



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **26.09.2019**

CORAM:

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

CRP PD(MD)No.970 of 2012
and
M.P.(MD)No.1 of 2012

1.S.Anand
2.R.Durga
3.R.Ragu
4.N.Saravanan

... Petitioners/Respondents/Defendants

Vs.

1.A.Jeyabalan
2.A.Murugan
3.Singam
4.Jeyakumar

... Respondents/ Petitioners/Plaintiffs

PRAYER: This petition is filed under Article 227 of Civil Procedure Code, against the order in I.A.No.146 of 2012 in O.S.No.23 of 2012, dated 14.03.2012, on the file of the District Munsif Court at Uthamapalayam.

For Petitioners : Mr.P.Muthuvijayapandian

For Respondents : Mr.S.Kadarkarai

O R D E R

This Civil Revision Petition has been filed challenging the fair and final order passed by the Court below in I.A.No.146 of 2012, allowing an application filed by the respondents, for appointment of Advocate Commissioner, to note down the standing crops that are present in the property and to file a report.

2. The respondents filed a suit seeking for the relief of bare injunction restraining the petitioners from interfering with the possession and enjoyment of the property. It is the case of the respondents that they are cultivating the lands and that there are standing crops in the property.



3. The respondents filed an application before the Court below under Order 26 Rule 9 of CPC., for appointment of Advocate Commissioner, to note down the standing crops in the property and to file a report. This application was allowed by the Court below and aggrieved by the same, the present Civil Revision has been filed before this Court.

4. The learned counsel for the petitioners submitted that the respondents should prove their case by marking the relevant revenue records that they are cultivating in the property and that cannot be indirectly done by appointing an Advocate Commissioner to identify the standing crops. The learned counsel further submitted that the respondents cannot be allowed to collect evidence in the form of appointing an Advocate Commissioner and the same goes against the very object of Order 26 Rule 9 of CPC. The learned counsel therefore submitted that the order passed by the Court below requires interference of this Court.

5. Per contra, the learned counsel appearing on behalf of the respondents submitted that the respondents have sufficient documents to show that they are in possession of the property and that they are cultivating crops in the property. The learned counsel submitted that the petitioners took a stand that the land is a Tharisu Land (barren land) and there are no standing crops in the property. That apart, the petitioners also created cloud in the title over the property. Therefore, it became necessary for the respondents to file an application for appointment of an Advocate Commissioner. The learned counsel further submitted that the Court below has appointed an Advocate Commissioner only to see whether there are standing crops available in the property and file his report. This report, according to the learned counsel for the respondents, will not in any way amount to collecting evidence and it will not in any way prejudice the interest of the petitioners and it will help the Court below in arriving at fair and just decision in the suit.

6. This Court has carefully considered the submissions made on either side and materials available on record.

7. The respondents want an Advocate Commissioner to be appointed only on the ground that the petitioners have raised a plea that the property is a Tharisu land and there are no standing crops in the property. The respondents want an Advocate Commissioner to visit the property and note down as to whether there are standing crops in the property and thereafter, to file a report. In the considered view of this Court, this attempt made by the respondents to get an Advocate Commissioner appointed, will indirectly amount to finding out who is in possession of the property and will also amount to collecting evidence.



8. Useful reference can be made to the Judgment of this Court in **Chinnathambi and Others Vs. Anjalai** reported in **(2006 (5) CTC 494)**. The relevant portion of the Judgment is extracted hereunder:-

"6. We shall now consider some of the decisions rendered by various Courts in this regard.

(i) In a decision reported in Puttappa vs. Ramappa (AIR 1996 Karnataka 257), in paragraph 3, the Court held as follows :

"3. a Commissioner cannot be appointed to find out as to who is in possession of the property. Under Order 26, C.P.C., a Commissioner can be appointed to make local investigation to investigate the facts or other materials which are found in the property and to make a report in regard to that matter to the Court. In a suit for injunction the question as to who is in possession of the property, is a matter to be decided by the Court on the basis of the evidence, either oral or documentary, to be adduced by the parties. That function cannot be delegated to a Commissioner who cannot find out as to who is in possession of the property. Accordingly, the Lower Court was right in rejecting the application.

(ii) In a decision reported in Union of India and another vs. M/s.Kripal Industries (AIR 1998 Rajasthan 224), the Court in paragraph 18 has held as follows :

18. power of appointment of Commissioner for local investigation cannot be exercised by the Court to assist party to collect evidence where it can get evidence itself. In the case on hand the written statement has already been filed, therefore, the disputed question of fact can be adjudicated upon by the Court after framing the issues and recording the evidence of the parties. For such purpose assistance of Commissioner is neither necessary nor justified.



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(iii) In a decision reported in Penta Urmila and others vs. Karukola Kumarasamy (2005 (2) ALD 130), the Court in paragraph 6 has held as follows:

6. In a suit for permanent injunction, the vital and important issue is whether the plaintiffs are in possession of the suit schedule land and whether there was attempt by the defendant/s to interfere with such possession of plaintiffs. The burden is entirely on the plaintiffs to bring convincing and cogent evidence on record and for so doing, it is not permissible for them to invoke Order XXVI Rule 9, which is intended for difference purpose. Further, if at this stage, Advocate Commissioner files a report, as directed by Appellate Court with the assistance of the Mandal Surveyor it would certainly amount to introducing additional evidence which is ordinarily not permissible unless proper application is made under Order XLI Rule 27 satisfying the conditions therein...."

7. In a matter relating to investigation in to the disputed question of fact of possession, the power of appointment of Commissioner for local investigation cannot be exercised by the Court to assist the party to collect evidence, where the party can collect evidence by himself. Thus in a case, where the claim of the plaintiff that, she is in possession of the disputed property is denied by the defendants by filing written statement, the disputed question of fact can be adjudicated upon by the Court, after framing of issues and recording evidence of the parties.

8. In the instant case, the suit is for permanent injunction and admittedly, interim injunction has been granted on 19.11.2003 and nearly after 1 year and 7 months, the petitioners have taken out an application for appointment of an Advocate Commissioner. Even as per the averments made in the petition, the respondent/plaintiff has stated that the petitioners/defendants are making arrangements to obliterate her cart-track or land and also proposed to encroach a further extent of 0.09 cents. Whereas, there is no averment in the plaint that there is an encroachment of land.

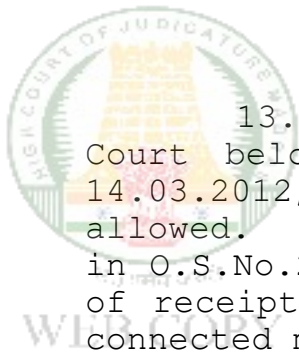


9. It is clear from the above Judgment that power to appoint a Commissioner for local investigation cannot be exercised by the Court to assist the party to collect evidence. It is also clear from the above Judgment that in a suit for permanent injunction, if the report of the Advocate Commissioner, would indirectly amount to finding out the possession of the property, such a commission should never be appointed.

10. This Court is aware of the fact that even in a suit for bare injunction, an Advocate Commissioner can be appointed. It is not a complete bar for a Court to appoint an Advocate Commissioner in a suit for bare injunction. However, such an appointment must be only in cases where it is necessary for localising the property, when there is a dispute regarding boundaries or there is an attempt made to alter the physical features of the property etc. In a suit for bare injunction, the Courts are normally reluctant to appoint a Commissioner for noting down the physical feature of the property, since in most of the cases, it will amount to collecting evidence in favour of one of the parties.

11. In the present case, it is the duty of the respondent, as plaintiffs, to establish their possession. If there are standing crops in the property, the same will be reflected in the adangal and other revenue records and there is no requirement for an Advocate Commissioner to visit the property and see if there are standing crops. Such an inspection will only amount to finding out who is in possession of the property. Just because the petitioners have raised a plea that the property is a barren land, that does not in any way justify the Court below to appoint an Advocate Commissioner. That apart, the cloud on the title of the respondents over the property can never be resolved with the report of an Advocate Commissioner. Looking at the order passed by the Court below in any manner, this Court does not find any justification in the Court below appointing an Advocate Commissioner. This court has no hesitation to interfere with the fair and final order passed by the Court below.

12. At this juncture, the learned counsel for the respondents submitted that the 3rd respondent has died and his legal heirs have not been brought on record and therefore, the proceedings will abate insofar as he is concerned. The suit has been filed for a bare injunction. The suit has been filed on the ground that the respondents are the joint owners of the property. Therefore, the interest of the 3rd respondent is sufficiently taken care by the other respondents and he is sufficiently represented by the other respondents. Therefore, there is no requirement to independently bring the other L.Rs. On record.



13. In the result, the fair and final order passed by the Court below in I.A.No.146 of 2012 in O.S.No.23 of 2012, dated 14.03.2012, is hereby set aside and the Civil Revision Petition is allowed. The Court below is directed to complete the proceedings in O.S.No.23 of 2012, within a period of three months from the date of receipt of a copy of this order. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (C.O)

// True Copy //

Sub Assistant Registrar(CS)

MPK

To

The District Munsif,
Uthamapalayam.

**CRP PD(MD)No.970 of 2012
26.09.2019**

CS (18.10.2019) 6P 2C