



C.R.P(PD)No.2852 of 2016

C.R.P(PD)No.2852 of 2016

WEB CO **J.SATHYA NARAYANA PRASAD, J.**

Today, this Civil Revision Petition is listed under the caption, “For Being Mentioned” at the instance of the learned counsel for the respondents 2 to 6.

2. Mr.N.Vanaraj, the learned counsel appearing for the respondents 2 to 6 submitted that his name has been wrongly typed as Mr.N.Vanraj in the bottom line of the first page and also, in the 1st line of the fifth paragraph of the order dated 22.03.2022 passed in C.R.P(PD)No.2852 of 2016. He further submitted that in this case, the 'northern side of the 'B' schedule property is a water body' and the petitioners are trying to encroach the same, but, in the last four lines of the fifth paragraph of the order, it has been wrongly typed as “*the 'B' schedule property is a water-body and the petitioners/plaintiffs are trying to encroach the same. The petitioners/plaintiffs have not come to the Court with clean hands since their only ulterior motive is to encroach upon the 'B' schedule property.*” Therefore, he prayed that the aforesaid typographical errors may be rectified.

3. The learned counsel for the petitioners has no serious objection for rectifying the aforesaid typographical errors crept-in, in the order dated 22.03.2022 passed in C.R.P(PD)No.2852 of 2016.



4. Considering the submissions made by the learned counsel on either side, this Court is inclined to rectify the aforesaid typographical errors crept-in, in the bottom line of the first page as well as in the fifth paragraph of the order dated 22.03.2022 passed in C.R.P(PD)No.2852 of 2016 and the same are accordingly, rectified. The bottom line of the first page of the order reads as follows:

“Respondents – 2 to 6 : Mr.N.Vanaraj”

and the fifth paragraph of the said order reads as follows:

“5. Mr.N.Vanaraj, learned counsel appearing for the respondents mainly contended that the petitioners/plaintiffs have filed I.A.No.43 of 2016, seeking for appointment of an Advocate Commissioner only with an intention to collect the evidence and nothing else. The prayer in the aforesaid application is “to appoint an Advocate Commissioner to note down the physical features available in the suit properties, mode of enjoyment of 'B' schedule property and direct him to file a detailed report with plan”, which clearly shows that the petitioners/plaintiffs are trying to collect the evidence to prove their enjoyment of 'B' schedule property. He further contended that the northern side of the 'B' schedule property is a water-body and the petitioners/plaintiffs are trying to encroach the same. The petitioners/plaintiffs have not come to the Court with clean hands since their only ulterior motive is to encroach upon the water-body situated on the northern side of the 'B' schedule property.”



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5. In all other aspects, the order dated 22.03.2022 passed in C.R.P(PD)No.2852 of 2016 remains the same. Registry is directed to issue a fresh order copy to all concerned, after carrying out the aforesaid corrections.

25.03.2022

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25.03.2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS



<i>Reserved on</i>	<i>11.03.2022</i>
<i>Pronounced on</i>	<i>22.03.2022</i>

Coram

The Honourable Mr.Justice J.SATHYA NARAYANA PRASAD

**C.R.P(PD)No.2852 of 2016
and C.M.P.No.14527 of 2016**

1.G.Udayathammal
2.K.Kritika

...Petitioners

Versus

1.S.Venkatesan Pillai (Died)
2.Usha
3.Rajendran
4.Ravi
5.Leema
6.Sankar

(Respondents 2 to 6 were brought on record as legal representatives of the deceased first respondent vide order dated 18.02.2022 made in C.M.P.No.20540 of 2021 in C.R.P(PD)No.2852 of 2016) ...Respondents

This Civil Revision Petition is filed under Article 227 of the Constitution of India praying to set aside the fair and final order of the Principal District Munsif Court, Mayiladuthurai dated 20.04.2016 made in I.A.No.43/2016 in O.S.No.249/2014 and allow the said application.

For Petitioners	:	Mr.S.Sounthar
For Respondent - 1	:	Died
Respondents – 2 to 6	:	Mr.N.Vanraj

ORDER



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WEB COPY This Civil Revision Petition has been filed by the petitioners challenging the order passed by the learned Principal District Munsif, Mayiladuthurai in I.A.No.43 of 2016 in O.S.No.249 of 2014 dated 20.04.2016, dismissing the Interlocutory Application filed by them, for appointment of Advocate Commissioner.

2. The brief facts of the case are as follows:

The plaintiffs in the suit are the revision petitioners herein. The immovable properties, more particularly, described in the suit schedule are punja house site and pathway situate at Sitharkadu Village, Mayiladuthurai Taluk. The deceased first respondent/defendant is the owner for entire R.S.Nos.480/4 & R.S.No.496/1. He formed a house site lay-out comprising several plots. A pathway to a breadth of 10 feet had been formed in the middle and house site plots were carved on the either side of the pathway. The pathway is running north-south and plots were on the eastern side as well as on the western side. The pathway is described as 'B' schedule property. The first petitioner/first plaintiff had purchased a plot vide



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registered sale deed dated 22.03.1995, which is situated on the east of the pathway, on the extreme north, which is suit 'A' schedule property. After the purchase of suit schedule property by the first petitioner/first plaintiff, the suit property is sub divided as R.S.No.480/4B. The first petitioner/first plaintiff has purchased 2,646 Sq.ft., but on earth available extent is only 2,340 Sq.ft. Thereafter, she sold the southern portion of the schedule property to her daughter who is none other than the second petitioner/second plaintiff, by way of registered sale deed dated 12.03.2014.

2.1. Though portion of 'A' schedule property had been sold to the second petitioner/second plaintiff, but on earth, the entire 'A' schedule property is enjoyed as a single unit without any demarcation. So the petitioners/plaintiffs have jointly filed the suit. Even in the sale deed dated 22.03.1995 which was executed in favour of the first petitioner/first plaintiff, the western boundary is shown as 10 feet breadth common pathway, namely, the suit 'B' schedule property. Without 'B' schedule property viz., common pathway, the petitioners/plaintiffs cannot enjoy the 'A' schedule property. The petitioners/plaintiffs have got right of easement over the 'B'



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schedule property. The said 'B' schedule property is all along enjoyed by the first plaintiff right from the date of her purchase, as a pathway to the suit, 'A' schedule property.

2.2. The deceased first respondent/defendant has no right to curtail or obstruct or diminish the utility of the 'B' schedule property by any means, so as to affect the ingress and egress of petitioners/plaintiffs. But all of a sudden, on and from 22.09.2014, the deceased first respondent/defendant is proclaiming that he will allot only 2 feet breadth passage abutting suit 'A' schedule property on its west and he will use the remaining portion of pathway for his house construction. This has necessitated the petitioners/plaintiffs to file the suit O.S.No.249 of 2014 for a decree of permanent injunction restraining the deceased first respondent/defendant, his men or his agents or servants or any person acting under him or through him from in any way obstructing, curtailing, plaintiffs' free movement of ingress and egress over the suit 'B' Schedule property by putting up any construction or super structure in the suit 'B' schedule property.



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3. The deceased first respondent/defendant has filed his written statement on 15.12.2014, in which, he has categorically denied that 'B' schedule property is not a common pathway and that the petitioners/plaintiffs are using the 'B' schedule property to access their 'A' schedule property. Moreover, the plaintiffs do not have right of easement over the 'B' schedule property. He further denied the statement made by the petitioners/plaintiffs in the plaint that the said 'B' schedule property is all along enjoyed by the first petitioner/first plaintiff right from the date of her purchase, as a pathway to the suit 'A' schedule property.

4. Mr.S.Sounthar, learned counsel for the petitioners would contend that in view of the denial by the deceased first respondent/defendant in regard to the usage of the 'B' schedule property as a pathway to approach the 'A' schedule property owned by the petitioners/plaintiffs, the petitioners/plaintiffs decided to file an application for appointment of Advocate Commissioner.



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4.1. The petitioners/plaintiffs have filed an Interlocutory Application in I.A.No.43 of 2016 under Order XXVI Rule 9 of C.P.C, seeking to appoint an Advocate Commissioner to note down the physical features available in the suit properties, mode of enjoyment of 'B' schedule property and direct him to file a detailed report with plan.

4.2. In the above application, no counter affidavit has been filed by the deceased first respondent/defendant. On 20.04.2016, even though the counsel on record for the deceased first respondent/defendant was present before the Court, the deceased first respondent/defendant was set *ex-parte* by the trial Court for the reason that despite several opportunities were given to the deceased first respondent/defendant for filing the counter affidavit, he did not choose to file the same and

4.3. The learned counsel for the petitioners further submitted that the petitioners/plaintiffs have filed the application for appointment of Advocate Commissioner, only to establish that the formation of 10 feet breadth



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pathway and how it is used as pathway to the plots situate on either side since they apprehend that the deceased first respondent/defendant may erase these physical features at any time. He further submitted that conducting a local inspection in the suit property by an Advocate Commissioner will give quietus to this dispute. He therefore prayed that this Civil Revision Petition may be allowed.

5. Mr.N.Vanraj, learned counsel appearing for the respondents mainly contended that the petitioners/plaintiffs have filed I.A.No.43 of 2016, seeking for appointment of an Advocate Commissioner only with an intention to collect the evidence and nothing else. The prayer in the aforesaid application is “to appoint an Advocate Commissioner to note down the physical features available in the suit properties, mode of enjoyment of 'B' schedule property and direct him to file a detailed report with plan”, which clearly shows that the petitioners/plaintiffs are trying to collect the evidence to prove their enjoyment of 'B' schedule property. He further contended that the 'B' schedule property is a water-body and the petitioners/plaintiffs are trying to encroach the same. The



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petitioners/plaintiffs have not come to the Court with clean hands since their only ulterior motive is to encroach upon the 'B' schedule property.

6. Heard the learned counsel on both sides and perused the materials available on record.

7. From a perusal of the materials placed before this Court, it is crystal clear and evident that the petitioners/plaintiffs have filed I.A.No.43 of 2016 only with an intention to collect the evidence in regard to their enjoyment of 'B' schedule property. The petitioners/plaintiffs have to prove their enjoyment of 'B' schedule property only by oral evidence and documents such as revenue records and not through an Advocate Commissioner. Moreover, the said application was filed by them only after the issues were framed by the trial Court.

8. As far as this case is concerned, both oral and documentary evidence are available. So, there is no necessity to appoint the Advocate Commissioner to inspect the suit property.



9. Moreover, it is a well settled law that an Advocate Commissioner cannot be appointed to collect oral or documentary evidence and it is the duty cast upon the petitioners/plaintiffs to prove their case by adducing an oral and documentary evidence. In the case of ***Rangasamy Vs. The Superintending Engineer, Tamil Nadu Electricity Board, Mettur Electricity System, Mettur Dam, Salem District and Ors.*** reported in **2006 4 LW 525**, this Court has held as follows:

“7. The object of the local investigation under Order 26 Rule 9 is not to collect evidence. Such materials enable the Court to properly and correctly understand and assess the evidence on record, which clarifies or explains any point, which is doubtful on the evidence on record. The Court shall not appoint an Advocate Commissioner for taking measurement of the suit properties in a mechanical manner without considering the need for appointment of an Advocate Commissioner. If the Court deems fit that local investigation is requisite or proper, for the purpose of elucidating the matter in dispute, then the appointment of an Advocate Commissioner is justified. If there is any doubt about the area of the land, identification or location of an object, then local investigation is necessary. In the instant case, there is absolutely no doubt about the location of the well in R.S.No.209/10 and that therefore, there is no necessity for measurement.



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8. *The Lower Court has properly considered the materials on record and found that there is no need to appoint an Advocate Commissioner. There is no error in the said order warranting interference.”*

Also, in the case of ***Chinnathambi and Ors. Vs. Anjali*** reported in **2006 4 LW 516**, this Court has observed as follows:

“8. In the instant case, the suit is for permanent injunction and admittedly, interim injunction has been granted on 19.11.2003 and nearly after 1 year and 7 months, the petitioners have taken out an application for appointment of an Advocate Commissioner. Even as per the averments made in the petition, the respondent/plaintiff has stated that the petitioners/defendants are making arrangements to obliterate her cart-track or land and also proposed to encroach a further extent of 0.09 cents. Whereas, there is no averment in the plaint that there is an encroachment of land.

It is a well accepted principle of law that an Advocate Commissioner should not be appointed to find out the possession of the property. Which has to be adjudicated only by oral and documentary evidence. Under such circumstances, the order of the Lower Court suffers from material irregularity and it is not in



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accordance with the principles laid down in the above decisions”.

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10. The trial Court has rightly dismissed the application filed by the petitioners/plaintiffs for appointment of Advocate Commissioner under Order XXVI Rule 9 of C.P.C. I do not find any infirmity in the order of the learned Principal District Munsif, Mayiladuthurai.

11. Considering the facts and circumstances of the case and in the light of the decisions of this Court in the cases of ***Rangasamy Vs. The Superintending Engineer, Tamil Nadu Electricity Board, Mettur Electricity System, Mettur Dam, Salem District and Ors.*** reported in ***2006 4 LW 525*** and ***Chinnathambi and Ors. Vs. Anjali*** reported in ***2006 4 LW 516***, the order passed by the learned Principal District Munsif, Mayiladuthurai in I.A.No.43/2016 in O.S.No.249/2014 dated 20.04.2016 is hereby confirmed and this Civil Revision Petition is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.



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Index : Yes/No

Speaking Order (or) Non-Speaking Order

J.SATHYA NARAYANA PRASAD, J.

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To

The Principal District Munsif Court,
Mayiladuthurai.

Pre-Delivery order
in C.R.P(PD)No.2852 of 2016

22.03.2022

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