

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.10.2019

PRONOUNCED ON : 22.10.2019

CORAM

THE HONOURABLE Mr. JUSTICE **R.PONGIAPPAN**

C.R.P.PD.No.3948 of 2014
and M.P.No.1 of 2014
and C.M.P.No.4113 of 2017

1. K.Bhadraiah
2. S.Jaikar
3. R.Sathish

... Petitioners

Vs

1. Mukesh K. Shah
2. M.Kanchan Jain

... Respondents

PRAYER : Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the order and decree dated 25.06.2014 passed in I.A.No.924 of 2014 in O.S.No.131 of 2011 on the file of the District Munsif Court, Tiruvottiyur.

For Petitioners : Mr.T.K.Viswanath

For Respondents : Mr.Sandeep S. Shah

ORDER

Aggrieved over the order dated 25.06.2014 passed in I.A.No.924 of 2014 in O.S.No.131 of 2011 on the file of the District Munsif Court, Tiruvottiyur, the petitioners, who are the plaintiffs in the said suit, filed this Civil Revision Petition.

2. Before the trial Court, the petitioners have filed the above referred suit as against the respondents for the relief of permanent injunction restraining the respondents and their agents in interfering with the plaintiffs' peaceful possession and enjoyments of the suit property. During the course of trial proceedings, the respondents filed an application in I.A.No.924 of 2012 and prayed to appoint an Advocate Commissioner to identify the property with the help of Taluk Surveyor.

3. The learned District Munsif, Tiruvottiyur, by an order dated 25.06.2014, allowed the application filed by the respondents and appointed an Advocate Commissioner to measure the property, particularly for fixing the boundary of the property owned by the petitioners and the respondents. Challenging the same, the respondents in that application are before this Court and prayed to set aside the above impugned order.

4. The learned counsel appearing for the petitioners made a submission that the property which required to be measured by the respondents is the property owned by the petitioners. Further, in page No.2 of the written statement filed by the respondents, they admitted the possession of the petitioners. The learned District Munsif, Tiruvottiyur, at the time of passing the order, without considering those aspects, allowed

the application filed by the respondents, which is erroneous in law. He has further contended that after admitting the possession of the petitioners, appointing an Advocate Commissioner to measure the property is unnecessary.

4.1. In this regard the learned counsel appearing for the petitioners relied upon the judgment reported in **2000 3 L.W.787** in the case of **R.Satyanarayana Rao & 3 others Vs. M.K.Manoharan and another**, in which this Court held in paragraph No.11 as follows :-

"11. When the identity of the property is not a matter in issue, and when the suit is also not one filed for recovery of property, I do not think there is any necessity to issue a Commission, and that too, when the question of issuing ryotwari patta is to be decided on the basis of documentary evidence produced before Court. Again, the relief prayed for in the application for appointment of Advocate Commissioner is to note down the physical features of 6th and 7th defendant's possession of the entire suit schedule property. When the plaintiff himself has admitted that defendants 6 and 7 are in possession, what is the necessity to note down the physical features of the property in the possession of defendants 6 and 7."

4.2. Further the learned counsel appearing for the petitioners has also relied upon the judgment dated 21.01.2016, passed in **C.R.P.(PD).No.4365 of 2015** in the case of **C.Rajendra Kumar Vs. Badrinath**, in which, this Court held as follows :-

"14. In these circumstances, I am of the view that the attitude of the defendant is not appreciable and by way of reissuing the warrant, the defendant wants to collect the material to prove his case. Further, it is well settled dictum of the Hon'ble Apex Court that the plaintiff must prove his case on the basis of the oral and documentary evidence and that he cannot take the loop holes in the case of the defendant and seek for remedy. In the instant case, it is the duty of the petitioner/plaintiff to prove his case and the defendant need not prove his case."

5. Resisting the claim made by the petitioners, the learned counsel appearing for the respondents relied upon the judgment of the Hon'ble Apex Court reported in **2008 Law Suit (SC) 2228** in the case of **Haryana Vaqf Board Vs. Shanti sarup** and made a submission that since the dispute between the petitioners and the respondents is in respect of the boundaries, the appointment of an Advocate Commissioner is very much necessary. Only on that score the learned District Munsif,

Tiruvottiyur, appointed the Advocate Commissioner. In the above judgment relied by the learned counsel appearing for the respondents, our Hon'ble Apex Court held as follows :-

"2..... the only controversy between the parties was regarding demarcation of the suit land because land of the respondents was adjacent to the suit land and the application for demarcation filed before the trial court was wrongly rejected. It is also not in dispute that even before the appellate court, the appellant-Board had filed an application for appointment of a Local Commissioner for demarcation of the suit land. In our view, this aspect of the matter was not at all gone into by the High Court while dismissing the second appeal summarily....."

5.1. The learned counsel appearing for the respondents further relied upon the judgment of this Court passed in **C.R.P.No.3295 of 1984** dated **18.09.1984**, in the case of **Ponnusamy Pandaram Vs. The salem Vaiyappamalai Jangamar Sangam** and made a submission that appointing an Advocate Commissioner for local investigation would be the best way to find out the position the property owned by the plaintiff and defendant. In the above judgment this Court has held as follows :-

"6. The object of local investigation under O.XXVI, R.9 of the Code cannot be littled. 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."

6. The submissions made by the learned counsel on both sides are considered.

7. Now on culling out the principles laid down by this Court as well as the Hon'ble Apex Court, appointment of Advocate Commissioner is necessary to identify the property. Further on going through the judgment relied upon by the learned counsel on either side, it is found that the suits pertaining to those judgments have been filed for the relief of declaration and permanent injunction. But here, in the case on hand, the suit is filed by the petitioners only for the injunction simpliciter. For availing the said remedy, he has to prove the possession only and the issue of title will not be arisen directly and substantially.

8. In this occasion, it is relevant to see the judgment reported in

AIR 2008 SC 2033 in the case of **Anathula Sudhakar Vs. P.Buchi**

Reddy by L.Rs & Ors., in which our Hon'ble Apex Court has held as follows:-

"b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession."

9. Accordingly, the petitioners/plaintiffs have the duty to prove their possession alone. In this regard, the letter sent by the respondents to the Assistant Executive Engineer, TNGEDCO, dated 29.06.2013, which was marked as Ex.R.16, before the trial Court, they have admitted that the property, which involved in this suit, is in possession of the petitioners and after encroachment, an electricity connections has also been obtained by them in Service No.028-007-1132. Therefore, after admitting the possession of the petitioners, now denying the same creates doubts, whether the respondents are in the possession of the suit property or not. What ever may be, as already referred above, the duty is only vested with

the petitioners to prove his possession and not otherwise.

10. Even assuming that the petitioners prayed the relief of injunction for the property owned by the respondents, it is open to the respondents to file a suit for declaration or otherwise for the relief of demarcation. Instead of adopting those mode, the respondents filed the application for appointing an Advocate Commissioner particularly for identifying the suit property. Ultimately, the respondents have attempted to disprove the case of the petitioners, which is unnecessary for deciding the case filed by the petitioners. So in the absence of the relief of declaration by the petitioners, it is unnecessary for the respondents to identify the property for the case instituted by the petitioners, claiming that the description of the property filed in the suit is belongs to them.

11. In general, accoring to the Section 101 of the Indian Evidence Act, the burden of proof is on the plaintiff, who asserts a right and it may be, having regard to the circumstances of each case, that the onus of proof may shift to the defendant. The plaintiff must establish his case and he will not automatically succeed merely because of the failure of the defendant to establish his case. Failure to prove the defence does not amount to an admission, not does it reverse or discharge the burden of proof of the plaintiff.

12. Further in respect to the dispute for title to the suit property, the plaintiff claimed title in the trial Court, hence burden was on him to prove the same. Once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant, it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title. Accordingly, the plaintiff alone has to prove his title to the satisfaction of the Court.

13. But here in the case on hand, even after admitting the possession of the petitioners, to disprove the case, the respondents have attempted to appoint the Advocate Commissioner, which is unnecessary and waste of judicial time. The learned District Munsif, Tiruvottiyur, without considering the said aspects, allowed the application filed by the respondents and appointed the Advocate Commissioner, which is erroneous in law. So, the order dated 25.06.2014 passed in I.A.No.924 of 2014 in O.S.No.131 of 2011 on the file of the District Munsif Court, Tiruvottiyur, is liable to be set aside and accordingly set aside.

14. In fine, this Civil Revision Petition is allowed. Consequently,

connected miscellaneous petitions are closed. No costs.

22.10.2019

Index : Yes/No

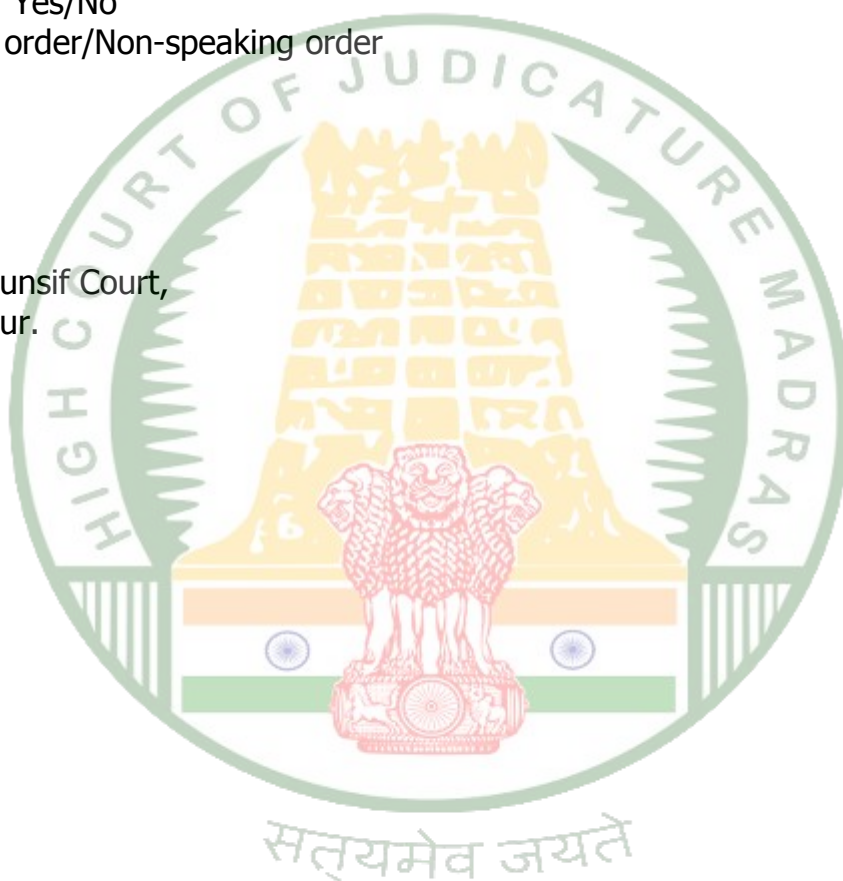
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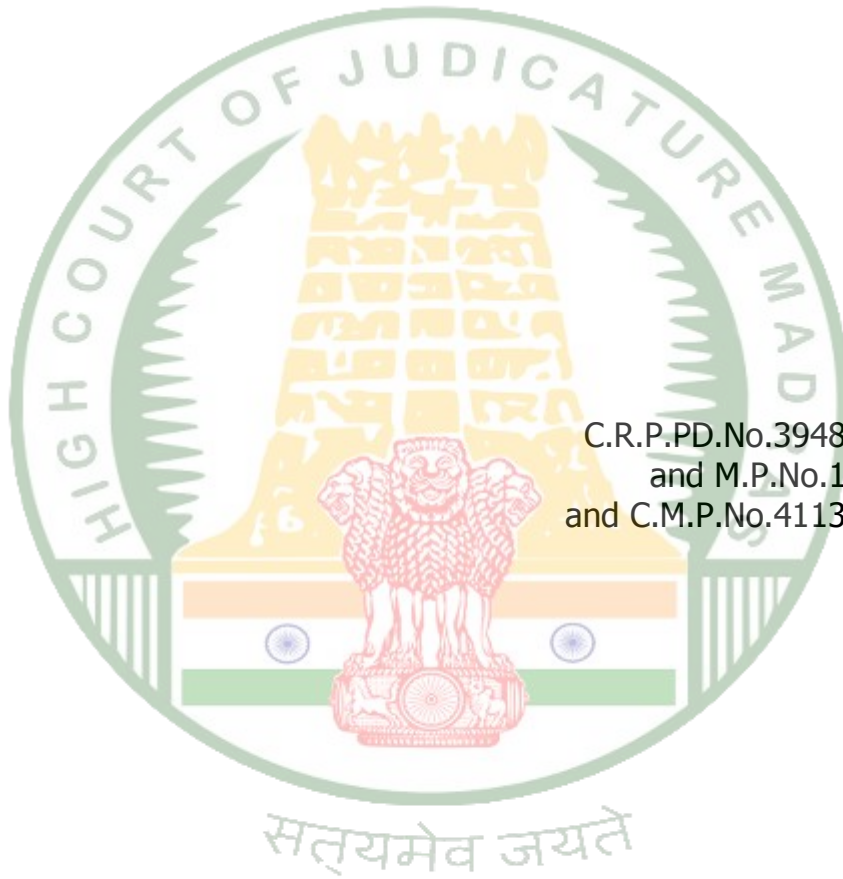
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