



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 02.07.2018

CORAM:

WEB COPY

THE HONOURABLE MR. JUSTICE M.V.MURALIDARAN

C.R.P. (NPD) (MD) No.1091 of 2018
and C.M.P. (MD) No.4737 of 2018

S.V.Sarojini ... Petitioner/Petitioner/Appellant
-vs-
1. Dr.T.Sripadmanabhan
2. T.Karthikeyan ... Respondent/Respondent/Respondent

Prayer: Civil Revision Petition is filed under Article 227 of the Constitution of India to call for the records relating to the fair and decreetal order dated 24.01.2018 made in I.A.No.546 of 2017 in A.S.No.19 of 2016 on the file of the court of the II Additional Subordinate Judge, at Nagercoil and to set aside the same and pass such further or other orders as this Honourable Court may deem fit and proper in the nature and circumstances of the case.

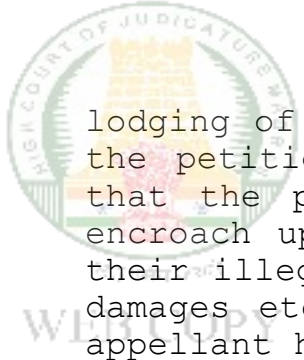
For Petitioner : Mr.M.Suri
For R1 : Mr.T.S.R.Venkatramana
For R2 : No Appearance

O R D E R

The Revision Petitioner is the appellant in the appeal suit in A.S.No.19 of 2016 on the file of the II Additional Subordinate Judge at Nagercoil and the appeal was filed against the order and judgment rendered in O.S.No.13 of 2013 by the learned Principal District Munsif, Nagercoil, in which she did not succeed. During the pendency of the appeal, the plaintiff/appellant filed an application in I.A.No.546 of 2017 for appointment of an Advocate Commissioner to note down the physical features of the appeal schedule property and the said application was dismissed by the Trial Court, holding that it should not be filed to fill up the lacuna. Challenging the same, this revision petition has been filed.

2. Heard the learned counsel for the petitioner and the learned counsel appearing for R1. There is no representation on behalf of the 2nd respondent.

3. It is the case of the revision petitioner that the appeal schedule property to the extent of 55 cents was originally a wet land, which was lying as a single unit duly fenced and the same was converted into a coconut garden on development of the land. Subsequently, the defendants, with an intention to grab the property, demolished the eastern compound wall, which resulted in



lodging of a criminal complaint against them. It is further case of the petitioner that though during Police enquiry, they had stated that the property does not belong to them and they attempted to encroach upon it, they did not stop their activities. Aggrieved by their illegal acts, the appellant had filed a suit for declaration, damages etc., which was dismissed by the Trial Court, stating the appellant had failed to prove her case with regard to the title over the property and against the said judgment and decree, the appellant preferred an appeal for setting aside the same, in which, she 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 appeal 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 appellant has raised a plea that the defendants have trespassed into her property and the entire cents of land belong to her and therefore, this Court is of the view that appointment of Advocate Commissioner will be helpful for the First Appellate 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, but on payment of costs.

7. In the result,

a) this civil revision petition is allowed and the order order dated 24.01.2018 made in I.A.No.546 of 2017 in A.S.No.19 of 2016 by the learned II Additional Subordinate Judge, Nagercoil, is set aside, subject to the condition that the petitioner shall pay a sum of Rs.5,000/- to the learned counsel for the respondent within a period of one week from the date of receipt of a copy of this order;



b) the learned II Additional Subordinate Judge, Nagercoil, upon filing necessary proof in respect of payment of costs, is directed to appoint an Advocate Commissioner within a period of two weeks from the date of payment of costs 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 II Additional Subordinate Judge, Nagercoil is directed to dispose of the appeal within a period of two months thereafter.

No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CO)

/True Copy/

Sub Assistant Registrar

To

1.The II Additional Subordinate Judge,
Nagercoil.

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

+1 CC to Mr.M.SURI, Advocate in SR.No.70745

+1 CC to Mr.T.S.R.VENKATARAMANA, Advocate in SR.No.70806

AR

RJ/PN/SAR-2/23/07/2018 - 4P/6C

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