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C.R.P. No.515 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.03.2024

C O R A M

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

C.R.P.(PD)No.515 of 2022

Mr.S.Sundaresan

Vs.

Rep.by his attorney
Mr.Senthil Selvan
1.Mrs.Umayal ... Petitioner

2.Mr.Muthiah Murugesan

3.Mr.Raja Arunachalam A.K.,

4.Mr.C.Balamurugan

5.Mrs.Mohana Gandhimathi

6.Mr.Muraleedhara Reddy

7.M/s.R.P.M.Housing and Construction,
rep.by its Sole Proprietor
Mr.Muthaiah Murugesan ... Respondents

PRAYER: Civil Revision Petition is filed under Article 227 of Constitution of India praying to set aside the order dated 04.01.2022 passed in I.A.No.120 of 2021 in O.S.No.365 of 2018 on the file of the Subordinate Court, Tambaram.

For Petitioner : Mr.Jana Ranjani for Mr.T.M.Mano

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For Respondents : No appearance

O R D E R

This revision petition has been filed against the fair and decreetal order passed in I.A.No.120 of 2021 in O.S.No.365 of 2018, on the file of the Subordinate Court, Tambaram, dated 04.01.2022.

2.The revision petitioner as plaintiff filed the above suit for declaration and for possession against the respondents/defendants. Pending suit, the petitioner filed the present I.A.No.120 of 2021 for appointment of advocate commissioner stating that to identify the suit A-schedule property, the property of the respondents and the quantum of the land encroached by the respondents, it is necessary to appoint a commissioner to inspect the suit property with the help of Surveyor and to file a report and plan. The trial Court without proper appreciation of law and facts had dismissed the commissioner application by impugned order dated 04.01.2022, against which, this revision is filed.

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3.The learned counsel for the petitioner would state that the trial Court failed to note that the suit is not only for declaration but also for possession of B-schedule property, by directing the respondents to remove the encroachments made therein and therefore, appointment of commissioner with the help of surveyor is indeed to measure the quantum of encroachment. Thus, he would pray for allowing the revision petition.

4.Heard the learned counsel for the petitioner. There is no appearance for the respondents.

5.Perusal of record shows that the petitioner has filed a suit for declaration for possession of B-schedule property, by directing the respondents to remove the encroachments made therein. He has filed a petition for appointment of advocate commissioner stating that the respondents have made encroachments into the petitioner's B-schedule property and to prove the alleged encroachment, appointment of advocate commissioner is necessary. The learned Judge dismissed the commissioner

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application as not maintainable holding that it is nothing but an attempt to gather evidence.

6.When there is an allegation of encroachment of land, advocate commissioner can be appointed for local investigation, as mere oral evidence will not aid either party to decide the issue of encroachment and such appointment cannot be said to be for collection of evidence as the object of local investigation itself is to collect evidence.

7.In Pormusamy Pandaram vs. The Salem Vaiyappamalai Jangamar Sangam reported in AIR 1986 Mad 33, this Court has held as follows:~

> --..... *A controversy as we could see from the pleadings, has arisen as to whether the constructions put up by the third defendant are within his land or whether they have encroached into the lands of the plaintiff. A local investigation is the best way to find out the position and the party, namely, the third defendant coveting to place the evidence before the court through local investigation by the Commissioner cannot be shut out of that right.* .....--

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8.In Shanmugathai vs. Kamalammal and another reported in 2017 (2) CTC 353, this Court has held that in a case of encroachment, appointment of commissioner is necessary to have picture of property to decide encroachment and noting physical feature would not amount to collection of evidence.

9.As per the above judgments, in cases of encroachment, commissioner can be appointed to find out the quantum of encroachment, but the learned Judge on erroneous appreciation that filing of commissioner application is nothing but an attempt to gather evidence, dismissed the commissioner application which in my opinion is not correct and therefore, the order passed by the learned Judge is liable to be set aside.

10.Accordingly, the fair and decreetal order passed in I.A.No.120 of 2021 in O.S.No.365 of 2018 on the file of the Subordinate Court, Tambaram, dated 04.01.2022, is set aside. The learned Judge shall pass appropriate orders in I.A.No.120 of 2021 appointing commissioner within a period of four weeks from the date of receipt of a copy of this order.

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J.NISHA BANU,J.

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11.With the above direction, this Civil Revision Petition is allowed. No costs.

08.03.2024

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To
The Subordinate Court, Tambaram.

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