



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 18.03.2021

CORAM:

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

CRP (MD)No.972 of 2020

and

CMP (MD)No.6396 of 2020

WEB COPY

P.Murugan

... Petitioner/Plaintiff

vs

1) P.Periyasamy
2) Nanthavanam
3) The Tahsildar,
Tahsildar Office,
Theni Taluk,
Theni District.
4) The District Collector,
Madurai Main Road,
Theni Taluk,
Theni District.

... Respondents/Defendants

Petition filed under Article 227 of the Constitution of India, against the fair and decreetal order passed in I.A.No.2 of 2020 in O.S.No.26 of 2015 on the file of the District Munsif, Theni, dated 02.11.2020.

For Petitioner	: Mr.M.A.M.Raja
For R1	: No appearance
For R2	: Mr.P.M.Vishnuvarthanan
For R3 & R4	Mr.J.Gunaseelan Muthiah Additional Government Pleader

ORDER

This revision petition has been filed against the fair and decreetal order passed in I.A.No.2 of 2020 in O.S.No.26 of 2015 on the file of the District Munsif, Theni, dated 02.11.2020.

2.The revision petitioner as plaintiff filed the above suit for permanent injunction and mandatory injunction against the respondents/defendants. Pending suit, the petitioner filed the present I.A.No.2 of 2020 for appointment of advocate commissioner stating that about 30 cents in the suit property is encroached by the defendants 1 and 2 and therefore, it is necessary to appoint a commissioner to inspect the suit property with the help of Surveyor and to file a report and plan. The 2nd respondent/2nd defendant filed counter expressing no objection for appointment of commissioner, but the trial Court dismissed the commissioner application by impugned order dated 02.11.2020, against which, this



3.The learned counsel for the petitioner would state that the trial Court failed to note that the suit is not only for permanent injunction but also for mandatory injunction to remove the encroachment and therefore, appointment of commissioner with the help of surveyor is indeed to measure the quantum of encroachment and the 2nd respondent also has no objection for appointment of commissioner. Thus, he would pray for allowing the revision petition.

4.The learned counsel for the 2nd respondent would state that the 3rd respondent/3rd defendant/revenue authority removed the encroachment made by the petitioner/plaintiff prior to the filing of the suit and the same was completely suppressed by the petitioner/plaintiff and the present commissioner application is only an attempt to collect evidence to prove possession and the same has been rightly dismissed by the learned Judge which does not require interference by this Court. In support of his contention that advocate commissioner cannot be appointed to prove possession, he would rely on various decisions.

5.Heard the learned counsel for the petitioner as well as the respondents 2 to 4. There is no appearance for the 1st respondent.

6.Perusal of record shows that the petitioner has filed a suit for permanent injunction and mandatory injunction. He has filed a petition for appointment of advocate commissioner stating that the defendants 1 and 2 have encroached 30 cents of land in the suit property and to prove the alleged encroachment, appointment of advocate commissioner is necessary. Though the 2nd respondent/2nd defendant filed counter in the commissioner application stating that the suit was dismissed for default in 2017 and it was restored in 2020 and only on the date fixed for trial, the commissioner application has been filed with an intention to drag on the proceedings, he had stated that he has no objection for appointment of commissioner. The learned Judge relying upon the decisions in Selvaraj vs. Kalarani, [2017 SCC Online Mad 25869] and Dhanalakshmi vs. Kumaresan [2017 SCC Online Mad 19229], dismissed the commissioner application as not maintainable holding that it is nothing but an attempt to find out possession of the property.

7.When there is an allegation of encroachment of land, advocate commissioner can be appointed for local investigation, as mere oral evidence will not aid either party to decide the issue of encroachment and such appointment cannot be said to be for collection of evidence as the object of local investigation itself is to collect evidence.

8.In Pormusamy Pandaram vs. The Salem Vaiyappamalai Jangamar Sangam reported in AIR 1986 Mad 33, this Court has held as follows:-

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''..... A controversy as we could see from the pleadings, has arisen as to whether the constructions put up by the third defendant are within his land or whether they have encroached into the lands of the plaintiff. A local investigation is the best way to find out the position and the party, namely, the third defendant coveting to place the evidence before the court through local investigation by the Commissioner cannot be shut out of that right.''

9.In Shanmugathai vs. Kamalammal and another reported in 2017 (2) CTC 353, this Court has held that in a case of encroachment, appointment of commissioner is necessary to have picture of property to decide encroachment and noting physical feature would not amount to collection of evidence.

10.As per the above judgments, in cases of encroachment, commissioner can be appointed to find out the quantum of encroachment, but the learned Judge on erroneous appreciation that filing of commissioner application is nothing but an attempt to find out the possession of the property, dismissed the commissioner application which in my opinion is not correct and therefore, the order passed by the learned Judge is liable to be set aside.

11.Accordingly, the fair and decreetal order passed in I.A.No.2 of 2020 in O.S.No.26 of 2015 on the file of the District Munsif, Theni, dated 02.11.2020, is set aside. The learned Judge shall pass appropriate orders in I.A.No.2 of 2020 appointing commissioner within a period of four weeks from the date of receipt of a copy of this order.

12.With the above direction, this Civil Revision Petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (AD II)

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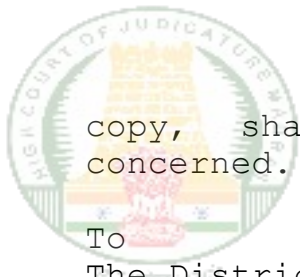
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Sub Assistant Registrar (CS)

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NOTE: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct

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copy, shall be the responsibility of the advocate/litigant concerned.

To
The District Munsif,
Theni.

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+1 CC to M/s.SPL GP (SR-12569[F] dated 19/03/2021)

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DATED : 18.03.2021

KK(03.06.2021) 4P 3C