



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 24.07.2018

CORAM:

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THE HONOURABLE MR. JUSTICE M.V.MURALIDARAN

C.R.P.(PD)(MD) No.1966 of 2017
and C.M.P.(MD) No.9978 of 2017

Tamilan ... Revision Petitioner/
Petitioner/Appellant
-vs-
Palanichamy ... Respondent/Respondent/Respondent

Prayer: Civil Revision Petition is filed under Article 227 of the Constitution of India to call for the records in Fair and Decretal order dated 07.02.2017 passed in I.A.No.53 of 2016 in A.S.No.9 of 2016 by the Sub Court, Aruppukottai and set aside the same.

For Petitioner : Mr.V.Perumal
For Respondent : Mr.S.Kaarthik

O R D E R

The Revision Petitioner is the appellant in the appeal suit in A.S.No.9 of 2016 on the file of the Sub Court, Aruppukottai and the appeal was filed against the order and judgment rendered in O.S.No.192 of 2009 by the learned District Munsif, Aruppukottai, which was partly allowed. During the pendency of the appeal, the plaintiff/appellant filed an application in I.A.No.53 of 2016 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 there is no need for appointment of an Advocate Commissioner, where sufficient materials are placed for deciding the appeal. Challenging the same, this revision petition has been filed.

2. Heard the learned counsel on either side and also perused the material documents available on record.

3. It is the case of the revision petitioner that the appeal schedule property is an ancestral property and the appellant built three houses in S.No.268/2 and two houses in S.No.268/3 and has been enjoying the properties for more than 40 years. While so, the defendant caused disturbance to the peaceful possession and enjoyment of the property stating that it belonged to his family and therefore, the appellant lodged a Police complaint against him. It is further case of the petitioner that though the Trial Court had granted an order in his favour in respect of S.No.268/2, the suit with respect to S.No.268/3 and against the said judgment and decree, the appellant preferred an appeal for setting aside the same, in which, he 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.

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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 defendant has trespassed into his property and the entire properties belong to him 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.

7. In the result,

a) this civil revision petition is allowed and the order dated 07.02.2017 passed in I.A.No.53 of 2016 in A.S.No.9 of 2016 by the learned Sub Judge, Aruppukottai, is set aside;

b) the learned Sub Judge, Aruppukottai is directed to appoint an Advocate Commissioner within a period of two weeks 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;

<https://hcservices.ecourts.gov.in/hcservices/>

c) on filing the report by the Advocate Commissioner, the learned Sub Judge, Aruppukottai is directed to dispose of the appeal



within a period of two months thereafter.

No costs. Consequently, connected miscellaneous petition is closed.

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Sd/-

Assistant Registrar (CS-I)

/True Copy/

Sub Assistant Registrar (CS-IV)

To:

The Subordinate Judge,
Aruppukottai.

+1CC to Mr.V.Perumal, Advocate in SR.No.74775.

+1CC to Mr.S.Karthick Advocate in SR.No.74755.

AR

DS/RP/SAR-4 :10.08.2018: 4P/4C

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