

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05-01-2016

(Orders reserved on 17.12.2015)

CORAM:

THE HONOURABLE MR.JUSTICE G.CHOCKALINGAM

C.R.P.(PD).No.2172 of 2013
& M.P.No.1 of 2013

1. Ramayee
2. Angamuthu,

D.No.2/322, Keeraikkarannor Kattu Valavu,
Koonandiyur Village, Mettur Taluk, Salem District.

Petitioners

Vs.

1. Angamuthu,
D.No.325, 2/101, Keeraikkarannor Kattu Valavu,
Koonandiyur Village, Mettur Taluk, Salem District.

2. Ranjitham
3. Saravanan

.. Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India,
against the fair and decretal order dated 12.12.2012 in I.A.No.855 of 2011 in
O.S.No.137 of 2011 on the file of the District Munsif Court, Mettur.

For petitioners : Mr.S.Udayakumar for M/s.Karan and Uday

For respondents : Mr.G.K.Ilanthiraiyan for M/s.Sai, Bharath & Ilan

ORDER

This Civil Revision Petition is filed against the order dated 12.12.2012 in
I.A.No.855 of 2011 in O.S.No.137 of 2011 passed by the learned District Munsif,
Mettur, in and by which, the application filed by the revision petitioners/plaintiffs

for appointment of Commissioner to measure and note down the physical features of the suit property and to file a report drawn to scale, was dismissed.

2. Learned counsel for the revision petitioners/plaintiffs contended that since the defendants have encroached nearly 60 feet of plaintiffs' land by way of constructing a terraced building in the suit property, the revision petitioners/plaintiffs have filed the application for appointment of Commissioner to measure and note down the physical features of the suit property and to file a report drawn to scale. He further submitted that the Court below, without applying the mind, dismissed the application stating that appointment of Commissioner is unnecessary and the trial would reveal the entire factum of the case. Therefore, learned counsel submitted that the impugned order of the Court below is erroneous and the Civil Revision Petition may be allowed.

3. Learned counsel for the respondents/defendants contended that the trial Court correctly appreciated the facts of the case and dismissed the application and hence, it is unnecessary to appoint a Commissioner. He further submitted that the impugned order of the trial Court does not warrant any interference by this Court and prayed that the Civil Revision Petition may be dismissed. In support of his submissions, learned counsel for the respondents relied on a decision of this Court (Madurai Bench) reported in 2010 (1) MLJ 1176 (R.Justin Arulappa Vs. R.Xavier Arulappa), wherein, this Court observed as follows:

"9. In the instant case, the Court below has not even

chosen to give a *prima facie* finding for the purpose of issuance of commission without notice to the other party. The need to have resorted to Order 26 Rule 9 of C.P.C. ought to be felt by the Court for the purpose of elucidating certain details and it cannot mechanically appoint an Advocate Commissioner without focussing attention as to what are the questions of dispute and whether for deciding the disputed question the appointment was necessary. But, in this case, utter disregard to the above said principles, the Court below had appointed an Advocate Commissioner to make local investigation as requested by the 1st respondent without even considering whether such issuance of commission is warranted at this stage."

4. Heard the learned counsel appearing for the parties and perused the materials available on record.

5. It is admitted that the suit is filed for declaration and permanent injunction and also for direction to the defendants to demolish the building in the suit property and hand over the vacant possession to the plaintiffs. Since the defendants deny the allegations of the plaintiffs, it is absolutely necessary to appoint a Commissioner. Moreover, to find out the encroached portion of the suit property, appointment of Commissioner will be useful for both sides and the Court would appreciate the measurement of the suit property by the Commissioner on the basis of his report and plan. In the above circumstances, the finding of the trial Court that the appointment of Commissioner is unnecessary, cannot be sustained. Since the suit is filed for declaration and recovery of possession and for direction to demolish the building, the Commissioner's report and plan will be very useful for appreciation of evidence and the oral evidence of both parties could be reduced regarding that aspect.

6. Though the learned counsel for the respondents relied on the said decision of this Court reported in 2010 (1) MLJ 1176 (cited supra), in the case on hand, since the suit is filed for declaration, recovery of possession from the defendants, permanent injunction and also for direction to the defendants to demolish the building, and as it is alleged that the defendants have encroached some portion of the suit property, it is necessary to appoint a Commissioner to measure the suit property. Hence, the above decision of this Court is not applicable to the facts of the present case.

7. For the reasons stated above, the impugned order of the trial Court is liable to be set aside and accordingly, the same is set aside. The Civil Revision Petition is allowed. The trial Court is directed to appoint a Commissioner and if necessary, with the help of a Surveyor, the Commissioner shall measure the suit property and note down the physical features and file a report and plan. The trial Court shall fix time limit for filing the report and plan of the Commissioner and fix his remuneration in accordance with law. No costs. The Miscellaneous Petition is closed.

05-01-2016

Index: Yes/no
Internet: Yes/no

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The District Munsif, Mettur.

G.CHOCKALINGAM, J

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Order

in

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