

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 25.11.2016

CORAM

The Hon'ble Mr.Justice M.V.MURALIDARAN

**CRP(PD)No.4499 of 2013
and
M.P.No.1 of 2013**

1.C.Radhakrishnan
2.C.Guruprathab @ Manoj
3.C.Hariprathab @ Hari
4.Sivaboosanam .. Petitioners

Vs

1.A.Kumarasamy Naidu
2.A.V.Kumari
3.A.V.Aswini
4.A.V.Anusha .. Respondents

Prayer: Civil Revision Petition filed under Article 227 of Constitution of India, against the Fair and Decretal order passed in I.A.No.213 of 2013 in O.S.No.48 of 2013, dated 21.10.2013, on the file of the Subordinate Judge at Tiruvallore.

Petitioners : Mr.V.Manohar

Respondents: Mr.R.Bharathkumar

ORDER

The defendants are the revision petitioners before this Court. Challenging the order passed in I.A.No.213 of 2013 in O.S.No.48 of 2013, dated 21.10.2013, on the file of the Subordinate Judge at Tiruvallore, by appointing an Advocate Commissioner in the suit.

2.The case of the plaintiffs is that they filed the above suit for delivery of possession of the suit Items 1 and 2 of the suit properties under Section 6 of the Specific Relief Act and for mandatory injunction that the damages of Rs.5,00,000/- with interest at the rate of 6% per annum from the date of plaint till the date of realisation.

3.Denying the above allegations set out in the complaint, the defendants were filed the written statement by stating that in the suit property, the defendants are in possession and enjoyment of the suit property and they were planted the paddy crops and the water pipe line, which was damaged long back i.e. before one year and hence they were removed pipe lines and they were made arrangements for open canal. The defendants also stated that in the property in S.No.161/6B to an extent of 3.08 acres, the plaintiffs have no right.

Therefore, they sought for dismissal of the suit.

4.While pendency of the above suit, the respondents/plaintiffs were filed an application in I.A.No.213 of 2013 in O.S.No.48 of 2013 for appointing an Advocate Commissioner under Order 26 Rule 9 of CPC. to note down the bore well in Item 17 of the suit properties, to note down the underground water pipes are removed from the 18th item of the suit properties and to note down that the crops in the other properties are damaged due to the removal of the underground water pipes and to note down such other physical features which are to be identified by the respondents/plaintiffs at the time of inspection and to file a report with plan.

5.The first respondent/first plaintiff was filed an affidavit states that his father wanted to purchase lands in Chatrakandigai and accordingly his father was purchased the following lands under two different sale deeds dated 21.08.1962 and 25.08.1962.

Sl. No.	Survey No.	Extent Cents	Ac.	Kist Payable
1.	161/7	0.34		0.55
2.	161/8	0.57		0.92
3.	163/4	0.19		3.39
4.	163/7	0.02		0.24
5.	163/8	0.04		0.24
6.	163/10	0.05		2.58

6.The respondents/plaintiffs also states that while purchasing the said lands, item 1 to 6, measuring 1 acre 21 cents, they were purchased by his father in the name of Late.Venkatapathy Naidu @ Megavarnam Naidu and subsequently his father was purchased the following items.

Sl. No.	Survey No.	Extent Cents	Ac.
1.	163/2	0.04	
2.	163/3	0.68	
3.	163/5	0.30	
4.	163/6	0.13	
5.	163/10	1.54	
6.	163/8	0.26	
7.	178/11	0.09	
8.	163/12	0.15	
9.	163/4	1.90	
10.	163/7	0.26	

7.Apart from the above purchase by totally 6.56 cents, the first respondent/first plaintiff also purchased 14 acres 24 cents in different survey numbers in the name of his wife and his mother. Therefore, the first respondent/first plaintiff owned in 19 acres 59 cents in Chatrakandigai Village apart from the lands measuring 1 acre 21 cents in the 6 survey numbers purchased in the name of Venkatapathy @ Megavarnam.

8.He also states that in the said lands in order to sunk a bore well, the first respondent/first plaintiff has purchased 3 cents out of 3.11 hectare from the first defendant's father by a registered sale deed dated 29.05.1997 and the sale deed was executed in the name of the first respondent/first plaintiff's son Vijayakumar. The said land measuring 3 cents has situated on the western side and the said lands measuring 19 acres 59 cents are located on the eastern side and southern side and that in the said 3 cents in S.No.161/6, a bore well is sunk and electricity service connection is also obtained and water from the said well in S.No.116/6 is used for cultivation of the other lands.

9.The first respondent/first plaintiff also states that he has put up water pipes underground from the said 3 cents to his lands in the remaining lands in S.No.161/6 in order to take water to the other part of his lands. He has also states that items 1 to 6 are situated on the eastern side of the said bore well. He has been in possession and enjoyment of the said 1 acre 21 cents all along with the said 19 acre 49 cents of land.

10.The first respondent/first plaintiff also states that from the

date of purchase of the above referred items 1 to 6, he is in possession and enjoyment of the said lands, out of item Nos.1 to 6, in respect of items 3 to 6 patta is standing in the name of the plaintiffs 2 to 4.

11.Though the water pipes put up underground of the lands measuring 3 acre 8 cents in S.No.161/6 now subdivided as S.No.161/6A and this is shown as Item No.17 in the suit properties. He has also come forward by saying that he has also been in possession and enjoyment of the item Nos.1 to 6 of the suit properties and his father-in-law was died on 20.07.1991. After the death of Rama Naidu there was strained relationship between him and late.Venkatapathy Naidu @ Megavarnam. After the death of Venkatapathy Naidu @ Megavarnam, the same strained relationship to continue. The first plaintiff also states that there are several instances to say that the relationship between him and the first defendant's family are not cordial, there was the difference of opinion in changing the electricity service connection, since the fact is his family and the first defendant's families are inimical to each other. The first respondent/first plaintiff also states that all these years he has been in possession and enjoyment of item Nos.1 to 6. He has been taking water from the 17th item only through the 18th item

through underground water pipes all these years.

12.The first respondent/first plaintiff has also states that on 02.05.2013, the first defendant lodged a complaint before Mappedu Police claiming interest over item Nos.1 to 6 of the suit properties. A copy of the complaint given by the first defendant to the police is given to him and the same will clearly shows that the first plaintiff alone is in possession and enjoyment of item Nos.1 to 6. Pending enquiry on 11.05.2013, the first defendant dispossessed him from item Nos.1 to 6 by force and took possession of the lands. On the same date, the first defendant has removed the pipe lines going under ground through the 18th item and thereby prevented the first plaintiff from taking water from the 17th item bore well to the other lands. On 11.05.2013 itself the first plaintiff has given a complaint and the police have given receipt for the same, but the police have not taken any action.

13.The first plaintiff also states that the land measuring 1 acre 21 cents described in items 1 to 6 are the absolute properties for the first plaintiff and they were purchased by his father Narayanasamy in the name of late.Venkatapathy Naidu @ Megavarnam Naidu and all

these years, he was in possession and enjoyment of the properties. The first plaintiff having perfect title in the said lands by adverse possession, since his possession is a long and continuous one, and as per Section 6 of the Specific Relief Act, the possession of lands in item Nos.1 to 6 are to be restored to the plaintiffs and if the defendants claim any right, they must have to take legal steps to recover possession from the plaintiffs. Therefore, he has filed the above suit sought for the relief of mandatory injunction to restore the pipe lines in the original possession in S.No.161/6 and if they fails as per law the Court has to restore the same.

14.The first plaintiff also states that they have perfected title to the suit properties item Nos.1 to 6 in the schedule, they are entitled to recovery of possession of 91 cents which are item Nos.1 and 2 in the suit properties. Item Nos.3 to 6 are still in possession and enjoyment of the plaintiffs. Hence, the plaintiffs sought for relief of declaration of title by adverse possession and injunction in respect of item Nos.3 to 6 in the suit properties. He has also states that all the plaintiffs are entitled to a mandatory injunction to restore the water pipe line which are removed from item 17 in the suit properties.

15.The first plaintiff also states that the plaintiffs have raised

ADT 43 paddy in the suit lands to an extent of 19.59 acres. The said cultivation was raised in the month of April 2013, for ploughing the entire lands at the rate of Rs.3000 per acre. The plaintiffs have spent 60,000/-, for planting paddy sapplings at the rate of Rs.3000/- per acre, they have spent 60,000/-, they have put up fertilize worth of Rs.30,000/-, they have incurred Rs.30,000/- for raising paddy sapplings, they incurred additional expenses to the tune of Rs.30,000/-. On 11.05.2013, when the plaintiffs were removing the underground water pipes the defendants prevented him from taking water and the entire crops are damaged without water. The above expenses of Rs.2,10,000/- the defendants should be paid by way of damages. The action of the defendants by removing underground water pipes and taking possession of item Nos.1 and 2 by force the defendants have caused stress, mental agony and fever to the first plaintiff. They estimate the damage caused by the defendants due to their vandalism at Rs.2,90,000/- and hence the defendants are liable to be paid to damages of Rs.5,00,000/-. Therefore he sought for the appointment of Advocate Commissioner to note down the bore well in Item No.17 of the suit properties, to note down the underground water pipes are removed from the 18th item of the suit properties and to note down that the crops in the other properties are damaged due to the removal of the underground water pipes.

16.Denying the averments made by the first plaintiff in I.A.No.213 of 2013, the first respondent has filed counter statement which was adopted by the other respondents.

17.They denied the entire allegations set out in the affidavit. The first respondent/defendant states that what is the necessity for appointment of Advocate Commissioner in respect of the lands in item Nos.1 to 6 of the suit property, but they gather material evidence for their case through appointment of Advocate Commissioner in respect of the lands in item Nos.1 to 6 of the suit property. The first respondent/defendants also states that to gather evidence for the suit property, this application has been filed and they have stated that gathered evidence of the suit property and found out the possession of the suit property and the above application is also not sustainable in law and sought for the prayer for dismissal of the application.

18.On hearing of both sides, the learned Sub-Judge, Thiruvallur, allowed the application by appointing an Advocate Commissioner on 21.10.2013. Challenging the said order, the present petition has been filed by the respondents/defendants on the

ground that an Advocate Commissioner's sketch and report is necessary. The plaintiff had not attached even a rough sketch along with plaint. No prejudice is going to be caused to the other side in appointing an Advocate Commissioner to note down the physical features atleast in order to assess the Court. Challenging the said order, the respondents/defendants have filed the above Civil Revision Petition before this Court.

19.Heard Mr.V.Manoharan, learned counsel appearing for the petitioners and Mr.R.Bharathkumar, learned counsel appearing for the respondents. I perused the relevant records.

20.This petitioner/defendants came to know that challenging the said order on the ground that the purpose behind the application does not exist and when the contention of the removing the pipe line laid in the field mentioned being admitted by the respondents/plaintiffs themselves about the removing of the same for the reasons stated there in and in such circumstances, there is no necessity to find out the existence of the pipe line or the removing of the same through an Court officer.

21.The learned counsel appearing for the petitioners also states

that the filing of the petition with an ulterior motive to insist upon despite the admission on the part of the respondents/plaintiffs which is contrary to the provisions and there is no requirement to procure any evidence and the same is not permitted under the law to procure any evidence through the process of the Court.

22.The main contention of the petitioners/defendants is that there is no necessity for appointing the Advocate Commissioner and the appointment of Advocate Commissioner is only to collect the evidence for supporting the case of the respondents/plaintiffs. But the learned Judge very clearly held that the Advocate Commissioner report just one piece of evidence available to either party and accept it has to be substantially supported by oral and documentary evidence by whom seeks to derive support from such report. Viewed from any angle though they have not for collecting evidence, but atleast for giving a rough picture to the Court about the actual existence of the property on the earth. Hence, the appointment of an Advocate Commissioner for noting down the physical features is absolutely essential.

23.In fact, I already decided in a case in ***B.Amutha v. Anandhi Sankara Narayanan*** reported in **2016 – 5 – L.W. 658** that

the appointment of Advocate Commissioner would not be prejudiced to the other side and in fact, the Commissioner cannot decide the dispute, his inspection and report would help the Court in deciding the dispute. In supporting the case, the learned counsel appearing for the respondents also produced two judgments as follows:

(1) In the case of ***B.Athilakshmi and another v. Sri Prasanna Vinayagar Temple, Pallavayal Road, Agaram, Jawahar Nagar, Chennai-82 and another*** reported in ***2008 (6) CTC 282***, this court has passed the following order:

"16. On a careful consideration of respective contentions, this Court opines for properly and correctly appreciating and assess the matter in issue in the Suit, the appointment of Commissioner made by the Court in I.A.No.1277 of 2008 is a correct one and therefore, the appointment of Advocate Commissioner Thiru. S. Krishnamoorthy to identify, inspect and note down the physical features of the suit property with the help of Taluk Surveyor is a necessary and essential one and therefore, this Court is not interfering with the discretion exercised by the Trial Court in appointing the Advocate Commissioner in I.A.No.1277 of 2008 and therefore, the Civil Revision Petition fails and the same is hereby

dismissed.”

(2) In one another case rendered by the Hon’ble Andhra Pradesh High Court in his case ***K.Dayanand and another v. P.Sampath Kumar***, it is held as follows:

“18.In the judgment cited by the respondent, in J.Satyasri Rambabu v. A.Anasuya and anr. (5 supra), this Court at paragraph No.6 held as under:
It is no doubt true that the Courts are normally reluctant to appoint a Commissioner for noting physical features of the suit schedule property, particularly in a suit for injunction since the same would amount to collecting evidence in favour of one of the parties. However, there is absolutely no reason to hold that it is a hard and fact rule. Having regard to facts and circumstances of the case and particularly whenever the Court prima facie finds that there is an attempt on the part of one of the parties to alter the physical features of the suit property and it is necessary to take note of the same, it is always open to the Court to appoint a Commissioner for inspection of such property. It is

relevant to note that Order XXXIX Rule 7 of the Code of Civil Procedure empowers the Court to make an order for detention, preservation or inspection of any property, which is the subject matter of the suit, if the Court feels that such action is necessary or expedient for the purpose of obtaining full information or evidence. In the light of the above said provision, I am unable to agree with the contention of the learned Counsel for the petitioner that the Court below has committed an error in appointing an Advocate Commissioner. As already noted above the specific plea of the plaintiffs is that in spite of the order of temporary injunction the defendant has been taking steps to alter the nature of the suit schedule land. In the circumstances, the Court below having considered the entire material on record has rightly appointed an Advocate Commissioner. The said order cannot be said to be vitiated on account of any patent error of fact or law and therefore, does not warrant interference in exercise of supervisory jurisdiction under Article 227 of the Constitution of India.

19. In Shaik Zareena Kasam v. Patan Sadab Khan and ors. (6 supra), this Court at paragraph No.10 held as under:

Whenever there is a dispute regarding boundaries or physical features of the property or any allegation of encroachment as narrated by one party and disputed by another party, the facts have to be physically verified, because, the recitals of the documents may not reveal the true facts and measuring of land on the spot by a Surveyor may become necessary. It is always better if the parties are allowed to adduce evidence at the stage of trial for better appreciation of the facts which will help the Court in effectively deciding the main dispute between the parties. If there is some delay in filing the application to appoint an Advocate Commissioner and if there are some laches on the part of one party, the Court may impose reasonable costs, but it is not desirable to dismiss an application on the ground of mere delay in filing it. In the light of the above referred decisions, I am of the view that the impugned order

does not sustain in the eyes of law.”

24.Considering all the above cases, the appointment of Advocate Commissioner in this case in I.A.No.213 of 2013 in O.S.No.48 of 2013, dated 21.10.2013, on the file of the Sub-Judge, Thiruvallur, is no prejudice would be caused to this petitioner, who is the defendant in the suit. Therefore, a local inspection is the best way to find out the position and the party and coveting the evidence to place before the Court through local investigation by the Commissioner cannot be shut out of their right. Therefore, the appointment of Advocate Commissioner ordered in the above I.A. is well considered order and there is no necessity arosed for the interference by this Court and accordingly, this civil revision petition is liable to be dismissed by confirming the order passed in I.A.No.213 of 2013 in O.S.No.48 of 2013, dated 21.10.2013.

25.In the result:

(a) this civil revision petition is dismissed, by confirming the order passed in I.A.No.213 of 2013 in O.S.No.48 of 2013, dated 21.10.2013, on the file of the Subordinate Judge, Thiruvallur;

(b) the trial Court is hereby directed to issue suitable direction to the Advocate Commissioner to make

inspection and file his report within a period of one month;

(c) based on the report filed by the Advocate Commissioner, the trial Court is directed to dispose of the suit within a period of three months, without giving any adjournment to either parties and both the parties are hereby directed to give their fullest cooperation for early disposal of the suit. No costs. Consequently, connected miscellaneous petition is closed.

25.11.2016

Note:Issue order copy on 14.03.2017

vs

Index:Yes

Internet:Yes

To

The Subordinate Court,
Thiruvallur.

M.V.MURALIDARAN,J.

VS

**Pre-Delivery Order made in
CRP(PD)No.4499 of 2013 and
M.P.No.1 of 2013**

25.11.2016