

HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU

CRP.No.2208 of 2015

O R D E R:

This revision petition is filed questioning the order dated 10.02.2015 in IA.No.248 of 2013 in OS.No.166 of 2013 passed by the I Additional Junior Civil judge, Machilipatnam.

The suit OS.No.166 of 2013 is filed for recovery of vacant possession of the site shown in the plaint plan, for mandatory injunction to remove the unauthorized fence in the northeastern corner of the plaint schedule property shown as 'A B C D' and for a permanent injunction. The suit was being contested. The application IA.No.248 of 2013 was filed for the appointment of an Advocate Commissioner to measure the petition schedule property with the assistance of a surveyor according to the plaintiff's title deeds and to file a report of the physical features. The lower Court after contest dismissed the application noting that as the suit is filed only for a permanent injunction, the plaintiff has to establish his possession on the date of the suit and that there is no ground to appoint an Advocate Commissioner.

This Court has heard Sri Narasimha Rao Gudiseva, learned counsel for the petitioner and Sri K.V.Subrahmanya Narusu, learned counsel for the respondent.

Learned counsel for the revision petitioner, who has challenged the order of dismissal submits that the Court did not apply its mind at all. He points out that the suit is filed

for recovery of possession, mandatory injunction etc., and is not a mere suit for injunction. He also points out that the rough sketch is drawn and shown as 'A B C D' in the plaint plan etc. He also points out that the survey stones were pulled out and the site was encroached by the defendant. This averment is specifically made in para 5 of the affidavit filed in support of the application. Therefore, learned counsel submits that there is no gathering of evidence and that the Commissioner should be appointed to help the Court to decide the questions involved in this case. He therefore, questions the order that is passed.

In reply thereto, learned counsel for the respondent submits that as the plaint plan is very specific and clear and the plaintiff has come with a specific case, it is not permissible for the Court to appoint an Advocate Commissioner as it would amount to gathering of evidence. Counsel points out that the order of the lower Court is correct and it is an order that should be sustained.

This Court notices at the very outset that the lower Court failed to notice the prayers in the suit. As pointed out by the learned counsel for the revision petitioner, the suit is filed for recovery of possession, mandatory injunction etc. There is a clear averment both in the plaint and in the affidavit that the survey stones were removed and the defendant encroached into the property and laid a fence. There is a clear pleading of an illegal and unlawful occupation

of the site. The occupied site is shown in red colour in the 'A B C D' in the rough plan that is annexed.

In these circumstances, this Court is of the opinion that the Court below committed a mistake. The rough plan is drawn by the plaintiff based on his idea of the suit schedule etc. The appointment of Commissioner in a case like this is necessary, because the Commissioner will go on to the site, measure the property and bring the data and inform the Court. As the Court is unable to personally go into the site, the appointment of an Advocate Commissioner would be useful for the Court to ascertain whether or not there is encroachment etc. This is the concept of local investigation enumerated in Order XXVI, Rule 9 of CPC.

Learned counsel for the revision petitioner relies upon a judgment of the Madras High Court reported in **Murugan vs. Vairavan**¹, wherein in similar circumstances, the single Judge of the Madurai Bench of Madras High Court held that to decide a case of this nature, an Advocate Commissioner should be appointed as it would throw more light on the facts and circumstances of the case. No prejudice will be caused to the respondent, as ultimately they can always cross-examine the Advocate Commissioner in case they are of the opinion that the report is not correct.

In the facts and circumstances of the case, as the suit is filed for the reliefs of possession, mandatory injunction etc.,

¹ 2018 SCC online Madras 1171

this Court is of the opinion that the appointment of Commissioner should be allowed in this case. The impugned order of the Court below is set aside. The lower Court is directed to appoint an Advocate Commissioner and fix his fee and time frame for the execution of the warrant etc.

With the said observation, the revision petition is allowed. No order as to costs.

As a sequel, miscellaneous petitions, if any, pending in this revision shall stand closed.

Date: 19.12.2018
KLP

D.V.S.S.SOMAYAJULU, J