



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 10.08.2016

CORAM :

THE HONOURABLE MR. JUSTICE K. KALYANASUNDARAM

C.R.P. (MD) No. 739 of 2016

and

C.M.P. (MD) No. 3500 of 2016

1. J. Pandeeswari

2. Jeganathan

... Petitioners/Respondents/
Defendants

Vs.

V. Sethuraman

... Respondent/Petitioner/
Plaintiff

PRAYER: Civil Revision Petition filed under Article 227 of Constitution of India to set aside the fair and decreetal order dated 19.02.2016 passed in I.A.No.457 of 2015 in O.S.No.208 of 2014 on the file of Additional District Munsif Court, Madurai Town, by allowing this Civil Revision Petition.

For Petitioners : Mr.M.Kannan
For Respondent : Mr.K.Vijayanand
for Mr.Suriyanarayanan

O R D E R

This revision arises out of the order passed by the learned Additional District Munsif(FAC), Madurai Town in I.A.No.457 of 2015 in O.S.No.208 of 2014.

2. Heard the learned counsel for the petitioner and the learned counsel for the respondent and perused the materials available on record.

3. The respondents filed the suit O.S.No.208 of 2014 against the petitioner to remove the illegal constructions made by them in 'C' schedule property to an extent of 2 ½ feet breadth X 50 ¾ length by a decree of mandatory injunction and for permanent injunction restraining the defendants, their men and agent from in any manner encroaching 'C' scheduled property.

4. According to the plaintiff, he is the absolute owner of 'A' schedule property by virtue of a registered sale deed dated 21.03.1985. The defendants are the absolute owners of 'B' schedule property and the suit 'C' schedule property is common pathway belonging to both of them and now it is encroached by the defendant.



5. During the pendency of the suit, the plaintiff filed an application in I.A.No.457 of 2015 for appointment of Advocate Commissioner to measure the suit property on the basis of the sale deeds of both the parties and pathway agreement dated 24.11.1979 with the help of a qualified Engineer. The application was resisted contending that the Advocate Commissioner cannot be appointed to collect evidence for the parties and they are also disputing that in both title deeds of the plaintiff and the defendants there is no mentioning about pathway. However, the learned Additional District Munsif appointed an Advocate Commissioner to measure 'C' schedule property with the help of a qualified Engineer. Against the order, the present revision is preferred.

6. The learned counsel for the petitioner would submit that the Advocate Commissioner cannot be appointed to procure evidence for the parties; there is no factual dispute as to the identity, extent and measurement of the suit property, when there is no dispute with regard to the measurement of the property as per the sale deeds and there is no existence of the 'C' schedule property, the court below erred in appointing the Advocate Commissioner.

7. Per contra, the learned counsel for the respondent would submit that the suit was filed for mandatory injunction and the trial court, having found that the report of the Advocate Commissioner would be helpful to decide the issues involved in the suit, chose to appoint an Advocate Commissioner and the discretion exercised by the court below need not be interfered with by this Court relying upon the decisions of this Court in **A.Nagarajan Vs. A.Madhanakumar in 1996(1) MLJ 422**, wherein it has been held as follows:

5. For the purpose of elucidating facts in respect of any matter in dispute means where the circumstances render it expedient in the interest of justice to do so, the Court has power, which is discretionary in nature, to appoint Commissioner for the purpose of ascertaining, to make it clear, intelligible and to throw light upon the matter in issue, means the main dispute as well as the facts leading to the dispute. This course may be adopted after examination of the party or parities of suo motu. If the court feels that clarification or confirmation is necessary on certain aspects on which the Court entertains doubt in the matters in issue or dispute, or the disputed questions of fact, for the purpose of ascertaining, clarification, or for proper scrutiny and examination, this course can be resorted to. In Public Prosecutor Vs. K.Jalayya and Another,



this Court has held in any event, an application under this rule must be made before the case is closed. In this view of the matter, appointment of a Commissioner can be resorted to after the evidence of the respective parties being placed. In *Pormusamy Pandaram Vs. The Salem Vaiyappamalai Jangamar Sangam*, this Court has taken the view that 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 evidence so collected through the Commissioner may be used to 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.

8. The learned counsel relied on another unreported judgment in ***Pormusamy Pandaram Vs. The Salem Vaiyappamaai Jangamar***, wherein it has been held as follows:

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 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 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 o.XXVI. R.9. When there is a decline by the Court to issue the commissioner 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 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.

9. The learned counsel for the respondent would further submit that the plaintiff has no objection in measuring the properties of the plaintiff, defendant and the common pathway, which is in 'C' schedule property.

10. It is seen from the records that the suit was filed for mandatory injunction and the trial court allowed the application by observing that it is necessary to appoint an Advocate Commissioner to note down the physical fetures of the suit property, which will help for proper adjudication and final conclusion of the case.

11. Following the decisions cited supra and also taking note of the prayer sought for in the suit, I am of the opinion that the trial court has rightly appointed the Advocate Commissioner. I do not find any merits in this revision.

12. In the result, the revision is dismissed. No costs. Consequently, connected C.M.P.(MD) No.3500 of 2016 is also dismissed. The Advocate Commissioner shall measure the entire suit properties based on the documents of both the parties.

Sd/-

Assistant Registrar(AE)

/True Copy/

Sub Assistant Registrar

To,

The Additional District Munsif Court, Madurai Town.

+1 cc to Mr.R.Suriya Narayanan, Advocate in SR No.43846

+1 cc to Mr.M.Kannan, Advocate in SR No.43353/16

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