred in accepting the plea of plaintiff to appoint Advocate-Commissioner in temporary injunction application and granting relief prayed by the plaintiff and is not sustainable. The Civil Revision Petition is allowed.

Pending miscellaneous applications stand closed. No costs.

JUSTICE P.NAVEEN RAO

Date: 10.04.2018
Kkm

HONOURABLE SRI JUSTICE P.NAVEEN RAO



CIVIL REVISION PETITION NO.7173 OF 2017

Date: 10.04.2018

kkm