

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.04.2019

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

C.R.P.(PD).No.1711 of 2015

and

M.P.No.1 of 2015

K.Lakshumanan,
S/o.Kullu Gounder,
Dasanaickenpatty Village,
D.Perumapalayam Post,
Sukkuampatty,
Via. Salem Taluk & District.

... Petitioner

Vs.

1.The Block Development Officer,
Ayothiyapattanam,
Salem Taluk, Salem District.

2.The President (Janaki) Dasanaickenpatty Village Panchayat,
D.Perumapalayam Post,
Sukkumpatty, Via. Salem Taluk and District.

3.The Village Administrative Officer,
D.Perumapalayam Village,
D.Perumapalayam Post,
Sukkumpatty, Via. Salem Taluk and District.

4.Manivelu,
S/o.Subramani.

5.Jagannathan,
S/o.Subramani

Respondents 4 & 5 are residing at
Dasanaickenpatty Village,
D.Perumapalayam Post,
Sukkampatty, Via. Salem Taluk & District.

... Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the fair and decreetal order of the learned Principal District Munsif, Salem dated 07.08.2014 in I.A.No.757 of 2014 in O.S.No.113 of 2013 and to order the said I.A. as prayed for.

For Petitioner : Mr.P.Valliappan
for Mr.T.M.Hariharan

For Respondents : Mr.V.Jayaprakash Narayanan
(for R1 & R2)

ORDER

This petition has been filed to set aside the fair and decreetal order passed by the learned Principal District Munsif, Salem, dated 07.08.2014, in I.A.No.757 of 2014 in O.S.No.113 of 2013

2.The revision petitioner filed I.A.No.757 of 2014 in O.S.No.113 of 2013 for appointment of Advocate Commissioner with a direction to visit the suit property, note down the physical features and fix the boundary line of the suit property with the help of Village Administrative Officer, qualified surveyor and with reference to FMB Sketch, and other features that would be pointed out at the time of his visit and file a report and plan. The same was dismissed by the learned Principal District Munsif, Salem. Against the order of dismissal, the petitioner is before this Court.

3.The suit itself filed by the petitioner/plaintiff for permanent injunction restraining the respondents/defendants from any manner interfering with the possession of the property. Pending suit, before the trial Court, the petitioner/plaintiff filed a petition for appointment of an Advocate Commissioner to inspect and measure the property and file a report based on the revenue records with the assistance of Village Administrative Officer and qualified Surveyor. The said petition was dismissed on the ground that the plaintiff has to adduce cogent, oral and documentary evidence to establish his possession through revenue documents and for that, appointment of Advocate Commissioner is not necessary, against which, the present Civil Revision Petition has been filed.

4.Heard Mr.P.Valliyappan, learned counsel for Mr.T.M.Hariharan, learned counsel for the petitioner and Mr.V.Jayaprakash Narayanan, learned counsel appearing for the respondents 1 and 2.

5.The learned counsel appearing for the petitioner would submit that the Suit was filed in the year 2013, wherein written statement was also filed in the year 2013 by the respondents/defendants and I.A.No.757 of 2014 was also filed in the year 2014. It is necessary to measure the property with the assistance of Village Administrative Officer and qualified

surveyor from the revenue department and no prejudice will be caused to the defendants. Accordingly, he prayed for allowing this petition.

6. In support of his contentions, the learned counsel for the petitioner relied on the following judgments:

In the case of *V.K.Ramanathan (deceased D3) and others Vs. Jayalakshmi and 5 others* reported in 2009 (4) CTC 271, wherein it was held as follows:

“The trial Court on receipt of the records shall appoint preferably the very same Advocate Commissioner, who already visited the suit property and submitted a report in respect of O.S.No.2 of 2003, to visit the suit property in connection with this case with the help of Inspector of Surveyors and locate the first item of the suit property herein with specific reference to Ex.A2 to the extent of 416 sq. ft. in commensurate with Ex.A3 and also find out the physical features therein and whereupon, the Trial Court after hearing both sides based on evidence already recorded and if any more evidence to be adduced by both sides, dispose of the matter within a period of three months from the date of receipt of a copy of this order.”

In the case of *Andal Vs. Ajjai Alva and others* reported in 2012 (2) MWN 255, wherein it was held as follows:

“In the light of the above said decisions, it is well settled that the order of remand for re-trial can be done only in

exceptional cases and if there are sufficient evidence before the Appellate Court the Court itself can decide the case as the First Appellate Court is the last Court on facts. I the order of remand is only for the purpose of appointment of Commissioner, the Appellate Court itself can appoint a Commissioner to assist the Court or it can direct the Trial Court to appoint a Commissioner, call for the report and decide the matter on merits”

In the case of *Rangasamy Gounder and others Vs. Valliammal and others* reported in 2012 (3) MWN (civil) 823, wherein it was held as follows:

“24.The Plaintiffs, no doubt simply claimed 20 cents in the suit property as their property, for which, there is no back up of recitals in Ex.A1-the Sale Deed dated 16.10.1917. It might be so that the Plaintiffs might be owning, adjacent to the Government allotted lands to D1 to D6. In such a case, if the properties of the Plaintiffs, and D1 to D6 are identified with reference to Ex.A1-the Sale Deed dated 16.10.1917, as well as the Revenue Records, then the dispute would come to an end. But such an exercise was not undertaken.

28.Not to put too fine a point on it, I would like to observe that sticking on to the punctilious of Court procedures cases should not be thrown away, but it is the duty of the Court to see that the actual dispute is resolved, if a dispute is resolvable. In my considered opinion, the dispute involved in this case is resolvable. Owing to misconception alone the parties are fighting at arms length all along. Hence, I am of the considered view that the matter should

necessarily be remitted back to the First Appellate Court with the following direction.

29. On balance, the judgment and decree of the First Appellate Court is set aside and the matter is remitted back to the First Appellate Court, with the direction to appoint an Advocate Commissioner, at the cost of the Plaintiffs, to visit the suit property and measure the same with the assistance of a Government surveyor and with reference to Ex.A1-the Sale Deed dated 16.10.1917 as well as the Revenue records and other documents and locate the same precisely and submit his report detailing the physical features also. Whereupon, after giving due opportunity to both sides, the First Appellate Court shall render its reasoned judgment.”

In the case of *Thangammal Vs. K.Kumarasamy* and another reported in 2015 (3) CTC 689, wherein it was held as follows:

“19. The said decisions may not be applicable to the present case. No doubt, in every Suit, the Court is not bound to appoint a Commissioner. The Commissioner's Report is only a piece of evidence and the same is not binding on the Court. A Commissioner cannot be appointed in a Suit for injunction to find out who is in possession and also to gather evidence. However, in the Suit like the present one, if the Commissioner is appointed, it would minimize the evidence for easy adjudication.

20. As stated earlier, the Trial Court has got discretion to Order a Commission or not and such discretion should be exercised judicially. As stated earlier, the Report of the Commissioner is only a piece of evidence and not necessary it

is not binding on the Court. The Trial Court being one of the fact finding Courts should give an opportunity to the parties to establish their case. In the present case, the First Plaintiff, is the wife of the First Defendant who alleges to have been defrauded. Therefore, the appointment of Commissioner at this stage is an effective need which would go to the adjudication of the Suit.”

In the case of *Semitta Kounder and another Vs. Murugesan* reported in 2016 (6) CTC 66, wherein it was held as follows:

“9.No doubt, as a matter of routine, there cannot be any Order for re-issue of Commissioner's Warrant in filling up any lacuna since it is always open to the aggrieved party to file Objections and cross-examine the Advocate-Commissioner concerned on his Report. However, in the instant case on hand, the claim of the Petitioners for re-issue of Commissioner's Warrant appears to be bona fide since it is only in regard to the proper identification and measurement of the Suit property as both the Petitioners and Respondent happened to be the neighbours and claiming rights over a portion of the property. In the absence of proper measurement and identification of the Suit property, the Trial Court may not be able to resolve the issue and give a quietus to the dispute between the parties. Mere opportunity to raise Objections and cross-examine the Advocate Commissioner on his Report, in the circumstances of the case, will be of no assistance to the Trial Judge for resolving the issue. Further, no prejudice would be caused to either side if the same Advocate-Commissioner is directed to properly

measure and identify the physical features of the property with the active assistance of the Surveyor and if proper Report is submitted on such re-issue of the Warrant and the Trial Court would be in a better position to adjudicate the claim and resolve the issues in favour of either parties. Therefore, this Court is of the view that the dismissal of the subject I.A. by the Judge, is not in order and the same is required interference of this Court.”

7.The learned counsel appearing for the respondents would submit that already the Taluk Surveyor certified that the petitioner/plaintiff has encroached the Odai Porombake in S.Nos.142, 143 and 145, which is adjacent to Survey Nos.7/2A and 7/2B. Further, the present Revision Petition is filed to drag on the proceedings and in order to collect fresh evidence, as there is no document available to prove his title, the Interlocutory Application is filed, which is not permissible one. Accordingly he prayed for dismissal of this Revision Petition.

8.The learned Principal District Munsif, Salem while dealing with the question of appointing Advocate Commissioner stated that if it is the case of the petitioner that the respondents have encroached the patta land, the petitioner ought to have filed a suit for declaration and also for removal of encroachment by way of mandatory injunction, whereas the suit has been filed only for a bare injunction. Therefore, it is for the petitioner/plaintiff

to adduce cogent, oral and documentary evidence to establish his possession through revenue documents and for that, appointment of Advocate Commissioner is not necessary and accordingly, the learned Judge has dismissed the Interlocutory Application.

9. Considering the facts and circumstances of the present case, I am of the view that the reasons stated by the Court below cannot be accepted and it is not accepted that the petitioner/plaintiff cannot seek for appointment of Advocate Commissioner under Order 26 Rule 9 and Section 151 of CPC. The appointment of Advocate Commissioner is useful to the Court to arrive at a proper conclusion in respect of the property and the Advocate Commissioner will not measure the property on its own, but with the help of Village Administrative Officer and qualified Surveyor on basis of revenue records. Hence, if the Advocate Commissioner with the help of qualified Surveyor and Village Administrative Officer visited the property and note down the physical features and measured the property on the basis of the rival documents produced by the parties, it would not cause any prejudice to the respondents/defendants and it would be necessary and it is only a guiding factor to the trial Court to arrive at a conclusion about the property. In this context, it is useful to extract below the observation of this Court in the case of *Saraswathy and another Vs. Viswanathan* reported in 2002 (4) LW 142.

“9. Generally speaking, in a suit filed by the plaintiff, he is a dominus litus and further, this is not an universal rule, in the considered opinion of this Court.

10. At best, an Advocate Commissioner's report can be taken note of by the first appellate Court along with the other oral and documentary evidence on record. Even if an Advocate Commissioner is appointed, the report filed by the Advocate Commissioner is not binding on a Court of law and a Court is entitled to act independently basing its conclusions on the strength of the documentary and oral evidence on record. It is also an axiomatic fact that a possession has to be proved by a litigating party and not by a Commissioner through his appointment made by a Court of law.”

10. Here also, even though the Advocate Commissioner is appointed, the Court is entitled to act independently based on the documents produced and oral evidence adduced by the parties. Hence, the appointment of Advocate Commissioner will not cause any prejudice to the respondents/defendants.

11. In view of the aforesaid facts and circumstances, I am inclined to issue a direction to the trial Court to appoint an Advocate Commissioner and pass appropriate orders. The Advocate Commissioner shall visit the suit property, note down the physical features and fix the boundary line of the suit property, after due measurements with the support of Village Administrative Officer, qualified surveyor and with reference to FMB Sketch, and other features that would be pointed out at the time of his visit and file a report and plan. The parties shall file a copy of their respective title deeds and also plans, to enable the Advocate Commissioner to inspect

the suit property and file a report.

12. Accordingly, the Civil Revision Petition is allowed. No costs.

Consequently, connected Miscellaneous Petition is also closed.

09.04.2019

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Speaking Order/ Non Speaking Order

Index: Yes/ No

Internet: Yes/ No

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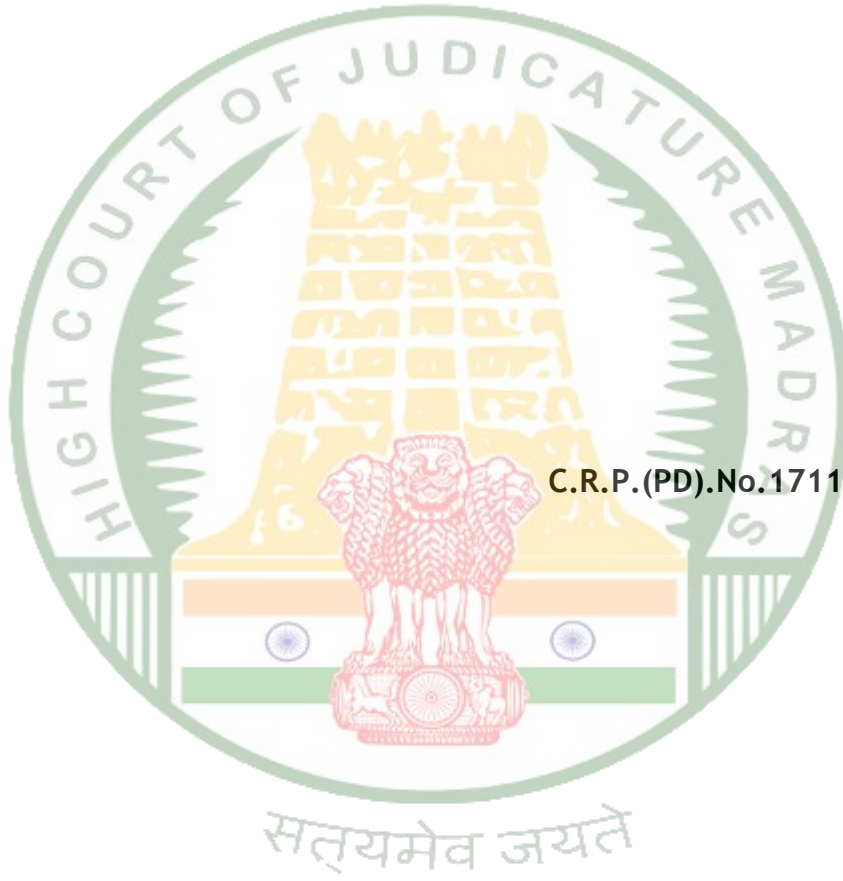
The Principal District Munsif,
Principal District Munsif Court,
Salem



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M.DHANDAPANI, J.

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Dated: 09.04.2019