



C.R.P.(MD)No.1680 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 08.09.2023

CORAM:

THE HONOURABLE MR.JUSTICE C.KUMARAPPAN

C.R.P.(MD)No.1680 of 2017
and C.M.P.(MD)No.9268 of 2017

- 1.Parameshwari
- 2.Kaveri Servai (Died)
- 3.K.Samayamuthu
- 4.Jothipandian (Died)

Memo presented before this Court on 28.04.2023

is recorded as the petitioners 2 and 4 died vide

Court order, dated 28.04.2023. ... Petitioners/Petitioners 1 to 7 & 9 /
Defendants 4 to 10 & 12

- 5.K.Alagarsamy
- 6.S.Karuppiah
- 7.R.Gnanagurusamy
- 8.T.Ravichandran
- 9.K.Mahali
- 10.K.Saraswathi

(Petitioners 9 & 10 are brought on record as LR's
of the deceased P2, as per the order of this Court,
dated 07.08.2023, in CMP(MD)No.9766/2023)

... Petitioners /LRs of the 2nd petitioner

Vs.

1.M.A.Sardhar Khan ... 1st Respondent / 1st Respondent/Plaintiff



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2.U.Mustafa Kamal @ U.M.K.Basha

3.K.Rameeja Begum

4.Faritha Begum

... Respondents 2 to 4/

Respondents 2 to 4/ Defendants 1 to 3

5.Muthuselvi

... 5th Respondent / 8th Petitioner /

11th defendant

Prayer: This Civil Revision Petition is filed under Article 227 of the Constitution of India, against the fair and executable order, dated 14.07.2017, passed in I.A.No.549 of 2017, in O.S.No.136 of 2011, on the file of the VI Additional District Judge, Madurai.

For Petitioners : Mr.V.Ramakrishnan

For Respondents : Mr.A.Arumugam
for M/s.Ajmal Associates for R1

: No appearance for R2 to R5

ORDER

The instant Civil Revision Petition has been filed against the order, dated 14.07.2017, passed in I.A.No.549 of 2017, in O.S.No.136 of 2011, on the file of the VI Additional District Judge, Madurai.



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2. The revision petitioners are the defendants 4 to 10 & 12, the first respondent herein is the plaintiff, the respondents 2 to 4 herein are the defendants 1 to 3 and the fifth respondent herein is the 11th defendant before the Court below. The petitioners 9 & 10 herein are the legal heirs of the deceased second petitioner / second defendant.

3. For the sake of convenience, the parties are referred to according to their litigative status before the Court below.

4. The defendants have filed an application for appointment of Advocate Commissioner to find out whether the suit properties are in existence as mentioned in the plaint and whether they are corroborating the properties mentioned in the alleged settlement deed, dated 24.09.1980 as well as suit in O.S.No.297 of 1983. It is submitted that the validity of the settlement deed has been confirmed upto the Supreme Court. However, though they filed a suit based upon the settlement deed, dated 24.09.1980, they have sought for the relief of delivery of possession and declaration of title, in respect of the different properties. The learned counsel for the defendants would submit that the plaintiff by



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his ingenious pleading has incorporated the defendants property, as the property derived through settlement deed, dated 24.09.1980. It is the specific contention of the learned counsel for the defendants that the properties referred to in the plaint is not the property referred in the settlement deed. Therefore, it is the submission of the learned counsel for the defendants that only to elucidate the said factum, the appointment of Advocate Commissioner is sought for.

5. Per contra, the learned counsel for the plaintiff would submit that there is a delay in filing such application, and there is no pleadings in respect of the dispute regarding the identity of the property. Therefore, he would submit that the finding of the Court below liable to be confirmed.

6. I have given my anxious consideration to the either side submissions.

7. The learned counsel for the defendants would rely upon the judgment of this Court reported in *AIR-1986-(Mad)-33 (Ponnusamy*



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Pandaram V. The Salem vaiyappamalai Jangamar Sangam). Wherein this Court has appointed the Advocate Commissioner in order to elucidate a point which may otherwise be left in doubt or ambiguity on record. The relevant portion of the judgment is as follows-

“6. The object of local investigation under 0. XXVI, R. 9 of the Code cannot be littled. Its object is to collect evidence at the instance of the party who relies on the same and which evidence cannot be taken in court but could be taken only from its peculiar nature, on the spot. This evidence will elucidate a point which may otherwise be left in doubt or ambiguity on record. The Commissioner, in effect, is a projection of the Court, appointed for a particular purpose. In this regard, the implication of 0. XXVI, R. 10 cannot be lost sight of when it says that the report of the Commissioner and the evidence taken by him shall be evidence in the suit and shall form part of the record. We are not very much concerned with the possessive value of the report of the Commissioner. But the party has got a right to place evidence which he could require to substantiate his case before the Court and, of course, subject to the law of evidence and the Code, and it is the duty of the Court to receive such evidence unless there are other justifiable factors in law to decline to receive such evidence. The law of evidence enjoins upon the party to



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prove the fact which he relies on and in that sense, an obligation is cast upon the party and if he fails to discharge that obligation, adverse consequence will follow and he will have to face the repercussions of the same. This right of the party to adduce evidence gets adjudicated in the interlocutory proceedings under O. XXVI, R. 9. When there is a decline by the Court to issue the commission asked for to make local investigation, the purpose behind it being significant and in stated cases, imperative too, that order certainly disposes of the right claimed by the party to place the requisite evidence on his behalf. The question as to whether a particular order adjudicates some rights or obligations of the parties in controversy will depend upon the nature or the right or obligation and it is not possible to lay down a uniform rule and no decision, including any of the highest Court in the land, attempted to do so. Untwalia, J. as he then was, in the case cited above enumerated examples on either side.”

8. In another judgment reported in **2005-3-MLJ-525 (Sivagurunathan V. Ramalingam)**. This Court has held that, when the location of the plaintiff's property and extent is denied, Commissioner ought to have been appointed for effectively adjudicating the dispute. The relevant portion of the judgment is as follows-



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“11. In the petition, the plaintiff has sought for appointment of Advocate Commissioner to note down the physical features and also to measure the suit property with the help of surveyor and to submit a report with a plan drawn to scale. But the learned District Munsif dismissed the application on the ground that the application has been filed seeking for issuance of commission to note down the possession and the existence of house. There is no proper exercise of discretion and the impugned order suffers from serious infirmity. when the location of the plaintiff's property and the extent is denied, Commissioner ought to have been appointed for effectively adjudicating the dispute. Report of the Advocate Commissioner and the plan drawn to scale would considerably reduce the oral evidence which aspect was not taken into consideration by the lower Court.”

The above judgment has been subsequently followed by this Court in a judgment reported in **2021-0-Supreme (Mad.)-813 (C.B.Manokaran V. P.Valli)**.

9. By relying the above judgment, the learned counsel for the defendants would submit that the very order of the dismissal is without any basis and therefore, prayed to allow this application.



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10. It is the specific submission of the defendants that though the plaintiff has contended that they are deriving the title through the settlement deed, dated 24.09.1980, the suit properties are not the properties referred in the settlement deed. The learned counsel would further submit that though the settlement deed confirmed up to Supreme Court, they were not party to this proceedings and that the plaintiff has played fraud against him. Only in such back ground the defendants wanted to correlate and elucidate that the schedule of property is not the property referred in settlement deed. For such purpose only they want the appointment of Commission. It is settled principle of law that when the identity of the property in dispute, then it is incumbent upon the Court to appoint a Commissioner. Therefore, they prayed for appointment of Advocate Commissioner.

11. No doubt, the realization of the defendants to file Commission application came little latter, but, that can not be a reason to reject the essential application for appointment of Commissioner. It is pertinent to mention here that the very appointment of Commission



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would definitely reduce much oral evidence and the report would be helpful for effective disposal of the suit.

12. Therefore, this Court is of the view that the order of the Court below is liable to be interfered with. Hence, the instant Civil Revision Petition is allowed and the Court below is directed to appoint the Advocate Commissioner with in a period of two weeks from the date of receipt of copy of this order and on appointment of Advocate Commissioner, the Commissioner is directed to complete the warrant of commission within a period of six weeks from the date of receipt of this warrant. If the Commissioner require any assistance from surveyor, the concerned authority is directed to provide necessary assistance. There shall be no order as to cost. Consequently, connected Miscellaneous Petition is closed.

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NCC : Yes/No
Index :Yes/No
Ls



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C.KUMARAPPAN.,J.

Ls

To

- 1.The District Munsif cum Judicial Magistrate,
Sivagiri.
- 2.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.

Order made in

C.R.P(MD)No.1680 of 2017

08.09.2023