

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

C.R.P. No.6081 of 2018

O R D E R:

This Revision is filed under Article 227 of Constitution of India challenging the order dt.27.08.2018 in I.A.No.251 of 2018 in O.S.No.1038 of 2010 of VII Senior Civil Judge, City Civil Court, Hyderabad.

2. Petitioner herein is the plaintiff in the above suit.

3. He filed the said suit against the respondents for perpetual injunction restraining the respondents from interfering with his peaceful possession and enjoyment of the plaint schedule property and for rectification of entries in the Revenue Records and Town Survey Land Records etc.

4. According to petitioner, his land is located in Sy.No.318 and its sub-divisions are 318/1, 318/2, 318/3, 318/4, 318/5 and is of extent 7,600 sq.yards at Gaddiannaram Village, Malakpet comprising of four rooms and surrounded by a compound wall.

5. He relied on a Sale Deed dated 21st Rabiussani, 1283 Hijri and other documents in support of his plea including the WILL executed by his mother on 08.07.1992. He alleged that the respondents have no right, title, interest or possession over the plaint schedule property but are interfering with his alleged possession of the plaint schedule property.

6. Written statement was filed by the 4th respondent disputing the claim of the petitioner. It is contended that under the garb of having property in Sy.No.318, the petitioner was trying to grab the property in Sy.No.314 where Homeopathy College is situated and the boundaries shown by the petitioner are in relation to the land in Sy.No.314 and not to the land in Sy.No.318.

7. Several other contentions were raised including a specific contention that the suit schedule property was identified on the ground and it falls in TS.No.12, Block-H, Ward No.170 and is correlated to Sy.No.314 of Gaddiannaram Village, Saidabad Mandal, Hyderabad District and it is contended that land in Sy.No.314 is a Government land and the title was claimed by the Government in 1964 itself.

8. Thus, from the pleadings, there is a clear dispute about where the plaint schedule property is located i.e., whether it is located in Sy.No.314 or in Sy.No.318.

9. Petitioner filed I.A.No.570 of 2016 initially to appoint a Government Surveyor to survey the land in Sy.No.314 and 318/1 to 5 asserting that the land claimed by him is in Sy.No.318 and not in Sy.No.314 as contended by the respondents.

10. Counter affidavit was filed by the 4th respondent opposing the same.

11. On 18.01.2018, the said I.A. was dismissed by the Court below observing that in Sy.No.314 to an extent of Ac.1-11 gts and in Sy.No.318/1 to an extent of Ac.109-21 gts there are other constructions therein and survey of the said land is not possible. It also observed that since the suit is for simple injunction, petitioner has to prove the location of the suit schedule property within the boundaries given and prove his possession, and he cannot seek to locate the suit schedule property through the Surveyor which amounts to collection of evidence.

12. Petitioner challenged the same in CRP.No.1414 of 2018 but withdrew it on 05.03.2018.

13. He then filed I.A.No.251 of 2018 to appoint an Advocate Commissioner to survey and demarcate the land in Sy.No.314 and 318/1 to 5 mentioning about the dismissal of CRP.No.1414 of 2018. He pleaded that while dismissing the CRP, this Court has directed to apply to Tahsildar, Saidabad Mandal for a survey; that he also paid necessary amount for such survey on 02.05.2018 but Tahsildar is not showing any interest. He contended that in view of the objections raised by the respondents claiming that the suit schedule property is in Sy.No.314, Advocate Commissioner is to be appointed to

survey the lands in Sy.No.314 and 314/1 to 5 by taking assistance of the Government Surveyor.

14. Counter affidavit was filed by the respondents opposing the said application and contending that once CRP.No.1414 of 2018 is withdrawn by the petitioner, he has no legal entitlement to seek appointment of an Advocate Commissioner, particularly when the land in both Survey Numbers is classified as “Kharij Khata”.

15. By order dated 27.08.2018, the Court below dismissed said application. It relied on earlier order dismissing I.A.No.570 of 2016 and the fact that it was confirmed in the Revision and held that by merely inserting the word Advocate Commissioner, I.A.No.251 of 2018 has been filed; since petitioner has filed a suit for injunction, he has to establish his case that his property is located in Sy.No.314; and he cannot seek assistance of the Court to prove his case through appointment of Advocate Commissioner or Surveyor since it amounts to collection of evidence.

16. Assailing the same, this Revision is filed.

17. Counsel for the petitioner contends that the dismissal of the CRP.No.1414 of 2018 cannot be a ground to deny the petitioner relief sought in I.A.No.251 of 2018, particularly when there was no prayer made earlier in I.A.No.570 of 2016,

out of which CRP.No.1414 of 2018 arose, seeking appointment of an Advocate Commissioner.

18. Counsel also relied on the decisions reported in ***Haryana Wakf Board v. Shanti Sarup***¹ and ***Donadulu Uma Devi v. Girika Katamaiah @ Basaiah and others***².

19. Learned Government Pleader for Arbitration supported the orders passed by the Court below and contended that Advocate Commissioner cannot be appointed in the facts and circumstances of the case not only because of the dismissal of CRP.No.1414 of 2018 earlier but also because it would amount to collection of evidence.

20. I have noted the contentions of both sides.

21. When there is a dispute as to Survey Numbers in which the plaint schedule property is located, the same cannot be established by oral or documentary evidence and there is a necessity to localize the land and locate it in one or the other survey number. This Court in ***Badana Mutyalu and another v. Palli Appalaraju***³ held that where there is controversy as to identification, location or measurement of the land, local investigation should be done.

22. In ***Haryana Waqf Board***'s case, a suit for declaration and injunction was filed in respect of certain properties and

¹ (2008) 8 SCC 671

² 2013 (2) ALD 86

³ 2013 (5) ALD 376

the said suit was dismissed and it was confirmed by the High Court also in Second Appeal. But the Supreme Court observed that since the dispute was whether there was an encroachment by one party upon the land belonging to another, it was a fit case where an Advocate Commissioner should have been appointed under Order 26 Rule 9 CPC. It observed that where there is a controversy between the parties regarding demarcation of the land, the Courts cannot reject the said applications.

23. This judgment was followed in ***Donadulu Uma Devi's*** case and it was held that where there is a dispute with regard to identity of property in litigation, it is necessary to appoint an Advocate Commissioner for localizing the property even by taking necessary assistance from a qualified Surveyor and it will not amount to collection of evidence. The Court observed that Order 26 Rule 9 CPC permits an Advocate Commissioner to demarcate the property taking assistance from a qualified Surveyor and the Courts should fully utilize this provision when the implementation of it is needed for proper disposal of the proceedings before it.

24. Similar view has been taken in ***Badana Mutyalu's case***. It was held therein that in circumstances where there is a controversy as to identification, location or measurement of the land, local investigation should be done at an earlier stage so that the parties are aware of the report of the

Commissioner, go to the trial prepared and parties against whom the report may have gone may choose to adduce evidence in rebuttal.

25. In view of the above settled legal position, the view taken by the Court below that an Advocate Commissioner cannot be appointed to localize the suit schedule property by taking the assistance of the Surveyor to survey the land in Sy.No.314 and 318/1 to 5 cannot be sustained.

26. It also erred in taking into account the dismissal of I.A.No.570 of 2016 filed earlier by the petitioner for appointment of Government Surveyor and taking withdrawal of CRP.No.1414 of 2018 by this Court as a ground to dismiss I.A.No.251 of 2018 because the scope of an application under Order 26 Rule 9 CPC is different.

27. Merely because, the petitioner probably felt that appointment of Government Surveyor in a litigation to which Government is a party may not be worth while and sought to have an Advocate Commissioner appointed under whose guidance, the demarcation can be done since the Advocate Commissioner is an Officer of the Court, the Court below could not have rejected this application.

28. As regards the apprehension of Government Pleader for Arbitration that the Court below may not look into other evidence adduced by the parties when such Advocate

Commissioner's report is available before it, such apprehension is without any basis because the Court below is expected to consider all the evidence on record, before it finally decides the suit and this Court has no reason to believe that the Court below will not do so.

29. The Civil Revision Petition is accordingly allowed; Order dated 27.08.2018 in I.A.No.251 of 2018 in O.S.No.1038 of 2010 of the VII Senior Civil Judge, City Civil Court is set aside; and the said IA is allowed. No costs.

30. Consequently, miscellaneous petitions pending, if any, shall stand dismissed.

M.S.RAMACHANDRA RAO, J

23.04.2019
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