



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 04.12.2015

CORAM:

THE HONOURABLE MR.JUSTICE T.MATHIVANAN

C.R.P (MD) No.2129 of 2015

and

M.P. (MD) .No.1 of 2015

J.Sivaraman

..Petitioner

Vs.

Pounthai

..Respondent

PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India, as against the order dated 23.06.2015 passed in I.A.No.141 of 2015 in O.S.No.74 of 2014 on the file of the District Munsif Court, Nilakottai.

For Petitioner : Mrs.S.Vijayalakshmi

For M/s.R.Suresh Kumar

For Respondent : Mr.V.Sitharanjandas

ORDER

Challenge is made in this revision against the fair and decretal order dated 23.06.2015 and made in I.A.No.141 of 2015 in O.S.No.74 of 2014 on the file of the learned District Munsif, Nilakottai. The revision petitioner herein is the defendant, whereas the respondent is the plaintiff in the suit in O.S.No.74 of 2014. Obviously, the suit in O.S.No.74 of 2014 has been filed by the respondent/plaintiff as against the revision petitioner, seeking the relief of permanent injunction. This suit has been contested by the revision petitioner by filing his written statement. During the pendency of the said suit the respondent /plaintiff has filed an application in I.A.No.141 of 2015 under Order 26 Rule 9 of the Code of Civil Procedure, to appoint an advocate commissioner to inspect the physical features of the suit property and also to measure the same with the help of the Nilakottai Taluk, Pallapatti Village surveyor based on his sale deed and to file a report along with the plan. Despite the contest made by the revision petitioner, the application in I.A.No.141 of 2015 was allowed on 23.06.2015. Impugning the said order, present revision is filed by him.

2. Heard Mrs. S.Vijayalakshmi, learned counsel appearing for Mr.R.Suresh Kumar, learned counsel, who is on record for the revision petitioner and Mr.V.Sitharanjandas, learned counsel appearing for the respondent.

3. It is brought to the notice of this Court that the commissioner has not yet visited the suit property. Before we go in to the merits of the case, it is pertinent on the part of this Court to extract the provisions of Rule 9 of Order 26 of the Code of Civil Procedure. Rule 9 reads as under:

<https://hcservices.ecourts.gov.in/hcservices/>

"9. Commissions to make local investigations;
In any suit in which the Court deems a local



investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules."

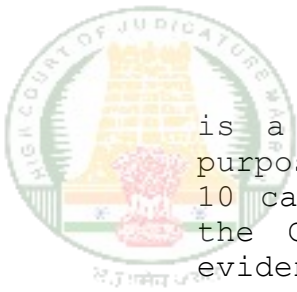
4. Under this Rule, power is conferred on the Court to appoint a commissioner for local inspection for the better appreciation of evidence already on record. However, this power is discretionary and a commissioner for local inspection can be appointed only after the parties have adduced the evidence. Of course, the object of local inspection under this Rule is not to collect the evidence which can be taken in Court, but to obtain the evidence for elucidating the matter, which due to its peculiar nature in character and can only be heard on the spot. The structure of Rule 9 Order 26 of the Code of Civil Procedure is very plausible and it says if the Court deems a local inspection to be requisite or proper for the purpose of elucidating any matter in dispute, the Court may issue a commission to such person, as it may thinks fit directing him to make such investigation and to report thereon to the Court.

5. This Court in *R.Malligeswari Vs. V.Munuswamy* reported in 2015 (3) LW 281 has observed in para 22(11), 23 and 24 as under:

"22. (11). The expression 'elucidate' means to make lucid or clear, throw light upon, explain, enlighten. Where the Court is satisfied on the materials available on the record that a party is not able to produce the desired evidence for reasonable circumstances, it may assist the party to appoint a 'Commissioner' to get the evidence. However, such evidence is not binding on the Court, which is to appreciate the same along with other evidence. The party can 'countermand' the evidence of Commissioner's report by giving any other evidence. This dictum is laid down in *Anukura & Ankura Charan Sahu v. Arjuna Charan Palei*, 1998 AIHC 1702 (Ori-DB). Besides this, in *Debendranath Nandi v. Natha Bhuiyan*, AIR 1973 Ori 240, it is held that the object of local investigation under Rule is to obtain evidence which from its peculiar nature can best be had from the spot."

"23. In *Ponnusamy Pandaram V. The Salam Jilla Vaiyappamalai Jangamar Sangam*, represented by its President, Palanivel reported in 1984 TNLJ 384, the learned Single Judge of this Court has observed as follows:-

The object of local investigation under Order XXVI, rule 9 of the Code cannot be belittled. 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 spot. 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 Order XXVI, Rule 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."

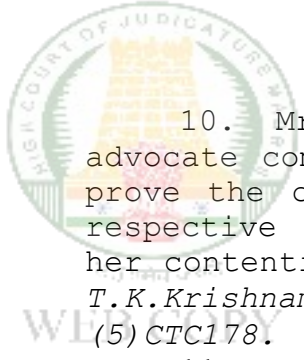
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"24. The power conferred on the Court to appoint a Commissioner for local inspection is for better appreciation of the evidence already on record. The trial Court has jurisdiction to decide under what circumstances it can appoint a Commissioner. The Commissioner so appointed is not performing a judicial act and it is a ministerial act. Nothing is left to discretion and there is no occasion to use judgment or adjudicate the issue involved, but only noting the details and reporting the actual state of affairs. Such report does not automatically form part of evidence in the proceeding and the Court has power to confirm, vary or set aside the Report or issue a new Commission. Hence, there is neither abdication nor delegation of the powers of functions of the Court to decide the issue. Only on examination of the Commissioner, the Report forms part of the record and evidence. The opposite party has opportunity to cross-examine the Commissioner. Of course, after failure to do so and to elicit such information as is required, he cannot at later stage object to the Report being accepted on the ground that the Commissioner was not examined or cross examined."

The above said proposition has been laid down in *A.Nagarajan vs. A.Madhanakumar* reported in 1996(1)LW 278.

8. Insofar as this revision petition is concerned, the respondent/plaintiff in para no.3 of her affidavit has stated that in the written statement filed by the revision petitioner/defendant it is stated that a vacant site belonging to the defendant is located on the eastern side of the suit property. Subsequently, objected by the respondent/plaintiff and what she would say is that the vacant site which is located on the eastern side of the suit property is belonging to her (plaintiff). Therefore, she has stated that to identify the property of the defendant and to find out the exact extent of the property belonged to the plaintiff based on her title deed, it is necessarily to be measured and only for this purpose she has filed the above petition to measure the property based on her sale deed dated 09.02.1977 with the help of surveyor by appointing an advocate commissioner.

9. The learned trial judge has also observed in the order dated 23.06.2015 that after purchasing the suit property on 09.02.1977 under a sale deed the respondent/plaintiff had put up the construction in one portion and the remaining portion is kept vacant and since the revision petitioner/defendant had claimed that the vacant site lying on the eastern side of the suit property is belonged to him, it would be expedient to appoint an advocate commissioner to inspect the suit property and find out the fact about the exact extent belonging to the plaintiff and to file a report with regard to the physical features of the suit property. He has also observed that by appointing an advocate commissioner no prejudice would be caused to the revision petitioner/defendant.



10. Mrs.S.Vijayalakshmi, learned counsel has submitted that an advocate commissioner should not be appointed to gather the evidence to prove the case of the parties. Instead, the parties should prove their respective cases by producing legally acceptable evidences. To support her contention she has placed reliance upon the decision of this Court in *T.K.Krishnamurthy vs.Tamilnadu Water and Drainage Board* reported in 2006 (5) CTC 178.

11. On the other hand Mr.V.Sitharanjandas, learned counsel appearing for the respondent/plaintiff has adverted to that the Court has discretion to appoint a commissioner.

12. However that discretionary power had to be exercised in a judicious and sound manner and not whimsically or capriciously. Where the Court considers a local investigation to be requisite and proper, ordinarily it should not decline to exercise its jurisdiction. The Court may decline to exercise its jurisdiction, only in the case of belated filing of petition seeking appointment of commissioner or if the Court finds that the motion was malafied or made in circumstances justifying a refusal.

13. In this circumstance this Court would point out that in the reasonable case, if the court considers that the appointment of an advocate commissioner is absolutely necessary for taking fair decision and when the controversy is as to identification, location or measurement of the land or premises or object, a local investigation should be done at an early stage that might not be any impediment to appoint an advocate commissioner. This principle is laid down in *Mahendranath Parida vs. Purnananda Parida and others* reported in AIR 1988 Orissa 248 and *Ponnusamy Pandaram vs. The Salem Vaiyappamalai Jangamar Sangam represented by its President, Palanivel* reported in 1984 TNLJ 384

14. This Court has considered the submissions made by both the learned counsels and also perused the grounds of the revision along with the impugned order.

15. Having been considered the nature of the case and the circumstances under which the commissioner is to be appointed, this Court is of firm view that the order of the trial court does not require any disturbance.

16. Keeping in view of the above fact this Civil Revision Petition is dismissed confirming the order of the trial Court. However, the following direction is also given to the commissioner to be complied with at the time of making his inspection in addition to the direction given in the commissions of warrant. The advocate commissioner is directed to measure the property in dispute, both belonged to the plaintiff as well as to the defendant, based on the sale deed dated 09.02.1977 (respondent/plaintiff's sale deed) as well as the sale deed dated 28.11.1966 (revision petitioner/defendant's sale deed) with the help of Nilakkottai Taluk, Pallapatti Village surveyor and the advocate commissioner shall have to file a report after completion of survey within a period of fifteen days from the date of inspection before the trial Court. Consequently, connected Miscellaneous Petition is closed. However, there shall be no order as to costs.

Sd/-

Assistant Registrar(Records)

/True copy/



To

The District Munsif,
Nilakottai.

+1cc to Mr.R.Sureshkumar, Advocate in SR.69924

+1cc to Mr.V.Sitharanjandoss, Advocate in SR.69733

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PJL

PBK/PM-MP/SAR-II 27.01.2016 ::5P-4C: