

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

Civil Revision Petition No.324 of 2019

ORDER :

This Civil Revision Petition is filed challenging the order dt.30.01.2019 passed in I.A.No.25 of 2019 in O.S.No.43 of 2012 on the file of Senior Civil Judge, at Huzurabad.

2. The petitioner herein is plaintiff in the above suit.
3. He filed the said suit against respondents for declaration of his title and for grant of perpetual injunction restraining the respondents from interfering with his possession and enjoyment of the suit schedule property; and also for mandatory injunction to demolish the structures raised in the suit schedule property.
4. It was the case of petitioner that he is the owner and possessor of the plaint schedule property consisting of 322 Sq.Yds. open site in Survey No.2372/C situate at Huzurabad Village and Mandal, Karimnagar District, having obtained the same under two different registered Gift Deeds dt.18.09.2009 executed in his favour by his brother and sisters. He also claimed to have been inducted into possession.
5. According to petitioner, the properties which were covered by both the Gift Deeds, form a compact plot which is described in the plaint schedule. He alleged that the vendor of his donors later denied title of his donors; that respondent no.1 filed suit O.S.No.74 of 2002

before the Junior Civil Judge, Huzurabad seeking perpetual injunction in respect of 585 Sq.Yds. comprised in Survey No.2372 of Huzurabad Village against the donors of petitioner, and they compromised the said suit wherein 70 Sq.Yds. of open site belonging to sister of petitioner was carved out. It was contended that at that time the suit schedule property, which belonged to the donors of petitioner, was not properly identified due to rustic and lack of proper education of the donors of petitioner apart from their innocence and old-age, and that the suit schedule site is actually located in between these two sites of 1st respondent in Survey Nos.2372/C and 2372/B, but not at all in the land which is subject matter of the suit in O.S.No.74 of 2002.

6. He also stated that his donors had filed O.S.No.1687 of 1989 and 1689 of 1989 against their vendors for declaration of title and perpetual injunction in respect of a suit schedule property and the suits were decreed in their favour and a perpetual injunction was granted in their favour on 29.01.1990 by the District Munsif, Huzurabad.

7. He contended that the 2nd respondent filed O.S.No.08 of 2009 before the Junior Civil Judge, Huzurabad against the donors of petitioner seeking perpetual injunction and then tried to interfere with the peaceful possession and enjoyment of donors of petitioner, and then they filed O.S.No.36 of 2009 in the same Court seeking perpetual injunction against him and also obtained an *ex parte* injunction.

8. He contended that though the 1st respondent owns two different sites towards North and South of the suit site, taking advantage of contiguity of those sites with the suit schedule property they were trying to interfere with the peaceful possession and enjoyment of the petitioner of the suit schedule property and they even forcibly erected compound walls towards east-west sides of the suit site carving out area left for way or lane towards western side of the suit site connecting to their compound walls erected to their sites, and erected a temporary shed therein, apart from other structures.

9. Written Statement was filed by respondents denying the allegations contained in the plaint. They contended that the alleged registered Gift Deeds on the basis of which the petitioner was claiming title and possession of the plaint schedule property are bogus, sham and fraudulently created and that they cover part of the house plot of 2nd respondent. It is alleged that neither petitioner nor his donors had any title or possession over the suit schedule property at any point of time. They also alleged that the land covered under the decrees in O.S.No.1687 of 1989 and 1689 of 1989 in favour of donors of petitioner is not the suit schedule property within the specific boundaries in the Schedule. It was also denied that the suit schedule property is located between the two sites of 1st respondent in Survey Nos.2372/C and 2372/B, as is alleged by petitioner, and also that it was not subject matter of O.S.No.74 of 2002. It was also denied that the suit schedule property was actually located between the northern

side of the property which is subject matter of O.S.No.8 of 2009, and it is contended that petitioner is trying to change the location of the plots of his donors from the southern side to the northern side of the plot of 2nd respondent.

10. Pending suit, the petitioner filed I.A.No.25 of 2019 under Order XXVI Rule 9 of Civil Procedure Code, 1908 to appoint an Advocate-Commissioner to locate, identify and measure the suit schedule property with the assistance of a Surveyor and file his report.

11. In the said application, he stated that since the respondents are contending that petitioner's donors compromised the subject matter of the suit in O.S.No.74 of 2002 and gave 70 Sq.Yds. to the sister of petitioner, and are contending that there does not exist the suit schedule property on the spot, it is necessary to appoint an Advocate-Commissioner to identify and locate the property with the assistance of a Surveyor. According to him, the property covered in O.S.No.74 of 2002 is different from the suit schedule property.

12. Counter-affidavit was filed by respondents opposing this contention. The contents of written statement were reiterated and it is stated that as per the compromise in O.S.No.74 of 2002 there is no land within the suit schedule boundaries belonging to the donors of petitioner irrespective of the sub-divisions in Survey No.2372. It is stated that the property can be identified only with the help of boundaries and survey number, but not with its sub-divisions. It is

also stated that PW.1 in his evidence had admitted that his vendors had only one property in that locality, and the *Caveat* petition filed by donors of petitioner with specific boundaries before this Court are very important since they specify the boundaries. He alleged that identification and location of the property means recording possession of the properties and this cannot be permitted under Order XXVI Rule 9 of Civil Procedure Code, 1908. He also stated that the suit is at a fag end and is posted for evidence of D.W.2, and this application is filed only to drag on the suit further.

13. By order dt.30.01.2019, the Court below dismissed the application. After referring to the contentions of parties, it made several comments on the merits of the claim of petitioner in the suit which are wholly unwarranted. It also observed that the suit is filed for declaration of title and injunction, and appointment of an Advocate-Commissioner to identify, locate and note down physical features or to conduct local inspection in such a suit for declaration and injunction is a rarity. It observed that petitioner cannot be permitted to gather evidence to prove his possession. It observed that appointment of an Advocate-Commissioner arises if only the trial of the suit is in process and a physical question which needs examination by an Advocate-Commissioner arises. It stated that the suit is coming up for defendants' further evidence and is ripe for disposal, and at such belated stage an Advocate-Commissioner cannot be appointed.

14. Assailing the same, the present Civil Revision Petition is filed.

15. The Counsel for petitioner contended that while deciding whether or not to appoint Advocate-Commissioner, the Court below was not correct in expressing the views on the merits of the claim of petitioner in the suit, and that the said comments were wholly unwarranted.

16. Though counsel for respondent sought to sustain the order passed by the Court below, I agree with the contention of counsel for petitioner that the Court below could not have expressed any opinion on the merits of the claim of petitioner in the suit while deciding the application for appointment of Advocate-Commissioner.

17. That apart, when the petitioner asserts in his plaint specifically that the property gifted to him by his vendors under a registered Gift Deed executed on 18.09.2009 is different from the property in O.S.No.74 of 2002 (where there is alleged to have been a compromise between the vendors of petitioner and the respondents), and when the respondents themselves took the plea that the property covered by the registered Gift Deeds overlaps part of the house plot of 2nd respondent and deny the allegations of petitioner that the suit schedule property is located between the sites of 1st respondent in Survey Nos.2372/C and 2372/B, in my opinion, it was a fit case to appoint an Advocate-Commissioner to locate, identify and measure the suit schedule property with the assistance of Surveyor.

18. In **Badana Mutyalu and another vs. Pallil Appalaraju**¹, this Court considered the other judgments of this Court and observed that in situations where there is a controversy as to identification, location or measurement of the land, local investigation should be done so that parties are aware of the report of the Commissioner and go to trial.

19. In my opinion, the object of appointment of an Advocate-Commissioner is to collect evidence at the instance of a party who relies on the same, and which cannot be taken in Court, but could be taken only from its peculiar nature on the spot.

20. Though the counsel for respondents cited the decision in **Sarala Jain and others vs. Sangu Gangadhar and others**², that was a case where an application for appointment of an Advocate-Commissioner was made for fixing boundaries to the property by both plaintiff and respondents, but the Court appointed Advocate-Commissioner only to fix boundaries to the property of respondents. Therefore, this Court rightly interfered with the said order. But the said decision cannot be of any assistance to respondents.

21. The Supreme Court also in **Haryana Waqf Board vs. Shanti Sarup and others**³ held as follows at para no.22 :

“Admittedly, in this case, an application was filed under Order 26 Rule 9 of the Code of Civil Procedure which was rejected by the Trial Court but in view of the fact that it was a case of demarcation of the disputed land, it was appropriate for the Court

¹ 2013 (5) A.L.D. 376

² 2016 (3) A.L.D. 197

³ 2008 AIR SCW 6500

to direct the investigation by appointing a Local Commissioner under Order 26 Rule 9 C.P.C.”

22. In my considered opinion, the Court below erred in refusing to appoint an Advocate-Commissioner at the request of petitioner in view of the dispute about the location of the plaint schedule property and also erred in making observations on the merits of claim of petitioner which were wholly unwarranted.

23. Therefore, the Civil Revision Petition is allowed. The order dt.30.01.2019 passed in I.A.No.25 of 2019 in O.S.No.43 of 2012 on the file of Senior Civil Judge, at Huzurabad is set aside, and the said I.A. is allowed. The Court below is directed to decide the suit uninfluenced by any observations made by it in the impugned order.

24. No order as to costs.

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

JUSTICE M.S.RAMACHANDRA RAO

Date: 20.03.2019

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