

(2008) 12 MAD CK 0263

In the Madras High Court

Case No : C.R.P. (PD) (MD) No. 277 of 2008 and M.P. (MD) No. 1 of 2008

Maria Selvaraj

APPELLANT

Vs

Mathias and Thiruvattar Primary Agricultural Co-operative
Rural Development Bank

RESPONDENT

Date of Decision : 16-12-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9

Citation : (2008) 12 MAD CK 0263

Hon'ble Judges : S. Palanivelu, J

Bench : Single Bench

Advocate : C. Godwin, for the Appellant; K.N. Thampi, for Respondent-1, for the Respondent

Final Decision : Dismissed

Judgement

S. Palanivelu, J.—The petitioner is the first defendant in O.S. No. 141 of 2006, on the file of the Subordinate Court, Padmanabhapuram. He filed the suit for specific performance of a contract on the strength of a sale agreement executed by this defendant, dated 10.10.2004. The first respondent/plaintiff filed the suit. He also filed an application under Order 26 Rule 9 of Civil Procedure Code, for appointment of an Advocate Commissioner to inspect the suit property and to file a report, after measuring and locating the schedule items 1 to 3, as per the sale deeds of the defendants and also resurvey the plan .

2. In the affidavit, he stated that in the nature of the case, the Commissioner's evidence is necessary to measure the available area in schedule items 1 to 3.

3. The petition was resisted by this petitioner in his counter, by stating that the application has been brought about after a long delay and that there is no necessity for appointment of an Advocate Commissioner. It is further alleged that the sale agreement clearly state the area and the well-defined boundaries which coincide with the admitted plaint schedule properties and there is no clause

either to measure the property after the agreement or to decide the reduced area and it is for the plaintiff to check and measure the property prior to the agreement. It is also mentioned that if the Commissioner is appointed, it will change the nature of the suit and may create a new cause of action and it will lead to further amendments in the pleadings.

4. The learned Subordinate Judge, Padmanabhapuram, entertained the request of the plaintiff by appointing an Advocate Commissioner for inspection of the suit property with the assistance of a qualified Surveyor. He has also observed that it is just and necessary that an Advocate Commissioner to be appointed.

5. The learned Counsel for the Petitioner Mr. C. Godwin would submit that inasmuch as the suit is only for the specific performance of the contract, there is no scope for the appointment of an Advocate Commissioner and it is an unnecessary exercise. It is his further argument that the Commissioner could not be appointed by the Court for collecting evidence in the suit which are required to be proved by leading oral evidence and that the order passed by the court below is in firm.

6. In support of his contention, he placed reliance upon three decisions of this Court which are as follows:

In D.S. Reddy rep. by his power agent, D.P.S. Reddy Vs. Dr. G.V. Reddy, rep. by his Power Agent M.S. Murthy and Another, , it is held that merely a prayer is sought for appointment of an Advocate Commissioner, there is no need for the Court to appoint a Commissioner which is within the judicial descretion and the order passed by the court shall be supported by sufficient reasons.

7. In Muthusamy Gounder Vs. Mysamy Gounder, , the learned Judge of this Court has observed in paragraph 9 that:

9...The appointment of an Advocate Commissioner is only to aid the court to assess the evidence let in by both parties with respect to the dispute....

8. In Rengasamy v. The Superintending Engineer, Tamil Nadu Electricity Board, Mettur Electricity System, Mettur Dam, Salem District and Ors. reported in 2006 (5) CTC 501, this Court has expressed its view in paragraph 7 that:

7. The object of the local investigation under Order 26 Rule 9 is not to collect evidence and the court shall not appoint an Advocate Commissioner for taking measurement of the suit properties in a mechanical manner without considering the need for appointment of an Advocate Commissioner...

9. As per the learned Counsel for the petitioner, the order passed by the court below is a mechanical one, without advertng to the claim of the parties and that by appointment of an Advocate Commissioner, no purpose will be served for the benefit of the parties.

10. Repelling to the contentions made by the learned Counsel for the petitioner, learned Counsel for the respondent Mr. K.N. Thampi would submit that inasmuch

as the plaintiff at the inception, i.e., while filing the suit itself has mentioned about the discrepancies in the extent of the suit items and stated that he would experience much difficulty while executing the decree passed by the court below, at the time of execution and that he has introduced specifically pleaded with regard to his claim in his plaint itself. He draws the attention of this Court to paragraph 10 of the plaint, in which it is pleaded that:

10. On measurements, there is shortage in area and the area for the schedule property comes only 2 acre 36 1/2 cents excluding item No. 4 and that the first defendant is also convinced that area is less...

Whatever may be the pleadings in the plaint, it is incumbent upon the defendant to deny the material pleadings thereon in his written statement. The learned Counsel for the respondent also focussed attention of this Court to the Written Statement, where there is no specific denial as to the shortage in area and the acceptance of the first respondent with regard to this. As per his contention, the appointment of an Advocate Commissioner is very much essential to elucidate before the Court the real controversies between the parties. He placed much reliance upon a decision in *Shreepat v. Rajendra Prasad and Ors.* reported in JT 2000 (7) SC 379, wherein in paragraph 4 of the judgment, their Lordships has held as follows:

4. In our opinion, this contention is correct. Since there was a serious dispute with regard to the area and boundaries of the land in question, especially with regard to its identity, the courts below, before decreeding the suit should have got the identity established by issuing a survey commission to locate the plot in dispute and find out whether it formed part of Khasra No. 257/3 or Khasra No. 257/1. This having not been done has resulted in serious miscarriage of justice...

11. He also cites an early decision of this Court in *Moosa Kutty's case* reported in AIR 1953 Mad. 717, in which it is held as follows:

The object of the local investigation is not so much to collect evidence which can be taken in Courts but to obtain evidence which from its very peculiar nature can only be had on the spot...

I am in respectful agreement with the above said proposition laid down by this Court. Only in the spot, the peculiar nature of evidence could be ascertained which would be more helpful to the court while deciding the matter finally to adjudicate the rights of the parties.

12. He also placed reliance upon a decision in *Sivagurunathan v. Ramalingam and Ors.* reported in (2005) 3 MLJ 525, in which it is observed that:

when the location of the plaintiff's property and the extent is denied, Commissioner ought to have been appointed for effectively adjudicating the dispute and that the report of the Advocate Commissioner and the plan drawn to scale would considerably reduce the oral evidence which aspect was not taken into consideration by the lower court.

13. In Mahendranath Parida Vs. Purnananda Parida and Others, , also an identical opinion has been expressed. It is in the words of the Orissa High Court that:

Where the controversy between the parties is the area of the land or identification or investigation is necessary, essential, requisite or proper. It will not be sound exercise of discretion without anything more to decline to appoint a Commissioner. Very often decision of a case turns on the identification or determination of the area and evidence in relation thereto from its peculiar nature can only be had on the spot (See Amulya Kumar Samaddar and Others Vs. Annada Charan Das and Others, and in S KUPPUSWAMI Vs. COMMISSIONER OF Income Tax, MADRAS. OCTOBER 20, 1953.,)..

The Orissa High Court has also referred to the judgment of this Court in Moosa Kutty's case cited supra and accepted the view taken by this Court.

14. In the light of the above said observations, obtained from the views expressed in the decisions of the Supreme Court and this Court, I am of the considered view that the appointment of an Advocate Commissioner is very much essential, inasmuch as the plaintiff has specifically averred in the plaint as regards the shortage in area and that the same was accepted by the first defendant also. Even though the order challenged is bereft of specific findings with regard to the pleadings of the parties, still it could be justified and the same deserves to be confirmed. Hence, this Civil Revision Petition does not merit consideration which suffers dismissal.

15. In fine, the Civil Revision Petition is dismissed. No costs. The learned Subordinate Judge, Padmanabhapuram, is directed to dispose of the suit in O.S. No. 141 of 2006, within a period of three months from the date of receipt of a copy of this Order. Consequently, connected Miscellaneous Petition is also dismissed.