



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 13.02.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M. VELUMANI

CRP(MD) .No.2686 of 2015 and
M.P(MD) .No.1 of 2015

K.A.Nachimuthu

: Petitioner

Vs.

1.A.Veera Ravi

2.K.A.Sahiyanantham

3.Lakshmiammal

4.Rajasekaran

: Respondents

Prayer: The Civil Revision Petition is filed under Article 227 of the Constitution of India praying to set aside the order dated 02.12.2015 made in I.A.no.984 of 2015 in O.S.No.527 of 2015 on the file of the Principal Sub Court, Karur.

For Petitioner : Mr. V. Sitharanjandas

For Caveator : Mr.M. Bindran -R1

O R D E R

This Civil Revision Petition is filed to set aside the order dated 02.12.2015 made in I.A.No.984 of 2015 in O.S.No.527 of 2015 on the file of the Principal Sub Court, Karur.

2. The petitioner is first defendant in O.S.No.527 of 2015 on the file of the Principal Sub Court, Karur. The first respondent, plaintiff filed the above suit for partition of the suit schedule properties and separate possession and for a direction to the second respondent to render accounts of the suit properties and business from the date of the suit till delivery of the possession.

3. According to the first respondent, all the properties and business are joint family properties. Along with the plaint, <https://hcservices.courts.gov.in/hcservices/> it filed I.A.No.984 of 2015 for appointment of Advocate Commissioner to take inventory of the business conducted in joint family properties and take note of the accounts.



According to the first respondent, the petitioner and the respondents 2 and 3 are collecting rental income as well as income from the business. But, they are not furnishing the accounts and giving share to the first respondent.

4. The petitioner filed counter affidavit and opposed the said application and submitted that it is for the plaintiff to prove all the averments made in the plaint and affidavit. The petitioner has stated that the first respondent has not given any reason for taking inventory of the business mentioned therein. He has not mentioned for what purpose inventory is needed in the affidavit and also not given any description of the property.

5. The learned Judge considering the averments made in the affidavit and counter affidavit and materials on record allowed the application, appointing an Advocate Commissioner holding that the petitioner has not specifically denied the averments made by the first respondent in para nos. 3 to 14 in the affidavit and para nos. 1 to 11 in the plaint and business mentioned in the plaint as well as in the affidavit filed in support of the application for appointment of Advocate Commissioner and has not denied that business mentioned in the petition, situate only in properties of item Nos.1 to 11 mentioned in the plaint.

6. Against the said order, the present Civil Revision Petition has been filed.

7. The learned counsel appearing for the petitioner submitted that the order of the learned Judge appointing an advocate Commissioner is beyond the scope of the suit and application. The learned Judge failed to see that there is no reference about the business unit in the plaint schedule properties and finding of the learned Judge that it has to be presumed that the business unit are in or other properties is erroneous. The first respondent has sought for partition of immovable properties set out in the plaint schedule properties. The first respondent made certain references about the business unit in para nos. 15 and 16 of the plaint and that will not be a ground for ordering inspection of business units. The learned Judge did not properly appreciate the scope of order 39 Rule 7 of CPC and the learned Judge failed to see that the said provision is not intended to take inventory of running business and as per Section 94 of CPC Court can pass orders and has no power to appoint Advocate Commissioner. The learned Judge while appointing Advocate Commissioner has permitted roving enquiry which is contrary to law and conclusion of learned Judge that other particulars are only formal defects is erroneous. The learned Judge failed to see that the defendant has not filed written statement with regard to business unit and inspection by Advocate Commissioner will spoil the business of the business. In support of his contention, the learned counsel appearing for the petitioner relied on the following Judgments:-



(i) AIR 1958 Rajasthan 218 (Ramswarup Vs. Mst. Kesar), and another wherein para nos. 8 and 13, it has been held as follows:-

8. We have given our careful consideration to the said arguments, but we find ourselves unable to accept it as correct. In our opinion, Order 39 Rule 7(1)(a) is primarily meant to empower the court to make an order about the detention, preservation and inspection of the property in dispute in the suit but it further authorises the court to pass similar orders about other property as to which any question might arise therein. This does not mean that the Court is authorised to pass an order on the application of one party to make a search of the documents which might be in the possession of the opposite party and then detain them by saying that a question might arise about them in the suit. If the books of accounts or other documents are not themselves the subject-matter of dispute in a suit then they can only serve the purpose of evidence. If a party who is in possession of such evidence does not produce it in spite of being asked to do so by the court, the court is free to draw an adverse inference against that party; but it has no authority to issue a search-warrant or any order of the sort and take the documents into its custody under this Order. The word 'property' is a term of wide import and covers both movable or immovable and corporeal or incorporeal property. For instance, 'even benefit arising out of land' or 'covenants running with the land' are also included within the meaning of property. We think that by using the words 'as to which any question might arise therein', the legislature meant to provide for the detention, preservation and inspection of that property which is incidental to the property in dispute and about which a question may arise in the suit. For instance, if there is a suit for possession of a certain immovable property and if the plaintiff alleges that there is a danger to other property to the property in dispute for example, some property which is supporting the property in dispute and from which plaintiff also seeks a right of support or if some easement which pertains to the property in dispute is in jeopardy, the court may proceed to make an order about it. Similarly in the case of movable property like the one involved in the present case, a question may arise about some precious jewellery-boxes in which the jewellery in dispute used to be placed. Such boxes may not be included in the plaint but if a question arises about them and if the court considers it necessary to make an order about their inspection, detention, preservation, it may pass an order about them. But this rule is not meant to authorise the court to pass orders about documents which are not the subject-matter of dispute and which, are only of evidentiary value and no more. We therefore, agree with the defendant's learned counsel that the trial court has committed irregularity in the exercise of its jurisdiction in so far as it has passed its order dated 6-12-1956 under Order 39 Rule 7 (1) (a) with regard to property other than that which is the

subject matter of dispute in the suit and as to which no question can arise in the suit.

13. In view of what we have discussed above, we cannot hold that the trial court was justified in directing the receiver under Order 39 Rule 7 (1), C. P. C. by its order dated 6-12-56 to make a list of the documents mentioned therein. It has committed material irregularity in adopting this procedure and therefore its order has got to be set aside.

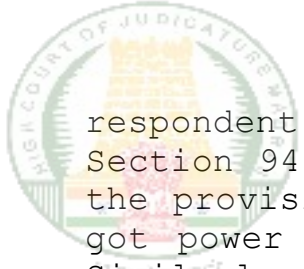
(ii) AIR 1961 SC 218 (Padam Sen and another Vs. The State of Uttar Pradesh and another), wherein para. no. 13 it has been held as follows:-

Further, the provisions of r. 5 of Order XXXVIII are to prevent a decree that may be passed being rendered infructuous and r. 1(b) of Order XXXIX is applicable where the defendant threatens to dispose of his property to defraud creditors. None of these provisions has any application to the facts of the present case. Rule 7 of Order XXXIX empowers the Court, on the application of any party to a suit, to make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit or as to which any question may arise therein. The account books of the plaintiffs were not 'property' which were the subject-matter of the suit nor such that about them a question could arise in the suit. The account books could, at best, have been piece of evidence, if the plaintiff or the defendant had cared to rely on them. We therefore hold that the Additional Munsif had no power under the Code to appoint the Commissioner for seizing the plaintiff's books of account.

8. The learned counsel appearing for the first respondent submitted that the first respondent has mentioned about the business in the plaint. According to the first respondent, these business are joint family business and petitioner and defendants 2 and 3 were giving share of the first respondent till recently and the first respondent has stated that on the advice of their children, petitioner and defendants 2 and 3 are not giving share of the first respondent and not agreeable for partition. The first respondent has made out case for appointment of Advocate Commissioner to take inventory of the items found in the business and also to inspect the account books.

9. I have heard the learned counsels appearing on either side and perused the materials available on record.

10. The contention of the learned counsel for the petitioner that the learned Judge has no power under Order 39 Rule 7 of CPC to appoint Advocate Commissioner to take inventory of running business is not correct. Section 94 of CPC does not confer power to the learned Judge to appoint Advocate Commissioner. This contention of the learned counsel for the petitioner is not correct. The first



respondent has filed petition not only under Order 39 Rule 7 and Section 94 of CPC, but, also under Order 26 Rule 9 of CPC. As per the provisions of Order 26 Rule 9 of CPC, the learned Judge has got power to appoint Advocate Commissioner for local inspection. Similarly Order 39 Rule 7 of CPC empowers the learned Judge to make an order for inspection of any property which is the subject matter of suit or with regard to any question that may arise in the suit.

Order 39 Rule 7 of CPC:

7. Detention, preservation, inspection etc., of subject matter of suit - (i) The Court may, on the application of any party to a suit, and on such terms as it thinks fit-

(a) make an order for the detention, preservation or inspection of any property which is the subject matter of such suit, or as to which any question may arise therein.

(b) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit; and

(c) for all or any of the purposes aforesaid authorize any samples to be taken or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

(2) The provisions as to execution of process shall apply, mutatis mutandis, to persons authorized to enter under this rule.

11. The first respondent has mentioned in the plaint that business mentioned in the plaint are joint family business and he is having share in the said business. The first respondent has repeated the said averments in the affidavit filed in support of the petition filed for appointment of Advocate Commissioner. However, the first respondent has sought for decree directing the petitioner and second defendant to render accounts of suit property and business from the date of suit till the delivery of possession.

12. The contention of the learned counsel for the petitioner that first respondent has not mentioned business unit in the plaint schedule property and therefore, he is not entitled to appointment of Advocate Commissioner to take inventory of business is untenable. The first respondent has sought for rendering of accounts in respect of the business also.

<https://hcservices.courts.gov.in/hcservices> 13. The learned Judge has appointed an Advocate Commissioner to take inventory of the item in the business and also to inspect the accounts books and to file a report. The learned Judge has



directed the Advocate Commissioner only to take inventory of the business and account books.

14. In the circumstances, the Judgments relied on by the counsel for the petitioner is not applicable to the facts of the present case. The learned Judge has exercised his jurisdiction conferred on him properly under Order 26 Rule 9 of CPC and Order 39 Rule 7 and Section 94 of CPC and there is no irregularity or illegality warranting interference by this Court.

15. In the result, the Civil Revision Petition is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

SD/-

ASSISTANT REGISTRAR(RTI)

/TRUE COPY/

SUB ASSISTANT REGISTRAR

To

The Principal Subordinate Judge,
Principal Sub Court, Karur.

+1 cc to Mr.M.BINDRAN,ADVOCATE,SR NO.8543

+1 CC TO MR.V.SITHARANJANDAS,ADVOCATE,SR NO,7758

trp

MAS/MR:19.04.2017:6P-4C

CRP(MD) .No.2686 of 2015 and
M.P(MD) .No.1 of 2015
13.02.2017