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THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 24.11.2017

CORAM :

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

CRP (PD) (MD) No.1374 of 2011

and

M.P (MD) No.2 of 2011

D.Jegadeesh

... Petitioner

vs.

The Nagercoil Municipality,
Rep. by its Commissioner,
Nagercoil,
Nagercoil Village,
Agasteeswaram Taluk,
Kanyakumari District.

... Respondent

Petition filed under Article 227 of the Constitution of India, against the order made in I.A.No.856 of 2010 in O.S.No.767 of 2009 dated 10.06.2011, on the file of the learned Principal District Munsif, Nagercoil.

For Petitioner
For Respondent

: Mr.RM.Sivakumar
: Mrs.S.Srimathy

ORDER

This revision petition has been filed against the order made in I.A.No.856 of 2010 in O.S.No.767 of 2009 dated 10.06.2011 on the file of the learned Principal District Munsif, Nagercoil.

2.The suit has been filed for permanent injunction and mandatory injunction directing the defendant to remove the encroachment made by him in a portion of Arasu Poramboke Pathai comprised in R.S.No.E.17/144 i.e., 'B' schedule property.

3.The contention of the revision petitioner is that there is no encroachment made by him and he had got a valid title over the plaint schedule property and the rights of the property can be decided only after the trial. The petitioner further contended that the suit itself is not maintainable since the respondent is a statutory authority who has got every right to take action in accordance with law for removal of encroachment. The respondent filed interlocutory application for appointment of Advocate Commissioner which was allowed by the Court below against which the present revision petition has been filed.

4.Heard the learned counsel for the petitioner as well as the learned counsel for the respondent and perused the materials

available on record.

5.As rightly contended by the learned counsel for the petitioner, there is a statutory provision provided under the Act for removal of encroachment by the respondent. But, as far as this case is concerned, since the right to the suit property itself is disputed, the Municipality has filed the above suit seeking the prayer of permanent injunction and mandatory injunction to remove the unauthorised construction. Since there is a dispute in the rights over the suit property, the same can be established only by filing a civil suit and in the case on hand, the Municipality has filed a suit for permanent injunction and mandatory injunction. As per the settled law, an Advocate Commissioner cannot be appointed in a suit for permanent injunction and mandatory injunction and therefore, the learned Judge ought not to have allowed the application for appointment of Advocate Commissioner. In a suit for permanent injunction, Advocate Commissioner cannot be appointed in the nature of collecting evidence.

6.In an unreported judgment in CRP(PD).No.2183 of 2014 dated 06.01.2015, it has been held as follows:-

"It is settled principle that no Advocate Commissioner can be appointed to gather the evidence as it is legally unsustainable. The suit is being one for bare injunction, an Advocate Commissioner cannot be appointed to find out the factum of possession."

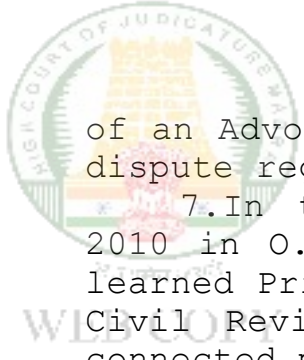
6.1.In *Chandrasekaran and six others vs. Doss Naidu* reported in (2006-2-L.W.159), this Court held that it would not be appropriate for the Court concerned to appoint an Advocate Commissioner to collect evidence in favour of the party seeking for such appointment. The claim of the party, with regard to the factum of possession of a property in question, should be proved only by adducing appropriate evidence. It cannot be done by collecting the necessary evidence, by way of a request to appoint an advocate commissioner. The power of the Court, under Article 227 of the Constitution of India, is to be exercised by the Court in its discretion and it cannot be claimed as a matter of right. To prove the fact with regard to the possession, the party making the claim should prove his possession of the property concerned by leading in evidence, based on the issues framed by the Court concerned.

6.2.In *Chinnathambi vs. Anjalai* reported in 2006 (5) CTC 494), this Court has held that the Commissioner cannot be appointed for a local investigation, where the possession of the property, sought to be inspected by the Commissioner, is in dispute. The court cannot appoint an Advocate Commissioner to assist a party to the suit in collecting the evidence, in respect of his claim relating to the possession of the property.

6.3.In *Jabeen Taj vs. M.Parveen Banu* reported in (2005) 3 N.L.J.247, this Court has held that, in a suit for declaration of title and for permanent injunction, the request for an appointment



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of an Advocate Commissioner ought to be rejected, when there is a dispute regarding the identity of the property.

7. In the result, the impugned order made in I.A.No.856 of 2010 in O.S.No.767 of 2009 dated 10.06.2011, on the file of the learned Principal District Munsif, Nagercoil, is set aside and the Civil Revision Petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-III)

/True copy/

Sub Assistant Registrar

To

The Principal District Munsif,
Nagercoil.

+1cc to Mr.R.M.SIVAKUMAR, Advocate, SR.85485

+1cc to M/S.SRIMATHY, Advocate, SR. 85549

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24.11.2017

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