



C.R.P.(MD)No.97 of 2021

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 07.03.2024

CORAM:

THE HON'BLE MR.JUSTICE MUMMINENI SUDHEER KUMAR

C.R.P.(MD)No.97 of 2021

and

C.M.P.(MD)No.632 of 2021

1.Ganesan

2.Raja

3.Periyasamy

4.Chellammal

5.Arasakumar

... Petitioners

Vs.

Mokkai @ Karuppa Thevar (died)

1.Periyasamy

2.Sivakumar

... Respondents

PRAYER : Petition filed under Article 227 of the Constitution of India, against the fair and decretal order dated 12.02.2020, made in I.A.No.308 of 2019 in O.S. No.119 of 2017 on the file of the District Munsif Court, Uthamapalayam.



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For Petitioners : Mr.K.Guhan

For Respondents : Mr.J.Lawrance

ORDER

This Civil Revision Petition is directed against the order dated 12.02.2020 passed in I.A.No.308 of 2019 in O.S.No.119 of 2017 on the file of the Court of District Munsif, Uthamapalayam. The petitioners herein are the plaintiffs in the original suit.

2. The respondents herein / defendants filed the above said application under Order XXVI Rule 9 of the Code of Civil Procedure, seeking appointment of an Advocate Commissioner for the purpose of noting down the physical features of the suit schedule property, especially, the existence of properties, pathways, etc.

3. The main suit was filed for injunction. The petitioners have claimed title and possession over the suit property. The respondents herein claimed that



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their father had taken possession of the subject property from a third party and has been in possession during his life time and therefore, the respondents came into force and thereby enjoying the same by cultivating in the said land. The trial is yet to be commenced. At that stage, the respondents / defendants filed the present application seeking appointment of Advocate Commissioner categorically stating that for the purpose of collecting the evidence as to the existence of the Coconut trees and other tress in the suit schedule property and to establish that the respondents are in possession of the suit property, they wanted appointment of an Advocate Commissioner. The said application was allowed by the trial Court.

4. As already noted above, the suit is for injunction filed by the petitioners. It is for the petitioners to establish that they have a *prima facie* title, possession and balance of convenience in their favour, in order to succeed in the suit. But, surprisingly the defendants in the suit filed the present application for appointment of an Advocate Commissioner for the purpose of collection of evidence as stated in the affidavit filed in support of the very same application.



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In the teeth of such averments made in the affidavit filed in support of the application, the learned trial Court should have been more careful and should have examined as to the intent and purpose of the application filed by the respondents herein. But, unfortunately, the same is lacking, in the order under revision. The trial Court without applying its mind and without verifying the intention of the parties for filing the application, allowed the same by appointing an Advocate Commissioner for recording physical features of the suit schedule property.

5. The cases in which and under what circumstances an Advocate Commissioner can be appointed under Order XXVI Rule 9 C.P.C is no more *res judicata*. It is settled law that the said provision cannot be used for the purpose of collection of evidence and it is for the parties to adduce their respective evidence on their own and it is only in case of any ambiguity or lack of clarity in the evidence brought on record, the provision under Order 26 Rule 9 C.P.C can be invoked. If the Court feels that physical inspection of the suit property is required, then only the question of appointing an Advocate Commissioner would



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L.W.-159, after examining entire case law, held as under:

“19. Possession of the Defendants in S. No. 8/1 is a matter of evidence. Power is conferred on the Court to appoint Commissioner to make local inspection not to collect evidence; but only to obtain evidence, which is a peculiar nature which could be obtained only on spot inspection. Possession of the Defendants in S. No. 8/1 could be well proved by adducing appropriate evidence. In that view of the matter also, the order of the Lower Court declining to appoint Advocate Commissioner is to be confirmed.

20. The case in hand stands on a different footing wherein the parties are seeking to appoint Advocate Commissioner to note down their possession, construction of the house and the trees raised by them. The factum of possession should be proved only by adducing appropriate evidence and not by collecting the evidence by seeking Appointment of Advocate Commissioner.”

Also in the case of ***T.K.Krishnamurthy V. Tamil Nadu Water and Drainage Board*** reported in ***2006-4-MLJ-626***, the learned Single Judge of this Court held as under :



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“9. The report of the advocate commissioner alone can never be the basis for deciding the suit as Commissioner should not be appointed to gather evidence to prove the case of the parties. Parties should prove their case by themselves by letting in legally acceptable evidence and the report of the Commissioner can only aid the court in evaluating the evidence to come to a just conclusion. But in this case Advocate Commissioner was sought for and appointed to gather the evidence to disprove the case of the revision petitioner in respect of a property which is not subject matter of the suit.”

Yet in another case in the case of ***Chinnathambi V. Anjali*** reported in **2006-5-CTC-494** is considered the very same aspect and took the very same view, which held as under:

9.It is a well accepted principle of law that an Advocate Commissioner should not be appointed to find out the possession of the property, which has to be adjudicated only by oral and documentary evidence. Under such circumstances, the order of the Lower Court suffers from material irregularity and it is not in accordance with the principles laid down in above decisions.”



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6. Thus, in the light of the above settled legal position, the purposes of filing an application under Order XXVI Rule 9 C.P.C by the respondents for the purposes of establishing the possession over the suit schedule property by noting down the physical features, etc., should not have been permitted. Unfortunately, the learned trial Judge in total ignorance of the settled legal position, passed the order under revision in a mechanical manner, without application of mind. In the light of the above, the order passed by the learned trial Court cannot be sustained and the same is accordingly set aside.

7. This Civil Revision Petition is allowed. There shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

07.03.2024.

Neutral Citation: Yes / No
Index : Yes / No
Internet : Yes/No
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MUMMINENI SUDHEER KUMAR, J.

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To

- 1.The District Munsif Court,
Uthamapalayam.
- 2.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

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