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C.R.P.(PD)(MD) No. 253 of 2020

THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on	20.11.2024
Pronounced on	23.01.2025

CORAM

THE HON'BLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI

**C.R.P.(MD) No.253 of 2020 and
CMP(MD).No.1535 of 2020**

1.S.Selvaraj(died)

2.Jayarani

3.Rajesh Johnson

... Petitioners

(petitioners 2 and 3 are brought on record
as LR's of the deceased sole petitioner vide
Court order, dated 11.11.2024 made in
CMP(MD).Nos.11067, 11069 and 11073 in
CRP(MD).No.253 of 2020 by KGTJ)

Vs.

V.David Michael

.. Respondent / Plaintiff

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decreetal order, dated 03.12.2019 passed in I.A.No.174 of 2018 in A.S.No.33 of 2018 on the file of the Sub Court, Tiruchendur.

For Petitioners

: Mr.M.P.Senthil

For Respondents

: Mr.S. Srinivasa Ragavan
for Mr.G.Rajaraman



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ORDER

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This Civil Revision Petition is filed against the fair and decreetal order, dated 03.12.2019 made in I.A.No.174 of 2018 in A.S.No.33 of 2018 on the file of the Sub Court, Tiruchendur.

2. The revision petitioners are the appellants in A.S.No.33 of 2018 on the file of the Sub Court, Tiruchendur and the defendants in the suit in O.S.No.113 of 2012 on the file of the District Munsif Court, Srivaikundam. The said suit was filed by the respondent / plaintiff for declaration and for mandatory injunction. The trial Court by its decree and Judgment, dated 09.08.2017 partly decreed the suit by granting declaratory relief in respect of the 2nd and 3rd items of the suit property and also granted the reliefs of permanent injunction restraining the defendants from interfering with the plaintiff's usage therein; for the maintenance of plaintiff's western and southern walls. In respect of the mandatory injunction with regard to the 4th schedule of property, the suit was dismissed. Against the disallowed portion the plaintiff preferred an appeal in A.S.No.33 of 2018 before the Sub Court, Thiruchendur. Whereas the defendant preferred an appeal in A.S.No.447 of 2017 before



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the Sub Court, Thiruchendur against the decree and Judgment passed against him in the above suit. While so, the plaintiff preferred an application in I.A.No.174 of 2018 in A.S.No.33 of 2018 seeking for appointment of Advocate Commissioner to note down the alleged encroachment made by the revision petitioner / defendant in the 4th schedule property. The said application was allowed by the first appellate Court. Aggrieved by the same, the present revision is preferred by the revision petitioner who is the respondent in the said appeal suit.

3. The learned counsel appearing for the revision petitioners / defendants would submit that originally the respondent / plaintiff filed an application in I.A.No.229 of 2013 in O.S.No.113 of 2012 for appointment of an Advocate Commissioner and the same was allowed by order, dated 01.01.2014. In spite of the same, the respondent did not take any steps to measure the property almost for 2 ½ years and finally the respondent himself not pressed the said application. Hence, the trial Court dismissed the said application on 29.08.2016. While so, the respondent again filed two applications in I.A.Nos.322 and 323 of 20217 for reopening the case and for appointment of Advocate Commissioner. Both the applications were dismissed by the trial Court on 16.06.2017. The said order was not



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challenged by the respondent and therefore, the same has attained finality.

In such circumstances, the first Appellate Court ought not to have entertained the present application for appointment of an Advocate Commissioner. Therefore, appointment of Advocate Commissioner during the First Appellate stage is totally unwarranted and no useful purpose will be served to dispose the appeal. Hence, prayed for setting the aside the order passed by the first Appellate Court in I.A.No.174 of 2018 in A.S.No.33 of 2018.

4. On the other hand the learned counsel for the respondent / appellant / plaintiff would submit that for ascertaining the actual encroachment made by the revision petitioner / defendant, appointment of an Advocate Commissioner is necessary. It is further submitted that no prejudice would be caused to the other side by appointing an Advocate Commissioner for the said purpose. Hence, the order of First Appellate Court calls for no interference by this Court.

5. Heard on both sides and perused the materials available on record.



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6. Admittedly, the applications filed by the respondent / plaintiff before the trial Court were dismissed and the order passed by the trial Court was not challenged. Even though there is no impediment to entertain the application for appointment of an Advocate Commissioner in the Appellate stage for an effective adjudication, however, the same cannot be granted simply it is asked by the respondent / plaintiff. The petitioner himself established that the appointment of Advocate Commissioner is essential to have an effective adjudication. No doubt, in case of encroachment, the appointment of Advocate Commissioner is necessary to measure the property for finding the alleged encroachment. The learned counsel appearing for the respondent / plaintiff would submit that in the event, the respondent succeeds in the appeal suit, it would be difficult for the respondent / plaintiff to execute the decree for recovery of possession. This arguments made by the learned counsel is un-sustainable. On perusal of the plaint, the description of the 4th schedule property it is clearly given and therefore, it is not necessary for appointing an Advocate Commissioner to inspect and measure the suit property. Moreover, the application was made, when appeal itself was listed for final arguments. The Appellate Court is bound to act on the basis of available oral and documentary evidence on record. The



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Commissioner cannot be appointed for collecting the evidence. The plaintiff cannot be allowed to fill up the lacuna at appellate stage.

7. In the result, this Civil Revision Petition is allowed setting aside the order, dated 03.12.2019 made in I.A.No.174 of 2018 in A.S.No.33 of 2018 on the file of the Sub Court, Tiruchendur. The first Appellate Court is directed to take up the appeal suit in A.S.No.33 of 2028 for final hearing and dispose the same within a period of three months from the date of receipt of copy of this order. No costs. Consequently, the connected Miscellaneous Petition is closed.

23.01.2025

Index: Yes/ No
Neutral Citation: Yes / No
Speaking Order/Non-Speaking Order

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The Sub Court, Tiruchendur.



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K.GOVINDARAJAN THILAKAVADI, J.

trp

Pre-Delivery Order made
in
**C.R.P.(MD) No.253 of 2020 and
CMP(MD).No.1535 of 2020**

23.01.2025