

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 02.09.2016

Pronounced on : 09.01.2017

CORAM

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

CRP(PD)Nos.4252 and 4253 of 2012

and

M.P.Nos.1 and 1 of 2012

Shanmugathai .. Petitioner in both the CRPs

Vs

Kamalammal ..Respondent in
CRP.No.4252/2012

Boopalan ..Respondent in
CRP.No.4253/2012

Common Prayer: Civil Revision Petition filed under Article 227 of Constitution of India, against the fair and decreetal orders dated 30.08.2012 passed in I.A.Nos.116 and 117 of 2012 in O.S.Nos.13 and 38 of 2009 respectively, on the file of the District Munsif Court, Ranipet, Vellore District.

(Both CRPs) Petitioner : Mr.P.Mani

(Both CRPs) Respondents: Mr.K.Gandhi Kumar

ORDER

Heard Mr.P.Mani, learned counsel appearing for the petitioner and Mr.K.Gandhi Kumar, learned counsel appearing for the respondents.

2.The Petitioner in both revisions is the plaintiff in O.S.No.13/2009 and O.S.No.38/2009, on the file of the District Munsif Court, Ranipettai. She has filed the suit in O.S.No.13/09 and O.S.No.38/2009 against the respondents herein respectively for declaration and recovery of possession and mandatory injunction to remove the semi permanent structure put up by the respective defendant and for permanent injunction. The suit property is one and the same in both the suits i.e. S.No.161/4, Karai Village of Walajapet Taluk.

3.According to the petitioner that the suit property belongs to her and the respondents who owned adjacent land encroached a portion of suit property and constructed the superstructure and thus she has prayed for the relief mentioned supra. Whereas the defendants deny the alleged encroachment and they pleaded that

their construction is within their property situated in S.No.147. Thus the crux of issue is as to whether the construction put up by the respective defendant is within their property or in the suit property.

4.The Trial was started and on behalf of the plaintiff her husband namely Natarajan Achari examined as witness and after completion of defendant side evidence and the suit was posted for arguments the petition in I.A.No.116/2012 in O.S.No.13/2009 and I.A.No.117/2012 in O.S.No.36/2009 was filed for appointment of an advocate commissioner to find out the alleged encroachment of 5 cents of the suit property stating that though the respective defendant encroached the suit property they deny the same and plead that the construction is within their respective property. Thus the lie and location of construction to be find out so as to decide the issue involved in the suits as the relief includes the mandatory injunction and recovery of possession.

5.Per contra, the respective defendants, primarily opposed the same stating that the petition is not maintainable as the petitioner did not sign in the affidavit and her husband alone signed, who has no locus standi; the petition was filed belatedly after the suit posted for arguments without filing a petition to re-open the suit and the

petition was filed to drag on the proceedings.

6.The Learned Judge upon hearing the arguments advanced on either side has dismissed the application filed to appoint the advocate commissioner on the ground that the petitioner's husband is not a party to the suit and he has no locus standi to file the application in the suit. Further the learned Judge held that the petitioner is to prove his case through evidence and the court cannot assist the party to collect evidence for his case and the petition was filed with an intention to delay the proceedings.

7.I have carefully considered the case of parties, arguments of both counsels and perused the records. Regarding the locus standi of the husband of petitioner to file the application is concerned the court below has erroneously held that the husband of petitioner, who is not a party to the suit, has no locus standi to file the application. The Court below has failed to see that under Section 120 of Indian Evidence Act, 1872, the parties to the civil suit, and their wives and husbands shall be competent witness. Thus the husband of the petitioner is competent witness to the civil suit. The provision under Section 120 of the Indian Evidence Act reads as follows:

"120.Parties to civil suit, and their wives or

husbands. Husband or wife of person under criminal trial.-In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness."

8.It is pertinent to mention here that the husband of the petitioner alone deposed evidence on behalf of his wife, the plaintiff, by filing the proof affidavit. While so, he has got every right to file an affidavit in support of the petition and affidavit filed by him cannot be held as incompetent. Apart from that an affidavit can be filed by any person, who is conversant with the facts of the case. Thus the husband of the petitioner who was examined as witness on behalf of the plaintiff is a person conversant with the facts of the case and he is entitled to file an affidavit in support of the application. This Hon'ble Court in a case of ***Pepsi Co India Holding Pvt. Ltd., rep. By its Unit Manager, No.2, Anna Salai, 3rd Floor, Wellington Plaza, Chennai-600 002 v. M/s.Ananda Agencies, 120, South Street, Thiruthuraipoondi, rep. By its Proprietor, Mr.Anthony Francis and another*** reported in ***2007 (1) CTC 166*** has categorically held the above position of law and competency of filing affidavit by the

person, who is conversant with the facts of the case and thus finding of the court below is erroneous and set-aside.

9. In so far as, ground raised opposing the petition, that without filing a petition to re-open the proceedings the petition for appointment of commissioner is not maintainable is not valid one. It is settled law that if the court deems a local investigation is necessary for the purpose of elucidating any matter in dispute, the court may issue commission, at any stage of the suit. There is no prescription of stage to file a petition for appointment of advocate commissioner provided under Civil Procedure Code. It is worth to see that for examination of witness of parties to the suit Order 18 of CPC contemplates the step by step procedure.

10. Thus when the evidence of one party is completed and other is started or when the evidence of both parties completed and the suit went to the next stages the formal application to re-open the stage if suit is necessary. As mentioned supra, since the Civil Procedure Code does not prescribe any stage for filing the application for appointment of advocate commissioner there is no necessities to file an application for re-open the stage of suit. After the report is filed by the advocate commissioner and if any party desires to cross-examine the

commissioner at that stage a formal application may be filed to re-open the case for adducing the evidence as contemplated under Order-18 of CPC.

11. Admittedly the present petition for appointment of an Advocate Commissioner was filed only at the stage of arguments, however the relief sought for in the suit is one for mandatory injunction and recovery of possession after declaration of the title. When the respective defendant deny the lie and location of disputed construction and specifically assert that the construction is within their property and there is no encroachment, the nature of dispute could be resolved only if the exact location of construction is brought to the knowledge of court, which cannot be done except by appointment of advocate commissioner. Thus mere delay in filing the application after the case was posted for arguments is not a ground for dismissal of application and substantial justice requires that the appointment of commissioner is very much necessary to decide the lis.

12. At this juncture, it is useful to refer the Judgment of this Hon'ble Court in the case of ***Panjavarnam and others -Vs- Visuvasam Jeyaseeli (CRP(NPD)(MD)No.2192 of 2012)*** wherein

it was held that the advocate commissioner if appointed would be able to visit the suit property with the help of a surveyor, measure the same and locate it and also note down as to what are all in existence in the suit property. Noting down the physical features would not amount to culling out the evidence. Further this court enunciated the importance of the maxim that "A Picture is worth a thousand words". Further it was held by this Hon'ble Court in the said Judgment that it is mandate on the part of Lower court to appoint an advocate commissioner with a mission to visit the suit property with the help of surveyor and measure the same by referring to the survey map and documents of both sides and note down the physical features.

13. In yet another decision of this Court in the case of ***Vaithinattar and another v. Sakkubal Ammal*** reported in ***AIR 2004 Madras 419*** it is held that in a suit for Declaration and Permanent Injunction, the dispute pertaining to portion of adjoining lands allegedly encroached by the defendants and the defendants denying that there was no such encroachment. This Hon'ble Court held that the best evidence in such case could be obtained only by the Appointment of advocate commissioner. Therefore in my considered view, no prejudice will be caused to the respondent herein by appointing the advocate commissioner to visit the suit property along

with the surveyor and note down the physical features. In fact, the advocate commissioner's report and plan would enable the court for the purpose of throwing more light or enlighten to arrive at a fair decision. Thus the appointment of commissioner is necessary and therefore the order of court below is liable to be set-aside.

14.In the result:

(a) the civil revision petition stands allowed and the fair and decretal order dated 30.08.2012 made in I.A.No.116 of 2012 in O.S.No.13 of 2009 and I.A.No.117 of 2012 in O.S.No.38 of 2009, on the file of the District Munsif Court, Ranipet, are set aside and I.A.Nos.116 and 117 of 2012 are allowed.

(b) the learned District Munsif, Ranipet is hereby directed to appoint an Advocate Commissioner within a period of two weeks from the date of receipt of this order, to note down the physical features of the suit property, along with surveyor with further direction to the Commissioner to file a report within a period of one month from the date of appointment of Advocate Commissioner.

(c) after submitting the report by the Advocate Commissioner, the learned District Munsif is further directed to dispose of the suit on or before 30.4.2017.

15. Therefore, the civil revision petition is allowed. No costs. Consequently, the connected miscellaneous petition is closed.

09.01.2017

vs

Index: Yes

Internet: Yes

To

The District Munsif Court, Ranipet,
Vellore District.

M.V.MURALIDARAN, J.

vs

**Pre-Delivery Order made in
CRP(PD)Nos.4252 and 4253 of 2012
and
M.P.Nos.1 and 1 of 2012**

**09.01.2017
<http://www.judis.nic.in>**