

(2009) 03 MAD CK 0120

In the Madras High Court

Case No : C.R.P. (PD) MD. No. 362 of 2009 and M.P. (MD) No. 1 of 2009

NSP. Nagappan and Others

APPELLANT

Vs

The District Collector and The Tahsildar

RESPONDENT

Date of Decision : 24-03-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9, 151

Citation : (2009) 03 MAD CK 0120

Hon'ble Judges : M. Venugopal, J

Bench : Single Bench

Advocate : G. Prabhu Rajadurai, for the Appellant;

Final Decision : Dismissed

Judgement

M. Venugopal, J.—The Civil Revision Petitioners/plaintiffs have filed this Civil Revision Petition as against the order dated 08.12.2008 in I.A. No. 609 of 2008 in O.S. No. 243 of 2007 passed by the learned District Munsif, Melur, in dismissing the application filed by the revision petitioners/plaintiffs praying for an appointment of an Advocate Commissioner under Order XXVI Rule 9 and Section 151 of the Code of Civil Procedure.

2. The trial Court while passing orders in I.A. No. 609 of 2008 in O.S. No. 243 of 2007 has inter alia opined that "the present suit is filed by the revision petitioners for bare injunction, whereas the respondents have denied the petitioners" title and possession of the suit property" and in the said circumstances, the Court is of the opinion that the proposed Commissioner's report would no way be helpful to decide the real dispute between the parties and resultantly, dismissed the application without costs.

3. Dissatisfied with the order passed by the trial Court in I.A. No. 609 of 2008 in O.S. No. 243 of 2007, the revision petitioners/plaintiffs have preferred this Civil Revision Petition before this Court.

4. The learned Counsel for the revision petitioners submits that the order of the

trial Court in dismissing the I.A. No. 609 of 2008 in O.S. No. 243 of 2007 in regard to the appointment of an Advocate Commissioner is contrary to law and that the trial Court has exceeded its jurisdiction in dismissing the application, even after the application has not been passed by the other side and the trial Court has not taken note of an important fact that if the application is allowed, then the Commissioner's report will throw light on the fact that quarry operators are allowed to have free hand over the land etc. and further that the trial Court has committed an error in dismissing the application since the respondents have failed to produce the documents relating to their contentions that the land was under Manavari cultivation and the Commissioner's report will be the only way to find out the nature of the property and therefore, prays for allowing this Civil Revision Petition in furtherance of substantial cause of justice.

5. It is to be pointed out that in the affidavit filed in I.A. No. 609 of 2008, the revision petitioners/plaintiffs have inter alia averred that the revision petitioners are the owners of the property bearing S. No. 701 admeasuring about 9.28 acres, 0.27 acres and 2.56 acres respectively lying at Kongampatti village, Melur Taluk, Madurai District etc. and that the said property originally belonged to their predecessor in title Sri. Nagappa Pillai (since deceased) by means of a partition deed dated 20.03.1996 and consequent to the demise of the said Sri. Nagappa Pillai, his three sons have inherited the properties and have been in enjoyment of the same by paying kists and the patta stands in their name and later, the revision petitioners/plaintiffs have become the owners of the said properties, but the lands are lying fallow, as there is no irrigation facility etc.

6. A perusal of the affidavit in I.A. No. 609 of 2008 filed by the revision petitioners clearly indicate that the second respondent has descended upon the suit property and threatened the petitioners with dire consequences if they claim right over the suit property and further that, the second respondent has threatened the revision petitioners at the instigation of quarry operators who is carrying on mining operation in the nearby hillocks etc.

7. In short, the revision petitioners/plaintiffs have prayed for an appointment of Advocate Commissioner to inspect the suit property to file a report on its physical features. The main thrust of the argument put forward by the learned Counsel for the revision petitioners is that if an Advocate Commissioner is appointed, then it will be of immense help to the Court when he submits his report for arriving at the just decision relating to the controversies/disputes involved and further, it will also reduce the necessity of adducing the evidence to establish the case in regard to the averment pertaining to the nature of the land.

8. At this juncture, the learned Counsel for the revision petitioners/plaintiffs brings it to the notice of this Court that I.A. No. 609 of 2008 praying for appointment of an Advocate Commissioner filed by the revision petitioners/plaintiffs, has not been opposed by the respondents.

9. It is not out of place to point out that the revision petitioners/plaintiffs in the

main suit O.S. No. 243 of 2007 on the file of the trial Court, have prayed for the relief of permanent injunction restraining the defendants and their men, agent, servants etc. claiming under or through them from disturbing the peaceful possession and enjoyment of the plaintiffs over the suit properties described in the Schedule thereto.

10. It is to be borne in mind that the aim of Order XXVI Rule 9 of the CPC is that one cannot assist a party to procure or collect evidence when an individual/party can get the evidence himself and produce the same. It is also well settled principle of law that the application for appointment of an Advocate Commissioner should not be ordered mechanically or even liberally on the request made by a party. However, a Court of law is to apply its mind as to whether the Advocate Commissioner can be appointed or not based on the facts and circumstances of a given case.

11. Indeed, the object of local inspection is not so much to collect evidence which can be taken in Court, but to obtain evidence which due its strange nature, can only be had at this spot. One cannot ignore an important fact that the power to appoint an Advocate Commissioner is purely discretionary and a Court of law has to exercise its power with greatest care and circumspection.

12. As far as the present case is concerned, the revision petitioners/plaintiffs have filed the main suit O.S. No. 243 of 2007 on the file of the learned District Munsif, Melur, only for the relief of permanent injunction. It transpires that the second respondent/defendant has filed his written statement before the trial Court.

13. Be that as it may, on a careful consideration of the contentions advanced on the side of the revision petitioners/plaintiffs and taking note of the fact that the revision petitioners/plaintiffs have filed the main suit O.S. No. 243 of 2007 only for permanent injunction, this Court is of the considered view that I.A. No. 609 of 2008 projected by the revision petitioners/plaintiffs is only a luxury and not a case of necessity and further, this Court opines that an Advocate Commissioner cannot be appointed to gather or procure evidence, when the revision petitioners/plaintiffs themselves can produce the best evidence on their behalf to substantiate their case and in that view of the matter, this Civil Revision Petition fails and the same is dismissed without costs. Consequently, the connected Miscellaneous Petition is dismissed. It is open to the revision petitioners/plaintiffs to raise all factual and legal pleas before the trial Court at the time of commencement of the trial of the case in order to substantiate their claim in the manner known to law.