



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date : 05.02.2020

CORAM

WEB COPY

**THE HONOURABLE MRS. JUSTICE R. THARANI**

C.R.P. (PD) (MD)No.1512 of 2017

and

CMP (MD)No.8228 of 2017

1.Jeganathan

2.Uthamaraj

... Petitioners/Respondents/  
Defendants

Vs.

Saraswathi

... Respondent/Petitioner/  
Plaintiff

**Prayer :** This Civil revision petition is filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order dated 25.04.2017 passed in I.A.No.260 of 2017 in O.S.No.21 of 2012 on the file of the District Munsif Court, Palani.

For Petitioners : Mr.M.P.Senthil

For Respondent : Mr.D.Venkatesh

**ORDER**

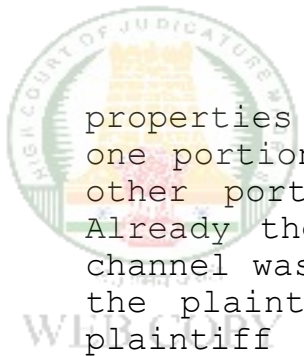
This petition has been filed to quash the order dated 25.04.2017 passed in I.A.No.260 of 2017 in O.S.No.21 of 2012 on the file of the District Munsif Court, Palani.

2.The petitioners herein are the defendants and the respondent herein is the plaintiff in the suit.

3.The respondent has filed a suit for a prayer of declaration and for injunction and in that suit, she filed a petition in I.A.No.260 of 2017 for appointment of an Advocate Commissioner. That petition was allowed by the Trial Court. Against which, the petitioners preferred this revision petition.

4.The brief substance of the petition in I.A.No.260 of 2017 is as follows:-

In the suit, P.W.1 was cross examined and 11 documents were marked. The evidence of plaintiff side was over. No oral evidence was recorded on the side of the defendants. The defendants side evidence was recorded as closed. The suit property and the adjacent



properties belonged to the same family and in the family partition, one portion of the property was purchased by the plaintiff and the other portion of the property was purchased by the defendants. Already there were separate pattas. But the common well and the channel was in the joint patta. The claim of the defendants is that the plaintiff encroached the property of the defendants and the plaintiff altered the physical features of the suit property. To prove the existence of the common well and the channel, the appointment of an Advocate Commissioner is necessary.

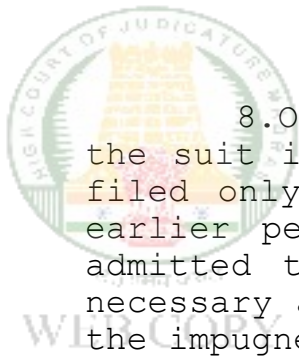
5.The brief substance of the counter in I.A.No.260 of 2017 is as follows:-

Already the respondent filed a petition for appointment of an Advocate Commissioner in I.A.No.129 of 2012. That petition was seriously objected by the petitioners. Claiming that already the property was sub divided and is in separate possession and there is no necessity to fix the boundaries. On the basis of the averments of the petitioners herein, the petition filed by the respondent was dismissed on 18.11.2015. After contesting the previous petition, the petitioners have filed this petition. When the Court has come to a certain conclusion in an earlier petition, another petition for the same relief cannot be allowed. If at all, the Advocate Commissioner is necessary, the petitioners would not have objected for the same at the earlier instance. Only at the stage of argument, this petition was filed and the same has to be dismissed.

6.After hearing both sides, the Trial Court allowed the petition. Against which, the petitioners preferred this revision petition on the following grounds:-

The Trial Court after dismissing the earlier application, the present petition for the same relief cannot be allowed. The Trial Court failed to consider that the respondent herein has opposed the earlier petition filed by the petitioners herein. The suit has reached the stage of arguments, there is absolutely no admissible reasons for appointment of an Advocate Commissioner. The order of the learned Judge is contrary to the scope and ambit of the Order 26, Rule 9 of the Civil Procedure Code.

7.On the side of the revision petitioners, it is stated that when the revision petitioners filed a petition for appointment of an Advocate Commissioner, the petitioners herein contest the same seriously. The Court has ordered for appointment of an Advocate Commissioner to fix the boundaries. After closing the evidence, at the stage of argument, this petition was filed at a belated stage. One petition is filed to re-open the case and the other petition is filed for appointment of an Advocate Commissioner to prove possession. In the petition, it is clearly mentioned that "to prove the possession of the respondent herein, the appointment of an Advocate Commissioner is necessary".



8.On the side of the revision petitioners, it is stated that the suit is of the year 2012 and the Interlocutory Application was filed only in the year 2017 after the arguments are over. In the earlier petition in I.A.No.29 of 2012, the respondent herein has admitted that the appointment of an Advocate Commissioner is not necessary and the respondent cannot take any other stand and prayed the impugned order to be set aside.

9.On the side of the respondent, it is stated that due to the change in the circumstances, appointment of an Advocate Commissioner is necessary. The petitioners have received the cost and the petitioners cannot question the impugned order after receiving the cost.

10.On the side of the petitioners, it is stated that cost was received only in the revision petition and not in the petition for appointment of an Advocate Commissioner and it is further stated that the possession cannot be proved by way of appointing Advocate Commissioner. To substantiate this claim, the judgment of this Court published in 2014 (3) MWN (Civil)51 is cited:-

*"In present case, there is no dispute as to identity of property, as it has been categorically admitted by petitioner/plaintiff that he is in possession and enjoyment of property - Therefore, it is very clear that present petition for appointment of Advocate Commissioner had been made only to procure evidence as to who is in possession of property - Hence, Court below has rightly dismissed petition"*

11.It is seen that the suit is for declaration and for injunction. The suit is pending from the year 2012. The revision petitioners have already filed a petition in I.A.No.129 of 2012 for appointment of an Advocate Commissioner. The petitioners herein contested the petition stating that appointment of an Advocate Commissioner is not necessary as the properties were already sub divided. That petition was dismissed by the Trial Court. At the stage of argument, the respondent filed a petition for appointment of an Advocate Commissioner. There is a clear words in that petition requesting for appointment of an Advocate Commissioner to prove the possession of the respondent herein. Law is well settled that a Commissioner cannot be appointed to prove possession or for gathering evidence. If at all, the appointment of an Advocate Commissioner is necessary, the respondent should not have contested the earlier petition. The Trial Judge did not give any findings regarding the validity of the averments raised by both parties. If at all, the Trial Court deems it fit to appoint Court Commissioner, the Trial Court is at liberty to appoint a Court Commissioner suo-motu and the fees for the Commissioner may be directed to be paid by the both parties.



12. With a above direction, this Civil Revision Petition is allowed and the order of the Trial Court passed in I.A.No.260 of 2017 in O.S.No.21 of 2012 on the file of District Munsif Court, Palani is hereby set aside. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

dss

To

1. The District Munsif,  
Palani.

Copy to : The Record Keeper,  
Vernacular Section,  
Madurai Bench of Madras High Court,  
Madurai.

+1 CC to M/s.D.VENKATESH, Advocate ( SR-4920[F] dated 06/02/2020 )

+1 CC to M/s.M.P.SENTHIL, Advocate ( SR-5032[F] dated 06/02/2020 )

**C.R.P. (PD) (MD)No.1512 of 2017**

**and**

**CMP (MD) No.8228 of 2017**

**05.02.2020**

**AP(05/06/2020) 4P 6C**