



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 05.04.2018

DELIVERED ON : 13.11.2018

WEB COPY

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THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

C.R.P. (MD) (PD) No.1701 of 2017

and

CMP(MD)No.9310 of 2017

Selvamariammal

.. Petitioner/Petitioner/Plaintiff

vs

Kanagavel

.. Respondent/Respondent/Defendant

Civil Revision Petition filed under Article 227 of Constitution of India against the order dated 15.06.2017 passed in I.A.No.184 of 2015 in O.S.No.63 of 2014 on the file of the I Additional Subordinate Court, Madurai.

For Petitioner : Mr.T.R.Jayapalam
For Respondent : Mr.B.S.Meltiue

ORDER

This Civil Revision Petition has been filed against the order dated 15.06.2017 made in I.A.No.184 of 2015 in O.S.No.63 of 2014 on the file of the learned I Additional Sub-Court, Madurai.

2. The petitioner is the plaintiff in the suit. The suit has been filed by the plaintiff for declaration to declare that the suit property belongs to the plaintiff and for recovery of possession, after removing the illegal construction put up by the defendant. Pending trial of the suit, the plaintiff has filed an application in I.A.No.184 of 2015 under Order 26, Rule 9 of CPC for appointment of an advocate commissioner to inspect and take down measurements of the suit property and also note down the extent and nature of encroachments made by the defendant and to file a report with plan.

3. In the affidavit, *inter alia*, it is alleged by the plaintiff that the defendant had filed the written statement contending that the measurement given in the plaint was wrong and that there had been encroachments by his neighbours over the suit property. It is also alleged that in order to brought to the notice of the extent of encroachments and the nature of encroachments, it



would be necessary to appoint an advocate commissioner and if the advocate commissioner measured the suit property and filed the report, it would be useful in deciding the issue involved in the suit.

4. The respondent filed counter in which among other things, he had also stated that the respondent had not encroached the property as alleged by the petitioner. Since the sale of the petitioner itself is not valid, the prayer for appointment of advocate commissioner is unsustainable in law.

5. After hearing both sides, the trial Court dismissed the petition holding that since the defendant raised an objection that the measurements given in the plaint were wrong, the same was not the reason for seeking appointment of advocate commissioner. The parties cannot use the Court proceedings to collect evidence. The trial Court has also held that the petitioner had not sought for appointment of advocate commissioner with the assistance of the Surveyor and the Village Administrative Officer and it was not possible for the advocate commissioner alone to inspect and measure the suit property and dismissed the petition.

6. The learned counsel for the petitioner submitted that the trial Court has failed to exercise the jurisdiction conferred on it without application of mind and there was flagrant violation of the principles of law and it has resulted in failure of justice to the petitioner. He would submit that the trial Court failed to note that the petitioner had specifically pleaded in the plaint that the respondent who was the neighbour of the petitioner had constructed a building encroaching into the suit property. The learned counsel further submitted that the petitioner had specifically pleaded that the respondent had encroached into an extent of 22 feet east-west and 6 feet north-south measuring 132 square feet. According to the learned counsel, the trial Court has failed to note that the report of the advocate commissioner alone can prove that encroachment had been committed by the respondent over the suit property and that the observation of the trial Court that the petitioner has filed the petition to collect evidence was absurd.

7. Per contra, the learned counsel for the respondent contended that appointment of advocate commissioner is not at all necessary and that the trial Court has rightly dismissed the petition and also appointment of advocate commissioner can be sought only after trial. The learned counsel would submit that there is no necessity to interfere with the order of the trial Court. Moreover, advocate commissioner cannot be appointed to collect evidence. In support, the learned counsel relied upon the decisions in *K.M.A.Wahab and 5 others v. Eswaran and another*, reported in 2008 (3) CTC 597; *Meenakshi v. Vennila and another*, reported in 2008 (3) TNCJ 650 (Mad); *R.Justin Arulappa v. R.Xavier Arulappa and another*, reported in (2010) 1 MLJ 1176; *Santha Satheesh v. H.J.Walter and others*, reported in 2012 (6) CTC 502; *M.A.Saravanan and others v.*



Kannan and others, reported in 2013 (2) TNCJ 428 (Mad).

8. It is true that Order 26, Rule 9 of CPC empowers the Court to appointment advocate commissioner to make local investigation as it finds fit and proper based on the facts and circumstances of the case. It is apposite to mention that it is not the aim of Order 26, Rule 9 of CPC to assist a litigant to collect evidence, where the litigant can get evidence himself.

9. In the instant case, the plaintiff had filed the suit for declaration in respect of the property in Re-Survey No.22/4B1 measuring 21 cents and Re-Survey No.22/4A1B measuring 23 cents out of 31 cents, totally 44 cents, out of it, the land measuring east to west 24 ½ feet on the north; east to west 22 feet on the south; north to south 92 feet on the west and north to south 83 ½ feet on the east. Out of the above mentioned property, the land measuring north to south 47 feet on the west and on the east; east to west 24 ½ feet on the north and 22 feet on the south including 7 ½ feet north to south space left for the 15 feet wide east to west road. The petitioner had sought recovery of possession in respect of the land said to have been encroached by the respondent measuring 22 feet east to west and 6 feet north to south measuring 132 feet.

10. In the plaint para 10, the plaintiff had specifically averred that the defendant had encroached an extent of 22 feet east to west and 6 feet north to south measuring 132 square feet of vacant land belonging to the plaintiff. When such being the pleading, it is the bounden duty of the plaintiff to prove the encroachment alleged to have been made by the defendant by adducing oral and documentary evidence. As rightly observed by the trial Court since the defendant had contended that measurements given in the plaint were all wrong, the same is not the reason for seeking appointment of advocate commissioner.

11. In *K.M.A.Wahab and 5 others v. Eswaran and another*, supra, the learned Single Judge of this Court held as under:

"6. As far as the factum of possession is concerned, the Court alone gather evidence through the parties and it cannot entrust the said matter to the Advocate Commissioner to collect the evidence. in as much as there is no dispute with regard to the identity of the property, the Trial Court has no reason to appoint the Advocate Commissioner."

12. In *Meenakshi v. Vennila and another*, supra, the learned Single Judge of this Court held:

"9. It is true that Order 26, Rule 9 of C.P.C. empowers the court to appointment commissioner to make local investigation as it finds fit and proper based on the facts and circumstances of the case. In the instant case, the suit has been filed only for permanent injunction and as such in regard to the factum of



possession, this Court opines that the lower Court alone can gather evidence through the parties to the litigation and therefore, the same cannot be entrusted to the Advocate Commissioner to gather evidence and in that view of the matter, the civil revision petition fails and the same is hereby dismissed in the interest of justice."

13. In *R. Justin Arulappa v. R. Xavier Arulappa and another*, supra, the learned Single Judge of this Court observed as under:

"9. ... The need to have resorted to Order 26, Rule 9 of C.P.C. ought to be felt by the Court for the purpose of elucidating certain details and it cannot mechanically appoint an Advocate Commissioner without focussing attention as to what are the questions of dispute and whether for deciding the disputed question the appointment was necessary. But, in this case, utter disregard to the above said principles, the Court below had appointed an Advocate Commissioner to make local investigation as requested by the 1st respondent without even considering whether such issuance of commission is warranted at this stage."

14. In *Santha Satheesh v. H.J. Walter and others*, supra, it has been held:

"10. The learned Sub-Judge, Palani has observed that in order to bring to the notice of this Court, the availability of the building in the suit property, it is beneficial to appoint a Commissioner and in view of the relief of mandatory injunction. It is worthwhile to note that the description of the property in the Plaint is bereft of boundaries. But in the Commission application, among other things, the Plaintiffs have prayed for appointment of Commissioner for ascertaining the four boundaries for the suit property. In the considered view of this Court, it amounts to collecting of evidence."

15. In *M.A. Saravanan and others v. Kannan and others*, supra, the learned Single Judge of this Court held:

"6. In a suit for declaration and injunction of this nature, the defendants need not seek for the appointment of Commissioner to disprove the case of the plaintiffs. The trial Court had considered all these facts and circumstances and also found that the plaintiffs are bound to prove their case based on their pleadings, for which the defendants are not entitled to make out any application for appointment of Commissioner, I find no irregularity or illegality in the order passed by the Court below. Accordingly, the Civil Revision Petition is dismissed. No costs. Consequently, the connected



miscellaneous petition is closed."

16. The parties to the suit have to establish their respective case by producing oral and documentary evidence. In the case on hand, the trial is yet to begin. During trial and/or after completion of trial, if the trial Court feels that it was necessary to appoint an advocate commissioner to decide the real controversy between the parties, then the trial Court can appoint advocate commissioner to measure the suit property and to note down the physical features of the suit property with the assistance of the Taluk Surveyor either *suo motu* or on an application of the petitioner and not now.

17. On a perusal of the averments in the affidavit filed in support of the petition, this Court finds that only to collect evidence to find out the extent of encroachment, the petitioner has filed the petition, which cannot be entertained and that the trial Court has rightly dismissed the petition. No valid grounds have been made out to interfere with the order of the trial Court and therefore, the revision is liable to be dismissed.

18. In the result, the Civil Revision Petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (AS)

/True Copy/

Sub Assistant Registrar (CS-IV)

To

The I Additional Subordinate Judge,
Madurai.

+ 1 CC TO Mr.T.R.JEYAPALAM, ADVOCATE IN SR No. 95162

VSV

TE/PM/SAR-4 : 13/12/2018 : 5P/3C

order made in
C.R.P. (MD) (PD) No.1701 of 2017 and
CMP (MD) No.9310 of 2017
13.11.2018