



C.R.P (MD) No.1358 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 16.06.2022

CORAM:

THE HONOURABLE MR.JUSTICE **B.PUGALENDHI**

C.R.P (MD) No.1358 of 2017

and

CMP (MD) No.6686 of 2017

1.K.Sellammal

2.K.Sowndarajan

Vs

... Petitioner

1.M.valarmathy

2.K.Santhy

3.M.Tamizharasi

4.M.Elaiyaraja

... Respondents

PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the order passed in I.A.No.167 of 201 in O.S.No.61 of 2017 dated 17.02.2017 on the file of the Principal District Munsif Court, Kumbakonam by allowing this civil revision petition.

For Petitioner : Mr.P.Yasmin Begum

For Respondents : Mr.A.Saravanan



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ORDER

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The petitioners are the defendants in O.S.No.61 of 2013. They have filed the present civil revision petition as against the fair and decreetal order passed by the Principal District Munsif Court, Kumbakonam in I.A.No.167 of 2017 in O.S.No.61 of 2017.

2.The respondents filed a suit for permanent injunction with regard to the suit property and also has taken out an application for appointment of Advocate Commissioner under Order 26 Rule 9 of CPC. The said application was allowed by the trial Court. Aggrieved over the same the present civil revision petition has been filed.

3.Heard the learned Counsel on either side and perused the materials placed on record.

4.The learned Counsel for the petitioners/defendants submits that the suit is filed for bare injunction and in the suit for bare injunction, the Court ought not to have appointed an Advocate commissioner. The learned Counsel



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also referred to the pleading in I.A.No.167 of 2017, wherein, the respondents / plaintiffs took a plea that to have a clear picture, it is just and necessary to appoint an Advocate / Commissioner, for inspection of the suit property in order to prove the plaintiffs' possession, enjoyment and extent of land possessed by them.

5.By referring the above pleadings, the learned Counsel for the petitioners submits that the application was taken out for appointment of Advocate Commissioner, to prove the plaintiffs' possession and enjoyment and for proving the possession, the plaintiffs are not entitled for appointment of Advocate/ Commissioner, however, the trial Court has wrongly allowed the application. The learned Counsel also pointed out that the plaintiffs have not mentioned the measurement in the suit schedule property and therefore, appointment of Advocate Commissioner is of no use. The petitioner has also relied the following judgments;

(i) *Jagadeswari Vs Kandasamy and Others*, reported in 2014 - 5 L.W.361, wherein this Court has held as follows:



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"10.1. In the decision reported in 2008 (3) CTC 597, K.M.A. Wahab and others v. Eswaran and another, it was held that as far as the factum of possession is concerned, Court alone could gather evidence through parties and it cannot entrust the matter to Advocate Commissioner to collect the evidence. It is appropriate to incorporate paragraph 6 of the said decision:

6.This Court has carefully considered the arguments put forth on either side. Order 26, Rule 9, 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



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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 above said provisions 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



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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, in as much 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 though 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."

(ii) The Principal, St. Patrick School and College, Crescent Road, Gandhi Nagar, Adayar, Chennai - 20 Vs. Amaravathi (deceased) and others [CRP.No.2503 of 2009, dated 21.10.2009];



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"6.He also presses into service the decision in *Puttappa Vs Ramappa*, 1996 (2) Kar LJ 70, where it is held as follows:

" Under Order 26, CPC, a Commissioner can be appointed to make local investigation to investigate the facts or other materials which are found in the property and to make a report in regard to that matter to the Court. In a suit for injunction the question as to who is in possession of the property, is a matter to be decided by the Court on the basis of evidence, either oral or documentary, to be adduced by the parties. That function cannot be delegated to a Commissioner who cannot find out as to who is in possession of the property. Accordingly, the Lower Court was right in rejecting the Application'

In the aforesaid decision, it is held that 'A Commissioner will not be in a position to determine the question as to who is in possession of the property when there is dispute between the parties regarding the same. The Court will have to decide the matter on the basis of the evidence to be adduced by the parties. It is not the function of the Commissioner to determine or to report to the Court as to who is in possession of the same."



(iii) Thangaraj Vs Pappathi reported in 2014 (2) CTC 68,

wherein this Court has held as follows:

"5.If at all the revision petitioner himself is not confident as to where the boundary line between the suit property and the adjacent poramboke land lies, he ought to have filed the suit for demarcation of the boundary and not fir bare injunction. When the failure to give the boundaries of the suit property was made as a ground for holding that the revision petition under could not have been in possession of the suit property, such a finding could not be sought to be nullified by seeking appointment of a Commissioner to fix the boundary after measuring the suit property. If at all there is any defect in the plaint, the revision petitioner could have very well sought the permission of the Court to withdraw the suit and file a fresh suit projecting the absence of proper description of the suit property as formal and technical defect. Without doing it, the revision petitioner has chosen to indirectly convert the bare injunction suit into one for identifying and fixing the boundary of the suit property. The learned Lower Appellate Judge has rightly held that the Application could not be maintained in view of the fact that already a



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Commissioner appointed by the trial Court had visited the suit property and submitted a report and plan, which were marked as Exs.C1 and C2."

6.The learned Counsel for the respondent submits that the suit was filed for permanent injunction that the respondents/plaintiffs property has been occupied by the defendants. The defendants were issued with patta in the year 1993, wherein the measurement has been specifically measured in the patta and the boundaries are also mentioned in the suit schedule and therefore, the contention of the petitioners is not correct. The learned Counsel further submits that the pleading found in paragraph No.13 of the affidavit in the said interlocutory application is misinterpreted by the learned Counsel for the petitioners and these petitioners have made a specific plea in paragraph No.9 of the affidavit that on 14.09.2017, the respondents attempted to interfere with the peaceful possession of the suit property and also attempted to trespass into the property. He has also relied on Order 26 Rule 9 of CPC. Therefore, the trial Court has rightly allowed the application.



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7.The petitioner raised a ground that in the suit for bare injunction appointment of advocate commissioner is not necessary. However, it seen that the a specific plea in paragraph No.9 of the affidavit has been raised that on 14.09.2017, the respondents attempted to interfere with the peaceful possession of the suit property and also attempted to trespass into the property. Further, it is relevant to extract Order 26 Rule 9 of CPC as hereunder:

"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."



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8.The above provision permits a commission to make local investigation in any suit in which the Court deems a local investigation to be requisite. The trial Court by taking to consideration of the above provision, appointed an Advocate Commissioner for a local investigation for the purpose of elucidating the matter in dispute, in view of the specific plea raised by the plaintiffs.

9.For the reasons stated above, this Court is not inclined to interfere with the orders of the trial Court. Accordingly this civil revision petition is dismissed. The trial Court is directed to dispose of the suit within a period of six months from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petition stands closed.

16.06.2022

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To

The Principal District Munsif,
Kumbakonam.

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B.PUGALENDHI, J.

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