



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 28.01.2016

CORAM:

THE HONOURABLE MR.JUSTICE T.MATHIVANAN

C.R.P (MD) No.145 of 2016 (PD)

1.Mariamammal

2.Syed Ali Fatima Beevi

.. Revision Petitioners/
Respondents/Respondents

Vs.

1.Mohammed Hasan

2.Paramasivan

3.Sahar Banu

.. Respondents/Appellants/
Petitioners

PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the order and decretal order dated 26.11.2015 made in I.A.No.319 of 2015 in A.S.No.36 of 2015 on the file of the Sub Court, Valliyoor.

For Petitioners : Mr.S.Siva Thilakar

For Respondents : Mr.S.Meenakshi Sundaram

ORDER

This Memorandum of Civil Revision is directed against the fair and decretal order, dated 26.11.2015 and made in the Interlocutory Application in I.A.No.319 of 2015 in A.S.No.36 of 2015 on the file of the learned Subordinate Judge, Valliyoor.

2.The revision petitioners herein are the plaintiffs in the suit in O.S.No.182 of 2011 whereas the respondents are the defendants.

3.As it appears from the records, the revision petitioners had filed the above suit as against the respondents seeking the relief of permanent injunction. The suit was contested by the respondents by filing their written statement. On appreciation of the evidences both oral and documentary, the trial Court had proceeded to decree the suit as prayed for, without costs.

4.Having been aggrieved by the judgment and decree dated 18.03.2015, the respondents being the defendants had preferred an appeal in A.S.No.36 of 2015 on the file of the learned Subordinate Judge, Valliyoor. During the pendency of the appeal, the respondents had taken out an application in I.A.No.319 of 2015 under Order 26 Rule 9 and Section 151 of Code of Civil Procedure



to appoint an Advocate Commissioner to inspect the suit schedule property and to note down it's physical features, along with a qualified surveyor and to file a report with plan. This petition was allowed appointing one Mr.T.Subramanian as Advocate Commissioner. This order, dated 26.11.2015 has been challenged in this Memorandum of Civil Revision by the petitioners/plaintiffs.

5.Heard Mr.S.Siva Thilakar, learned counsel appearing for the revision petitioners/plaintiffs and Mr.S.Meenakshi Sundaram, learned counsel appearing for the respondents/defendants.

6.The only contention made by Mr.S.Siva Thilakar, learned counsel for the revision petitioners is that the appellate Court did not have power to appoint an Advocate Commissioner during the appeal stage when no effort was taken by the respondents/defendants before the trial Court for the appointment of Advocate Commissioner.

7.What he would contend is that the learned first appellate Judge (Subordinate Judge), Valliyoor had committed a serious error in appointing the Advocate Commissioner and that his Act was in total negation of the Principles laid down Under Order 26 Rule 9 of Code of Civil Procedure. He has also submitted that the revision petitioners/plaintiffs had filed the suit for bare injunction and despite the strenuous contest made on behalf of the respondents/defendants, the suit was decreed as prayed for accepting the possession of the revision petitioners in respect of suit property and that the application Under Order 26 Rule 9 to appoint an Advocate Commissioner at the appellate stage was not sustainable in law as there was no dispute with regard to the identity of the property especially when the respondents/defendants had specifically admitted that the revision petitioners/plaintiffs were in possession and enjoyment of the suit property.

8.On the other hand, Mr.S.Meenakshi Sundaram, learned counsel appearing for the respondents has adverted to that the appellate Court was having every power to appoint an Advocate Commissioner even at the appellate stage and the powers of the appellate Court was not restricted by any provisions of Code of Civil Procedure. During the course of his arguments, he has also made reference to the provisions of Order 41 Rule 33. Rule 33 to Order 41 is extracted as under:-

"33.Power of Court of Appeal.

The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is

only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any



appeal or objection [and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees].

Provided that the Appellate Court shall not make any order under Section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order."

9. In support of his contention he has also placed reliance upon the following decisions:-

- (i) A. Sulthan and another vs. Mohammed Dasthagir
(2008) 6 MLJ 359
- (ii) Poolar Vs. Gomathi Moopoanar & 2 others
1996(II) CTC 539
- (iii) Anwar Batcha and another Vs. S. Mahuedoom
2014(5) CTC 85

In the decision first cited, the learned Single Judge of this Court has observed as under:-

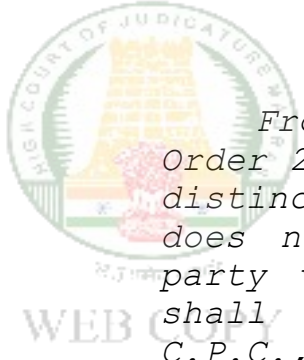
"It is clear that the Court can grant the relief of appointment of Commissioner to enable the respective parties and the Court to have the first hand knowledge about the allegations and counter allegations and this cannot be denied.

Even in a bare injunction suit, appointment of an Advocate Commissioner could be allowed on the basis of the pleadings. In the present case, the plaintiff prayed for two permanent injunction reliefs; one for restraining the defendants from letting out to the sullage waste water on the side of the plaintiff's building which will corrode the building and cause damages and the second injunction is for restraining the defendants from interfering with the plaintiff's possession."

In the decision second cited, the another learned Single Judge of this Court has observed that the appellate Court has ample power to issue commission for local inspection in the same manner in which it can be done by a Trial Court.

In the another decision, 3rd cited this Court has observed as under:-

"Rule 9 to Order 26 of the Code of Civil Procedure envisages that 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 or interest, 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.



From the texture of the languages coined in Rule 9 to Order 26, C.P.C., it is explicit that it does not make any distinction between the Plaintiff and the Defendant or it does not have any reference to show that a particular party viz., either the Plaintiff or the Defendant alone shall file an Application under Rule 9 to Order 26, C.P.C., with a prayer to appoint an Advocate Commissioner. What it transpires is, where the Court deems a local investigation to be requisite or proper in any Suit for the purpose of elucidating any matter, 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.

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 *Ankura & Ankura Charan Sahu v. Arjuna Charan Palei*, 1998 AIHC 1703 (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."

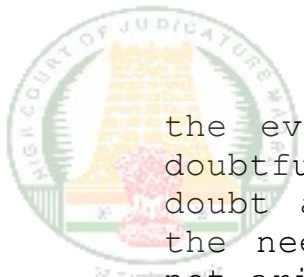
10.Mr.S.Siva Thilakar, learned counsel appearing for the revision petitioners has also referred to the following decisions in support of his contention:-

(i) *The Principal St. Patrick School and College vs. Mrs.Amaravathi (D) and others* 2010(1) T.N.C.J.145 (Mad) in this case the learned Single Judge of this Court has observed that Commissioner cannot be appointed to procure or gather evidence by filling up lacuna at appellate stage where it is not case of appellate Court that there is insufficient or doubtful evidence available on record.

(ii) *In Ainthu Oor Veera Saiva Sangam & others v. Rajamanickam & others* 2013-2 L.W. 874, this Court has held that appointment of Advocate Commissioner under Order 26, Rule 9, taking into account the nature of the prayer in the plaint is not necessary.

iii) Another decision in *Rangasamy vs. Superintending Engineer, T.N.E.B., and others* (2007)1 MLJ, the learned Single Judge of this Court has observed as under:-

While the object of local investigation under Order 26 Rule 9, C.P.C., 1908, is not to collect evidence, but to enable the Court to properly and correctly understand and assess



the evidence on record, to clarify any point, which is doubtful on the evidence on record. Since there was no doubt about the location of the suit Well in this case, the need for appointment of an Advocate Commissioner did not arise."

11. Mr. S. Siva Thilakar, learned counsel appearing for the petitioners has also placed reliance upon yet another decision in *Chinnathambi and others vs. Anjalai* 2006(5) CTC 494 wherein it is held that:

'It is a well settled principle of law that an Advocate Commissioner should not be appointed to find out the possession of the property, which has to be adjudicated only by oral and documentary evidence. Under such circumstances, the order of the lower Court suffers from material irregularity and it is not in accordance with the principles laid down in the above decisions.'

12. This Court has carefully gone through the decisions on behalf of both sides. Mr. S. Siva Thilakar has questioned the authority of appellate Court to appoint an Advocate Commissioner at the appellate stage. As it is demonstrated by Mr. S. Meenakshi Sundaram learned counsel appearing for the respondents as well as in the light of the decisions cited by him, this Court is of the view that the power of appellate Court has not been curtailed. As observed by this Court that 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. It is to be noted that Order 26 to Rule 9 of Code of Civil Procedure does not make any distinction between the Plaintiff and the Defendant or it does not have any reference to show that a particular party viz., either the Plaintiff or the Defendant alone shall file an Application under Rule 9 to Order 26 of the Civil Procedure Code with a prayer to appoint an Advocate Commissioner. What it transpires is, where the Court deems a local investigation to be requisite or proper in any Suit for the purpose of elucidating any matter, 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.

13. It is also significant to note here that Rule 9 to Order 26 does not say that the application for appointment of Advocate Commissioner shall be filed in a particular stage of the suit. Even at the appellate stage also either the appellant or the respondents can file an application under Order 26 Rule 9 to appoint an Advocate Commissioner where the Court is satisfied on the merits of the case. It is also available on record that a party is not able to produce 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 *Anwar Batcha and another vs. S.Mahuedoom 204(5) CTC 85*.

14.Keeping in view of the above fact and on considering the submission made on behalf of both sides, this Court finds that the revision petition is devoid of any merit and therefore, liable to be dismissed.

15.In the result, the revision petition is dismissed and the impugned order is confirmed. No order as to costs.

Sd/
Assistant Registrar (RTI)

/True Copy/

Sub Assistant Registrar

To
The Sobordinate Judge,
Valliyoor.

+1cc to Mr.S.Sivathilakar, Advocate in Sr.No.5123

CN/SKN-SK/18.03.2016/6P-3C

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