

(2011) 08 MAD CK 0135

In the Madras High Court

Case No : C.R.P. (PD) (MD) No. 204 of 2010 and M.P. (MD) No. 1 of 2010

M. Nachiappan and V. Asokan

APPELLANT

Vs

A. Nachiappan and Others

RESPONDENT

Date of Decision : 02-08-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Constitution of India, 1950 — Article 227

Citation : (2011) 08 MAD CK 0135

Hon'ble Judges : C.S. Karnan, J

Bench : Single Bench

Advocate : T.S. Mohamed Mohideen, for the Appellant; T.V. Sivakumar and B. Muruganandham, for the Respondent

Final Decision : Dismissed

Judgement

C.S. Karnan, J.—This petition has been filed by the Petitioners/Defendants to set aside the fair and decretal order passed on 04.12.2009 in

I.A. No. 447 of 2009 in O.S. No. 177 of 2007 on the file of the Additional District Munsif Court, Karaikudi.

2. The short facts of the case are as follows:

The Respondents/Plaintiffs have filed a suit in O.S. No. 177 of 2007 on the file of the District Munsif Court, Karaikudi against the revision

Petitioners/Defendants for declaration and injunction stating that the "A" Schedule property belongs to the 1st Plaintiff and that his peaceful

possession would not be disturbed. The "B" schedule property belongs to the 2nd Plaintiff. As such, the 2nd Plaintiff seeks a declaration and

injunction restraining the Defendants. The 3rd Plaintiff seeks injunction and declaration restraining the Defendants from interfering with his peaceful

possession and other relief. The said suit has been resisted by the Defendant and written statement has also been filed.

3. The Plaintiffs have filed an interlocutory application in I.A. No. 83 of 2009 to appoint an advocate commissioner for inspection of the suit

property in order to prove the Plaintiffs possession and enjoyment and extent of land possessed by them. The said application for appointment of

Advocate Commissioner was opposed by the Defendants, who had filed counter statements. The learned Judge, after hearing the arguments of the

learned Counsel on both sides and on scrutiny of the averments on both the sides, dismissed the said application.

4. Thereafter, the Plaintiffs have filed another application in I.A. No. 447 of 2009 in O.S. No. 177 of 2009 with the same prayer of appointment

of Advocate Commissioner. This application was also opposed by the Defendants, who filed counter statement. The learned Judge, after

considering the arguments advanced by the learned Counsels of both the parties, and after considering the averments of both parties appointed an

advocate commissioner, who was directed to inspect the petition mentioned property with the help of a Taluk Surveyor and to measure the suit

property and to note down the physical features.

5. Against the said order, the revision Petitioners/Defendants have filed the above revision petition to set aside the order and decretal order passed

in I.A. No. 447 of 2009 in O.S. No. 177 of 2007 on the file of the Additional District Munsif Court, Karaikudi. The learned Counsel for the

revision Petitioner argued that No. petition under Order 26 Rule 9 can be maintained to fix the possession of property and that the failure of

possession cannot be decided by appointing a commissioner. It was also pointed out that when an earlier application for appointment of

commissioner was dismissed, allowing the subsequent application which has the same literal meaning is unsustainable. It was also argued that the

mere apprehension that the Defendant may encroach upon the suit property cannot be a ground to allow a petition under Order 26 Rule 9. The

learned Counsel has also argued that the property has been described by the Plaintiffs and it any dispute arise, if can be settled by letting evidence.

As such the aim of the Plaintiff to locate the possession has not been looked clearly by the lower court. The learned Counsel for the revision

Petitioner further argued that the Plaintiffs have filed the 2nd application for appointment of advocate commissioner, on the same purpose, with the intention of dragging on the proceedings.

6. The learned Counsel for the Respondents argued that if the advocate commissioner inspects the property and notes down the physical features of the property with the help of a Taluk Surveyor, the interest of the revision Petitioners would not be prejudiced. There is No. necessity to drag on the suit proceedings since the Respondents/Plaintiffs have sought relief against the revision Petitioners/Defendants. The 2nd application for appointment of advocate commissioner has been done with the view to determine the physical feature of the property.

7. In support of this case, he cited a judgment in the case of Mangayarakarasi Ammal v. Nagammal reported in 2009(5) CTC 444. The relevant portion of this judgment reads as follows:

Code of Code of Civil Procedure, 1908 (5 of 1908), Section 11 and Order 26, Rule 9 - Res judicata - Whether earlier dismissal of Interlocutory

Application would operate as res judicata - Respondents filed Application for appointment of Advocate Commissioner to ascertain market value

of suit property - Trial Court dismissed Petition on ground that No. issue framed regarding valuation of suit property -Subsequently additional issue

framed as to whether said Court has pecuniary jurisdiction - Respondents filed second Application for appointment of Advocate Commissioner to

ascertain market value of suit property which was allowed - Whether similar Petition is maintainable for same purpose when earlier Application is

dismissed - Held: Second Application for same relief is maintainable as it has not been decided finally and conclusively in earlier Application -

Pandurang Ramchandra Mandlik (Since Deceased) by his Lrs. and Another Vs. Shantibai Ramchandra Ghatge and Others, and The United

Provinces Electric Supply Co. Ltd., Allahabad Vs. Their Workmen, , followed.

8. In another judgment in the case of A. Nagarajan Vs. A. Madhanakumar, . The relevant portion of this judgment reads as follows:

Code of CPC 1908, Order 26, Rule 9 - Appointment of Commissioner in Rent Control Proceedings - Stage of Appointment of Commissioner -

Power of Court. Rent Controller appointed a Civil Engineer as Commissioner to submit report with plan - Application was moved during trial -

Civil Revision Petition under Article 226 challenging order appointing commissioner was dismissed - Validity of such order appointing

commissioner can be challenged in appeal preferred against final order and not by invoking extraordinary jurisdiction under Article 227 of the

Constitution of India.

4. The main dispute now revolves round the point is at what stage and when a commissioner can be appointed by the Court?

Rules 9 of Order 26, CPC Contemplates in any proceeding, in which the Court is of the opinion that local investigation is requisite or proper for

the purpose of elucidating any matter in dispute it may issue a commission to such person as it thinks fit direct him to make such investigation and to

report thereon to the Court (Italic is mine). Such report shall form part of the record. But the Court or with the permission of the Court, any of the

parties to the proceeding may examine the Commissioner in open court touching any of the matters referred to him or mentioned in his report as to

the manner in which he has made the investigation. Whether the court is, for any reason, dissatisfied with the report, it may direct further enquiry to

be made as it shall think fit. The purpose of local investigation is ascertaining, collecting or elucidating facts in respect of any matter in dispute after

proper scrutiny of examination and sifting of materials. Elucidate according to Websters Dictionary means ""to make light or clear, to explain, to

remove obscurity from and render intelligible, to illustrate "". According to Chambers Dictionary, elucidate means to make lucid or clear or to

throw light upon, to illustrate, making clear, explanatory"". According to the Oxford Dictionary, "" elucidate means to throw light on, explain"" etc.

5. For the purpose of elucidating facts in respect of any matter in dispute means where the circumstances render it expedient in the interest of

justice to do so, the Court has power, which is discretionary in nature, to appoint Commissioner for the purpose of ascertaining, to make it clear,

intelligible and to throw light upon the matter in issue, means the main dispute as well as the facts leading to the dispute. The course may be

adopted after the examination of the party or parties of suo motu. If the courts feels that clarification or confirmation is necessary on certain aspects

on which the Court entertains doubt in the matter in issue or dispute, or the disputed questions of fact, for the purpose, of ascertaining, clarification,

or for proper scrutiny and examination, this course can be restored to. In P.Moosa Kutty, in re AIR 1953 Madras 632, this Court has held in any

even, an application under this rule must be made before the case is closed. In this view of the matter, appointment of a commissioner can be

restored to after the evidence of the respective parties being placed. In Pormusamy Pandaram Vs. The Salem Vaiyappamalai Jangamar Sangam, ,

this Court has taken the view that the party has got a right to place evidence which he could require to substantiate his case before the court and,

of course, subject to the law of evidence and the code, and it is the duty of the court to receive such evidence, unless there are other justifiable

factors in law to decline to receive such evidence. The evidence so collected through the Commissioner may be used to elucidate a point which

may otherwise be left in doubt or ambiguity on record. The Commissioner in effect is a projection of the Court appointed for a particular purpose.

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

jurisdiction, erroneous assumption of jurisdiction of excess of jurisdiction of where there is gross dereliction of duty, flagrant violation of law, error

of law apparent on 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 of 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. The act of appointing a commissioner

cannot be termed as one without jurisdiction.

... Learned Judge ought to have allowed the Respondent-Petitioner to complete his side of the evidence and then resorted to this course of

appointing a Commissioner, if so advised. As has been held by this Court in *Sangili v. Mookan* ILR 16 Mad 350, the word elucidation

presupposes the existence of some independent evidence on record. It is reasonable to resort to the appointment of a Commissioner after placing

evidence by the respective parties. With respect, I differ from the view expressed in *John Vs. Kamarunnissa*, . Thus, I answer the point that

Commissioner can be appointed after closure of his side of evidence by a party for the purpose of clarification, explanation and proof of the matter

in issue or a fact which requires elucidation. I see No. reason to quash the impugned order, but however, I direct the learned Judge to complete

the evidence of the Respondent who is the Petitioner in R.C.O.P. and then give effect to the order impugned.

9. In another judgment in the case of *Pormusamy Pandaram Vs. The Salem Vaiyappamalai Jangamar Sangam*, . The relevant portion of this

judgment reads as follows:

9. Coming to the question as to whether, on the basis that the order passed by the Court below is a case decide, there is a warrant for interference

within the meaning of Section 115 of the Code, I find that it is so. A controversy, as we could see from the pleadings, has arisen as to whether the

constructions put up by the third Defendant are within his land or whether they have encroached into the lands of the Plaintiff. A local investigation

is the best way to find out the position and the party, namely, the third Defendant" coveting to place the evidence before the court through local

investigation by the Commissioner cannot be shut out of that right. A misconception has weighed in the mind of the Court below when it reasoned

that there is No. dispute about the ownership of S. No. 289/1 by the third Defendant. That is not the point in issue. Shutting out the evidence which

a party is entitled to place before Court to substantiate his case, definitely

decides that right of the party, adversely against him and in this view, the order passed by the Court below is a "case decided" and apart from that, on merits the order passed by the Court below comes within the mischief of the ratio adumbrated in Section 115 of the Code. There has been a failure to exercise jurisdiction vested in it by the Court below to a patent misconception of the position and this obliges me to interfere in revision.

10. In another judgment in the case of *Saraswathy v. Viswanathan* reported in 2002(2) CTC 199. The relevant portion of this judgment reads as follows:

Code of Civil Procedure, 1908 Order 26, Rule 9 - Appointment of Advocate Commissioners - Grounds for - In suit for permanent

injunction restraining Defendant from interfering with Plaintiffs easementary right and light and air to suit property - Plaintiff sought appointment of

Advocate Commissioner to visit suit property and note down physical features of suit property including age and stage of new construction in suit

property - Absence of dispute with regard to identity of property does not disentitle party to seek appointment of Advocate Commissioner -

Advocate Commissioner could be appointed and directed to note physical feature of property and verify whether construction put up is in

accordance with sanctioned plan - Object of appointment of Commissioner is not to collect evidence but to elucidate matters which are local in

character and which can be done only by local investigation at spot - Commissioner cannot decide dispute but his report would help Court in

deciding dispute - No. prejudice is caused to other side by appointing Advocate Commissioner - Order of trial Court refusing to appoint set aside

and trial Court directed to appoint Advocate Commissioner -.

11. In the facts and circumstances of the case and at the hearing of arguments advanced by the learned Counsel on both sides and on perusal of

the order of appointment of Advocate Commissioner passed in I.A. No. 447 of 2009 in O.S. No. 177 of 2007 on the file of the Additional

District Munsif Court, Karaikudi, this Court is of the considered opinion that (1) The appointment of advocate commissioner has been done not

with a view for favouring either of the parties but has been done to get more clarity and insight into the said suit property to render proper verdict

to the parties concerned. (2) The expenditure incurred for utilising the service of

advocate commissioner will be borne by the Petitioner, who has sought for appointment of advocate commissioner (3) The mere appointment of advocate commissioner will not be prejudicial to the interest of the revision Petitioners/Defendants, as he has been appointed only for the purpose of determining the actual possession of the property. Considering the above mentioned aspects, the order passed by the learned Judge in I.A. No. 447 of 2009 in O.S. No. 177 of 2007 is found to be fair in the circumstances of the case.

12. Resultantly, the above civil revision petition is dismissed. Consequently, the order and decretal order passed in I.A. No. 447 of 2009 in O.S.

No. 177 of 2007 on the file of the Additional District Munsif Court, Karaikudi is confirmed. Connected miscellaneous petition is closed. This

Court further directs the learned Judge to dispose the case within a period of six months, without being influenced by the discussion of this Court.

Accordingly ordered. There is No. order as to costs.