



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 13.06.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

**C.R.P. (PD) (MD) No.730 of 2018
and C.M.P. (MD) Nos.3249 & 4303 of 2018**

A.Thangamma

... Petitioner/Petitioner/Plaintiff

-vs-

1. A.Adhi Narayanan
2. RL.Anu Dev (Minor)
Rep. by the Court Guardian
A.Adhi Narayanan, S/o.Ahagappan
3. A.Raj Mohan
4. A.Rajendran
5. Smt.J.Idhal Raichel Rani
- 6.J.Selvi

... Respondents/Respondents/Defendants

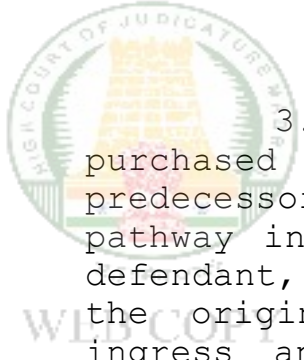
Prayer: Civil Revision Petition is filed under Article 227 of the Constitution of India to set aside the order dated 12.06.2017 made in I.A.No.96 of 2016 in O.S.No.15 of 2016 on the file of the Learned District Munsif-cum-Judicial Magistrate, Bhoothapandi.

For Petitioners	: Mr.V.Angusamy
For R1 to R4	: Mr.C.Dhanaseelan
For R5 & R6	: No Appearance

O R D E R

The Revision Petitioner is the plaintiff in the suit in O.S.No.15 of 2016 on the file of the learned District Munsif-cum-Judicial Magistrate, Bhoothapandi and the suit was filed by the plaintiff for declaration, mandatory injunction among various other reliefs. During the pendency of the suit, the plaintiff filed an application in I.A.No.96 of 2016 for appointment of an Advocate Commissioner to note down the physical features of the plaint A and B schedule property and the said application was dismissed by the Trial Court. Challenging the same, this revision petition has been filed.

2. Heard the learned counsel for the petitioner and the learned counsel appearing for R1 to R4.



3. It is the case of the revision petitioner that she had purchased the "A" schedule property in the year 1990 and her predecessor in title had been enjoyed the "B" schedule property as pathway in order to reach the plaint "A" schedule property. The defendant, who succeeded to the above property after the demise of the original owner, started obstructing the pathway for her ingress and egress to the "A" schedule property. Under such circumstances, having left with no other option, the plaintiff has filed the present suit for declaration and other reliefs. It is also submitted that subsequently, the plaintiff had filed an application for appointment of Advocate Commissioner to prove the exact nature of the fact in dispute and also to ascertain the actual position in respect of the properties. But the Trial Court, instead of exercising its discretion vested under Order 26 Rule 9 CPC, dismissed the said application.

4. The revision petitioner states that it is mandate on the part of the Trial Court to appoint an Advocate Commissioner with a mission to visit the suit property with the help of a Surveyor and measure the same by referring to the Survey Map and documents of both sides and note down the physical features. In support of his submission, he has relied upon the judgment of this Court in the case of **Shanmugathai vs. Kamalammal and another** reported in **2017 (2) MWN (Civil) 315**, wherein this Court was pleased to appoint an Advocate Commissioner for the purpose of inspection of the suit property.

5. In the said judgment, this Court held as follows:

"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 Honble 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 Honble 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 Honble 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 commissioners 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."

6. Admittedly, the present petition for appointment of an Advocate Commissioner was filed at the stage of conducting the proceedings in the suit and the nature of dispute could only be resolved, only if the exact location / status of the suit property is identified, which cannot be done except by appointment of Advocate Commissioner. Noting down the physical features and other things would not amount to culling out the evidence and no prejudice will be caused to other side in such appointment of Advocate Commissioner. It is seen that the plaintiff has raised a plea that the defendants have obstructed the only pathway available to her to reach her property and therefore, this Court is of the view that appointment of Advocate Commissioner will be helpful for the Trial Court to sort out the issue in letter and spirit. Hence, in my considered opinion, appointment of an Advocate Commissioner is essential in this case.



7. In the result,

a) this civil revision petition is allowed and the order dated 12.06.2017 made in I.A.No.96 of 2016 in O.S.No.15 of 2016 by the learned District Munsif-cum-Judicial Magistrate, Bhoothapandi, is set aside;

b) the learned District Munsif-cum-Judicial Magistrate, Bhoothapandi is directed to appoint an Advocate Commissioner within a period of one week from the date of receipt of a copy of this order to ascertain the actual position, note down the physical features of the suit property, etc., along with Surveyor after notice to both the parties, with a direction to the Advocate Commissioner to file a report within a period of one month from the date of such appointment;

c) on filing the report by the Advocate Commissioner, the learned District Munsif-cum-Judicial Magistrate, Bhoothapandi is directed to dispose of the suit within a period of four months thereafter.

No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CS-II)

/True Copy/

Sub Assistant Registrar

To:

1. The District Munsif-cum-Judicial Magistrate,
Bhoothapandi

2. The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai. (2 copies)

+ 1 cc TO Mr.V.Angusamy , Advocate in SR No. 68048
+ 1 cc TO Mr.C.Dhanaseelan , Advocate in SR No. 68544

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AE/SV/SAR3/23.07.2018/4P/6C

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