



CRP (MD) No.285 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on	04.07.2023
Pronounced on	14.07.2023

CORAM:

THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI

CRP (MD) No.285 of 2023

and

CMP(MD)No.1358 of 2023

1.Chinnathambi

2.Arumugam

... Petitioners/ Respondents 1&2/
Defendants

Vs.

Masanam

... Respondent/Petitioner/
Plaintiff

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order passed in I.A.No.4 of 2022 in O.S.No.200 of 2014, on the file of the Additional District Munsif Court, Valliyoor, dated 10.01.2023.

For Petitioners : Mr.M.Subbiah

For Respondent : Mr.S.Micheal Heldon Kumar



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ORDER

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This civil revision petition is preferred against the fair and decreetal order passed in I.A.No.4 of 2022 in O.S.No.200 of 2014, on the file of the Additional District Munsif Court, Valliyoor dated 10.01.2023.

2. While allowing the application in I.A.No.04 of 2022 filed by the respondent/plaintiff for appointment of Commissioner under Order 26 Rule 9 of CPC to make local inspection of the property with the help of surveyor to note down its physical features and measure the property and to file his report. The learned trial Judge has come to the conclusion that the appointment of the Advocate Commissioner will be helpful in deciding the issue in the suit. Aggrieved by this the present revision petition is filed by the petitioners/defendants.

3. According to the learned counsel for the revision petitioner is that the suit is only for bare injunction and the issue involved in this suit is only in respect of possession of the parties, which has to be proved only by oral and documentary evidence. An Advocate Commissioner cannot be appointed to collect evidence.



4. In the petition for appointment of Advocate Commissioner, the respondent/plaintiff has stated that he has purchased the suit property in the year 2011 in Survey No.851/1A to an extent of 10 cents. The defendants have produced the map pertaining to Survey No.851, in which it is mentioned that Survey No.851/1 was sub divided as 851/1A, 851/1B, 851/1C respectively. It is also mentioned that the extent in Survey No.851/1A is 10 cents. He further submitted that the defendants have categorically admitted that the property purchased by them is surrounded by fence and they have constructed a house in the suit property during the pendency of the suit. Therefore, to find out the real facts in Survey No.851/1A, it has become necessary for the plaintiff to seek for appointment of Advocate Commissioner and also to find out what extent the house of the plaintiff is constructed in Survey No.851/1A.

5. The claim of the respondent/plaintiff was resisted by the defendants stating that it is a suit for bare injunction in the schedule of property. The plaintiff has mentioned that he is seeking for relief of permanent injunction in respect of the property situated in Survey No. 851/1A to the extent of 368.1



square metre, which is a vacant site. He had further stated in the plaint that after resurvey, the extent in Survey No.851/1A was 0.03.90 hectare. Even in the petition for appointment of Advocate Commissioner, the plaintiff has mentioned the suit property only as vacant land. However, in the petition averments the plaintiff has stated that he is residing in the house situated in Survey No.851/1A and sought for appointment of Advocate Commissioner to inspect a house, which is not in the suit property. The attempt of the plaintiff is only to collect evidence with regard to possession and the same cannot be permitted. However, the trial Judge allowed the said application, which compelled the petitioners/defendants to file the above revision petition.

6. The learned counsel appearing for the revision petitioner would submit that the factum of possession cannot be ascertained by seeking an appointment of Advocate Commissioner. The party must prove the factum of possession by evidence. To support his contention, he has relied upon the decision reported in 2008 (5) CTC 181, in which, it is held as follows:-

"It is true that Order 26, Rule 9 of C.P.C. empowers the Court to appoint commissioner to make local investigation as it finds fit and proper based on the facts and circumstances of the



case. At this stage, it is pertinent to point out that it is not the aim of Order 26 Rule 9 of C.P.C. to assist a litigant to collect evidence, where the litigant can get evidence himself. In the instant case, the suit has been filed only for permanent injunction and as such in regard to the factum of possession, this Court opines that the lower court alone can gather evidence through the parties to the litigation and therefore, the same cannot be entrusted to the Advocate Commissioner to gather evidence and in that view of the matter, the Civil Revision Petition fails and the same is hereby dismissed in the interest of Justice."

7. On the other hand, learned counsel appearing for the respondent/plaintiff would submit that in a suit of injunction appointment of an Advocate Commissioner is very essential as the dispute is mainly with regard to extent and boundaries. For an effective adjudication, it is essential to appoint an Advocate Commissioner to elucidate the matter in dispute.

8. On perusal of the evidence of the first defendant, who was examined as D.W1, he has categorically admitted that after purchasing the suit property in the year 2011, the plaintiff has constructed the house in the



suit property. D.W1 further admitted that the western boundary in which the compound wall is situated belong to the plaintiff and further admitted that the plaintiff has constructed the house in the property purchased by him and he has no objection in decreeing the suit in respect of the property in Survey No. 851/1A in which the plaintiff has constructed the house and residing.

9. When there is categorical admission made by D.W1, this Court feels that the matter does not require an appointment of Advocate Commissioner to ascertain the boundaries and identity of the property. Moreover, it is well settled principle of law that in a suit of bare injunction, appointment of advocate commissioner cannot be ordered either to prove the possession or collect the evidence, unless the matter requires for appointment of Advocate Commissioner to elucidate the matter in dispute and for an effective adjudication. When the first defendant himself admitted that he has no dispute over survey No.851/1A in which the plaintiff has constructed the house and residing, there is no necessity for appointing an Advocate Commissioner. Moreover, the factum of possession must be proved only through evidence let in by the parties to the litigation. The Advocate



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Commissioner cannot be appointed to gather evidence. In view of that, the trial Court failed to consider the necessity for appointing an Advocate Commissioner in the fact and circumstances of this case. This Court finds that there is perversity in the order passed by the trial Court.

10. In the result, this Civil Revision Petition is allowed and the order passed in I.A.No4 of 2022 in O.S.No.200 of 2014, on the file of the Additional District Munsif Court, Valliyoor, dated 10.01.2023, is set aside. No costs. Consequently, connected miscellaneous petition is closed.

14.07.2023

NCC : Yes/No
Index : Yes/No
Internet : Yes
cp

To

The Additional District Munsif,
Valliyoor



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K.GOVINDARAJAN THILAKAVADI

cp

Pre-delivery order made in
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