

IN THE HIGH COURT OF JUDICATURE OF MADRAS

DATED: 11.03.2021

CORAM:

THE HONOURABLE MRS. JUSTICE **V.BHAVANI SUBBAROYAN**

C.R.P.(PD)No.511 of 2021

and

C.M.P.No.4406 of 2021

P.Madhurajan

...Petitioner

Vs

A.Rajendran

...Respondent

PRAYER: Civil Revision Petition filed under Article 227 of Constitution of India, to set aside the fair and decreetal order dated 21.12.2020 made in I.A.No.3 of 2020 in O.S.No.262 of 2020 on the file of the IV Additional district Munsif, Salem.

For Petitioner : Mr.N.Anand

For Respondent : Mr.R.Nalliyappan

ORDER

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The limited prayer sought for in this petition is against the fair and decreetal order dated 21.12.2020 made in I.A.No.3 of 2020 in O.S.No.262 of 2020 on the file of the IV Additional district Munsif, Salem.

2. The petitioner here had filed the suit in O.S.No.262 of 2020 before the District Munsif Court, Salem, for restraining the defendant and his men from in any way encroaching the vacant space of the suit properties left by the plaintiff in front of his house bearing Door.No.6-6/16 measuring cast-west 10 feet breadth of the vacant space runs towards south-north up to the Vellavari Odai and interfering and disturbing the plaintiff's possession and enjoyment of the suit properties by means of a permanent injunction. During the pendency of the suit, the respondent herein had filed the interlocutory application in I.A.No.3 of 2020 before the IV Additional District Munsif Court, Salem, for appointment of Advocate Commissioner to note down the physical features including the measurement of the properties of the petitioner and the respondent as per their respective title deeds with all road access and existence of stream and bridges connecting petitioner's land to Vagaimara Street road and S.V.R. Govindaraj Street Road on his North-East and North-West and with help of competent Government surveyor and file his report with plan drawn to scale with photographs.

3. The learned IV Additional District Munsif, Salem, by order dated 21.12.2020, has allowed the application stating that the local investigation by an Advocate Commissioner is necessary to elucidate the matter in dispute in the suit. The physical features of the properties and the measurement done by a qualified surveyor based on title deeds and revenue records and a report prepared on the same would be requisite for elucidating the main dispute in the suit.

4. The learned counsel for the petitioner submitted that the trial Court erred in allowing the application filed under Order 26 rule 9 CPC in a suit for bare injunction. It is further contended that the learned Judge failed to note that the rule governing principle in a suit for bare injunction was not followed. It is pertinent to note that it is for the plaintiff, who seek such relief, to establish his case first by adducing evidence in support of his pleadings. Therefore, the application for appointment of advocate Commissioner by the defendants is unsustainable in law. The purpose of appointment of advocate commissioner would amount to collecting/gathering evidence by the defendant and the same cannot be allowed as the defendant is not entitled

to file such application at all. It is the contention of the learned counsel that the learned judge failed to note that in order to prove possessions of the properties, appointment of the Advocate Commissioner cannot be appointed and the same would cause prejudice to the right of the parties in trial. Hence, the impugned order in allowing the application for appointment of Advocate Commissioner is liable to set aside forthwith. Further, the learned judge ought to have considered that the nature of application filed is only to canvass evidence through the government authority for the illegal fencing put up by the defendant on the land owned by the petitioner. The same could elucidate only during the trial by the respective parties. Therefore, appointment of an Advocate Commissioner does not require in this nature of suit. Hence, the learned counsel for the petitioner prays to allow this petition.

5. Heard the learned counsel for the petitioner and perused the materials available on record.

6. As per the settled law, an Advocate Commissioner cannot be appointed in a suit for permanent injunction and therefore, the learned

trial Judge ought not to have allowed the application for appointment of Advocate Commissioner. This Court in an earlier decision in the case of Chandrasekaran and six others vs. Doss Naidu reported in 2006-2-L.W.159, this Court held that it would not be appropriate for the Court concerned to appoint an Advocate Commissioner to collect evidence in favour of the party seeking for such appointment. The claim of the party, with regard to the factum of possession of a property in question, should be proved only by adducing appropriate evidence. Hence, this Court is of the view that the request for appointment of Advocate Commissioner ought to be rejected, when there is a dispute regarding the identity of the property.

7. Accordingly, the present civil revision petition stands dismissed.

No costs. Consequently connected miscellaneous petition is also closed.

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Index: Yes/No

Speaking order/Non Speaking order

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To

The IV Additional District Munsif Court,
Salem.



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