



CRP No.4048 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.10.2024

CORAM

THE HON'BLE MR.JUSTICE **V.LAKSHMINARAYANAN**

CRP No.4048 of 2024 &
CMP.No.22264 of 2024

K.M.Natarajan : Petitioner

versus

1.K.M.Manickam
2.K.M.Venkatachalam : Respondents

Prayer: Petition filed under Article 227 of the Constitution of India to set aside the fair and final order dated 15.12.2023 passed in I.A.No.3 of 2022 in O.S.No.116 of 2022 on the file of the Additional District Munsif Court, Attur, Salem District.

For Petitioner : Mr.K.S.Jayaganesh for
Mr.P.Navaneetha Krishnan

ORDER

This civil revision petitioner is at the instance of the first defendant.



CRP No.4048 of 2024

WEB COPY

2. The first respondent/plaintiff has presented O.S.No.116 of 2022 before the learned District Munsif at Attur. The plaintiff seeks for a declaration of title over the second item of the property which is a cart track and for removing all the encroachments created by the first defendant/civil revision petitioner by way of mandatory injunction. The other connected reliefs are also sought for.

3. Pending the suit, the plaintiff took out an application for appointment of an Advocate Commissioner to visit and measure the suit property along with a qualified surveyor and submit a report. This application was received in I.A.No.3 of 2022. The learned Trial Judge ordered notice in the said application. After receiving a counter from the first defendant, the learned Trial Judge allowed the application. Hence, this revision.

4. I have heard Mr.K.S.Jayaganesh for Mr.P.Navaneetha Krishnan for the civil revision petitioner.



CRP No.4048 of 2024

WEB COPY

5. Mr.P.S.Jayaganesh would point out that the parties to the present suit were also the parties to a partition suit in O.S.No.486 of 1985 on the file of the Subordinate Court at Salem. The said suit was decreed on 03.08.1989 declaring 1/7th share for all the parties. In order to convert the said preliminary decree into an executable final decree, an application was filed in I.A.No.231 of 2019 for appointment of an Advocate Commissioner. An Advocate Commissioner was also appointed and after a report was filed, a division was ordered. Therefore, Mr.K.S.Jayaganesh states that since an Advocate Commissioner has already visited the suit property, pursuant to the warrant issued in I.A.No.231 of 2019 in O.S.No.486 of 1985 and submitted a report on 28.07.2023, the appointment of Advocate Commissioner in this case is irrelevant. Therefore, he would plead that the order of the trial court requires to be revised.

6. I have carefully considered the submissions of Mr.Jayaganesh.

7. The Advocate commissioner appointed, under the impugned order, has been in the exercise of the powers vested in the court under Order XXVI



CRP No.4048 of 2024

Rule 9 of the Code. He has been appointed to note down the physical features of the cart track as well as the common well. The dispute in this suit relates to these two items of the suit property. Where a plea has been raised by the plaintiff, that encroachments have been made by the defendants on the property commonly enjoyed by them, the only way that the Court can ascertain the matter in dispute - the alleged encroachment - is by appointment of an Advocate Commissioner.

8. Insofar as the plea that the Commissioner has already visited the suit property and submitted a report, I am not aware of any position of law that for one suit property, there has to be only one Advocate Commissioner. In any event, an Advocate Commissioner for suggesting the mode of division is appointed under Order XXVI Rule 13 and the procedure, he has to follow, is under Order XXVI Rule 14. This is fundamentally different from a Commissioner appointed under Order XXVI Rule 9 of the Code of Civil Procedure.

9. Furthermore, even if I were to agree with Mr.P.S.Jayaganesh, which



CRP No.4048 of 2024

WEB COPY

I am not, that the Advocate Commissioner's report under Order XXVI Rule 13 can be used in a subsequent suit, such a plea would fall foul of Order XXVI Rule 10(2) of the Code of Civil Procedure. This is because under Order XXVI Rule 10(2), a report filed by the Commissioner can be used in evidence in the suit in which he is appointed. It cannot form part of evidence in another suit, especially when the issues are totally different.

10. The issues that are framed in a suit for partition will not be the same as the issues that are framed in a suit for declaration of a right over the common cart track and the common well. That being the situation, the Advocate Commissioner's report submitted pursuant to the appointment under Order XXVI Rule 13 cannot be used in the subsequent suit or for that matter, in the current suit.

11. In the light of the above discussion, this civil revision petitioner is dismissed. No costs. Consequently, the connected miscellaneous petition is closed.

03.10.2024

nl

Index : Yes/No

Page 5 of 8



CRP No.4048 of 2024

Speaking Order/Non speaking order
Neutral Citation : Yes/No



WEB COPY



CRP No.4048 of 2024

V.LAKSHMINARAYANAN, J.

nl

To

The Additional District Munsif Court,
Attur, Salem District.

CRP No.4048 of 2024



WEB COPY



CRP No.4048 of 2024

03.10.2024