

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.08.2021

CORAM :

THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

C.R.P.No.3374 of 2018 &
C.M.P.No.19098 of 2018

Sridharan

....

Petitioner

Vs.

Ramesh

....

Respondent

PRAYER: Civil Revision Petition filed under Article 227 of Indian Constitution to set aside the order passed in I.A.No.46 of 2017 in O.S.No.40 of 2016, dated 24.07.2018, on the file of the Principal District Munsif Court, Vandavasi, Thiruvannamalai District.

For Petitioner : Mr.K.G.Senthilkumar

For Respondent : Mr.G.Bharatha Chakravarthy

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ORDER

This Revision arises out of the order passed by the Principal District Munsif Court, Vandavasi, Thiruvannamalai District in I.A.No.46 of 2017 in O.S.No.40 of 2016, dated 24.07.2018.

2. The petitioner as plaintiff instituted the suit in O.S.No.40 of 2016 for declaration that he is owner of 'B' schedule property and for mandatory injunction to remove the superstructure put up by the defendant and for delivery of possession of the suit property.

3. According to the plaintiff 'A' schedule property measuring an extent of 30 feet East-West and 30 feet North-South is the ancestral property. The petitioner's father Agasthiappa Nainar was allotted the property in the partition deed dated 12.03.1962. After the demise of his father Agathiappa Nainar in the year 1980, the plaintiff and his brother Vijaya Kumar inherited the same and they were in joint possession and enjoyment of the same. It is his further case that the plaintiff and his brother Vijaya Kumar partitioned the family properties on 22.08.2005, in which 'A' schedule property was allotted to him. Natham patta was also issued and he is in possession and enjoyment of the property.

4. The petitioner further stated that Appachi Nainar was allotted property in S.F.No.356/34, on the eastern side of the plaintiff's property. It is alleged that the defendant not only encroached the property in S.No.356/34, but also a portion of the land in S.No.353/33 and put up construction thereon, which is 'B' schedule property.

5. The suit was contested by the defendant denying the allegations made in the plaintiff. In the written statement, it is stated that the defendant's father Pushpanatha Nainar was the adopted son of Appachi Nainar and on 25.06.1959, the said Agasthiappa Nainar and Appachi Nainar entered into an Exchange Deed, whereby Agasthiappa Nainar exchanged an extent of East-West 4 Gejam and South-North 5 Gejam and got exchanged equal extent of property from Appachi Nainar. In short, the case of the defendant was that he did not encroach the property of the plaintiff and he had put construction within the area allotted to Appachi Nainar. It is further stated that even before filing the suit, he completed the construction.

6. Pending suit, the plaintiff filed the present petition seeking appointment of an Advocate Commissioner to note down the physical feature of the suit property with the help of a Surveyor. The petition was opposed by the respondent stating that an Advocate Commissioner cannot be appointed for the purpose of collection of evidence and there is no necessity to appoint an Advocate Commissioner for his convenience. The learned District Munsif rejected the petition. Hence, the present revision.

7. Mr.K.G.Senthilkumar, learned counsel for the petitioner would argue that the Court below grossly erred in not considering the reason assigned by the petitioner seeking appointment of an Advocate Commissioner. It is his contention that the Commissioner's Report will be helpful to decide the issue involved in the suit and on the other hand, appointment of Advocate Commissioner would not cause any prejudice to the respondent. In this regard, the Judgment reported in **(2017) 2 CTC 353 [Shanmugathai Vs. Kamalammal]** is relied upon.

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8. *Per contra* Mr.G.Bharatha Chakravarthy, learned counsel appearing for the respondent argued justifying the order of the Court below. According to the learned counsel, the defendant became the owner

of the disputed property by virtue of the Exchange Deed dated 25.06.1959. When the title is in dispute, there is absolutely no necessity for appointment of an Advocate Commissioner. He further added that if the plaintiff establishes his title over the disputed property, then only he is entitled for mandatory injunction and this application was filed only for collecting evidence in his case and there is no illegality in the order.

9. Heard the rival submissions and perused the materials placed on record.

10. In the present case, the petitioner filed the suit for mandatory injunction, declaration and for recovery of possession. It is specifically alleged that the plaintiff is the absolute owner of 'B' schedule property in S.No.356/33 and it has been now encroached by the defendant and he also put up construction. In the plaint, it has been categorically averred that Appachi Nainar was allotted property in S.No.356/34.

11. Indisputably, trial in the suit has not yet commenced and it is in a preliminary stage. In the decisions cited infra, this Court has taken a consistent view that on the facts and circumstances of the case, Advocate

Commissioner can be appointed and the report and plan of the Advocate Commissioner would be helpful to decide the issue involved in the suit.

(i) *Ganesa Gounder Vs. Chakkaravarthy and others* [(2013) 7 MLJ 600]

"6. At any event, it is only an application seeking for appointment of Advocate Commissioner to note down the physical features of the suit property. Admittedly, the suit is one for mandatory injunction for restoration of the pipeline and for damages. Whether the pipeline was in existence or not in the suit property can be ascertained by appointing an Advocate Commissioner and such appointment will not prejudice the interest of the other side and on the other hand it would help the Court below to decide the issue. No doubt the petitioner has filed the application at the appellate stage. He has also given sufficient reason for filing such application at the appellate stage. It is well settled that commission application can be filed even at the appellate stage. Therefore, the delay cannot be the reason for rejecting such application, when the petitioner has given valid reasons for appointment of Advocate Commissioner."

(ii) *M.Samuvel Vs. Suyambukani and Others*

[C.R.P.(PD)(MD)No.1106 of 2014, dated 28.09.2020]

"7. A perusal of the plaint shows that the first respondent / plaintiff has filed the aforesaid suit for

declaration of her title, permanent injunction and for mandatory injunction. According to her, the petitioner herein has encroached a portion of the property in Survey No.1259/3A of Arasoor Village and in such a case, the properties of both the parties have to be measured with the help of a qualified Surveyor and with reference to the title deeds of both the parties, FMB and other revenue records and for that purpose, a Commissioner has to be appointed. If the Commissioner measured the properties of both the parties with reference to the documents of both parties and revenue records, that would help the Court to take a decision whether there is any encroachment in the said property as alleged by the first respondent / plaintiff or not. In case the Commissioner finds that there is no encroachment, the petitioner will get favourable order in the suit and therefore, this Court is of the view that no prejudice will be caused to the petitioner. Further, the Commissioner's report and Surveyor's plan will reduce the oral evidence and also minimize the Court's time."

12. In the decision cited by the learned counsel for the petitioner (2017) 2 CTC 353 (supra), the plaintiff in that case had sought for the similar reliefs, as in this case. Although after conclusion of trial and when the suit was posted for arguments, the application was filed for appointment of an Advocate Commissioner, this Court has allowed the application and the relevant paragraphs are extracted hereunder:-

"11. Admittedly the present petition for appointment of an Advocate Commissioner was filed only at the stage of arguments, however the relief sought for in the suit is one for mandatory injunction and recovery of possession after declaration of the title. When the respective defendant deny the lie and location of disputed construction and specifically assert that the construction is within their property and there is no encroachment, the nature of dispute could be resolved only if the exact location of construction is brought to the knowledge of court, which cannot be done except by appointment of advocate commissioner. Thus mere delay in filing the application after the case was posted for arguments is not a ground for dismissal of application and substantial justice requires that the appointment of commissioner is very much necessary to decide the lis.

12. At this juncture, it is useful to refer the Judgment of this Hon'ble Court in the case of Panjavarnam v. Visuvasam Jeyaseeli (CRP (NPD) (MD) No. 2192 of 2012) wherein it was held that the advocate commissioner if appointed would be able to visit the suit property with the help of a surveyor, measure the same and locate it and also note down as to what are all in existence in the suit property. Noting down the physical features would not amount to culling out the evidence. Further this court enunciated the importance of the maxim that "A Picture is worth a thousand words". Further it was held by this Hon'ble

Court in the said Judgment that it is mandate on the part of Lower court to appoint an advocate commissioner with a mission to visit the suit property with the help of surveyor and measure the same by referring to the survey map and documents of both sides and note down the physical features.

13. In yet another decision of this Court in the case of *Vaithinattar v. Sakkubal Ammal* reported in [AIR 2004 Madras 419](#) it is held that in a suit for Declaration and Permanent Injunction, the dispute pertaining to portion of adjoining lands allegedly encroached by the defendants and the defendants denying that there was no such encroachment. This Hon'ble Court held that the best evidence in such case could be obtained only by the Appointment of advocate commissioner. Therefore in my considered view, no prejudice will be caused to the respondent herein by appointing the advocate commissioner to visit the suit property along with the surveyor and note down the physical features. In fact, the advocate commissioner's report and plan would enable the court for the purpose of throwing more light or enlighten to arrive at a fair decision. Thus the appointment of commissioner is necessary and therefore the order of court below is liable to be set-aside."

13. It appears that the learned District Munsif dismissed the petition on the grounds that no document was produced by the plaintiff to

prove the alleged construction in the suit property and the application was filed to collect evidence. In the light of the ratio laid down in the above decisions and considering the facts of this case, the reasons assigned by the trial Court cannot be countenanced. In view of the allegations made in the present case, in my considered opinion, the Commissioner's report would certainly helpful to the Court to take a just decision in the suit.

14. For the aforesaid reasons, the impugned order is set aside. The Civil Revision Petition is allowed. There is no order as to costs. Consequently, connected miscellaneous petition is closed.

16.08.2021

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Internet : Yes

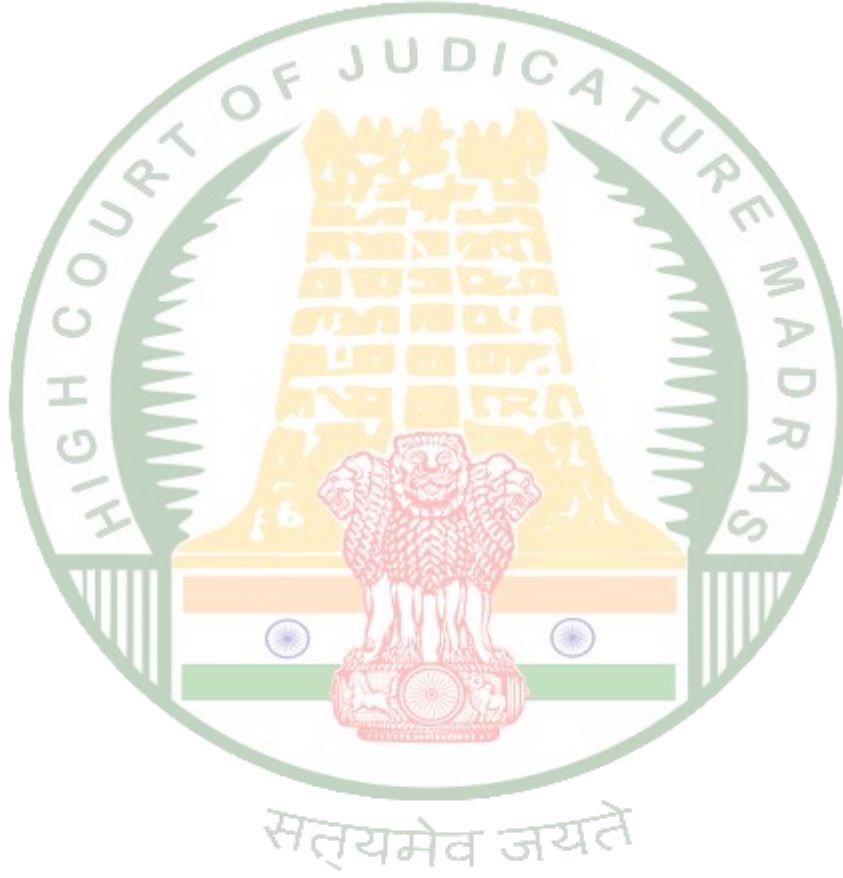
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To

The Principal District Munsif Court, Vandavasi,
Thiruvannamalai District.

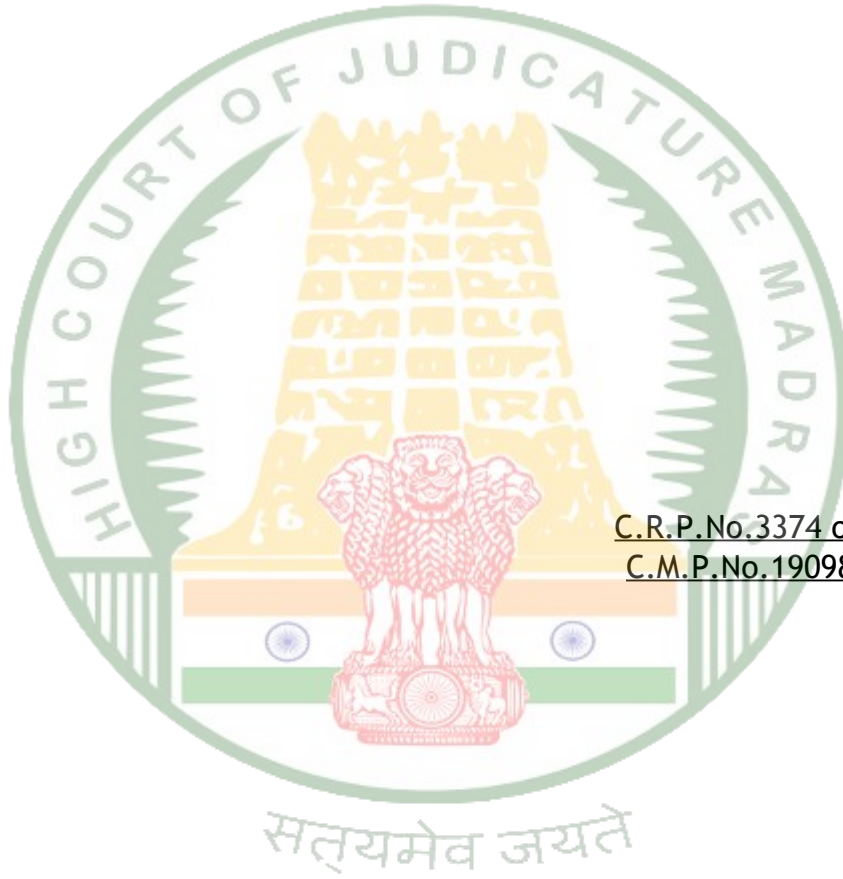


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