



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
RESERVED ON : 13.02.2018
DELIVERED ON : 17.04.2018
CORAM :

THE HONOURABLE MRS.JUSTICE J.NISHA BANU
C.R.P. (PD) (MD)No.304 of 2018
and
C.M.P. (MD)No.1398 of 2018

1. M/s.Kumarrss, a firm registered
Indian Partnership Act 1932,
Having its registered office at
No.D-6-7th Cross East Thillai Nagar,
Trichy - 620 018
Rep. by its Managing Partner,
Senthil Kumar.
2. M/s.Eshcol Infra,
Rep. by their Managing Partnership
A.R.Ramanathan. : Petitioners / Respondents / Defendants

vs.

M/s.Sri Vari Construction a Partnership
Firm registered under
Indian Partnership Act 1932,
Rep. by its Managing Partner,
T.Muhilvanan : Respondent / Petitioner / Plaintiff

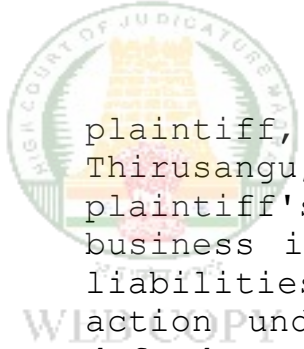
PRAYER : Petition filed under Article 227 of the Constitution of India to set aside the order, dated 04.01.2018, made in I.A.No.12 of 2018 in O.S.No.13 of 2018 on the file of the II Additional Sub Court, Tiruchirapalli.

For Petitioners : Mr.M.Ajmal Khan, Senior Counsel
for Ajmal Associates

For Respondent : Mr.M.Vallinayagam, Senior Counsel
for Mr.D.Sadiq Raja

ORDER

This Civil Revision Petition has been filed by the revision petitioners / defendants as against the order appointing an Advocate Commissioner to note down the physical features including the inventory of movables lie over the suit properties.

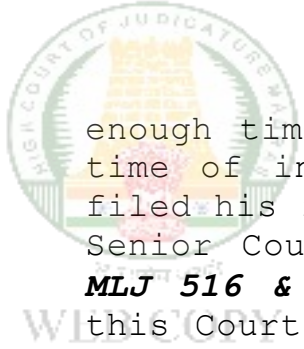


plaintiff, the suit mentioned properties belonged to one Thirusangu, who is one of the partners of the respondent's / plaintiff's firm and the respondent / plaintiff have been running business in the suit properties. The said Thirusangu had certain liabilities in the shape of Bank Loan and the Bank had initiated action under SARFAESI Act. In the meantime, the petitioners / defendants had approached the said Thirusangu for purchasing the suit properties and the said Thirusangu had also agreed to sell the suit properties in favour of the petitioners / defendants in respect of A & B schedule properties and the petitioners / defendants have also orally agreed to lease back the suit property in favour of the respondent / plaintiff firm for a period of 2 or 3 years. Believing the said words of the petitioners / defendants, sale deeds, dated 22.03.2017 & 28.04.2017 were executed by the said Thirusangu. All were going well and the respondent / plaintiff firm was regular in paying rent and they were having enough proof to substantiate that they have been in occupation of the premises as tenants. While so, the petitioners / defendants demanded the respondent / plaintiff firm to vacate the suit properties. Along with the said suit, the respondent / plaintiff had filed an interlocutory application in I.A.No.12 of 2018 to pass an ex-parte order of appointment of an Advocate Commissioner to note down the physical features of the suit properties including inventory of movables and to file a report.

3. The Court below, after considering the facts and circumstances of the case, has passed an ex-parte order, dated 04.01.2018, thereby appointed a Commissioner to inspect the suit property, execute the warrant as required and file report and plan by 18.01.2018. Aggrieved thereby, the petitioners/ defendants have preferred the present revision petition.

4. The learned Senior Counsel appearing for the petitioners / defendants submitted that the averments made in the plaint would clearly show that the application is filed only for the purpose of collecting evidence regarding the suit properties and the movables and articles in the suit properties. It can be proved only by producing necessary oral and documentary evidences and not by appointing a Commissioner. An order of inventory is beyond the scope of the suit, as value of the inventory was not stated in the plaint as well as movables are not the subject matter of the suit. It is a settled principle that Commissioner shall not be appointed for collecting evidences and the Court below, without considering the same, has passed an ex-parte order, thereby appointed a Commissioner.

5. The learned senior counsel appearing for the petitioners / defendants would further submit that the order of the Court below was not in clear terms. It simply states that Commissioner has to inspect the property to execute the warrant as required and file report. Adding fuel to fire, the Commissioner, without giving

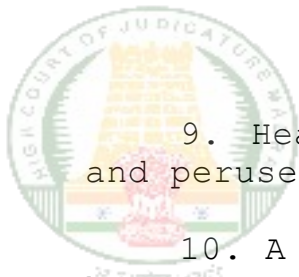


enough time to the petitioners / defendants to be present at the time of inspection, has hastily inspected the suit premises and filed his final report. In support of his contention, the learned Senior Counsel would rely on the judgments reported in **(2009) 1 MLJ 516 & (2010) 1 MLJ 909**. Therefore, he seeks interference by this Court on the ex-parte order passed by the Court below, which is impugned in the present petition.

6. The learned Senior Counsel appearing for the respondent, on the other hand, would submit that the respondent/plaintiff firm was originally constituted with one S.Munusamy, who is none other than the father of the said Thirusangu. The partnership firm was engaged in construction business in the name and style of "Excellant Constructions", which was later renamed as "Sri Vari Construction" with effect from 23.01.2014. The respondent/plaintiff firm has established its business office at one of the premises belonging to the said Thirusangu. Using the financial conditions of the said Thirusangu, the petitioners / defendants had hard pressed him to execute sale deeds in respect of the suit properties and agreed lease back of the same after a period of 2 or 3 years and thereafter, sale deeds were executed in their favour. Though sale deeds in respect of the suit properties were executed in favour of the petitioners / defendants, the respondent/plaintiff firm is in occupation of the premises, however, receipts were not issued due to their close bonding. Electricity receipts and property tax receipts are there to show that they are in possession. After a lapse of nine months, the petitioners firm had demanded the respondent firm to vacate and hand over the premises. Hence, the suit in O.S.No.13 of 2018 seeking permanent injunction came was filed.

7. The learned Senior Counsel would further submit that on 04.01.2018, the Court below, being satisfied with the averments made in the affidavit filed in support of the plaint, has appointed a Commissioner, who, in turn, has made his preliminary inspection on 04.01.2018 at about 5.45 p.m. Thereafter, the Commissioner had informed both the parties to assemble at the suit premises on 12.01.2018 for final inspection. Such being so, on 08.01.2018, at about 1'o clock in the night, the petitioners herein, accompanied by some rowdy elements, have trespassed the premises and had illegally caused damage to the construction as well as other belongings therein, despite *status-quo* order of the Court below. Quoting all these incidents, with evidence, viz., video recordings, the respondent had lodged a criminal complaint before the Police and the same is pending.

8. The learned Senior Counsel for the respondent / plaintiff has produced a copy of the complaint lodged before the Police. He would further rely upon the judgments reported in **AIR 1996 MAD 347, 2014 (3) MWN 161 & 2008 (2) TLNJ 93**.



9. Heard the learned Senior Counsel appearing on both sides and perused the documents placed on record.

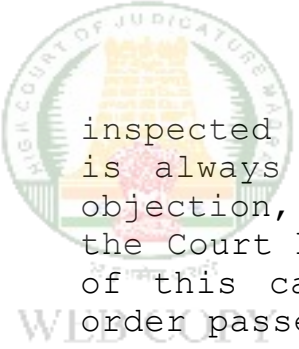
10. A Perusal of record clearly shows that the said Thirusangu has executed two deeds in respect of the suit property to the petitioners / defendants firm, however, according to the respondent/plaintiff, even after execution of the said deeds, they are in possession and enjoyment of the suit property on the basis of oral agreement. In order to substantiate his contention, he has produced the electricity charges paid upto the month of November, 2017, purchase invoice bills, Income Tax notice, etc. It is also stated by the respondent / plaintiff firm that though the rent has been paid, due to close relationship, the respondents / defendants did not give any receipt for the same.

11. The main ground on which the respondent / plaintiff sought to appoint an Advocate Commissioner is that there is a threat of forcible dispossession and they are likely to be dispossessed at any time and if the petitioners / defendants forcibly dispossessed them, they could not prove their possession.

12. Order 26 Rule 9 of the Code of Civil Procedure envisages that 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.

13. It is trite law that each case has to be decided according to its own facts and circumstances. In this case, considering the facts and circumstances of the case, the Court below has appointed an Advocate Commissioner to note down the physical features of the properties. Where the Court is satisfied on the materials available on record that a party is not able to produce the desired evidence for reasonable circumstances, it may assist the party to appoint a Commissioner to get the evidence. However, such evidence is not binding on the Court, which is to appreciate the same along with the other evidence. The party can countermand the evidence of Commissioner's report by giving any other evidence.

14. It is submitted by the learned counsel for the respondent / plaintiff that after an inspection of the Commissioner, the petitioners / defendants along with their henchmen, trespassed into the suit properties and damaged the buildings and also the articles worth about Rs.3 lakhs and therefore, the respondent / plaintiff has filed a criminal complaint against the petitioners / defendants. It is seen from the record that in this case, the Commissioner has already



inspected the suit properties and filed his report and plan. It is always open to the petitioners / defendants to submit their objection, if any, against the report of the Commissioner, before the Court below. Considering the peculiar facts and circumstances of this case, this Court is not inclined to interfere with the order passed by the Court below.

15. In the result, this civil revision petition is dismissed. No costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-
Assistant Registrar(CO)

/True Copy/

Sub Assistant Registrar

To

The II Additional Sub Court,
Tiruchirapalli.

+1cc to M/s.Ajmal Associates, Sr.No.61833
+1cc to Mr.D.Sadiq Raja, Advocate Sr.No.61788

GCG

VB/SV/MMS/SAR1/18/04/2018/5P/4C

order made in
C.R.P. (PD) (MD) No.304 of 2018
17.04.2018