



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 11.08.2021

Pronounced on : 26 .08.2021

CORAM:

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

C.R.P. (MD) No.1550 of 2014

and

MP (MD) No.1 of 2014

WEB COPY

1. Kovilpillai Asirvatham
2. Thaniyel

... Revision Petitioners/
Petitioners/ Plaintiffs

-vs-

1. Pitchai @ Santhana Viyagappan
2. Arockia Thayonish

... Respondents/Respondents/
Defendants

PRAYER: Civil Revision Petition is filed under Article 227 of Constitution of India , to set aside the order passed in I.A.No.123 of 2014 in O.S.No.29 of 2013 on the file of the District Munsif Court, Sathankulam dated 04.04.2014.

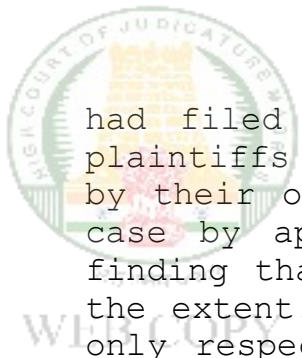
For Petitioners : Mr. C.K.M.Appaji

For Respondents : Mr.J.Ashok

O R D E R

The present Civil Revision Petition has been filed seeking to set aside the order passed in IA No. 123 Of 2014 in O.S.No.29 Of 2013 on the file of the District Munsif Court, Sathankuulam dated 04.04.2014 dismissing the petition filed to appoint an Advocate Commissioner.

2. The petitioners /plaintiffs have filed a suit in O.S.NO. 29 of 2103 seeking for declaration and mandatory injunction. The petitioners had claimed that the suit second scheduled property belongs to the first plaintiff and the suit first scheduled property belongs to the second scheduled property and they have also filed a petition for mandatory injunction to remove the structure put up on the suit scheduled property one property and hand over the possession of the same to the first plaintiff. The respondents/defendants had filed a written statement . During the pendency of the suit the petitioners/plaintiffs had filed IA No. 123 of 2014 seeking to appoint an Advocate Commissioner to measure the property with the help of a qualified surveyor and to give a report about the features along with a plan. The respondents/ defendants



had filed a counter resisting the claim of the petitioners/ plaintiffs stating that petitioner/ plaintiff can prove their case by their own documents and they cannot be permitted to prove their case by appointment of an advocate commissioner. The trial Court finding that there was no dispute in respect of the schedule and the extent. Moreso, the trial Court finding that the dispute was in only respect of possession had dismissed the petition holding that the petitioner/plaintiff cannot be allowed to grant the prayer of appointing the advocate commissioner had dismissed the petition. Against which the present revision has been filed.

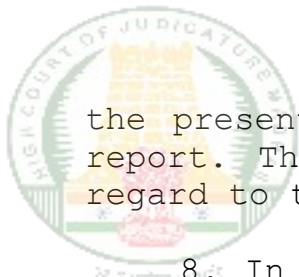
3. The learned counsel for the petitioners would submit that the prayer of the petitioners is only to find out the physical features and nature of the property by measuring the same through the local surveyor and to file a report, whereas the trial Court on wrong premise that the petitioners had attempted to make out the case had wrongly dismissed the petition.

4. As per Order 26 Rule 9 of the Civil Procedure Code in any suit when a local investigation is requisite or proper for the purpose of elucidating any matter in dispute, the Court may issue commission to make such investigation and file a report thereon. In this case the report of the commissioner is required so as to prove the boundaries and extent and thereby the petition was filed, whereas the trial court had wrongly dismissed the same.

5. Per contra, the learned counsel for the respondent would submit that the case of the petitioners/plaintiffs is that the respondent are alleged to have encroached upon the property of the petitioners/plaintiffs. When that is so, the plaintiffs have to prove their case by adducing evidence on their own they cannot be allowed to prove the factum of the same by the report of the Commissioner. The trial Court rightly finding that there was no dispute with regard to the boundaries and the extent and finding that the petitioners/plaintiffs cannot be allowed to bring in evidence through appointment of commissioner had rightly dismissed the same and there is no infirmity or error in the order passed by the trial Court.

6. Heard the learned counsel for the petitioners/Plaintiffs and the learned counsel for the respondents/defendants.

7. Before the trial Court it is the case of the plaintiffs that the respondents/defendants had encroached upon their property and had put up fence and put up temporary shed in that area. However it is the case of the respondents that the plaintiffs had attempted to illegally take possession based on the patta and that the petitioners/plaintiff had made a false claim. The petitioners/plaintiff had not let in evidence to prove that the respondents/defendants had encroached upon the property where as



the present petition had been filed to measure the area and file a report. The trial Court finding that there was no dispute with regard to the boundaries or extent had rejected the petition.

8. In **K.M.A Wahab and others vs. Eswaran and another** reported in **2008(3)CTC 597** this Court has held that sofar as the factum of the possession is concerned Court alone can gather evidence and it cannot entrust the matter to the Advocate Commissioner to collect the evidence. In the case of **Jabeen Taj vs. M. Parveen Banu** reported in **2005(3)MLJ 24 B**, it has been held that when there is no dispute with regard to the property there is no reason to appoint the advocate Commissioner. In **Puttappa .vs. Ramanappa in AIR 1996 Karnataka 257** had held that the Commissioner cannot be appointed to find out who is in possession of the property . Further, in the suit for possession the question of who is in possession of property is a matter to be decided by the Court on the basis of evidence either orally or documentary to be adduced by the parties and that the function cannot be delegated to the advocate commissioner to find out as to who is in possession of the property. In this case as rightly pointed out by the Trial Court, there was no dispute with regard to the boundaries or extent of the property. In such circumstances, this Court is of the considered view that the trial Court had rightly dismissed the petition. I do not find any infirmity or error in the order passed by the trial Court.

9. In the result, the Civil Revision Petition stands dismissed. No costs. Consequently connected miscellaneous petition is also closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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To:

The District Munsif Court, Sathankulam

C.R.P. (MD) No.1550 of 2014

and

MP (MD) No.1 of 2014

26.08.2021

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