



IN THE HIGH COURT OF JUDICATURE AT MADRAS

<i>Reserved on</i>	10.02.2022
<i>Pronounced on</i>	16.02.2022

CORAM :
THE HONOURABLE MR. JUSTICE J.SATHYA NARAYANA PRASAD

Civil Revision Petition (PD) No.3272 of 2016

1. S.Palanivel
2. P.Sakthivel ... Petitioners

Vs.

Mathaiyan ... Respondent

Civil Revision Petition filed under Article 227 of the Constitution of India, praying to set aside the fair order and the decretal order dated 07.09.2016 passed in I.A.No.1116 of 2015 in O.S.No.6 of 2012 on the file of the District Munsif cum Judicial Magistrate Court, Pappireddipatti.

For Petitioners : M/s.R.Neelakandan

For Respondent : M/s.G.Arul Murugan

ORDER

This Civil Revision Petition was filed challenging the order and decretal order in I.A.No.1116 of 2015 in O.S.No.6 of 2012 dated 07.09.2016 passed by the learned District Munsif Cum Judicial Magistrate, Pappireddipatti.

2. The petitioners are the defendants in the suit in O.S.No.6 of 2012



which has been filed by the respondent herein for declaration and for permanent injunction, restraining the defendants from interfering with the peaceful possession and enjoyment of the A,B,C,D,E,F cart-track (Vandi pathai/வண்டி பாதை)

3. The I.A.No.1116 of 2015 was filed under Order XXVI Rule 9 r/w section 151 of Civil Procedure Code by the respondent / plaintiff for appointing a Advocate Commissioner to collect evidence and the same was allowed by the Trial Court. The reason stated in the affidavit filed in support of I.A.No.1116 of 2015 is that to prove the existence of the suit cart-track and to support the plaintiff's case, he sought for appointment of Advocate Commissioner.

4. The learned counsel for the petitioner contended that the reason given in the affidavit filed in support of I.A.No.1116 of 2015 for appointment of Advocate Commissioner to collect evidence in support of the case of the plaintiff should not be allowed, since it is duty of the plaintiff to prove the existence of the cart-track by way of adducing his own oral evidence and documentary evidence and not through the Advocate Commissioner. Apart



from this, there is no specific existence of the suit cart-track given in the petition by the respondent/plaintiff, hence the Advocate Commissioner cannot be appointed for collecting the same. Moreover, the plaintiff does not have any right over any property mentioned in the suit schedule as the entire property belongs to the defendants. Hence, there is no prima facie case made out by the plaintiff to seek for the appointment of Advocate Commissioner. He further added that the respondent/plaintiff is attempting to confuse the facts as to the location of his properties and the access to the alleged cart-track (Vandi pathai - வண்டி பாதை)

5. He further contended that in the application filed by the plaintiff for appointment of Advocate Commissioner, it is stated that only after seeing the written statement of the defendants, the very existence of the alleged suit cart-track was disputed. The written statement was filed as early as on 24.05.2012 but the application for appointment of Advocate Commissioner was filed only during September 2015, which is after a lapse of more than three years and there is no valid or sufficient reason given for the inordinate delay in filing the application.

6. The learned counsel for the respondent submitted that in the written



statement filed by the petitioners/defendants, they have categorically stated that there is no cart-track in E,B,F,D portions. Even in paragraph 14 of the written statement filed by the petitioners/plaintiffs stated that there is no cart-track in the A,B,C,D,E,F schedule property and the plaintiff has falsely shown that there is a cart-track in E,B,F,D portions and it can be seen from the F.M.B sketch and the documents that there is no cart-track as stated in the schedule property. The true fact is that the plaintiff has filed a false and vexatious suit as if there is a cart-track in the schedule property. If there was any cart-track, it would have been clearly reflected / shown in the F.M.B Sketch.

7. The Trial Court in its order has observed that the defendants in paragraph 14 of the written statement have stated that there is no cart-track. So whether there is a cart-track is in existence or not is the issue that to be decided in this case/suit. The petitioners/defendants in their counter affidavit have stated that the petition for appointment of Advocate Commissioner is to drag on the proceedings, and the learned counsel for the petitioner submitted that the application for appointment of Advocate Commissioner is filed only after the written statement filed by the defendants. The Advocate Commissioner cannot be appointed for collecting the evidence and it is for the



respondent/plaintiff to prove his case by adducing oral evidence and supported by documentary evidence. The first issue to be decided in the suit is that, whether the cart-track is in existence or not? This can be decided only by way of appointing an Advocate Commissioner and for these reasons, the petition was allowed by the Trial Court.

8. On a perusal of the materials and documents available on record, it is crystal clear that the purpose for appointing Advocate Commissioner is only to collect the evidence in support of the case of the petitioners which is not sustainable in law. The plaintiff has to prove his case only by his own/oral evidence and documentary evidence and not through the Advocate Commissioner. The written statement was filed as early as on 25.04.2012, whereas the application for appointment of Advocate Commissioner to record/collect the evidence was filed only after a lapse of three years i.e., in the year 2015 which indicates the clear intention of the respondent/plaintiff is to protract the proceedings when the Suit is in the Trial stage.

9. The learned counsel for the petitioner relied on the judgment of this Court passed in C.R.P(PD)No.1461 of 2005 dated 13.09.2006 reported in



2006-4-L.W.525 in the case of Rangasamy Vs. The Superintending Engineer, Tamilnadu Electricity Board, Mettur Electricity System, Mettur Dam, Salem District and others. For better appreciation the relevant paragraphs are extracted hereunder:

“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”.

And further relied on the judgment of this Court in C.R.P(PD)No.1721 of 2005 and C.M.P.No.19371 of 2005 reported in 2006-4-L.W.516 in the case of Chinnathambi and others Vs. Anjali. The relevant portions are extracted 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



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evidence. Under such circumstances, the order of the Lower Court suffers from material irregularity and it is not in accordance with the principles laid down in the above decisions”.

10. On considering the facts and circumstances of the case and relying upon the decision of this Court, the order passed by the learned District Munsif cum Judicial Magistrate, Pappireddipatti is liable to be set aside and the same is set aside.

11. Accordingly, this Civil Revision Petition stands allowed. Consequently, connected C.M.P.No.16618 of 2016 is closed. No costs.

16.02.2022

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Index : Yes/No
Speaking Order/Non-Speaking Order



C.R.P(PD)No.3272 of 2017

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To:

The District Munsif Cum Judicial Magistrate,
Papireddipatti.

J.SATHYA NARAYANA PRASAD,J.

Page No.9 of 10



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C.R.P(PD)No.3272 of 2016

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Pre Delivery Order in
C.R.P(PD)No.3272 of 2016

16.02.2022