



C.R.P.No.791 of 2020
and C.M.P.No.4241 of 2020

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.11.2022

CORAM :

THE HONOURABLE MRS. JUSTICE **R.HEMALATHA**

C.R.P.No.791 of 2020

and

C.M.P.No.4241 of 2020

1. S.K. Selva Murugan

2. T. Thirumal

3. K. Rajeswari

... Petitioners

Vs.

V.C. Vadivudaiyan

... Respondent

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decreetal orders dated 14.11.2019, made in I.A. No.3 of 2019 in O.S. No.1796 of 2019 on the file of VII Assistant City Civil Court, Judge, Chennai.

For Petitioners : Mr. R. Thiagarajan

For Respondent : Mr. B.L. Jayakandan

ORDER

This Civil Revision Petition is filed against the fair and decreetal orders dated 14.11.2019, made in I.A. No.3 of 2019 in



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WEB COPY O.S.No.1796 of 2019 on the file of VII Assistant City Civil Court,
Chennai.

2. The revision petitioners are the owners of flat No. F6, F5 & F4 respectively in Chandrasekar Foundation Manoj Flats, bearing Door No.40/25, Bharathi Street, Gandhi Nagar, Saligramam, Chennai-93. The respondent / defendant is the owner of G1 flat in the ground floor. The entire apartment complex consists of 6 apartments namely 3 in the ground floor and 3 in the first floor.

3. The petitioners had filed O.S.No.1796/2019 before the VII Assistant Judge, City Civil Court seeking for a relief of declaration that 240 sq. ft. of the covered common area on the western side of the building cannot be used as an exclusive car parking area of the defendant and also for a permanent injunction restraining the defendant or his men and agents from using the common area of 240 sq. ft. as his exclusive car parking area.



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4. This being so, an application in I.A. No.3/19 under Order XXVI Rule 9 CPC was filed by the plaintiffs for appointment of an Advocate Commissioner to inspect the apartment premises and submit a report on the facts. This I.A. was resisted by the defendant stating that only 3 owners out of the remaining 5 flats had filed this O.S.1796/2019 and therefore the suit itself is liable to be rejected on the ground of non joinder of proper and necessary parties. Secondly, the defendant contended that he has purchased the flat G1 in the apartment complex along with a covered car parking vide sale deed dated 10.01.2017 from the vendors Muthukumar and Kutty Raj who are the sons of the original owner Ramakrishnan. It was also pointed out by him that he was a tenant in the same house before becoming the owner and was having the same privilege which his vendors were enjoying. Therefore, he prayed for dismissal of I.A. No.3/2019.

5. The learned VII Assistant Judge, City Civil Court, Chennai, dismissed I.A. No.3/2019 vide his orders dated 14.11.2019 on the ground that the dispute was not pertaining to the boundary or the extent of the



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area and furthermore with the photos of the actual site having been adduced on the side of the plaintiffs there was no necessity to appoint an Advocate Commissioner as prayed for by the plaintiffs. The present Civil Revision Petition is filed challenging this order.

6. Heard Mr. R. Thiagarajan, learned counsel appearing for the revision petitioners and Mr. B.L. Jayakandan, learned counsel appearing for the respondent.

7. The learned counsel appearing for the revision petitioners would contend that the trial court had erred in the judicial discretion of knowing the present status of the building and the alterations carried out by the respondent/defendant in order to accommodate an exclusive car parking for himself in the common area. It was also argued that though it is a parking area and the occupants of the building have been parking two wheelers in that area, the act of the respondent in demolishing and reconstructing the gate to accommodate his car and thereby restricting the free movement of the other occupants around the building would be more



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evident only if an Advocate Commissioner is appointed to note down the physical features of the flat's common area utilised for two wheeler parking, side set back and the recently erected grill gates which would help the trial court to get a better picture as to the hindrance caused to the other occupants. It was also pointed out by him that the respondent/defendant instead of admitting that he had illegally encroached upon the common area to carve out a space for his car parking has instead tried to argue on certain point which have to be discussed only in the main trial. He also further contended that the building is facing the main road and the portion in which a new grill gate has been erected is protruding towards the main road.

8. Per contra, the learned counsel appearing for the respondent would contend that he is in possession of a valid sale deed for the covered car parking area too and if at all there is an objection for disturbance to the parking of car in the area, it should have come from the other occupants of the ground floor and not from the present plaintiffs who are all residing in the first floor of the building.



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9. It is well settled that to adjudicate on such disputes the need to know the exact extent of alleged encroachment or alleged alteration to any building can be satisfied only by appointment of an Advocate Commissioner. The task of an Advocate Commissioner would throw more light into the actual facts in the spot and the same may not find a place by merely looking into the photographs. The Apex Court in the decision in ***Badana Mutyalu and another vs. Palli Alppalaraju*** has held that in circumstances where there is controversy as to identification, location or measurement of the land, local investigation should be done by appointing an Advocate Commissioner. In the case of ***Jajula Koteswar Rao vs. Ravulapalli Masthan Rao***, the Supreme Court held that the object of the local investigation under Order XXVI Rule 9 CPC is to collect evidence at the instance of the party who relies on the same and which evidence cannot be taken in court but can be taken only from the peculiar nature, on the spot. The commissioner in effect is a projection of the Court appointed for a particular purpose. The law of evidence enjoins upon a party to prove the fact which he relies on and in that sense, an obligation is cast upon the party; and if he fails to discharge that



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obligation, adverse consequence will follow and he will have to face the repercussions of the same. This right of the party to adduce evidence gets adjudicated in the interlocutory proceedings under Order XXVI Rule 9 CPC.

10. Therefore it is abundantly clear that the appointment of an Advocate Commissioner at this stage will only be helpful to the court to adjudicate the dispute which has arisen in the apartment complex. It can also be seen that the appointment of Advocate Commissioner should not be construed as an aspect favouring the party requesting for such an appointment since the report may also fail the party who seeks the same. Therefore, in the interest of justice, Mr. Yashwant Rajan,D., Enrolment No.2097/2016, Ph.No.9042404030 is appointed as an Advocate Commissioner to inspect the said property and submit a detailed report before the trial court, namely, VII Assistant Judge, City Civil Court within one month from today. His initial remuneration is fixed as Rs.25,000/- which shall be paid by the petitioners directly to the Advocate Commissioner under intimation to this Court.



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11. In the result,

- i. the Civil Revision Petition is allowed. No costs. Consequently connected miscellaneous petition is closed.
- ii. the fair and decreetal orders dated 14.11.2019, made in I.A. No.3 of 2019 in O.S. No.1796 of 2019 on the file of VII Assistant City Civil Court, Judge, Chennai, is set aside.

15.11.2022

Index: Yes/No
Internet: Yes/No
Speaking/Non-Speaking order
bga

To

The VII Assistant Judge, City Civil Court, Chennai.

Copy to

Mr. Yashwant Rajan,D., Advocate Commissioner

Enrollment No.2097/2016, Ph.No.9042404030

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