



C.R.P(MD)No.346 of 2020

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 29.02.2024

CORAM

THE HONOURABLE MR.JUSTICE MUMMINENI SUDHEER KUMAR

C.R.P(MD)No.346 of 2020

and

C.M.P(MD)No.1953 of 2020

Anthony Bensam

... Petitioner/Petitioner/
Plaintiff

Vs.

Dominic (Died)

... Respondent/Respondent/
Defendant

2.Sumathi

3.John Shabith

4.John Varship

5.John Sabinson (Minor)

... Respondents

*(Represented by his mother second respondent
Sumathi)*

*(Respondents 2 to 5 were impleaded as legal
representatives of deceased sole respondent vide
Court order, dated 29.02.2024 in C.M.P(MD)No.
3832 of 2022 in C.R.P(MD)No.346 of 2020)*



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Prayer : Civil Revision Petition filed under Article 227 of the Constitution of India, to call for the records relating to fair and decreetal order passed by the learned Principal District Judge, Kanyakumari in I.A.No.2 of 2019 in O.S.No. 146 of 2011, dated 25.11.2019 and set aside the same.

For Petitioner : Mr.K.P.Narayanakumar

For Respondents : No appearance

ORDER

This Civil Revision Petition is directed against an order passed in I.A.No. 2 of 2019 in O.S.No.146 of 2011, dated 25.11.2019 passed by the Principal District Judge, Kanyakumari at Nagercoil under Order 26, Rule 9 of CPC seeking appointment of an Advocate Commissioner for the purpose of measuring the suit / petition schedule property and to note down the physical features of suit property. The said application was filed by the plaintiff / petitioner even before the commencement of the trial. The main suit was filed seeking specific performance of the agreement of sale said to have been executed by the first respondent herein. However, it appears that there is a



dispute about the nature of property that is being claimed by the petitioner herein as subject matter of agreement of sale. As the first respondent herein disputed about the nature of property that was subject matter of the agreement of sale, the petitioner filed the present application for the purpose of establishing his case and a statement is also made in the affidavit filed in support of the said application to that effect also. The learned trial Court having taken note of the fact that the said application was filed even before commencement of trial and it is for the plaintiff to establish his case by adducing the necessary evidence, and by recording a finding that the said application was filed under Order 26, Rule 9 of CPC in a suit for specific performance is nothing but an attempt to gather evidence with the assistance of the Court, refused to entertain the said application.

2. Heard the learned Counsel for the petitioner.

3. It is the contention of the learned Counsel for the petitioner that in case if an Advocate Commissioner is appointed and a report is submitted, that will resolve the entire dispute between the parties once for all and Court can come to a right conclusion from the report submitted by the Advocate Commissioner.



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He also further submitted that the first respondent herein though admitted about execution of the agreement of sale, disputed about the property which was the subject matter of the said agreement of sale by contending that their sale is only 10 cents in one survey number instead of 28 cents as contended by the petitioner herein. Therefore appointment of Advocate Commissioner is very much necessary.

4. This Court has carefully considered the submissions made by the learned Counsel for the petitioner and also perused the entire materials on record.

5. First of all it is settled law that no Advocate Commissioner can be appointed under Order 26, Rule 9 of CPC for the purpose of collecting evidence. It is for the parties to adduce evidence to establish their respective cases and it is only when it is not possible for the parties to adduce certain evidence to establish facts, such as physical features of a property. When there is a dispute about the physical features of the property or identification of the property etc., the Court on considering the over all evidence i.e., placed before the Court, may consider such request for rendering complete justice between



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the parties and for passing a final order between the parties. In the instant case, the present application in I.A.No.2 of 2019 was filed even before the commencement of trial in the suit. Further the suit itself is of the year 2011, which was dismissed for default once and restored but evidence is not adduced on behalf of the petitioner / plaintiff so far. The learned trial Court taking those facts into consideration, refused to entertain the said application.

6. This Court is at loss to find fault with the order under revision and therefore, not inclined to entertain this revision petition at this stage. Accordingly, this Civil Revision Petition is dismissed.

7. However, incase after the entire evidence of both the sides is over, still if the petitioner herein feels that the appointment of Advocate Commissioner is necessary, then it is left open for the petitioner to make such an application and the same shall be considered by the learned trial Court on its own merits.



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8. In the result, this Civil Revision Petition stands dismissed. There shall be no order as to costs. Consequently, connected Miscellaneous Petition stands closed.

29.02.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes
BTR

To

- 1.The Principal District Judge,
Kanyakumari.
- 2.The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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MUMMINENI SUDHEER KUMAR, J.

BTR

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