



WEB COPY



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 10.07.2023

Delivered on : 18.08.2023

CORAM

**THE HONOURABLE MRS JUSTICE K. GOVINDARAJAN
THILAKAVADI**

C.R.P(MD)No.1237 of 2023

and

C.M.P(MD)No.6048 of 2023

Raj

... Revision Petitioner/1st Respondent/
1st Defendant

Vs.

1.Sheik Meeran
2.Naththakar Bava
3.Mohammed Meeran
4.Mydeen Fathimal

... Respondents 1to 4/Petitioners/
Plaintiffs

Govindan(Died)
5.A.Haja Mohaideen
6.A.N.Kaja Mohaideen
7.Rathinasamy

...Respondents 5 to 7/Respondents 3
to 5/Defendants 3 to 5

Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order dated 28.03.2023 passed in I.A.No.9 of 2023 in O.S.No.46 of 2017 on the file of the learned Additional District (Fast Track) Court, Tenkasi.

For Petitioner

:Mr.M.P.Senthil

for Mr.G.Sailendrababu

For R1

:Mr.M.Mohammed Ibram Saibu

for M/s.Ajmal Associates

For R2, 3 & 5

:No appearance

**ORDER**

This civil revision petition is filed against the fair and decreetal order, dated 28.03.2023 passed in I.A.No.9 of 2023 in O.S.No.46 of 2017 by the learned Additional District (Fast Track) Court, Tenkasi.

2.According to the revision petitioner/1st defendant, the above suit in O.S.No.46 of 2017 was filed by the respondents 1 to 4/plaintiffs, before the Additional District (Fast Track Court), Tenkasi, for declaration of title and for permanent injunction. During the pendency of the suit, the respondents 1 to 4/plaintiffs filed an application in I.A.No.9 of 2023 for appointment of Advocate Commissioner to note down the physical features of the suit schedule property. The said application was resisted on the side of the petitioner/first defendant and the respondents 5 to 7. The trial Court allowed the said application and appointed an advocate commissioner to inspect the suit property. Against which, the present revision petition is filed.

3.The learned counsel appearing for the revision petitioner would submit that in the present suit, both the parties traced an independent title over the suit schedule property. In such circumstances, appointing an Advocate Commissioner to note down the physical features of the suit property will not serve any purpose. The title of the property can be



established only by the documentary evidence. The trial Court, without advertng to the objections raised by the petitioner in his counter, erroneously allowed the application and appointed the Advocate Commissioner. The learned counsel further submitted that the Advocate Commissioner cannot be appointed for collecting evidence and to note down the possession of the respondents. Further, the suit was filed in the year 2017 and the respondents 1 to 4/plaintiffs have come forward with the present application after a lapse of six years and now, the suit is at the stage of defendant's side evidence. In such circumstances, the trial Judge, ought not to have allowed the application for appointment of Advocate Commissioner and hence, the order of the trial Court is liable to be dismissed.

4.The learned counsel appearing for the petitioner would further submit that the Advocate Commissioner cannot be appointed for local investigation where possession of the property sought to be inspected and investigated by the Commissioner is in dispute. The possession of the property has to be adjudicated only by oral and documentary evidence, since it is a suit for permanent injunction. Therefore, seeking appointment of Commissioner long after to inspect the property alleging that the defendant has obliterated the Cart-Track cannot be permitted. To support his contention, he has relied upon the following decisions:



(i) In the case of *Chinnathambi and others-vs-Anjalai*, reported in **2006(5) CTC 494**.

WEB COPY

(ii) In the case of *Jagadeswari-vs-Kandasamy and others*, reported in **2014-5-L.W.361**.

5. On the other hand, the learned counsel appearing for the respondents would submit that in a case of encroachment, appointment of Advocate Commissioner is necessary to have the picture of property to decide encroachment and noting all physical features would not amount to collection of evidence. He would further submit that the application for appointment of Advocate Commissioner can be filed at any stage and therefore, there is no irregularity or infirmity in the order passed by the trial Court which calls for no interference.

6. The learned counsel appearing for the respondents would further submit that when the respondents 1 to 4/plaintiffs have made specific allegations that the defendants had encroached into their property, the appointment of Advocate Commissioner is necessary to have a picture of property to decide the encroachment. Therefore, noting physical feature would not amount to collection of evidence and moreover, the application for appointment of Commencement can be filed at any stage. To support his contention, the learned counsel appearing for the respondents would rely



upon the decision made in **2017(2) MWN(Civil)315** in ***Shanmugathai-vs-Kamalammal.***

WEB COPY

7.Heard the learned counsel appearing for the petitioner and the learned counsel appearing for the first respondent and perused the materials available on record.

8.Admittedly, in this case, the suit was laid in the year 2017 and the respondents have come forward with the present application after a lapse of six years and that too at the stage of defendants' side evidence. It is a suit for declaration of title and for permanent injunction. The respondents 1 to 4, who are the plaintiffs in the above suit, have filed an application in I.A.No.9 of 2023 under Order 26 Rule 9 and Section 151 C.P.C., for appointment of Advocate Commissioner to inspect the suit property and measure the same with the help of the surveyor and to file his report. The contention of the petitioner in the petition is that in the evidence of D.W.1, he had falsely deposed with regard to the location of the suit property. According to the petitioner, the suit properties are situated in S.Nos.1048/5 and 1048/6 and the properties situated to north of the suit property also belongs to the petitioner. Further more, it is stated that to the South of it, a building with Door Nos.2/494 and 2/495 is situated and apart from that, two toilet rooms are also situated. But the first defendant has denied the existence of the



above building and toilets. Therefore, it has become necessary to appoint an Advocate Commissioner to note down the physical features in the suit property. The only objection made by the petitioner/first defendant is that the above petition was filed belatedly after a lapse of six years and moreover, the the respondents 1 to 4/plaintiffs have to establish his case only through oral and documentary evidence and therefore, it is not necessary for appointment of Advocate Commissioner to note down the physical features in the suit property. When the respective defendants denied the title and location of disputed construction, the nature of dispute could be resolved only if the exact location of construction is brought to the knowledge of the Court, which cannot be done except by appointment of Advocate Commissioner. Thus, mere delay in filing the application belatedly is not a ground for dismissal of the application and substantial justice requires that the appointment of Commissioner is very much necessary to decide the lis.

9. At this juncture, it is useful to refer the judgment of this Court in the case of *Panjavarnam and others-vs-Visuvasam Jeyaseeli, C.R.P(NPD) (MD)No.2192 of 2012*, which was also referred in the judgment produced by the learned counsel for the respondent in *2017(2)MWN (Civil) 315*, in which, it was held that the Advocate Commissioner if appointed would be able to visit the suit property with the help of a surveyor, measure the same



and locate it and also note down as to what are all in existence in the suit property. Noting down the physical features would not amount to culling out the evidence. Further, this Court enunciated the importance of the maxim that "A picture is worth a thousand words". Further, it was held by this Court in the said judgment that it is mandate on the part of Lower Court to appoint an Advocate Commissioner with a mission to visit the suit property with the help of Surveyor and measure the same by referring to the Survey Map and documents of both sides and note down the physical features.

10. In yet another decision of this Court in the case of Vaithinattar and another-vs-Sakkubal Ammal, AIR 2004 Mad. 419, it is held that in a suit for declaration and permanent injunction, the dispute pertaining to portion of adjoining lands allegedly encroached by the defendants and the defendants denying that there was no such encroachment. This Court held that the best evidence in such case could be obtained only by appointment of Advocate Commissioner. Therefore, in my considered view, no prejudice will be caused to the revision petitioner herein by appointing the Advocate Commissioner to visit the suit property along with the surveyor and note down the physical features. In fact, the Advocate Commissioner's report and plan would enable the Court for the purpose of throwing more light or enlighten to arrive at a fair decision. Thus, the appointment of Commissioner is necessary and therefore, there is no infirmity in the order



of the trial Court.

WEB COPY

11. In the result, this Civil Revision Petition is dismissed and the order dated 28.03.2023 passed in I.A.No.9 of 2023 in O.S.No.46 of 2017 by the learned Additional District (Fast Track) Court, Tenkasi, is confirmed. No costs. Consequently, connected miscellaneous petition is closed.

18.08.2023

NCC: Yes/No

Index: Yes/No

Internet: Yes/No

Ns

To

1. The Additional District (Fast Track) Court,
Tenkasi.

2. The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY



K.GOVINDARAJAN THILAKAVADI, J.

Ns

C.R.P(MD)No.1237 of 2023
and
C.M.P(MD)No.6048 of 2023

18.08.2023