

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.11.2021

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.R.P. (PD) No.2278 of 2020
and CMP No.14265 of 2020

P.Kuttiyappan

.. Petitioner

Vs.

P.Palanisamy

.. Respondent

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, praying to set aside the fair and final order dated 29.10.2020 in I.A.No.3 of 2020 in O.S.No.98 of 2019 on the file of District Munsif Court, Anthiyur.

For Petitioner : Mr. M.Rajeev Gandhi
for M/s.S.Kathamalai Kumaran

For Respondents : Mr. M.Guruprasad

ORDER

Challenge is to the order of the Trial Court appointing a Commissioner to measure the suit property and to identify the area encroached by the defendant over the plaintiff's property. The plaintiff had sued for declaration of his title in respect of two items of properties, for recovery of possession of the first item and for injunction restraining the defendant from interfering with his possession of the suit second item.

2. The suit is resisted by the defendant contending that there is no encroachment as alleged in the plaint. After the evidence was over and when the suit was posted for arguments, the plaintiff came up with the instant application seeking appointment of Commissioner to inspect the property and to file a report regarding the actual area of encroachment made by the defendant.

3. The affidavit states that the Commissioner's Report would aid the Court in ascertaining the actual extent of encroachment made by the

defendant. Though this application was opposed, the learned Trial Judge on an erroneous appreciation of the scope of Order XXVI Rule 9 of the Code of Civil Procedure, concluded that a Commissioner needs to be appointed to resolve the dispute between the parties. Hence, the present Civil Revision Petition.

4. I have heard Mr.M.Rajeev Gandhi, learned counsel appearing for Mr.S.Kaithamalai Kumaran, appearing for the petitioner and Mr.M.Guruprasad, learned counsel appearing for the respondent.

5. Mr.M.Rajeev Gandhi, learned counsel appearing for the petitioner would vehemently contend that the plaintiff is attempting to gather evidence through appointment of Commissioner. According to him, the plaintiff having sued for declaration of title and recovery of possession, ought to establish his title and prove the encroachment in order to be favoured with such a decree.

6. Contending contra, Mr.M.Guruprasad, learned counsel appearing

for the respondent would submit that the defendant claims to have purchased about 4033 square feet of land without proper measurements and therefore, it becomes imperative that a Commissioner is appointed to measure the property, locate the property as well as the encroachment.

7. I am unable to concur with the submissions of the learned counsel for the respondent. The law is settled that the Commissioner cannot be appointed to gather evidence. As already pointed out that the suit is one for declaration and recovery of possession. It is for the plaintiff to prove his title as well as the factum of encroachment in order to be favoured with the decree for declaration and recovery of possession.

8. The plaintiff cannot seek the aid of the Court, through appointment of Commissioner, to gather evidence. What the plaintiff is attempting to do by this application is disclosed in the very affidavit filed in support of the application. The plaintiff would aver that the Commissioner's report will aid the Court in identifying the actual encroachment. The Court cannot appoint a Commissioner for the said purpose. Unfortunately, the Trial

Court has overlooked the above settled position of law, which renders its order revisable at my hands. Therefore, the Revision is **allowed**, the order dated 29.10.2020 is set aside I.A.No.3 of 2020 will stand dismissed. No costs. Consequently, the connected miscellaneous petition is closed.

08.11.2021

Index: Yes/No
Internet: Yes/No
Speaking order/Non Speaking order
jv

To

1. The District Munsif,
Anthiyur.
2. The Section Officer, V.R.Section,
High Court of Madras.

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R.SUBRAMANIAN, J.

jv



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