



CRP(MD)No.702 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 18.12.2024

CORAM:

**THE HONOURABLE MR.JUSTICE N.SENTHILKUMAR**

CRP(MD)No.702 of 2021  
and  
CMP(MD)No.3832 of 2021

1.K.Dharmar (Died)

2.Kasiyammal

3.D.Karuppasamy

... Petitioners

*(Petitioners 2 and 3 are brought on record as LRs of the deceased sole petitioner vide Court order dated 17.11.22 made in CMP(MD)No.1402 of 2022 in CRP(MD)No.702 of 2021)*

Vs

1.M.Balasubramanian

2.K.Balakrishnan

... Respondents

**Prayer:** This Petition is filed under Article 227 of the Constitution of India, to call for the records pertaining to the fair and decreetal order of dismissal in I.A.No.1 of 2021 in A.S.No.3 of 2021 on the file of the learned Subordinate Judge, Sattur, Virudhunagar District dated 12.02.2021 and set aside the same.



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For Petitioners : Mr.B.N.Raja Mohamed

For R1 : Mr.M.Kannan

For R2 : No appearance

### **ORDER**

The Civil Revision Petition is filed to set aside the fair and decreetal order made in I.A.No.1 of 2021 in A.S.No.3 of 2021, dated 12.02.2021 on the file of the Subordinate Court, Sattur, Virudhunagar District.

2. The first respondent/plaintiff has filed a suit in O.S.No.18 of 2012 before the District Munsif Court, Sattur for declaration and injunction against the first petitioner-deceased Dharmar/first defendant and the second respondent/second defendant in the suit. The trial Court, after trial, had decreed the suit in favour of the first respondent/plaintiff. Against which, the first petitioner/first defendant had filed an appeal in A.S.No.12 of 2016 before the Subordinate Court, Sivakasi. Pending appeal, the first petitioner/first defendant filed an application in I.A.No. 94 of 2019 for appointment of Advocate Commissioner under Order 26 Rule 9 C.P.C. and thereafter, the appeal and the application were transferred to the Subordinate Court, Sattur and the same were renumbered as A.S.No.3 of 2021



and I.A.No.1 of 2021. The First Appellate Court, after enquiry, has dismissed the commission application on 12.02.2021. Challenging the said order, the present revision is filed.

3. For the sake of convenience and brevity, the parties herein will be referred to as per their status/ranking in the trial Court.

4. The First Appellate Judge has dismissed the commission application on the following three grounds;

*1. The first defendant had not filed any petition to appoint an Advocate Commissioner before the trial Court raising the contention now raised.*

*2. Though the first defendant was aware of the construction made in the suit scheduled property in the year 1999 itself, he has not taken any steps to remove the encroachment made by the plaintiff but only after filing of the suit by the plaintiff, the first defendant has sought relief by way of his counter claim.*

*3. The first defendant has only produced Natham nila vari patta and except this, no other documents were filed by him before the Court.*

5. The learned counsel appearing for the first defendant would submit that



the appointment of the Advocate Commissioner to note down the physical features of the suit property is highly essential to prove the possession of the first defendant over the suit property. He would further submit that the appeal is nothing but a continuation of original suit and therefore, they are entitled to make an application for appointment of Advocate Commissioner at the appeal stage.

6. The learned counsel appearing for the first defendant would submit that the trial Court has not looked into the facts correctly before decreeing the suit in favour of the plaintiff and as such, Advocate Commissioner has to be appointed to ascertain the clear demarcation of suit scheduled property and the alleged encroachment made by the plaintiff. Unless and until an Advocate Commissioner is appointed to find out the alleged encroachment made by the plaintiff, it may not be appropriate for the trial Court or the First Appellate Court to come to a conclusion in favour of the plaintiff.

7. To support his arguments, the learned counsel appearing for the first defendant has relied upon the following judgments;

***(1) A.Nagarajan Vs. A.Madhanakumar (1996 (1) CTC 229)***

*“10. It is well settled that Article 227 of the Constitution can be invoked only in the following circumstances, namely, when*



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*there is lack of jurisdiction, erroneous assumption of jurisdiction of excess of jurisdiction or where there is gross dereliction of duty, flagrant violation of law, error of law apparent on the face of the record or where there is violation of principles of natural justice and finding is based on no material or whatever which is by very nature arbitrary or capricious. The power conferred on the court to appoint a Commissioner for local inspection is for better appreciation of the evidence already on record. The trial court had the jurisdiction to decide under what circumstances it can appoint a Commissioner. The Commissioner so appointed is not performing a judicial act and it is a "ministerial Act". Nothing is left to discretion and there is no occasion to use judgment or adjudicate the issue involved but only noting the details and reporting the actual state of affairs. Such report does not automatically form part of evidence in the proceeding and the court has power to confirm, vary or set aside the report or issue a new commission. Hence there is neither abdication nor delegation of the powers or functions of the Court to decide the issue. Only an examination of the Commissioner, the report forms part of the record and evidence. The opposite party has opportunity to cross-examine the Commissioner. Of course, failure to do so to elicit such information as it required, cannot at later stage object to the report being accepted on the ground Commissioner not examined or cross examined. The contention of the learned counsel that the impugned order is per se illegal, unsustainable and amounts to delegating the functions of the Court to decide the issue are*



*misconceived and hence rejected...”*

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**(2) Haryana Waqf Board Vs. Shanti Sarup and others  
((2008) 8 SCC 671)**

*“2. ... Therefore, it cannot be in dispute that the dispute was in respect of the encroachment of the suit land. Admittedly, in this case, an application was filed under Order 26 Rule 9 of the Code of Civil Procedure\_which was rejected by the trial court but in view of the fact that it was a case of demarcation of the disputed land, it was appropriate for the court to direct the investigation by appointing a Local Commissioner under Order 26 Rule 9 of the CPC. The appellate court found that the trial court did not take into consideration the pleadings of the parties when there was no specific denial on the part of the respondents regarding the allegations of unauthorized possession in respect of the suit land by them as per paragraph 3 of the plaint. But the only controversy between the parties was regarding demarcation of the suit land because land of the respondents was adjacent to the suit land and the application for demarcation filed before the trial court was wrongly rejected. It is also not in dispute that even before the appellate court, the appellant-Board had filed an application for appointment of a Local Commissioner for demarcation of the suit land. In our view, this aspect of the matter was not at all gone into by the High Court while dismissing the second appeal summarily. The High Court ought to have considered whether in view of the nature of dispute and in the facts of the present case, whether the*



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*Local Commissioner should be appointed for the purpose of demarcation in respect of the suit land.”*

***(3) Union of India Vs. K.V.Lakshman and others ((2016) 3 SCC 124)***

*“43. While trying the civil suit, the Court may in its discretion or at the instance of any party, as the case may be, consider appointing Court Commissioner preferably any retired government revenue official by taking recourse to the provisions of Order 26 of the Code to undertake spot inspection of the suit land with a view to verify its exact location, area, boundaries etc. keeping in view the evidence on record in relation to the suit land.”*

8. There is no dispute with regard to the legal position above referred.

9. In my considered opinion, in a suit for bare injunction, the necessity for appointment of Advocate Commissioner that too for noting down the physical features of the suit property does not arise and such exercise is not going to help the first defendant in any manner in deciding the suit for bare injunction at the appeal stage. Admittedly, the first defendant has not taken any such application during trial. Even assuming that such appointment of Advocate Commissioner is necessary, it should be noted that only at the appeal stage, the first defendant has



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chosen to file the present application that too with an averment only for noting down of the existing physical features of the suit property by appointment of Advocate Commissioner. The said reasoning of the first defendant seeking for appointment of Advocate Commissioner is wholly unjustifiable, more so, in a suit for bare injunction. Therefore, taking out an application for appointment of Advocate Commissioner at the stage of appeal is nothing but an after thought and unnecessary exercise which the Court below has rightly rejected.

10. As rightly observed by the learned First Appellate Judge, the first defendant himself has given evidence that the plaintiff had constructed the compound wall in the year 1999, but the defendants have not taken any steps for appointment of Advocate Commissioner before the trial Court and now only to delay the proceedings and for collection of evidence, filed this petition.

11. The First Appellate Court also in the order has elaborately discussed and correctly dismissed the petition. Therefore, the order passed by the Trial Court is in order and it does not warrant interference. In view of the above said reason, the Civil Revision Petition has no merit and the same is liable to be dismissed.



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12. In the result, this Civil Revision Petition stands dismissed. As the appeal suit is pending from 2016, the Subordinate Judge, Sattur, Virudhunagar District shall conclude the appeal within a period of six months from the date of receipt of a copy of this order. Consequently, connected Miscellaneous Petition is closed.

**18.12.2024**

NCC : Yes / No  
Index : Yes / No  
Internet : Yes / No  
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To

The Subordinate Judge, Sattur,  
Virudhunagar District.



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**N.SENTHILKUMAR, J.**

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