

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

Civil Revision Petition No.6877 of 2018

ORDER :

This Civil Revision Petition is filed under Article 227 of the Constitution of India challenging the order dt.10.10.2018 passed in I.A.No.208 of 2018 in O.S.No.51 of 2018 on the file of the Junior Civil Judge, Metpalli.

2. The petitioners herein are defendants in the above suit.
3. The respondents filed the said suit against petitioners for a mandatory injunction directing petitioners to remove cross-bund obstruction over existing schedule 12 feet wide road shown in the sketch map annexed to the plaint; and for a permanent injunction restraining petitioners from obstructing the said road.
4. According to them, they have lands in Survey Nos.158, 159, 160 and 166 of Regunta Village of Mallapur Mandal, and they used to go to their fields through an existing 12 feet wide road as shown in the schedule / sketch given in the plaint, and petitioners who have lands in Survey Nos.165 and 167 situated towards eastern side of the schedule road wanted to grab the land covered by the road and merged it into their lands illegally, and they have raised a cross-bund with clay at the point shown in the plaint plan across the existing road preventing the respondents from going to their agricultural fields.

5. The respondents also filed I.A.No.139 of 2018 invoking Order XXXIX Rules 1 and 2 of Civil Procedure Code, 1908 seeking an *ad interim ex parte* injunction restraining petitioners from obstructing them from using the said road; and also I.A.No.208 of 2018 in I.A.No.139 of 2018 under Order XXVI Rule 9 of Civil Procedure Code, 1908 to appoint an Advocate-Commissioner for local investigation to find out whether there is such existing road of 12 feet width as shown in the plaint plan or not.

6. The respondents contended that they have a right of easement to go through the said schedule road, and that it is an easement of necessity; and petitioners have no right to obstruct them from exercising the right which was being exercised from time immemorial.

7. No counter-affidavit was filed by petitioners opposing the said application though an opportunity was granted, and the Court below forfeited their right to file a counter.

8. By order dt.10.10.2018, the Court below allowed the said application and appointed an Advocate-Commissioner to make local investigation to find out whether there is an existing road towards the land of respondents from the village or not, or is there any other way to go their land, by taking into consideration the map filed by the respondents.

9. It observed that for purpose of local investigation an Advocate-Commissioner is appointed under Order XXVI Rule 9 of Civil Procedure Code, 1908 and he has to ascertain, collect or elucidate facts in respect of any matter in dispute where it is in the interests of justice to do so. It observed that following this course can be resorted to in order to determine whether there has been an encroachment to determine the exact area of encroachment. It observed that no prejudice would be caused to petitioners if Advocate-Commissioner is appointed.

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

11. The counsel for petitioner firstly contended that the Court below ought not to have appointed an Advocate-Commissioner because the stage of recording evidence has not yet commenced and relied upon the decision in **Dammalapati Satyanarayana vs. Datla Venkata Ramabhadra Raju alias D.V.R. Raju**¹.

12. In **Dammalapati Satyanarayana** (1 supra), the Court observed that an Advocate-Commissioner should undertake localization of suit schedule property basing on title deeds of both parties, that the so-called title deeds must be accepted by the Court in evidence, before they constitute the basis of identification of the property, and admissibility, relevance, etc., of the sale deeds can be undertaken only at the stage of recording evidence, and if any report of Advocate-Commissioner is obtained before the title deeds are admitted into

¹ 2006 (4) A.L.D. 675

evidence the whole trial will only revolve around the said report, and so it was impermissible.

13. The said decision, in my opinion, does not reflect the correct position of law.

14. A Division Bench of this Court in **C. Veeranna v. C. Venkatachalam**² has held that a plaintiff could have a Commissioner appointed for local investigation even *ex parte* on the date of the suit. The Division Bench held it is open to the Court to issue an *ex parte* Commission if it deems that a local investigation is requisite for the purpose of the suit.

15. In **Savitramma and another vs. B. Changa Reddy**³, the said decision of the Division Bench in **C. Veeranna (2 supra)** was followed and it was observed that question as to when a Commissioner has to be appointed is within 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.

16. This Court considered the decision in **Dammalapati Satyanarayana (1 supra)** in **Badana Mutyalu and another vs. Palli Appalaraju**⁴ and held that the said decisions do not represent the correct legal position by relying on the decision in **C. Veeranna (2 supra)** and **Savitramma and another (3 supra)**. It also referred to

² AIR 1959 A.P. 170

³ 1988 (1) A.L.T. 353

⁴ 2013 (5) A.L.D. 376

the decision in **Ponnusamy Pandaram vs. The Salem Vayyappamalai Jangamar Sangam**⁵ and held that the object of local investigation under Order XXVI Rule 9 of the Code cannot be belittled, and its object is to collect evidence at the instance of petitioner who relies on the same and which evidence cannot be taken in Court but could be taken only due to its peculiar nature, on the spot, and that this evidence would elucidate a point which may otherwise be left in doubt or ambiguity on record. The Commissioner, in effect, is a projection of the Court, appointed for a particular purpose. This Court also placed reliance on the judgment of the Orissa High Court in **Mahendranath Parida vs. Punanda Parida**⁶ where the Orissa High Court held that :

“When the controversy is as to identification, location or measurement of the land or premise or object, local investigation should be done at an early stage so that the parties are aware of the report of the Commissioner and got to trial prepared. The party against whom the report may have gone may choose to adduce evidence in rebuttal. Hence, ordinarily in such type of cases local investigation should not be deferred to a stage after the closure of evidence. I do not mean thereby that in no circumstances can local investigation be sought after the evidence is closed. But ordinarily it should be done before the parties adduced evidence. Hence, I do not accept the contention of Mr. B. Patnaik that inasmuch as the party has a right to and can adduce evidence of a survey knowing person engaged by him privately with reference to identification of location, it is open to the Court to decline to appoint a Commissioner for local investigation under Order 26, Rule 9. In this case the controversy can be resolved by locating the wall upon measurement, that is to say, whether it stood on Plot No.306 or Plot No.307. So, the local

⁵ AIR 1986 Mad. 33

⁶ AIR 1988 Ori. 248

investigation is essential. The learned Munsif having failed to exercise jurisdiction vested in him, I interfere and vacate the impugned order. He is directed to appoint a survey knowing, Commissioner.”

17. It then concluded that in situations where there is controversy as to identification, location or measurement of the land, local investigation should be done at the earliest so that parties are aware of the report of Commissioner and go to the trial prepared and the party against whom the report may have gone may choose to adduce evidence in rebuttal.

18. To the above category of cases, is also to be added cases like the instant case, where right of easement is claimed and to establish it, the respondents / plaintiffs would have to show that there was an existing road. Since the existence of the road can only be known from evidence at the spot, there is nothing wrong in the Trial Court appointing an Advocate-Commissioner to ascertain whether there is in fact in existence a road as is alleged by the respondents or not.

19. The counsel further contended that respondents had suppressed the fact that there was an injunction granted against them at the instance of son of petitioners. Without filing any counter-affidavit in the Court below when an opportunity was given to petitioners, they cannot canvass the said point for the first time in this Court. Also, the property which is subject matter of the said suit does not appear to be the property through which the existence of the road is pleaded by the

respondents. In any event, that is a matter to be gone into at the stage of trial.

20. I therefore do not find any merit in the Revision and it is accordingly dismissed at the stage of admission. No order as to costs.

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

JUSTICE M.S.RAMACHANDRA RAO

Date: 28.03.2019

Ndr/*

