

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.03.2019

CORAM

THE HONOURABLE **Ms.JUSTICE P.T.ASHA**

CRP(PD).No.424 of 2019

and

C.M.P.Nos. 4447 of 2019, 2859 of 2019

Mr.Sitharathan

..Petitioner / Plaintiff

Vs

1.Jagavalli

..Respondent / 2nd Defendant

2.Dinakaran

..Respondent / 1st Defendant

This Civil Revision Petitions filed under Article 227 of the Constitution of India to set aside the Fair and Decreetal order dated 17.12.2018 in I.A.No.49 of 2018 in I.A.No.1373 of 2009 in O.S.No.206 of 2008 on the file of the learned Additional District Munsif at Alandur.

For Petitioner : Mr.K.Elangoo

For R1 : Mr.M.Vijayakumar

For R2 : Not ready in notice

ORDER

The above Civil Revision Petition is filed challenging the order passed by the learned Additional District Munsif, Alundur, allowing the application filed by the second defendant / first respondent herein for reissuing the warrant to the Advocate Commissioner for inspection of the suit property and file his report and for costs. The order is challenged by the plaintiff before this Court.

2 It is necessary to briefly allude to the facts of the case, in order to appreciate the facts preceeding the order under revision. The revision petitioner/plaintiff had filed a suit for a bare injunction in respect of the following property:

"All that piece and parcel of land measuring to an extent of 2,400 sq.ft. in Village Site Survey No: 137/1, Thiruneermalai Village, Tambaram Taluk, Kancheepuram District, bounded on the North by: Thiruneermali Road, South by: land belonged to Mr. Ekambaram, East by land belonged to Kandamy Naicker and Karuppan and on the West by: Land belonged to Ram Singh, admeasuring North-South: 60 feet, East-West: 40 feet on both the sides."

3 It is the case of the plaintiff that the property is Village House Site, which belonged absolutely to his father Natarajan, S/o Rangasamy and his father had put up constructions on the suit property and was in possession of the same. The Revenue Authorities had given necessary Enjoyment Certificate and Residential Certificate in the name of his father Natarajan and on 26.11.2007, under a Registered Settlement Deed in document No: 5065 of 2007 of Sub Registrar Office, Pammal, the suit property was settled to the plaintiff. It is the further case of the plaintiff that he is

in possession and enjoyment of the same without any let or hindrance from the said date. As the superstructure on the suit land had become highly dilapidated, the plaintiff had decided to pull down the structure and to put up a new construction on the suit property. When the whole superstructure was removed and the property had become vacant land and when the plaintiff attempted to start the construction, the defendants started giving him trouble. It is the further case of the plaintiff that the first defendant is a highly influential person in the locality and the second defendant is a close associate of the first defendant and the first defendant using his influence, was attempting to prevent the plaintiff from enjoying the property. Therefore, in order to prevent the trespass by the defendants, the plaintiff had to move the suit for the relief claimed above.

4 The said suit was resisted by the second defendant by filing a written statement, inter alia contending that he is the occupier of the suit property and the suit property's actual measurement is 3605 sq.ft. and the following are its description:

"Grama Natham Survery No. 137/1, and it's actual total extent is 3,605 square feet, admeasuring east to west on the northern side 60 feet & southern side 43 feet, north to south on the both eastern &

western sides 70 feet, bounded on the

north by : Thiruneermalai Main Road,

*south by : Remaining land of Sekar (Now owned
Mrs. Visalatchi and Mr. Mohan),*

east by : Property belongs to 2nd defendant,

*west by : Vacant Land (Now owned by Mrs.
Lakshmi, W/o. Surendrakumar)"*

5 He would further submit that the 2nd defendant is in physical possession of the same and that he had purchased the property from one Shekar, who was the original owner of the property along with the first defendant Dinakaran. It is his contention that on 14.06.2017, he had entered into an unregistered agreement of sale for purchasing the suit property and though, there was a mis-description and typographical error in the agreement in respect of the month, the seller had signed it with a date namely, 14.06.2007. It is a case that on the date of the agreement sale, the 2nd defendant has been put in possession of the property and the first defendant has executed a registered Power of Attorney on 29.8.2007 and the entire sale consideration has been paid. However, the written statement does not make any mention of Sale Deed being executed in favour of the second defendant and is silent about this fact.

6 Be that as it may, it is the case of the 2nd defendant that he has the necessary revenue records to show his possession of the suit property.

7 Pending suit, the 2nd defendant had taken out an application for appointing an Advocate Commissioner in I.A.No. 1240 of 2008 and in the affidavit filed in support of the said application, the 2nd defendant has contended the necessity for appointing an Advocate Commissioner is for the following reason:

"I humbly submit that the burden of proof to establish the physical features of the property and correct extent of my possession and enjoyment of the suit property still on my part. Therefore, I have to given proper opportunity to establish the disputed fact of physical futures and the extent of the area of the property. I file this present application only to assist the Court to arrive at a correct conclusion with regard to the physical feature of the property, boundaries and extent of the property which is under dispute. The true and clear fact will come out only on the inspection of the suit premises by the court through the Advocate Commissioner with the assistance of the surveyor. Therefore, I have been advice to file this application of appointment of Advocate Commissioner to inspect and note the physical features of the suit property at the

earliest point of time otherwise there are high possibilities to change the very physical features of the properties and the suit premises.”

8 It is seen from the “A” diary extracts that this application was filed on 09.06.2008 and was ultimately ordered on 05.12.2018 and an Advocate Commissioner was appointed. However, the records show that the Advocate Commissioner for over a period of two years had not executed the warrant. However, on 02.12.2010 a memo was filed returning the warrant and a new Advocate Commissioner was appointed. The 'A' diary extract does not reveal if the new Commissioner was appointed pursuant to an application being filed to this affect. It is also seen that at no point of time the respondent/defendant, who had moved the application had protested the conduct of the Advocate Commissioner. This commissioner has also not inspected property and on 18.07.2011, the petitioner closed the said petition with a liberty to reopen **if circumstances arose**. Thereafter, it is seen that the parties had gone to trial and trial had commenced; PW1 was in the box and the matter was in a part heard stage. At that juncture, the 2nd defendant has come forward with the application for re-issuing and re-warrant. The only reason for seeking the appointment of an Advocate Commissioner as mentioned at para 4 and 5 of the affidavit filed in support of I.A.No.49 of 2018, which are as follows:

"4.In the meantime, I changed my counsel. Hence, I could not follow as to the status of application filed under Order 29 and Rule 6. However, this Hon'ble Court was pleased to close the application as the matter is pending for a long time.

5.I submit in the event of the inspection of the Advocate Commissioner along with Taluk Surveyor, the entire matter would be sorted out as the suit property and the property in my possession and enjoyment is totally different. Hence, I have been advised to file the above application seeking to recall of warrant with the direction to advise the Advocate Commissioner to revisit the property for better adjudication and appreciation of the facts and circumstances of the case."

This application has been ordered by the learned Additional District Munsif, Alandur and challenging the same, the revision petitioner/plaintiff is before this Court.

9 Heard Mr.K.Elangoo, learned counsel appearing on behalf of the revision petitioner, who would contend that the petition for appointing Advocate Commissioner is totally mis-conceived and alien to a suit for bare injunction. It is also seen that though the application was closed in the year 2012, no steps were taken by the respondent/second defendant for reopening and reissuing the same

for over seven years and it was only when the matter was in the part heard stage, that the present application has been filed.

10 Per contra, Mr.M.Vijaykumar, appearing on behalf of the first respondent would contend that, there is a necessity for appointment of an Advocate Commissioner, since, there was discrepancies in the measurements. He would further argue that an earlier application had been moved for appointing of an Advocate Commissioner and it was not opposed by the plaintiff and the plaintiff had not opposed the re-issue of warrant to the second Commissioner and also the closure of the petition with a liberty and at this juncture, the petitioner cannot turn around stating that, appointment of advocate commissioner was erroneous. He would further argue that the enjoyment certificate, which has been produced by the revision petitioner is a bogus one and necessary steps have been taken by him to cancel the said certificate. He would also submit that he has filed necessary revenue records to show his possession and the application having been allowed initially, there was no harm in the same being subsequently allowed and the plaintiff does not suffer any prejudice.

11 Heard counsel and perused the papers.

12 The suit filed is one for bare injunction and it is settled principle of law that in a suit for bare injunction, there cannot be an appointment of Advocate Commissioner unless such compelling circumstances have been put forward by the applicant seeking for an appointment of an Advocate Commissioner. Since the earlier application has already been ordered, this Court is not referring to the said affidavit except for stating that a reading of affidavit would clearly show that, it is an attempt on the part of the defendants to collect evidence for proving possession. In the Judgment reported in **2009 (5) CTC 709 – Elango Vs. Kasthuri**, this Court has held that an Advocate Commissioner cannot be appointed to note down the physical features, which is albiet only an attempt to gather evidence to prove possession. This Judgment has been relied upon in another Judgment reported **in 2011 SCC on line Mad 2355 - Ramanathan Vs. Ayya voo and others**. The ratio of the various Judgments clearly established that an Advocate Commissioner cannot be used to collect evidence. In a suit for bare injunction possession being the primordial factor it is for the parties to independently by other cogent evidence to prove their case. That apart, even the liberty that was granted was only “in case if circumstances arose”. The affidavit filed in support of the present application does not reflect any such change in circumstances for warranting the appointment the Advocate Commissioner. The earlier application was closed on 01.08.2015 and

till 2018, when the matter was posted in the list, no steps were taken. The 2nd defendant would himself state that he has sufficient materials in the form of revenue records to show his possession. The suit being one for bare injunction, the parties are only required to show, who is in possession of the property to prove their case and the Advocate Commissioner cannot be used as a fact finder. The learned District Munsif, Alandur had erred in appointing an Advocate Commissioner and that to at the stage, when the matter was posted in the list and when no sufficient cause has been shown by the defendants.

13 In the result, the Civil Revision Petition is allowed and order passed in I.A.No.49 of 2018 in I.A.No.1373 of 2009 in O.S.No.206 of 2008, by the learned Additional District Munsif at Alandur, dated 17.12.2018 is set aside. No costs. Consequently, connected miscellaneous petitions are also closed.

WEB COPY

13.03.2019

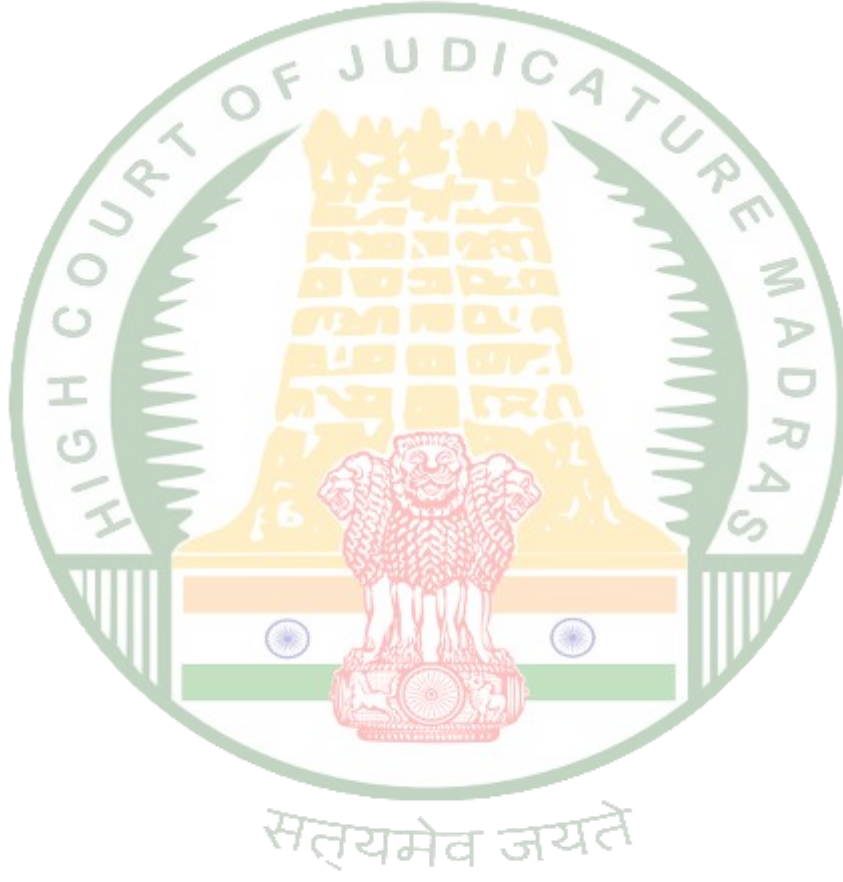
dua

Index: Yes/No

Internet: Yes/No

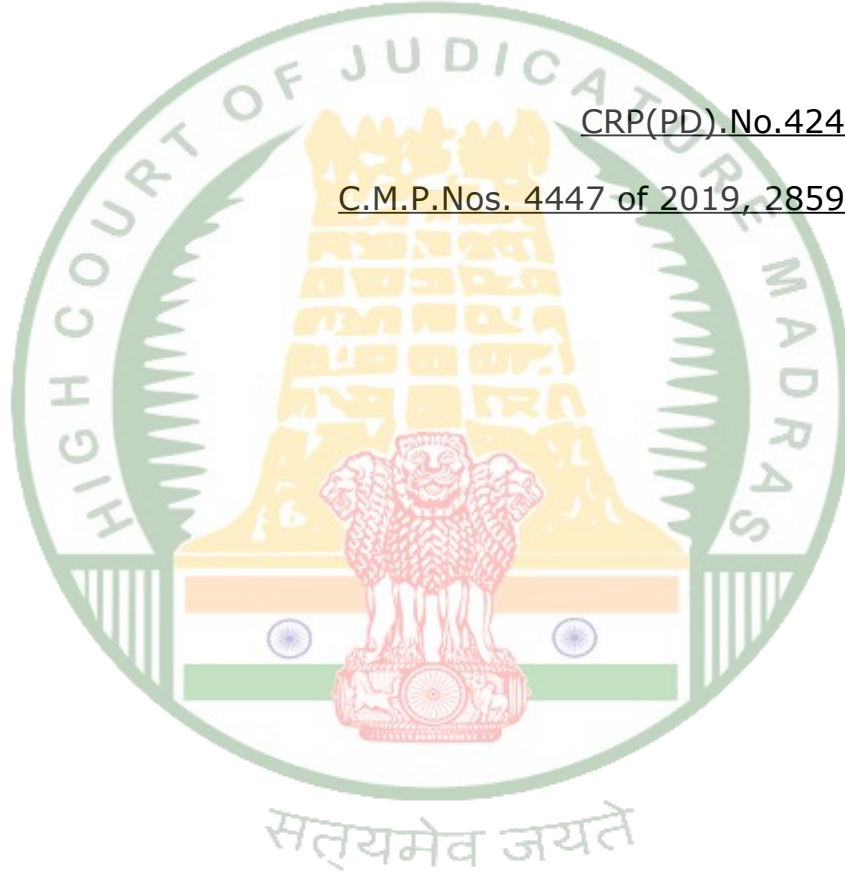
Speaking order / Non-speaking order

To
The learned Additional District Munsif,
Alandur.



WEB COPY

P.T.ASHA, J.
dua



CRP(PD).No.424 of 2019
and
C.M.P.Nos. 4447 of 2019, 2859 of 2019

13.03.2019

WEB COPY