



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 25.10.2018
CORAM :
THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

Tr.C.M.P.(MD)No.412 and 413 of 2018
and
C.M.P.(MD)No.9841 of 2018

Mani ...Petitioner
/Vs./

1.Viswam
2.Uma Viswam
3.Drishya Viswam
4.Vivek Viswam @ Kannan ...Respondents

(in Tr.C.M.P.(MD)No.412 of 2018)

1.K.Singarayan
2.Mani ...Petitioners

/Vs./
Viswam ...Respondent

(in Tr.C.M.P.(MD)No.413 of 2018)

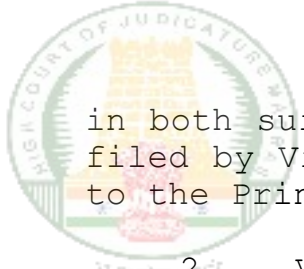
Common Prayer: Petitions - filed under Section 24 of the Civil Procedure Code, to withdraw the suit in O.S.No.14 of 2016 and O.S.No.31 of 2017 pending on the file of the learned District Judge, Kanyakumari at Nagercoil and transfer the above suit to some other Court respectively.

For Petitioner : Mr.R.Ramanlal
For R-1 : Ms.L.Victoria Gowri
(in Tr.C.M.P.(MD)No.412 of 2018)

For Petitioners : Mr.R.Ramanlal
For Respondent : Ms.L.Victoria Gowri
(in Tr.C.M.P.(MD)No.413 of 2018)

COMMON ORDER

O.S.No.47 of 2016 was filed by one Viswam against the petitioners in Tr.C.M.P.(MD)No.413 of 2018 herein before the Sub Court, Padmanabhapuram seeking the relief of permanent injunction from committing trespass or acts of waste on the suit property. The said suit was subsequently transferred to the file of the Principal District Judge, Kanyakumari at Nagercoil, and renumbered as O.S.No.31 of 2017. The petitioner in Tr.C.M.P.(MD)No.412 of 2018 herein filed O.S.No.14 of 2016 before the learned Principal District Judge, Kanyakumari at Nagercoil, seeking the relief of specific performance against the said Viswam and others. The suit property



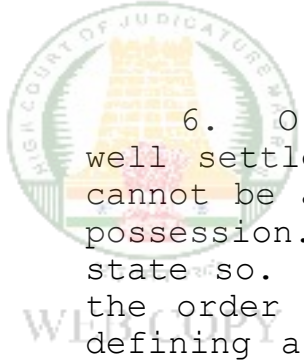
in both suits are one and the same. Therefore, the injunction suit filed by Viswam was transferred from the Sub Court, Padmanabhapuram to the Principal District Judge, Kanyakumari at Nagercoil.

2. Viswam filed I.A.No.125 of 2017 in O.S.No.31 of 2017 seeking relief of interim injunction. The petitioners in Tr.C.M.P. (MD)No.413 of 2018 herein filed I.A.No.126 of 2017 for restraining the said Viswam not to create any encumbrance relating the suit property. They also filed I.A.No.127 of 2017 in the very same suit seeking appointment of an Advocate Commissioner. Advocate Commissioner was appointed on 16.02.2018. On the same day, orders were passed in both I.As namely I.A.No.125 and 126 of 2017. The petitioners in both cases have filed the present transfer civil miscellaneous petitions seeking transfer of both suits namely O.S.No.14 of 2016 and O.S.No.31 of 2017 from the file of the learned Principal District Judge, Kanyakumari at Nagercoil, to some other Court. The Transfer Civil Miscellaneous Petitions were taken up for hearing on 10.10.2018 and since caveats have been filed, the matter was posted for disposal on 25.10.2018.

3. Today, when the petitions were taken up for final hearing, on the side of the respondents, a typed set of papers has been filed. But, no counter affidavit has been filed by the respondents controverting the averments made in both the Transfer Civil Miscellaneous Petitions.

4. The learned counsel appearing for the respondents raised three grounds. She contends that the petitioners herein have not approached this Court with clean hands. She raised a further contention that the orders passed by the trial Judge cannot be made a basis for transfer. Thirdly, the learned trial Judge cannot really be blamed. She would point out that it was the petitioners herein, who applied for appointment of an Advocate Commissioner and that later for reasons best known, they chose to withdraw I.A.No.127 of 2017. The learned Principal District Judge, Kanyakumari at Nagercoil, after dismissing I.A.No.127 of 2017 on 09.04.2018, appointed the advocate commissioner on the same day. The said advocate commissioner has since filed his report on 08.10.2018. The learned counsel would also contend that the trial judge has inherent powers under Order 26 Rule 9 CPC to appoint an Advocate Commissioner on his own and that withdrawal of I.A.No.127 of 2017 cannot take away the power and jurisdiction of the learned trial judge to do so.

5. This Court went through the order dated 16.02.2018 made in I.A.No.125 of 2017 in O.S.No.31 of 2017. The said IA was filed by Viswam for restraining the petitioners herein from trespassing into the suit property and from committing act of waste. The learned trial judge, after recording the fact that the Commissioner has been appointed on the said date, directed both the parties to maintain status quo as to be found by the Commissioner. This order makes a rather disturbing reading.



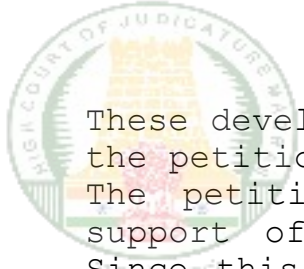
6. O.S.No.31 of 2018 is a suit for bare injunction. It is well settled that in an injunction suit, an Advocate commissioner cannot be appointed for the purpose of finding out as to who is in possession. Of course, the terms of the warrant do not explicitly state so. Again in decision after decision, it has been held that the order to maintain status quo ought not to be granted without defining as to what is the status quo. In this case, the trial judge has not defined the status quo that obtained on the date of filing I.A.No.125 of 2017. Instead, after giving a direction to the parties to maintain status quo, the learned judge has left it to the Advocate Commissioner to find what is status quo. Of course, the petitioners herein have not filed any objection before me challenging the said order dated 16.02.2018 in I.A.No.125 of 2017. But then, I am presently exercising jurisdiction under Article 227 of the Constitution of India. It is my duty to see whether the Courts below are acting within the bounds of their authority and in a legal and proper manner. I am constrained to observe that this kind of order ought not to have been passed by the trial judge.

7. It was the petitioners herein, who wanted an advocate commissioner to be appointed. Acceding to the request, the learned judge appointed an Advocate Commissioner on 16.02.2018. Sofar so good. But then, the petitioners herein had filed a memo on 09.04.2018 for withdrawing I.A.No.127 of 2017. The learned trial Judge took on record the said memo and dismissed I.A.No.127 of 2017. Of course, it is open to the trial Court to even suo motu appoint an Advocate Commissioner to elucidate the matters in dispute. In this regard, I fully concur with the legal submissions made by the learned counsel appearing for the respondents. But then, it has been averred on oath in the form of affidavit that the petitioners were not aware about the re-appointing of the very same Advocate Commissioner on 09.04.2018. There is no counter controverting this assertion.

8. Be that as it may. The report of the Advocate Commissioner appears to be tailored to point out that Vishwam is in possession. The report of the Advocate Commissioner dated 08.10.2018 has been filed before me.

9. The learned Advocate Commissioner in his report states that the Schedule property is enclosed by a fence and that there is an Iron gate, which is locked. He would state that lock was opened by a man named Vishwam. He later came to know that Vishwam is the plaintiff in O.S.No.31 of 2017 in the said suit. From this, one can very easily say that Advocate Commissioner wanted to bring on record that Vishwam is in possession and that he has control of the suit property. Such observations cannot be appreciated.

10. It is also seen that the revision petitioners have filed copy applications seeking issuance of certified copies of certain orders, so that they can challenge the same before this Court. It is seen that copy applications were not numbered, but returned.



These developments have give rise to an apprehension in the minds of the petitioners that their suits will not be tried in a fair manner. The petitioners herein have filed a very detailed affidavit in support of their prayer for transfer of the suits in question. Since this Court does not propose to dwell further in the matter, but, taking note of the averments set out in the affidavit made in both tr.C.M.Ps, this Court withdraws O.S.No.14 of 2016 as well as O.S.No.31 of 2017 on the file of the Principal District Judge, Kanyakumari at Nagercoil and transfers the same to the learned Additional District Judge, Kanyakumari. Accordingly, these transfer civil miscellaneous petitions are allowed. No costs. Consequently, connected Miscellaneous Petition is closed. It is specifically observed that the remarks made in this order are only for the purpose of disposing these Tr.C.M.Ps and shall not be construed in any other manner for any purpose.

Sd/-
Assistant Registrar(CO)

/True Copy/

Sub Assistant Registrar(CS-I)

To

1. The Principal District Judge,
Kanyakumari at Nagercoil.

2.The Additional District Judge, Kanyakumari.

+2CC to Ms.L.Victoria Gowri, Advocate, SR.No.92055

+1CC to Mr.R.Ramanlal, Advocate, SR.No.92092

Common Order made in
Tr.C.M.P. (MD)No.412 and 413 of 2018
25.10.2018

SM

ES/SKN/RSK/SAR 1/07.12.2018/4P/6C