

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 02.11.2018

Coram:

The Honourable Ms.Justice P.T.ASHA

**C.R.P(PD).No.4878 of 2012
and
M.P.No.1 of 2012**

Utsavlal Bagrecha

...Petitioner

Versus

Vinodh G. Lalwani

...Respondent

PRAYER This Civil Revision Petition is filed under Article 227 of the Constitution of India praying to set aside the fair and decreetal order dated 12.12.2012 passed in I.A.NO.4305 of 2012 in O.S.No.1429 of 2009 on the file of the XI Assistant Judge, City Civil Court, Madras.

For Petitioner : Mr.T.Thiyagarajan

For Respondent : Mr.S.Y.Mohamed Ghouse

ORDER

The above Civil Revision petition is filed challenging the order dated 12.12.2012 passed by the learned XI Assistant Judge, City Civil Court, Chennai in I.A.No.4305 of 2012 in O.S.No.1429 of 2009, in and by which, the learned Judge has allowed the application filed by the respondent/plaintiff for appointing an Advocate Commissioner to note down the physical features of the suit property and submit his report.

2. The facts in brief are as follows:

2.1. The respondent has filed a suit for bare injunction with reference to the property measuring an extent of about 928 sq.ft. measuring north to south 58 feet and east to west 16 feet (which was subsequently amended as north to south 16 feet and east to west 58 feet) at door No. 28, Kasi Chetty Street, Sowcarpet, Chennai. It is the case of the respondent that his father, was a statutory tenant in respect of the some portions of the ground and first floor and the entire second floor of the building in the said door number for the past 42 years and after his death, the respondent/plaintiff has stepped in. It is his further case, that the revision petitioner herein is a tenant occupying 172 sq.ft. on the north eastern corner of the ground floor of the above said premises. He would further contend that the revision petitioner had handed over his portion to his father several years ago and that his father is paying the monthly rent with reference to the entire suit property. After the death of his father, the revision petitioner had used his influence with the Inspector of Police attached to C-1 Flower Bazaar Range Police Station and had the respondent summoned and he had instigated the concerned Police Inspector to threaten him to vacate his portion and hand over the same to the Revision Petitioner by 07.02.2009. On the midnight of 11/12.02.2009, it was the case of the respondent that the revision petitioner unauthorisedly entered the ground floor of the portion breaking open all the locks and throwing out all items belonging to the plaintiff. The respondent had filed a complaint on 12.02.2009, which was not acted upon by the police. He would further contend that the revision

petitioner, who originally occupied 530 sq.ft on the ground floor, is now claiming the entire ground floor portion by stating that he was in possession of the entire property. In these circumstances, the respondent had instituted the suit.

2.2. The revision petitioner had filed a detailed written statement in which he had contented that the property in question is a commercial property in which there are several tenants on the ground floor and first floor. Each of the tenants occupying a small portion, depending upon their business needs and paying rent directly to the landlord. The respondent's father was a tenant occupying a portion in the ground floor and first floor. Similarly, the revision petitioner has occupied a portion measuring an extent of 172 sq.ft. on the north eastern portion of the ground floor.

2.3. The written statement also contained the description of the property in question and he has also averred that he continued to be in possession and enjoyment of 530 sq.ft. The revision petitioner has also contended that it is not only the revision petitioner who is a tenant in the ground floor, but it is also occupied by other tenants. The portion in his occupation is an extent of 30 ft X 14 ft and 13.6 ft X 8 ft and he has been in occupation of the said premises under lease deed dated 29.01.1968 with the landlord. The Revision Petitioner contended that he and the respondent's father, had a very cordial relationship and they hail from the same village and the keys relating in respect of the revision petitioner's portion was always in the custody of the

respondent's father, which arrangement continued even after the demise of the respondent's father and now the respondent, taking advantage of this is trying to take control of the entire property. When the suit was posted for cross examination of the defendant/revision petitioner, the respondent herein had come forward with the application in I.A.No.4305 of 2012 for appointing an Advocate Commissioner. The reasons for filing the application has been stated in paragraph 6 & 7 of the affidavit filed in support of the application, which read as follows:

"6. This respondent submits that he did not use any influence with the police nor the Inspector of Police threatened the petitioner to vacate the portion and hand over the same to respondent the attempt of the petitioner to trespass was prevented and did not occupy any portion. To say that he occupied the portion and he was directed to vacate, is nothing but an allegation to create a cause of action to institute the present suit. The respondent has got every right to enter into his portion in the ground floor rear portion and repeated statements in the proof affidavit and in the plaint by the petitioner that he was occupying the ground floor is not correct. No damage was caused to the petitioner's belongings, nor any lock was broken forcibly or illegally.

7. Further the averments contained in para-6 of the application is denied and the reference to the ground floor is only in respect of the floor where the M/s Seashore traders business is carried on. The question of spending huge sum in

respect of respondent portion does not arise at all in view of the fact that the respondent is in possession of the property and as such the stocks are kept in his premises including his office equipments like file, records and two big iron almirahs. This respondent further submits that the present application is devoid of merits and the said application is filed at the stage when the court refused to grant time for cross examination of DW1. Though the counsel had sought for time and in order to drag on the proceedings the present application is filed. Further the appointment of Commissioner is only to note down the physical features and not to gather information or collect evidence for and on behalf of the petitioner. The reasons assigned for appointment of Commissioner as referred to in paras 6 & 7 is nothing but to collect the evidence."

2.4. This application was objected to by the revision petitioner, who contended that the suit being one for a bare injunction, there was no need for appointing an Advocate Commissioner and further from a reading of the reasons for appointing an Advocate Commissioner, it is amply evident that the intention of the respondent was to gather evidence.

2.5. After hearing the parties , the learned XI Assistant Judge

<http://www.judis.nic.in> proceeded to allow the application on the ground that there has been no serious objection from the revision petitioner/defendant and therefore, it would not cause any prejudice to the revision petitioner, if

the application is allowed and it is always open to the revision petitioner to file his objection to the Commissioner.

2.6. Aggrieved by the said order, the revision petitioner/defendant is before this Court.

3. Heard, Mr.T.Thiyagarajan, learned counsel for the petitioner and Mr.S.Y.Mohamed Ghouse, learned counsel for the respondent.

4. From a perusal of the records it is seen that the suit which is filed by the revision petitioner is one for a bare injunction stating that the respondent is in occupation of the suit property and that his possession has to be protected. In the affidavit that has been filed in support of the appointment of an Advocate Commissioner's application, the respondent has contented that he has developed the suit portion by spending huge sum of money for internal amenities of the ground floor and in order to note down the physical features, the Commissioner has to be appointed. It is a well established principle that in a suit for permanent injunction, the appointment of an Advocate Commissioner has to be frowned down, since the report of the Advocate commissioner cannot be used as a substitute for evidence and an Advocate Commissioner cannot be appointed to gather evidence. The physical features of the property is of no significance, since in a suit for bare injunction, the plaintiff has to prove his possession in respect of the property occupied by him through other cogent evidence.

5. The respondent, who claims to be a tenant in respect of the entire extent and claims that he is paying rent for the said portion can prove his possession through other means and he cannot have an Advocate Commissioner appointed, clandestinely to note down physical features of the suit property in possession.

6. The learned XI Assistant Judge has also not applied his mind to the objection that has been raised by the revision petitioner in the counter and has simply stated that there is no serious objection on the side of the revision petitioner. The order is thus erroneous and therefore, the order of the learned XI Assistant Judge, Madras in I.A.No.4305 of 2012 deserves to be set aside. In the result, the Civil Revision Petition is allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

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02.11.2018

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Index : Yes / No

Internet : Yes / No

Speaking Order/Non-Speaking Order

P.T.Asha, J.,

vkrr/mbi



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