

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

Civil Revision Petition No.259 of 2019

ORDER :

Heard both sides.

2. This Civil Revision Petition is filed under Article 227 of the Constitution of India challenging the order dt.21.12.2018 passed in I.A.No.2111 of 2018 in I.A.No.1719 of 2018 in O.S.No.2040 of 2018 on the file of IX Additional Senior Civil Judge, L.B. Nagar, Ranga Reddy District.

3. Admittedly, the petitioner and respondent are neighbours and it is the allegation of petitioner that respondent is trying to interfere with his possession and enjoyment of the suit schedule property, and on 04.10.2018, the respondent tried to interfere with his peaceful possession and enjoyment of the said property.

4. Written Statement was filed by respondent opposing the suit claim and contending that petitioner is not in possession and enjoyment of the suit schedule property, and denying that there was any attempt to interfere with the possession and enjoyment of petitioner over the said property. It is alleged that it is the petitioner who started to encroach the plot of respondent and was trying to construct a compound wall which was resisted by respondent. It is also alleged that petitioner suppressed true and material facts and approached the Court with unclean hands.

5. The petitioner therefore filed I.A.No.2111 of 2018 under Order XXVI Rule 9 read with Section 151 of Civil Procedure Code, 1908 to appoint an Advocate-Commissioner to note down the physical features of the suit schedule property by demarcating the boundaries with the help of a Mandal Surveyor.

6. In the affidavit filed in support of the said application it is stated that petitioner had filed I.A.No.1719 of 2018 seeking temporary injunction; that since each party is alleging that the other party is trying to encroach into the other's party, it is necessary to appoint an Advocate-Commissioner to note down the physical features of the respective properties by demarcating the boundaries of their plots with the help of Mandal Surveyor.

7. Counter-affidavit has been filed by the respondent opposing the said application, and contending that the allegations made in the affidavit filed in support of I.A.No.2111 of 2018 are false.

8. By order dt.21.12.2018, the Court below dismissed the said application. It held that when there is a dispute regarding boundaries or physical features of a property or if there are allegations of encroachment alleged by one party and disputed by other party, facts have to be physically verified because recitals of a document may not reveal the true facts, and measurements of land on the plot by a Surveyor, may become necessary.

9. But curiously, the Court below states that having obtained interim order of injunction, the petitioner cannot seek for identification of the property armed with an order of injunction. A further observation is made that petitioner having obtained *ad interim injunction* suppressed with regard to the construction of compound wall around the suit schedule property, and that after filing counter by respondent the petitioner had taken a plea that he constructed a compound wall in the petition schedule property long back, and that the northern part had collapsed.

10. This observation by the Court below cannot be countenanced, since the Court below had no material before it to show whether there was in fact a compound wall or not, and whether there was an existing compound wall which had collapsed or not.

11. This Court in **Bandaru Mutyalu vs. Palli Appalaraju**¹ held that in circumstances where there is controversy as to identification, location or measurement of the land, appointment of an Advocate-Commissioner can be done, and such local investigation is permitted.

12. It was also mentioned therein that the object of local investigation under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 is to collect evidence at the instance of the party who relies on the same and which evidence cannot be taken in Court but can only be taken from its peculiar nature, on the spot. It also rejected the contention that appointment of an Advocate-Commissioner in the

¹ 2013 (5) A.L.D. 376 = 2013 (6) A.L.T. 26

above circumstances would amount to collection of evidence. It relied on the decision of the Supreme Court in **Haryana Wakf Board vs. Shanti Sarup**² wherein the Supreme Court had held that in a case where demarcation of the disputed land is warranted, it would be appropriate to direct Court investigation by appointment of an Advocate-Commissioner under Order XXVI Rule 9 of the Code of Civil Procedure, 1908.

13. Similar view has also been expressed in **Donadulu Uma Devi vs. Girika Katamaiah @ Basaiah and others**³ and in **Bandi Samuel and another vs. Medida Nageswara Rao**⁴.

14. In the light of the above settled legal position, it cannot be said that appointment of an Advocate-Commissioner, when there is a necessity to demarcate the properties to avoid conflicts between them, amounts to conclusion of evidence.

15. Therefore, order dt.21.12.2018 passed in I.A.No.2111 of 2018 in I.A.No.1719 of 2018 in O.S.No.2040 of 2018 on the file of IX Additional Senior Civil Judge, L.B. Nagar, Ranga Reddy District cannot be sustained, and it is accordingly set aside; and I.A.No.2111 of 2018 is allowed.

16. Accordingly, the Civil Revision Petition is allowed as above.
No order as to costs.

² (2008) 8 S.C.C. 671

³ 2013 (2) A.L.D. 86

⁴ 2017 (1) A.L.D. 582

17. As a sequel, miscellaneous petitions pending if any in this Civil Revision Petition, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 18.06.2019

Ndr/*

