

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

CRP.No.761 of 2016

O R D E R:

This Revision is filed assailing the order dt.16.11.2015 in I.A.No.170 of 2014 in I.A.No.397 of 2013 in O.S.No.483 of 2013 of the Principal Senior Civil Judge, Warangal.

2. Petitioner herein is plaintiff in the above suit.

3. He filed the said suit against the respondent for declaration of his title to Item 2 of B-schedule property for a perpetual injunction restraining the respondents from interfering with his possession and enjoyment of the said property.

4. Petitioner contended that the 1st respondent is his neighbour and he is trying to encroach the above said property; that between the properties of petitioner and respondent, there is a well, which is located in the property of the 1st respondent, but the 1st respondent is trying to disturb the boundary of the petitioner. He contended that 1st respondent proposed to get a survey of the land in 2012 which is located to the west side of the suit schedule

property, but the surveyor did not survey the land of the petitioner.

5. Written statement was filed by the 1st respondent disputing the boundaries of the suit schedule property and contending that the petitioner was disputing the boundary of the 1st respondent's property. He contended that he is the owner of item 2 of the B-schedule property and the petitioner had no concern with it. The respondents even denied the possession of the petitioner over Item-2 of the B-schedule property. 1st respondent also relied upon a survey which was got done with a Mandal Surveyor on 13.05.2012 wherein this property was surveyed and demarcated.

6. Pending suit, petitioner filed I.A.No.397 of 2013 under Order XXXIX Rule 1 and 2 CPC seeking interim injunction.

7. It is not in dispute that the petitioner also filed W.P.No.25959 of 2013 before this Court contending that he had sought for appointment of a surveyor to demarcate his property, but the surveyor failed to fix boundaries though he visited the property on 27.01.2012, 26.07.2012, and 18.09.2012. He contended that the inaction of the Deputy Inspector of Survey, Warangal in fixing the boundaries of the petitioner's property is illegal.

8. The said W.P. was disposed of on 05.09.2013 by this Court directing the petitioner to file appropriate application in O.S.No.483 of 2013 already filed by him for a proper survey and demarcation of the boundaries of his land. Copy of the said order is also placed before this Court.

9. Petitioner thereafter filed I.A.No.170 of 2014 to appoint an Advocate-Commissioner to note down the physical features and to take assistance of a surveyor to measure the property and fix the boundaries in a survey. He also alleged that though he had an interim order granted in I.A.No.397 of 2013, respondents violated the same and disturbed the boundary between their respective properties. He contended that the property of the respondent is in a different survey number, while his own property is in another survey number and so fixation of boundaries as per the survey touch map is necessary.

10. Counter affidavit was filed by the respondents opposing the said application. It is alleged that there was already a demarcation of the lands of both the parties in 2012-13 and a fresh demarcation is not necessary through an Advocate-Commissioner. Allegations about petitioner's lack of possession of the suit schedule property were also reiterated.

11. By order dt.16.11.2015, the Court below dismissed the said application. It observed that appointment of Advocate-Commissioner is nothing but collection of evidence being sought by the petitioner and since the respondents had already stated that demarcation was already done by Thasildar and Assistant Director of Survey and Settlement, those measurements can be taken into account. It also observed that petitioner has to prove his case by adducing oral and documentary evidence and cannot depend on commissioner's evidence and the questions, whether the measurements were correctly taken or not, and whether any prejudice was caused to the petitioner during the said survey by the Mandal Surveyor and the Assistant Director of Survey and Settlement, can be looked into at the time of trial.

12. Assailing the same, this Revision is filed.

13. Counsel for the petitioner contended that when there is a dispute between the petitioner and respondents about interference by the latter with the property of the petitioner and when there is an order dt.05.09.2013 in W.P.No.25959 of 2013 permitting the petitioner to seek demarcation of the property of the petitioner in the suit, the respondents cannot oppose for appointment of Advocate-Commissioner for demarcating their respective properties. He also contended

that the evidence of encroachment would be of such a nature as it would be available only on the ground at the spot and no amount of oral evidence would suffice in the matter.

14. Sri M.Surendra Rao, Senior counsel appearing for respondents refuted the said contentions and supported the order passed by the Court below. He also pointed out that the order dt.05.09.2013 in W.P.No.25959 of 2013 has not even been mentioned by the petitioner in I.A.No.170 of 2014 and so the petitioner cannot now seek to rely on it.

15. I have noted the contentions of both sides.

16. From the pleadings of the parties and the suit, it is clear that petitioner is alleging interference by the respondents of his property and has specifically contended that the respondents are trying to disturb the boundary stones of the petitioner's property.

17. These allegations are no doubt disputed by the respondents who allege that petitioner has neither title nor possession to the plaint schedule property.

18. In **Haryana Waqf Board Vs. Shanti Sarup & Ors.**,¹ the Supreme Court has held that where there is a dispute of demarcation of property, it is appropriate for a Civil Court to

¹ 2008(8) SCC 671

direct investigation by appointing a local commissioner under Order XXVI Rule 9 CPC. It observed that in view of the nature of the dispute it was a fit case for an Advocate-Commissioner to be appointed for the purpose of demarcation.

19. This judgment as well as other judgments were followed by this court in **Jajula Koteswar Rao v. Ravulapalli Masthan Rao**² wherein this Court has held that where there is an allegation of encroachment, mere oral evidence will not aid the parties. It was observed that:

“18. The object of the local investigation under Order XXVI Rule 9 CPC 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 be taken only from the peculiar nature, on the spot. The Commissioner in effect is a projection of the Court appointed for a particular purpose. The law of evidence enjoins upon a party to prove the fact which he relies on and in that sense, an obligation is cast upon the party; and if he fails to discharge that obligation, adverse consequence will follow and he will have to face the repercussions of the same. This right of the party to adduce evidence gets adjudicated in the interlocutory proceedings under Order XXVI Rule 9 CPC.”

20. The observations of the Court below, that appointment of Advocate-Commissioner in the facts and circumstances of

² 2016(1) ALT 134

the case amounts to collection of evidence, therefore cannot be sustained.

21. Accordingly, this Civil Revision Petition allowed; the impugned order dt.16.11.2015 in I.A.No.170 of 2014 in I.A.No.397 of 2013 in O.S.No.483 of 2013 of the Principal Senior Civil Judge, Warangal is set aside; and the said I.A., is allowed. The interim order granted earlier shall stand vacated. No order as to costs.

22. Consequently, miscellaneous petitions pending if any, shall stand closed.

M.S. RAMACHANDRA RAO, J

22nd April, 2019.

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