

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

**DATED : 23.06.2021**

**CORAM :**

**THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA**

**CRP(PD)No.1368 of 2017**  
**and CMP No.6361 of 2017**

K.Renganathan ... petitioner

Vs.

1. Mullaimmal  
2. Kumarasami ... Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the fair and decreetal orders dated 16.09.2016 in IA.No.16 of 2016 in OS.No.157 of 2013 on the file of the District Munsif, Mannarkudi.

For Petitioner : M/s.R.Meenal  
For Respondents : Mr.Sabarish  
for M/s.Kingston Jerold for R1 & R2.

**ORDER**

(This case has been heard through video conference)

This civil revision petition has been filed seeking to set aside the order and decree dated 16.09.2016 in IA.No.16 of 2016 in OS.No.157 of 2013 on the file of the District Munsif, Mannarkudi.

2. The brief facts :-

The learned counsel for the petitioner would submit that the petitioner is the plaintiff, he has filed the suit in OS.No.157 of 2013 seeking for a mandatory injunction restraining the respondents from interfering with the suit schedule property and also to remove the encroachments put up by the defendants on 29.01.2015 within the particular date fixed by the Court. The respondents/defendants filed a written statement and additional written statement denying the encroachments. Thereafter, the petitioner/plaintiff had filed IA.No.16 of 2016 seeking to appoint an advocate commissioner to find out the extent of encroachment with a help of a Taluk Deputy Inspector of Surveyor and to file the report. The trial Court had dismissed the application against which the present revision has been filed.

3. The learned counsel for the petitioner/plaintiff would further submit that the respondents/defendants during the pendency of the suit interfered with the possession of the petitioner/plaintiff and on 29.01.2015 trespassed into the property and encroached into the property and put up a fence. The petitioner had thereby filed the petition for

appointment of advocate commissioner to conduct an inspection with the help of a Taluk Deputy Inspector of Surveyor to find out the area of encroachment and to file a report, since, it is necessary for the purpose of elucidating the matter in dispute. Whereas, the trial Court without taking into consideration the need and necessity for appointment of advocate commissioner committed an error and had dismissed the petition.

4. The trial judge failed to note that no prejudice would be caused to the respondents/defendants by appointing an advocate commissioner and thereby she would seek to set aside the order of dismissal and an order for appointment of commissioner.

5. Per contra, the learned counsel for the respondents/defendants would submit that prayer in the main suit itself is for an injunction restraining the respondents/defendants and their men from interfering with the possession and to remove the alleged encroachment and the fence alleged to be put up by the respondents/defendants after the encroachment on 29.01.2015. The respondents/defendants have denied having trespassed and encroached

the property. When such being so, the petition for appointment of commissioner had been filed with a composite prayer seeking commissioner not only to note down the physical features, but also to find out the extent of alleged encroachment in the suit property, which is nothing but an indirect way of collecting evidence. The trial has not commenced and evidence has not been let in so far on either side.

6. The trial Court rightly finding that the prayer in the suit itself was for removal of encroachment and that the averment had been specifically pleaded in the suit about the alleged encroachment i.e., East to West 112 feet and from South to North 1½ feet had rightly held that the extent of alleged encroachment had already been pleaded in the plaint and that the appointment of advocate commissioner would only amount to collection of evidence in favour of the plaintiff, had rightly dismissed the petition.

7. The learned counsel would further submit that the case of the plaintiff has to be proved by letting in evidence and not to collect the evidence through the advocate commissioner. The trial Court had rightly dismissed the petition which needs no interference.

8. Heard the counsel and perused the impugned order and the materials available on record.

9. The suit in OS.No.157 of 2013 has been filed for permanent injunction and mandatory injunction to remove the fence alleged to be put up by the respondents/defendants after trespass and encroachment on 29.01.2015.

10. In the suit, the petitioner/plaintiff had specifically pleaded about the encroachment at Para 3(a). The trial Court finding that there was a pleading in the suit with regard to the alleged encroachment and that there was no mention in the suit schedule with regard to the encroachment had held that the petitioner/plaintiff cannot be permitted to collect evidence by appointment of commissioner and had dismissed the petition.

11. In **Jagadeswari v. Kandasamy and others** reported in **(2014) 5 LW 361**, this Court has held that the advocate commissioner

cannot be appointed to prove the possession. The advocate commissioner cannot be appointed to collect the material evidence to prove the case that too to prove the factum of possession. The trial Court had rightly dismissed the petition and I do not find any infirmity in the order passed by the trial Court.

12. In the result, the civil revision petition stands dismissed.

No costs. Consequently, connected miscellaneous petition is closed.

**23.06.2021.**

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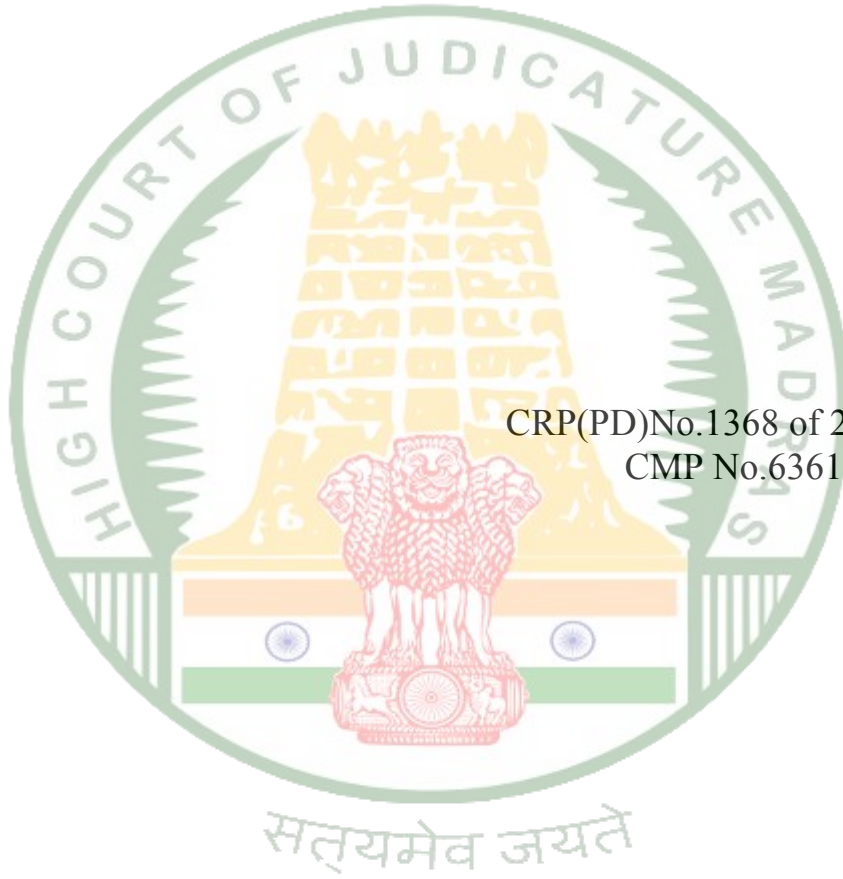
The District Munsif, Mannarkudi.



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**A.D. JAGADISH CHANDIRA, J.,**

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