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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 17.04.2018

DELIVERED ON : 14.09.2018

CORAM

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

C.R.P. (MD) (PD) No.1796 of 2017

and

CMP (MD) No.9588 of 2017

Aathichandran @ Chandran ... Petitioner/Petitioner/Plaintiff

vs

1.Selladurai

2.Jayan

3.Gnanamuthu

4.Iyyathurai Pandian .. Respondents/Respondents/Defendants

Prayer: Civil Revision Petition filed under Article 227 of Constitution of India, against the fair and decreetal order dated 09.12.2016 passed in I.A.No.188 of 2013 in O.S.No.130 of 2013 on the file of the 1st Additional District Munsif Court, Nagercoil, Kanyakumari District.

For Petitioner : Mr.M.P.Senthil

For Respondents : Mr.A.Arumugam (for R2)
: for M/s.Ajmal Associates
No Appearance (for R1, R3 and R4)

ORDER

The plaintiff is the revision petitioner and he filed the present Civil Revision Petition as against the impugned Order of the Trial Court dated 09.12.2016 dismissing his application in I.A.No.188 of 2013 in O.S.No.130 of 2013 for appointment of Advocate Commissioner.



Additional Sub Court, Nagarcoil for the relief of Declaration, Recovery of Possession, Mandatory Injunction and Permanent Injunction. Since pending suit the respondents herein /defendants have put up construction of tomb over Cemetery of Ayyadurai Pandian, the plaintiff filed an application in I.A.No.188 of 2013 for appointment of Advocate Commissioner along with Surveyor to make local inspection of the suit schedule property for the purpose of measuring the suit property in accordance with document No.1512 of 1971.

3.The said application was resisted by the respondents on the ground that the appointment of the Advocate Commissioner was meant for the purpose of collecting evidence. Further the appointment of the Advocate Commissioner is sought for to stop the construction of residential house. According to the 1st respondent herein he is the absolute owner of the suit property. Further, there is no tomb as alleged by the plaintiff in the property purchased by the 1st defendant.

4.Upon considering the affidavit and counter affidavit, the Trial Court has come to the conclusion that the issue to be decided in the suit is as to whether the suit property is exclusive property of plaintiff and hence the appointment of the Advocate Commissioner is not maintainable and hence it was dismissed.

5.I have heard the arguments of Mr.M.P.Senthil, learned counsel for the petitioner and Mr.A.Arumugam for M/s.Ajmal Associates, learned counsel for the 2nd respondent and entire materials available on record are perused.

6.In the instant case, the plaintiff has come up with Advocate Commissioner Application seeking to measure the suit schedule properties as per the Sale Deed vide Doc.No.1572 of 1971 with the help of Taluk Surveyor. The plaintiff / petitioner had filed the above suit for the relief of Declaration, Mandatory injunction and recovery of possession. According to the learned counsel for the petitioner, in the suit property the respondents had put up construction over the cemetery of Ayyathurai Pandian.

7.By contending so, the Learned Counsel for the revision petitioner draw the attention of this Court to a decision of this Court made in the matter of Ponnusamy Pandaram Vs The Salem Vaiyappamalai Jangamar Sangam reported in 1986 AIR (Mad) 33; wherein it was held as under:

"6. The object of local investigation under O.XXVI, R.9 of the Code cannot be little. Its object is to collect evidence at the instance of the party who relies on the same



and which evidence cannot be taken in court but could be taken only from its peculiar nature, on the spot. # This evidence will elucidate a point which may otherwise be left in doubt or ambiguity on record. # The Commissioner, in effect, is a projection of the Court, appointed for a particular purpose. In this regard, the implication of O.XXVI, R.10 # cannot be lost sight of when it says that the report of the Commissioner and the evidence taken by him shall be evidence in the suit and shall form part of the record. # We are not very much concerned with the possessive value of the report of the Commissioner. But the party has got a right to place evidence which he could require to substantiate his case before the Court and, of course, subject to the law of evidence and the Code, and it is the duty of the Court to receive such evidence unless there are other justifiable factors in law to decline to receive such evidence. The law of evidence enjoins upon the party to prove the fact which he relies on and in that sense, an obligation is cast upon the party and if he fails to discharge that obligation, adverse consequence will follow and he will have to face the repercussions of the same. This right of the party to adduce evidence gets adjudicated in the interlocutory proceedings under O. # XXVI, R.9. When there is a decline by the Court to issue the commission asked for to make local investigation, the purpose behind it being significant and in stated cases, imperative too, that order certainly disposes of the right claimed by the party to place the requisite evidence on his behalf."

8.The Learned Counsel for the revision petitioner made further reliance upon the decision of this Court made in Shanmugathai vs Kamalammal reported in 2017 (2) CTC 353 holding as under:

"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 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."

9. Whereas the said contention was denied by the respondents, further it is stated by the respondents that the suit property is the absolute property of the respondents. The appointment of Advocate Commissioner was sought only to collect evidence.

10. As far as the scope of appointment of Advocate Commissioner, this Court is of the firm view that an advocate commissioner has to be appointed at the first instance, if sought for by the parties, even in the case of Injunction suits. In actual I have reiterated the said preposition of Law in many of my decisions dealing with appointment of Advocate Commissioner.

11. The above decision relied upon by the Learned Counsel for the revision petitioner reported in 2017 (2) CTC 353 is one amongst them, wherein it was expressed clearly and candidly that " the advocate commissioner's report and plan would enable the court for the purpose of throwing more light or enlighten to arrive at a fair decision."

12. Admittedly the suit is for Declaration, Recovery of possession and Mandatory Injunction, in such case this Court is of the view that unless a clear picture of actual physical features of the suit property is identified and visualized, a just and proper decision could not be arrived at. In the said circumstance, this Court finds that the impugned Order of the Trial Court is not proper.

13. In the result, the Civil Revision Petition stands allowed by setting aside the fair and decreetal order dated 09.12.2016 passed in I.A.No.188 of 2013 in O.S.No.130 of 2013 on the file of



the 1st Additional District Munsif Court, Nagercoil, Kanyakumari District and the Trial Court is directed to appoint an Advocate Commissioner. No costs. Consequently, connected miscellaneous petition is closed.

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Sd/
Assistant Registrar (Crl Side)

Sub Assistant Registrar (CS-I)

To

The 1st Additional District Munsif Court,
Nagercoil, Kanyakumari District.

+1cc to Mr.M.P.SENTHIL, Advocate, SR.No. 84458

+1cc to M/S.AJMAL ASSOCIATES, Advocate, SR.No. 84414

C.R.P. (MD) (PD) No.1796 of 2017
and
CMP (MD) No.9588 of 2017
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