



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 22.11.2017

Delivered on : 10.04.2018

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**THE HONOURABLE MRS.JUSTICE J.NISHA BANU**

C.R.P (MD) No.2374 of 2015 (PD)

1.Aginikumar

2.Mageswari

... Petitioners/ Respondents/  
Defendants

**-Vs-**

1.Thalavai

2.Utchimakalli

3.Ramaiya

... Respondents/Petitioners/  
Plaintiffs

**Prayer:** Civil Revision Petition filed under Article 227 of Constitution of India, to set aside the Fair and Decreetal Order dated 26.08.2015 passed in I.A.No.407 of 2015 in O.S.No.37 of 2014 on the file of the Principal District Munsif Court, Ambasamudram.

For Petitioners : Mr.G.Karnan

For Respondents : Mr.H.Arumugam

### **O R D E R**

This Civil Revision Petition has been filed to set aside the fair and decreetal order dated 26.08.2015 passed in I.A.No.407 of 2015 in O.S.No.37 of 2014 on the file of the Principal District Munsif Court, Ambasamudram.

**2.** The brief facts, which are necessary in this case, are as follows:

**2.i)** The suit in O.S.No.37 of 2014 was filed for declaration and permanent injunction against the petitioners herein. Pending suit, the plaintiffs have filed I.A.No.407 of 2015 under Order 26 Rule 9 C.P.C to appoint an Advocate Commissioner for measuring the suit property and to submit a report along with a plan. Though the said application was filed for measuring the suit property, it is mentioned in their affidavit that the possession was disturbed by the defendants and if an Advocate Commissioner is appointed, the same should be revealed.



2.ii) The trial court has allowed the said petition without considering the facts that the plaintiffs/respondents have already filed the same application in I.A.No.174 of 2014 and the same was dismissed for non-prosecution on 04.12.2014 and the same was suppressed in the subsequent application. Aggrieved over the said order, the petitioners/ defendants are before this Court.

3. The learned counsel for the petitioners submits that since the suit is one for declaration and permanent injunction, there is no necessary to appoint an Advocate Commissioner to measure the suit property and to find out possession and the same should be proved through witnesses and documentary evidences and he prays for setting aside the order.

4. In support of this contention, he has relied on the judgment in **Chinnathambi vs. Anjalai** reported in **2006 (5) CTC 494**). In the said Judgement, 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.

5. The learned counsel for the respondents submitted that the court below has rightly allowed the Interlocutory Application and there is no error in the order of the court below and he prays for dismissal of this Civil Revision Petition.

6. Heard the learned counsel for the petitioner and the learned counsel for the respondent and perused the materials available on record.

7. Perusal of records would show that the petitioner has filed the above application only to prove the possession. It is settled law that the possession cannot be proved by appointing an Advocate Commissioner. The judgment cited supra is squarely applicable to the facts of the present case. When the suit is filed for declaration and injunction, the parties has to adduce evidence to prove the title of the property.

8. Further, there are no reasons forthcoming from the respondents for suppressing the same application which was filed in I.A.No.174 of 2014 and the same was dismissed for non-prosecution on 04.01.2014. The learned Judge has also not discussed about the dismissal of the earlier Interlocutory Application and in my considered opinion, the learned Judge ought not to have allowed the application, as filing of the application in the earlier round, withdrawing the same and then filing another Interlocutory Application (present I.A) is only to protract the proceedings and therefore, the order of the learned Judge required interference.



Accordingly, the the order passed by the learned Principal District Munsif, Ambasamudram, in I.A.No.407 of 2015 in O.S.No.37 of 2014 stands set aside. Consequently, this Civil Revision Petition stands allowed. No costs.

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Sd/-

Assistant Registrar (Crl.side)

/True Copy/

Sub Assistant Registrar

**To**

The Principal District Munsif,  
Ambasamudram.

+ 1 CC TO Mr.G.KARNAN, ADVOCATE IN SR No. 60410

CM

TE/KKR/SAR-3 : 25/04/2018 : 3P/3C

Judgment in  
C.R.P (MD) No.2374 of 2015 (PD)  
10.04.2018