



C.R.P.No.2292 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.07.2024
PRONOUNCED ON : 06.12.2024

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

C.R.P.No.2292 of 2024
and
C.M.P. No.12051 of 2024

E.Sivakumar

... Petitioner / Defendant

Vs.

S.Tamil Selvi

... Respondent / Plaintiff

PRAYER: Civil Revision Petition filed under Article 227 of Constitution of India, to set aside the fair order and decree, dated 21.03.2024 passed in I.A.No.2 of 2023 in O.S.No.707 of 2023, on the file of the XIX Asst.Judge, City Civil Court, Chennai.

For Petitioner : Mr.K.V.Sundararajan

For Respondent : Mr.A.Adithya

ORDER

Challenging the order and decree, dated 21.03.2024 passed in I.A.No.2 of 2023 in O.S.No.707 of 2023, by the learned XIX Assistant



C.R.P.No.2292 of 2024

Judge, City Civil Court, Chennai, the petitioner is before this Court with the present Revision.

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2.Mr.K.V.Sundararajan, the learned counsel appearing for the petitioner/defendant would submit that the petitioner and the respondent/plaintiff are siblings and there is some dispute with regard to sharing of property. The respondent/plaintiff filed a suit without ascertaining physical features of the property. To collect evidence, the respondent filed an application in I.A.No.2 of 2023 in O.S.No.707 of 2023, for appointment of Advocate Commissioner. The purpose of appointing Advocate Commissioner is only to note down the physical features, not to collect evidence. Now, the respondent is enlarging the scope of plaint. The respondent has to prove her case on own merits and not by collecting evidence through the Advocate Commissioner. The learned counsel further submitted that the application for appointment of Advocate Commissioner is filed only for the purpose of filling up latches and lacuna in the case of petitioner/ defendant. Schedule of the Suit did not have proper description as to the exact direction, area, boundaries of encroachment and to rectify the fatal mistake, the application for appointment of Advocate Commissioner has been filed. The learned counsel for the petitioner, in support of



his contention, has relied on the decision of this Court in ***President, Soorthal Kovil Madurai Veeran Kula Theiva Koil and Others Vs. S.M.Ramalingam and Others*** reported in ***(2020 SCC OnLine Mad 18706)*** wherein it has been held as follows:-

“...plaintiffs have come out with the specific case that there is an encroachment by putting up a building to an extent of 1,215 Square feet along with liner measurements (56 ½ feet x 21 ½ feet). When such a specific plea has been projected by the plaintiffs, it is not open to them to improve upon the case in order to collect evidence by seeking appointment of Commissioner.”

3.Per contra, Mr.A.Adithya, the learned counsel appearing for the respondent/plaintiff would submit that inspection of the property by the Advocate Commissioner is completed as early as on 12.06.2024. When the Advocate Commissioner inspected the property, the petitioner participated during inspection. Now, the suit is posted for filing report of the Advocate Commissioner. Hence, the Revision become infructuous, not maintainable and to be dismissed. The learned counsel for the respondent, in support of his contention, has relied on the decision of this Court in ***A.Nagarajan Vs.***



A.Dadhanakumar reported in **(1996 (1) MLJ 422)** wherein it has been held as follows:-

“For the purpose of elucidating facts in respect of any matter in dispute where the circumstances render it expedient in the interest of justice to do so, the Court has power, which is discretionary in nature, to appoint Commissioner for the purpose of ascertaining, certain facts, to make it clear, intelligible and to throw light upon the matter in issue, relating to the main case as well as the facts leading to the dispute.”

4. Further, the learned counsel relied on a decision of this Court in **Anwar Batcha and Another. Vs. S.Mahuedoom** reported in **(2014 (5) CTC 85)** wherein it has been held as follows:-

“Rule 9 to [Order XXVI of the Code of Civil Procedure](#) envisages that 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.”



C.R.P.No.2292 of 2024

WEB COPY

5. I have heard the learned counsels appearing on either side and perused the materials available on record.

6. On perusal of the records it is seen that the respondent / plaintiff filed the Suit in O.S.No.707 of 2023 on the file of the learned XIX Assistant Judge, City Civil Court, Chennai, for recovery of possession and permanent injunction. Now, the Suit is pending for cross-examination of P.W.1. At this stage, the respondent/plaintiff filed an application in I.A.No.2 of 2023 in O.S.No.707 of 2023, for appointment of Advocate Commissioner to measure the Suit 'B' schedule property, as petitioner / defendant encroached the Suit 'B' schedule property. It is the contention of the petitioner / defendant that he has not encroached any portion of the respondent / plaintiff and the application in I.A.No.2 of 2023 has been filed only with an intention to collect the evidence and also to fill up the lacuna. However, the trial Court allowed the petition filed by the respondent / plaintiff. Aggrieved over the same, the respondent / defendant is before this Court with this Revision.



C.R.P.No.2292 of 2024

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7. Appointment of Advocate commissioner is matter of judicial discretion. No doubt, the petitioner / defendant have a legal right to object upon Commissioner's report and if any objections would be filed upon the same, the trial Court would be under legal obligations to dispose of objections filed, in accordance with law. The petitioner can examine the Commissioner in the open Court touching any of the matters referred to him or mentioned in his report or as to his report or as to manner in which he prepared the report. In the present case, the trial Court has found that appointment of Commissioner is necessary to note down the physical features and allowed the petition filed by the respondent/plaintiff by appointing the Advocate Commissioner. Further it is seen from the records that inspection of the property by the Advocate Commissioner is completed as early as on 12.06.2024. When the Advocate Commissioner inspected the property, the petitioner participated during inspection. Now, the suit is posted for filing report of the Advocate Commissioner.

8. Considering the facts and circumstances of the case and keeping in view the fact that petitioner have legal right to file objections upon Commissioner's Report, and the trial Court to



C.R.P.No.2292 of 2024

consider the obligation to dispose of the objections filed against the Commissioner's Report, this Court is of the view that the trial Court did not commit any illegality in the present case by way of appointing the Advocate Commissioner. The decision relied on by the petitioner has no application to the facts of the present case. The petitioner / defendant and respondent / plaintiff are siblings. Hence, such overlapping of claim any interest and right found to arise. Hence, appointment of Advocate Commissioner is necessary to ascertain and conclude the best interest of both plaintiff and defendant

9. In view of the foregoing reasons, this Civil Revision Petition stands dismissed. No costs. Consequently, the connected miscellaneous petition is also dismissed.

06.12.2024

Speaking Order/Non Speaking Order

Index : Yes/No

Internet : Yes

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To

The XIX Assistant Judge,
City Civil Court,
Chennai,



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C.R.P.No.2292 of 2024

M.NIRMAL KUMAR, J.

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PRE-DELIVERY ORDER MADE
IN
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06.12.2024