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Andhra Pradesh High Court

Case No: Civil Revision Petition No: 5525 of 2011

Badana Mutyalu and Badana Laxminarayana	APPELLANT
Vs	
Palli Appalaraju	RESPONDENT

Date of Decision: July 1, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 26 Rule 10, Order 26 Rule 9
- Constitution of India, 1950 - Article 227

Citation: (2013) 5 ALD 376 : (2013) 6 ALT 26

Hon'ble Judges: M.S. Ramachandra Rao, J

Bench: Single Bench

Advocate: K. Subrahmanyam, for the Appellant; P. Veera Reddy, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

M.S. Ramachandra Rao, J.
This revision petition is filed under Article 227 of the Constitution of India challenging the order dt. 18-08-2011 in I.A. No. 173 of 2008 in O.S. No. 448 of 2004 on the file of the Principal Junior Civil Judges Court, Srikakulam. The petitioners are defendants in the suit. The suit was filed by the respondent for permanent injunction restraining the petitioners from interfering with his peaceful possession and enjoyment of the "ABCD" marked front yard vacant site.

2. Pending suit, I.A. No. 173 of 2008 was filed by the respondent under Order XXVI Rule 9 CPC praying for appointment of an advocate commissioner to take measurements of the property mentioned in the registered sale deed dt. 28-02-1963 under which he has purchased the property and to find out whether the "ABCD" plan marked vacant site is part and parcel of the property mentioned in the said registered sale deed or not with the

help of a qualified surveyor.

3. The petitioners opposed the said I.A. They contended that at their instance I.A. No. 968 of 2004 was filed for local inspection; that it was allowed and an advocate commissioner was appointed who executed the warrant and filed the report. It was also contended that the respondent had not filed any objection at that time and now he has filed present petition to appoint an advocate commissioner again to harass the petitioners.

4. By order dt. 18-08-2011, the Court below allowed I.A. No. 173 of 2008 holding that the real question in controversy is with regard to localization of the "ABCD" marked site and that it is necessary to localize it with reference to the sale deed of the respondent and other title deeds, if any, of both the parties; it also rejected the objection of the petitioners that the present petition is not maintainable because of an earlier order appointing advocate commissioner to note down the physical features.

5. Aggrieved thereby, the present revision petition is filed.

6. Heard Sri. K. Subrahmanyam, learned counsel for the petitioners and Sri. P. Veera Reddy, learned counsel for the respondent.

7. The learned counsel for the petitioners contended that the purpose for which the LA. was filed by the respondent was to collect evidence; that the earlier advocate commissioner was appointed to note down physical features of the property and therefore another advocate commissioner cannot be appointed to localize the "ABCD" site which is subject matter of the dispute between the parties. He also relied upon the decision in Dammalapati Satyanarayana and Others Vs. Datla Venkata Ramabhadra Raju @ D.V.R. Raju and Another, and Sanjay Khandare Vs. Sahebrao Khandare and Others, .

8. Per contra, the learned counsel for the respondent-plaintiff contended that the order passed by the Court below does not suffer from any error warranting interference by this Court under Article 227 of the Constitution of India and that valid reasons have been given by the Court below for allowing I.A. No. 173 of 2008.

9. I have noted the contentions of the respective parties.

10. In the present case, the dispute between the parties is whether the "ABCD" marked vacant site shown in the plaint plan by the respondent is part of the property which belongs to the respondent which had been purchased by his father and uncle under registered sale deed dt. 28-02-1963. In the written statement, it is contended by the petitioners that respondent"s vendor nor respondent have no clear title, that the vendors under the above sale deed fixed the boundaries on assumption and there is no basis for the said measurements. It is also contended in the written statement that the boundaries and measurements given by the respondent are false and incorrect and the plaint plan itself was not valid in the eye of law.

11. It is not disputed that the respondent and the petitioners are neighbours and the house of the petitioners is to the north of the property of the respondent. When the parties are neighbours and there is an allegation that the property belonging to the respondent is being interfered with by petitioner, it is incumbent on the Court to decide where the disputed portion is located and whether or not it forms part of the property claimed by the respondent.

12. It is no doubt true that previously an advocate commissioner was appointed at the instance of the petitioners but he only noted down the physical features. It is not the case of the petitioners that measurements of the disputed site and its localization were done by the earlier advocate commissioner.

13. In Dammalapati Satyanarayana (1 supra), this Court has taken a view that an advocate commissioner can only be appointed after the title deeds of both the parties were accepted by the Court in evidence and that only then, they can be taken as a basis for identification of the property. The court held parties therein were uncertain as to their claim in respect of any definite property and appointment of an advocate commissioner would amount to an exercise to gather evidence. I am unable to agree. The view expressed in Dammalapati Satyanarayana (1 supra) is against the weight of the other authorities mentioned below. Also no authority is cited for laying down the said principle.

14. In Ponnusamy Pandaram v. The Salem Vaiyappamalai Jangamar Sangam AIR 1986 Madras 33, a dispute had arisen as to whether constructions put up by the 3rd defendant in the suit therein were within his land or whether he had encroached into the land of the plaintiff. The Court held:

6. The object of local investigation under O. XXVI R. 9 of the Code cannot be littled. Its object is to collect evidence at the instance of the party who relies on the same and which evidence cannot be taken in court but could be taken only from its peculiar nature, on the soot. This evidence will 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. In this regard, the implication of O. XXVI, R. 10 cannot be lost sight of when it says that the report of the Commissioner and the evidence taken by him shall be evidence in the suit and shall form part of the record. We are not very much concerned with the possessive value of the report of the Commissioner. But the party has got a right to place evidence which he could require to substantiate his case before the Court and, of course, subject to the law of evidence and the Code, and it is the duty of the Court to receive such evidence unless there are other justifiable factors in law to decline to receive such evidence. The law of evidence enjoins upon the 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 0. XXVI, R. 9. When there is a decline by the Court to issue the commission asked for to make local investigation, the purpose behind it being

significant and in stated cases, imperative too, that order certainly disposes of the right claimed by the party to place the requisite evidence on his behalf. The question as to whether a particular order adjudicates some rights or obligations of the parties in controversy will depend upon the nature or the right or obligation and it is not possible to lay down a uniform rule and no decision, including any of the highest Court in the land, attempted to do so.

The Court held that a local investigation is the best way to find out the position and the party, namely, the 3rd defendant therein, intending to place the evidence before the Court through local investigation by the Commissioner, cannot be deprived of that right. It further held that a misconception had weighed in the mind of the Court below when it reasoned that there is no dispute about the ownership of S. No. 289/1 by the 3rd defendant which was not the point in issue.

15. In Mahendranath Parida Vs. Purnananda Parida and Others, , the Orissa High Court held:

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 go 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 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.

16. it has been held that a plaintiff could have a Commissioner appointed for local investigation even ex-parte on the date of the suit. It has been so held by a Division Bench of this Court in Chalapati Veeranna and Others Vs. Chalapati Venkatachalam, consisting of P. Chandra Reddy, Offg. C.J. (as he then was) and Seshachalapati, J. It was argued before the learned judges that Rule 18 of Order 25 contemplates the issue of notices before the appointment of the Commissioner. This contention was rejected and it was held that Rule 18 contemplated the issue of notices after the appointment of a Commissioner, but not before such appointment. There was, therefore, no mandate in the statute that an ex parte Commissioner could not be appointed. The learned judges observed:

Rote 18 contemplates a situation after the appointment of a Commissioner and not before the commission is issued. There is nothing in Rule 9 of warrant a contention that a duty is cast on the Court to issue notice before an order is passed under that rule. It is open to the Court to issue an ex parte commissioner if it deems that a local investigation is requisite for the purpose of the suit...

17. This decision of the Division bench was followed in Savitramma and another v. B. Changa Reddy 1988(1) ALT 353. In that case, it was held:

16. The question as to when a Commissioner could be appointed should be 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.....

18. So it has been held that either party to the suit could have a Commissioner appointed even before the trial. In view of the above decisions, I hold that in situations where there is controversy as to identification, location or measurement of the land, local investigation should be done at an early stage so that the parties are aware of the report of the Commissioner and go to trial prepared. The party against whom the report may have gone may choose to adduce evidence in rebuttal.

19. In Sanjay (2 supra), cited by the learned counsel for the petitioners, the Court held that an advocate commissioner cannot be appointed to submit a report recording actual possession of the disputed property. In the present case, however, the advocate commissioner is appointed to localize the disputed "ABCD" portion with reference to the title deeds of both the parties with the assistance of a qualified surveyor and not to determine possession of any party. Therefore, the said decision has no application.

20. I am of the view that there is no error of jurisdiction committed by the Court below in the impugned order warranting interference by this Court under Article 227 of the Constitution of India. The Civil Revision Petition is accordingly dismissed. No costs.