



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 10.02.2020
CORAM

THE HONOURABLE MRS. JUSTICE R. THARANI

C.R.P. (MD)No.1498 of 2019
and
C.M.P. (MD)No.7903 of 2019

1.Rosammal
2.Thampi Raja
3.Santhi
4.Suguna

..Petitioners 1 to 4/R1 to R4/Plaintiffs

Vs.

1.Selvaraj
2.Bonrolance
3.Vijaya Claiment
4.Gnana Raja
5.Vijayakala
6.John Jeldop

.. R1 to R3/Petitioners/Defendants 3,4&5

.. R4 to R6/R5 to 7/Defendants 1,2&6

Prayer: This Civil Revision Petition is filed under Article 227 of Constitution of India, to set aside the order passed by the learned Principal District Munsif cum Judicial Magistrate, Eraniel dated 16.04.2019 in I.A.No.223 of 2018 in O.S.No.47 of 2018.

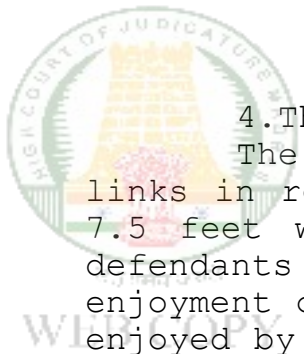
For Petitioners : Mr.N.Dilip Kumar
For Respondents 1 to 3 : Mr.M.P.Senthil

ORDER

Heard the learned counsel appearing on either side.

2.This Civil Revision Petition has been filed against the order passed in I.A.No.223 of 2018 in O.S.No.47 of 2018 dated 16.04.2019, on the file of the learned Principal District Munsif cum Judicial Magistrate, Eraniel.

3.The petitioners herein are the plaintiffs, the respondents 1 to 3 herein are the defendants 3 to 5 and the respondents 4 to 6 herein are the defendants 1, 2 and 6 in the suit. The petitioners herein have filed a suit in O.S.No.47 of 2018 for declaration and for permanent injunction. In that suit, the respondents 1 to 3 herein have filed an application in I.A.No.223 of 2018 for appointment of an Advocate Commissioner. That petition was allowed by the trial Court. Against which, the petitioners herein have filed the present petition.



4.The brief substance in I.A.No.223 of 2018 is as follows:

The suit property is alleged to have an extent of 0.33 square links in re survey No.41/4 of Thalakulam Village with a portion of 7.5 feet width common pathway, which leads to the properties of defendants 3 to 5. The plaintiffs are not in possession and enjoyment of the portion as alleged in the plaint. The property was enjoyed by the defendants for the past 60 years and the pathway was earmarked by the predecessor of title of the defendants as well as the petitioners. The petitioners are having common right over the common pathway. The plaintiffs are residing 1km away from the suit property. The allegation that the cemetery of the plaintiffs forefathers is kept inside the plaint schedule property is an utter falsehood. Their cemetery is situated far away from the western side of the residence of the plaintiffs. The property of one Vijayan and the property of the fifth defendant is situated with well defined compound wall and that a cement road is laid by the Panchayat and the right of pathway has been recognized, approved and accepted. The plaintiffs, who have no interest or right over the pathway with an intention to cause nuisance to the defendants put up some construction with an extent of 4 x 4 square feet across the pathway and they planted coconut sapplings and appointment of an Advocate Commissioner is necessary to note down these points.

5.The brief substance of counter filed by the first defendant in I.A.No.223 of 2018 is as follows:

The schedule property with an extent of 33 square feet absolutely belong to one Muthaiyah by virtue of a partition deed dated 13.02.1981. That Muthaiyah executed a sale deed in favour of the defendants 1 and 2 in respect of 4.504 cents out of 5.8575 cents. He retained 0.33 square links, since cemetery of his forefathers are kept inside. The suit property is not a portion of the common pathway. The width of pathway is approximately three feet. The defendants are trying to extend the width of the pathway. The property 33 square links was mistakenly omitted from being mentioned in the sale deed. On 30.05.2016, Muthaiyan died leaving behind the plaintiffs as his legal heirs. The defendants 1 and 2 conspired together and they executed a correction deed on 05.06.2018 before the Sub Registrar office and the allegation of enjoyment of 7.5 feet common pathway is baseless and imaginary.

6.The trial Court after considering both the sides, allowed the petition. Against which, the petitioner has filed this revision petition.

7.On the side of the petitioner, it is stated that the suit was filed for declaration and for injunction. The written statement with counter claim to remove the unauthorized construction was filed. Only to collect evidence, the Advocate Commissioner petition was filed by the respondents 1 to 3 and that the Court cannot appoint a Commissioner to collect evidence on behalf of the parties.



8.The learned counsel for the petitioner would rely upon the judgment passed by this Court in the case of **Chinnathambi and others v. Anjalai** reported in (2006) 4 LW 516, wherein it is stated as follows:

"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.

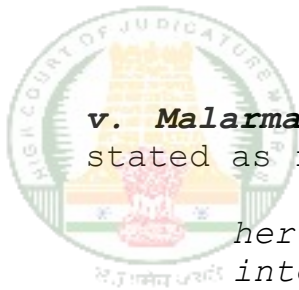
8.In the instant case, the suit is for permanent injunction and admittedly, interim injunction has been granted on 19.11.2003 and nearly after 1 year and 7 months, the petitioners have taken out an application for appointment of an Advocate Commissioner. Even as per the averments made in the petition, 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.

It is a well accepted principle of law that an Advocate Commissioner should not be appointed to find out the possession of the property, which has to be adjudicated only by oral and documentary evidence. Under such circumstances, the order of the Lower Court suffers from material irregularity and it is not in accordance with the principles laid down in the above decisions."

9.The learned counsel for the petitioner would rely upon the judgment passed by this Court in the case of **Jagadeswari v. Kandasamy and others** reported in (2014) 5 LW 361, wherein it is stated as follows:

"So, mere filing of the report by the Advocate Commissioner will not vitiate the right of the revision petitions. Once the appointment of Advocate Commissioner itself is set aside, the report filed by the Commissioner becomes non - est in the eye of law."

10.The learned counsel for the petitioner would rely upon the judgment passed by this Court in the case of **Madheswari and others**



v. Malarmi reported in **2017 SSC Online Mad 9307**, wherein it is stated as follows:

"Therefore, it is for the respondent to prove her possession and that the petitioners are interfering with her peaceful possession, by letting in oral and documentary evidence. In the circumstances, Advocate Commissioner cannot be appointed to inspect the suit property to note down the physical features. It will amount to collecting evidence on behalf of the respondent. The learned District Munsif erred in holding that there is no dispute as to who is in possession of the suit property. "

11.The learned counsel for the petitioner would rely upon the judgment passed by this Court in the case of **P.G.Murugesan v. Advocates Bar Association Palcode** reported in **2017 SCC Online Mad 16644**, wherein it is stated as follows:

"3.It is settled position that an advocate Commissioner cannot be appointed to collect evidence and the parties have to establish their case only by way oral and documentary evidence. In the case on hand, the suit has been filed by the plaintiff for declaration and permanent injunction. So far as the injuncton is concerned, the plaintiff has to establish his case with regard to his position by adducing oral and documentary evidence."

12.On the side of the respondents, it is stated that the suit property is the only pathway to defendants' house and they were in enjoyment of the property and that the Panchayat has also laid down a cement road.

13.The learned counsel for the respondents would rely upon the judgment passed by this Court in the case of **V.Ganesan v. Kamal Jain and another** reported in **2013 (2) MWN (Civil) 619**, wherein it is stated as follows:

"7.A perusal of the pleadings of both parties will make it clear that there is an issue as to whether the pathway really forms part of the suit property. Of course, the Commissioner in his earlier report has submitted that there is a pathway. That is very seriously objected to by the petitioner/plaintiff."

14.The learned counsel for the respondents would rely upon the judgment passed by this Court in the case of **B.Amutha v. Anandhi Sankara Narayanan** reported in **2016 (3) MWN (Civil) 614**, wherein it is stated as follows:



"28. Therefore, as per the judgment referred by the various Courts, I am of the consider view that absolutely there was no prejudice would be caused to the respondent/defendant by appointing an Advocate Commissioner for the purpose of inspecting the property and submit his report on physical features, measurements, etc. In fact, though the Commissioner cannot decide the dispute, his inspection and report would helpful the Court in deciding the dispute. Hence, a local investigation is the best way to find out the position and the party, and coveting the evidence to place before the Court through local investigation by the Commissioner cannot be shut out of their right."

15. It is seen that there is a dispute regarding the pathway. The respondents 1 to 3 filed written statement with a counter claim. They claim that the pathway with a measurement of 7.5 feet is a common pathway. The claim of the petitioners herein is that there is a pathway only with a width of 3 feet and rest of the portion belongs to the plaintiffs. The plaintiffs claim the property from one Muthaiyah. It is seen that Muthaiyah sold the property to the defendants 1 and 2 and it is stated that 33 square links was not mentioned in the sale deed. The allegation of the plaintiffs is that Muthaiyah left 33 square links in the property in memory of the cemetery of his fore-fathers, which is in the suit property. Except the allegation that the defendants are trying to gather evidence, no other reason is stated in the petition. The existence of the pathway with an width of 3 feet is accepted by the defendants. Now the width of the pathway is in dispute. The defendants also filed a counter claim. The defendants have the duty to prove the counter claim.

16. Hence, an opportunity for the petitioner to put forth his case has to be given. Since the measurement is the main dispute, the appointment of Commissioner to visit the property is also necessary.

17. In the above circumstances, there is nothing sufficient enough to interfere in the order passed by the trial Court. Hence, this Civil Revision Petition is dismissed and the order passed in I.A.No.223 of 2018 in O.S.No.47 of 2018 dated 16.04.2019, on the file of the learned Principal District Munsif cum Judicial Magistrate, Eraniel is confirmed. No Costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

// True Copy //

/ /2020

Sub Assistant Registrar(CS)



The Principal District Munsif
cum Judicial Magistrate, Eraniel.

+1 CC to Mr.M.P.SENTHIL, Advocate (SR-5553[F] dated 11/02/2020)
+1 CC to Mr.N.DILIP KUMAR, Advocate (SR-5638[F] dated 11/02/2020)

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MK (18.02.2020) 6P 4C