

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 04.01.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

**CRP(PD)No.2718 of 2012
and
M.P.No.1 of 2012**

T.Kanthasamy

.. Petitioner

Vs.

V.Periyathambi

..Respondent

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the order passed by the learned District Munsiff Court, Omalur in I.A.No.350 of 2012 in O.S.No.65 of 2010 dated 30.04.2012.

For Petitioner : Mr.P.Vijendran

For Respondent : Mrs.R.Meenal

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ORDER

The case of the revision petitioner is that the respondent /plaintiff filed a suit against him in O.S.No.65 of 2010, on the file of the District Munsif Court, Omalur, for Permanent Injunction. Pending suit, the respondents herein filed an application in I.A.No.350 of 2012 to appoint an advocate commissioner to measure the suit property in the presence of the Firka Surveyor and V.A.O on the ground that when the plaintiff tried to put up iron fencing around the suit property, it was objected by the revision petitioner saying that after making survey of the suit land only, the plaintiff can put up iron fencing.

2.The said application was resisted by the revision petitioner on the ground that the appointment of advocate commissioner is filed by the plaintiff for collection of evidence to show that he is in possession and enjoyment of suit property in question. The possession cannot be proved through the report and plan of advocate commissioner. Further a Commissioner for measuring the property cannot be appointed in a bare injunction suit.

3.The trial Court after hearing the arguments has allowed the application filed under Order 26, Rule 9 of CPC and thereby appointed an advocate commissioner to visit the suit property and measure the same with the help of Village Administrative Officer and Surveyor by order dated 30.4.2012 which is impugned in this civil revision petition.

4.I heard Mr.P.Vijendran, learned counsel appearing for the petitioner and Mrs.R.Meenal, learned counsel appearing for the respondent. I have perused the entire available material on record.

5.First up all it is the suit for bare injunction. Normally in a suit for bare injunction no commission application will be entertained. Further it is for the plaintiff to prove his possession by filling relevant documents. It is well settled preposition of law is that no commission would be appointed to prove possession.

6.In the present case on hand, the allegation of the plaintiff is that the revision petitioner objected him while he tried to put up iron fencing around the suit property which necessitated him to file the application to appoint an Advocate Commissioner to measure the suit property with the help of Surveyor and Village Administrative Officer.

It is a suit for bare injunction and it is for the plaintiff to successes his case by establishing his possession by producing clinching documents.

7.Already I decided in many cases that the Advocate Commissioner is maintainable in the bare injunction, since the very appointment of Advocate Commissioner is not collecting the evidence, but, the Court precious time is saved by the appointment of Advocate Commissioner.

8.It is the case of the petitioner that the allegation of the plaintiff is that the revision petitioner objected him while he tried to put up iron fencing around the suit property which necessitated him to file the application to appoint an Advocate Commissioner to measure the suit property with the help of Surveyor and Village Administrative Officer.

9.If the Advocate Commissioner is appointed in this case, there is no prejudiced caused to this respondent and in fact an appointment of Advocate Commissioner is helpful to both the parties, not only both the parties, but the Court also disposed the suit in expeditious manner based on the appointment of Advocate Commissioner.

10. Therefore, the learned counsel appearing for the petitioner has produced the following judgments:

(1) ***Meenakshi v. Vennila and another*** reported in ***2008 (5) CTC 181*** as follows:

"Code of Civil Procedure, 1908 (5 of 1908), Order 26, Rule 9 – Advocate Commissioner for local inspection to ascertain factum of possession – Suit for permanent injunction – Factum of possession cannot be ascertained by seeking an appointment of an Advocate Commissioner – Party must prove factum of possession by evidence."

(2) ***D.Kuttiyappan and others v. Meenakshiammal Polytechnic Unit of M/s.Meenakshiammal Trust, represented by its Managing trustee, Thiru.A.H.Radhakrishnan, Madras and another*** reported in ***(2005) 4 M.L.J. 592*** as follows:

"There seems to be no bona fide on the part of the defendants. Only when the trial commenced and P.W.1 was partly examined, the petition was filed which clearly shows the intention of the defendants to delay the trial proceedings. The defendants have sought for appointment

of Advocate Commissioner to measure the property in suit S.No.383/3A as well as the disputed properties on the South of tharisu land in S.No.383/1, which is in the occupation of the defendants to an extent of about 45 cents. In the affidavit, it is stated that only the Commissioner report will prove their case that they are in possession and enjoyment of S.No.383/3F which is adjacent to the suit property. It is well settled that a Commissioner cannot be appointed to note down the factum of possession or the enjoyment. The defendants are not entitled to seek for the Appointment of Commissioner to note their possession."

(3) ***Chinnathambi and Others v. Anjalai*** reported in **(2007) 1 MLJ 513** as follows:

"8.In the instant case, the suit is for permanent injunction and admittedly, interim injunction has been granted on 19.11.2003 and nearly after 1 year and 7 months, the petitioners have taken out an application for appointment of an Advocate Commissioner. Even as per the averments made in the petition, the

respondent/plaintiff has stated that the petitioners/defendants are making arrangements to obliterate her cart-track or land and also proposed to encroach a further extent of 0.09 cents. Whereas, there is no averment in the plaint that there is an encroachment of land.

9.It is a well accepted 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."

(4) ***B.Amutha v. Anandhi Sankara Narayanan***

reported in **(2016) 8 MLJ 368**, it is held as follows:

"27.In the said judgment, the learned Judge of High Court, Andhra Pradesh clearly states that when there is a dispute or issue with regard to identify of a property in a litigation it is necessary to appoint a Commissioner for

localizing the property which may be even by taking necessary assistance from a qualified surveyor which will not amount to collecting evidence which is prohibited. The provision of Order 26 Rule 9 of CPC contemplates 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. But, 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. The issue of the above provision appointment of a Commissioner to visit the suit property and also demarcate the property or properties taking assistance from a qualified surveyor and also note the physical features of the property in question is qualified.

28. Therefore, as per the judgment referred by the

various Courts, I am of the consider view that absolutely there was no prejudice would be caused in the respondent / defendant by appointing an Advocate Commissioner for the purpose of inspecting the property and submit his report on physical features, measurements etc. In fact, though the Commissioner cannot decide the dispute, his inspection and report would helpful the Court in deciding the dispute. Hence, a local investigation 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 is maintainable in this case, even in the suit filed by the petitioner / plaintiff for permanent injunction and accordingly there is necessity for the interference by this Court and accordingly, I am inclined to set aside the order passed by the learned Principal District Munsif Court, Poonamallee, in I.A.No.1471 of 2012 in O.S.No.121 of 2012 dated 04.07.2013 and suitable direction in the issue to the trial Court for appointing an Advocate Commissioner."

11.All the judgments referred, I am not inclined to appoint an Advocate Commissioner, but in this case, where I dealt with the case of **B.Amutha v. Anandhi Sankara Narayanan** reported in **(2016) 8 MLJ 368**. Therefore, I am of the opinion that 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.350 of 2012 in O.S.No.65 of 2010, dated 30.04.2012.

12.In the result:

(a) this civil revision petition is dismissed, by confirming the order passed in I.A.No.350 of 2012 in O.S.No.65 of 2010, dated 30.04.2012, on the file of the District Munsiff Court, Omalur;

(b) the learned District Munsiff Court is hereby directed to pass appropriate orders to the Advocate Commissioner to get the report within a period of one month from the date of receipt of a copy of this order;

(c) on receiving the report, the trial Court is directed

to take up the suit and to dispose the same within a period of three months thereafter. No costs. Consequently, connected miscellaneous petition is closed.

04.01.2017

Note: Issue order copy on 20.07.2017.

Internet: Yes

Index: Yes

vs

To

The District Munsiff Court,
Omalur.



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M.V.MURALIDARAN, J.

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