



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 14.06.2022

CORAM:

THE HONOURABLE MR.JUSTICE B.PUGALENDHI

CRP(PD) (MD)No.1817 of 2021 and
CMP(MD) No.9746 of 2021

Suyambu

... Petitioner

Vs

1.Balakrishnan

2.The Commissioner of Municipality,
Thoothukudi Corporation,
Thoothukudi.

3.The Town Planning Officer,
Thoothukudi Corporation,
Thoothukudi.

... Respondents

Prayer: Petition filed under Article 227 of the Constitution of India, to call for the records relating to the order, dated 07.09.2021, made in I.A.No.1 of 2020, in O.S.No.70 of 2020, on the file of the District Munsif Court, Thoothukudi and set aside the same.

For Petitioner:	Mr.J.Anandkumar
For R1	: Mr.S.Selva Aditya for Mr.G.Prabhu Rajadurai
For R2 & R3	: Mr.Shaji Bino Special Government Pleader

O R D E R

This Civil Revision Petition is filed as against the order dated 07.09.2021 made in I.A.No.1 of 2020 in O.S.No.70 of 2020, on the file of the District Munsif Court, Thoothukudi.

2.The petitioner herein filed a suit in O.S.No.70 of 2020, before the District Munsif Court, Thoothukudi, seeking declaration, declaring that the suit second schedule property is a common pathway and for a permanent injunction. Pending the suit, he has also taken up an application in I.A.No.1 of 2020, for appointment of an Advocate Commissioner that the first respondent/first defendant is attempted to encroach upon the petitioner/plaintiff's common pathway and attempted to construct compound wall. In the said I.A.No.1 of 2020, though the first respondent/first defendant has denied the averments raised in the application, he has not raised any serious objection for appointment of Advocate Commissioner. However, the



trial Court dismissed the application on the ground that the plaintiff cannot take out an application for appointment of Advocate Commissioner, to prove the possession of the suit second schedule property with him. Aggrieved over the said dismissal order, the present Civil Revision Petition is filed.

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3.The learned counsel appearing for the revision petitioner submits that since the first respondent attempted to make improvements in the suit second schedule property and in order to prove such improvements, it is essential to note down the physical features of the suit second schedule property, by way of a Commissioner's Report and hence the petitioner/plaintiff has filed the application in I.A.No.1 of 2020, for appointment of Advocate Commissioner. Yet another contention raised by the petitioner's counsel is that the first respondent, who is the contesting respondent/ first defendant in the suit has no objection in appointing the Advocate Commissioner to inspect the suit second schedule property. While so, the trial Court dismissed the application on a total misconception of facts. Hence, the order of the trial Court is liable to be set aside.

4.In response, Mr.S.Selva Aditya, learned counsel appearing for the first respondent submits that the trial Court has rightly dismissed the application filed by the petitioner/plaintiff, seeking appointment of Advocate Commissioner, since the petitioner/plaintiff attempted to prove his possession of the suit second schedule property by way of a Commissioner's report. To substantiate his contention, the learned counsel has relied upon the judgment of this Court, in **K.M.A.Wahab and 5 others Vs. Eswaran and another**, reported in **2008 (3) CTC 597**, wherein, it was held as follows:-

"6.This Court has carefully considered the arguments put forth on either side. Order 26 Rule 9 of CPC states as follows:-

'9.Commissions to make local investigations.- In any Suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court: Provided that, where the State Government has made Rules as to the persons to whom such commission shall be issued, the Court shall be bound by such Rules.'

It is evident from the abovesaid provision of law that a Court may appoint a Commissioner in any Suit where it

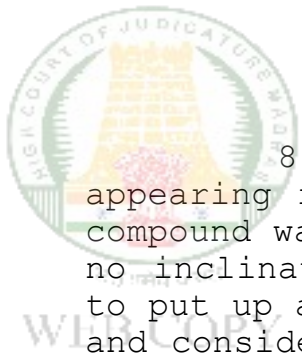


deems a local investigation to be requisite for the purpose of elucidating any matter in dispute. It is necessary to point out in the affidavit filed in support of I.A.No.697 of 2006, it is stated by the respondent therein that he is alone in possession by cultivating the suit property and only to seek to find out the factum of possession, he sought for appointment of the Advocate Commissioner under the pretext of taking of the physical features indirectly. Such reasons ought to have been rejected by the Trial Court as untenable. As far as the factum of possession is concerned, the Court alone gather evidence through the parties and it cannot entrust the said matter to the Advocate-Commissioner to collect the evidence. As held in the judgment reported in Jabeen Taj V.M.Parveen Banu, 2005(3) MLJ 24, inasmuch as there is no dispute with regard to the identity of the property, the trial Court has no reason to appoint the Advocate Commissioner. Similarly, in the other judgment reported in Chandrasekaran and 6 others V.V.Doss Naidu, 2006(2) LW 159, it is held that through remuneration is paid by the party, who sought for appointment of the Advocate Commissioner, as such no prejudice will be caused to the other side, is not at all relevant factor for appointment of the Advocate Commissioner."

5.This Court considered the rival submissions made and also perused the materials placed on record.

6.The petitioner has filed a suit in O.S.No.70 of 2020, before the District Munsif Court, Thoothukudi, for declaration declaring that the suit second schedule property is a common pathway and also for permanent injunction. He also taken out an Interlocutory Application in I.A.No.1 of 2020, for appointment of Advocate Commissioner that the suit second schedule property is in his possession. It is the main contention of the petitioner that the defendant is attempted to encroach upon the pathway and also attempted to construct a compound wall in the subject property. During the course of arguments, the learned counsel appearing for the first respondent/first defendant submits that the averment of the petitioner is false and there is no attempt on the part of the first respondent/first defendant for constructing any compound wall in the suit second schedule property. The learned counsel further submits that he is not at all inclined to put up any construction, pending suit, provided, if the plaintiff/petitioner will co-operate for early disposal of the suit within a reasonable time.

7.In reply, the learned counsel appearing for the petitioner also consented to co-operate for early disposal of the



8. Recording the said submission of the learned counsel appearing for the first respondent/first defendant that there is no compound wall in the suit second schedule property and also there is no inclination on the part of the first respondent/first defendant to put up any construction in the subject property, pending the suit and considering his intention for early disposal of the suit within a reasonable time and also taking into consideration the fact that the learned counsel appearing for the petitioner also consented for the same, this Civil Revision Petition is dismissed with a direction to the trial Court to dispose of the suit as expeditiously as possible, preferably within a period of eight months from the date of receipt of a copy of this order. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS-I)

// True Copy //

/06/2022

Sub Assistant Registrar(CS)

vrn

To

The District Munsif Court, Thoothukudi

+1 CC to M/s.J. ANANDKUMAR, Advocate (SR-25548[F] dated 14/06/2022)

+1 CC to M/s.S. SAJI BINO, Advocate (SR-25933[F] dated 15/06/2022)

+1 CC to M/s.G. PRABHU RAJADURAI, Advocate (SR-26202[F] dated 16/06/2022)

Order made in
CRP(PD)(MD)No.1817 of 2021
14.06.2022

KG(CO)

TR(28.06.2022) 4P 5C