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**(2009) 09 MAD CK 0198**

**In the Madras High Court**

**Case No : CRP (PD) No. 839 of 2009 and MP. No. 1 of 2009**

R. Justin Arulappa

APPELLANT

Vs

R. Xavier Arulappa and Gerayana Rani

RESPONDENT

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**Date of Decision : 01-09-2009**

**Acts Referred:**

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

**Citation :** (2009) 5 LW 711 : (2010) 1 MLJ 1176

**Hon'ble Judges :** Aruna Jagadeesan, J

**Bench :** Single Bench

**Advocate :** T. Selvakumar, for the Appellant; R. Joseph Thankaran, for R1 and C. Sankar Prakash, for R2, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

Aruna Jagadeesan, J.—This Civil Revision Petition is filed by the 1st defendant against the order dated 21.4.2009 passed in IA. No. 98/2009 in OS. No. 54/2009 by the learned II Additional Sub Judge, Nagercoil.

2. The 1st respondent/plaintiff has filed the above said suit for declaration of plaintiff's title and recovery of possession of the plaint schedule property from the defendants and to direct the 1st defendant to pay the arrears of licence amount of Rs. 90,000/- for the usage of the schedule mentioned property with 12% interest per annum. Pending the suit, the 1st respondent has filed the said application for issuance of commission for local investigation of the schedule mentioned property in relation to certain points stated by the 1st respondent in the said application. The allegations made by the 1st respondent is that the petitioner has annexed certain portion of land with the property of the petitioner on the western side and issuance of commission is filed to segregate the annexed portion from the petitioner's possession and for mesne profits for the usage of the disputed portion.

3. Strangely, though the court below has observed in its order that a commission

cannot be issued to separate the schedule mentioned property, to assess the mesne profits and to fix the rent for the building, however, it appointed an Advocate Commissioner for the purposes as required by the 1st respondent. Admittedly, the appointment of the Advocate Commissioner was without even notice to the petitioner. Though it is not obligatory on the court to issue notice to the other side before issuing commission, but natural justice requires that such an order should not be passed without notice to one of the parties.

4. In case of this nature, where the dispute between the parties relates to the determination of question of encroachment made by the other party, it is necessary that the other party should be given notice and allow him to put forth his defence before issuing a commission to visit the suit property and to make even the local investigation. It is rightly pointed out by the learned Counsel for the petitioner that the appointment of an Advocate Commissioner cannot be utilized for the purpose of gathering or collecting evidence by other party in any proceedings.

5. The learned Counsel for the petitioner placed reliance on the judgement of the Division Bench of this court rendered in the case of K. Mariappan and Others Vs. Chennaivazh Nadargal Sangam and Others, and contended that there cannot be a commission for noting down the physical features as set out in the petition filed by the 1st respondent in his petition and the Advocate Commissioner cannot divide the property and there is no necessity or justification to appoint an Advocate Commissioner for the said purpose.

6. The points to be noted by the Advocate Commissioner have been stated in the petition filed by the 1st respondent, which is extracted below for easy reference:

1. To identify and separate the schedule property from the I defendant property on the western side with the assistance of Taluk Surveyor, Agasteeswaram Taluk at Nagercoil.
2. To note the nature of the building in the schedule property and the business conducted there in and to assess the mesne profits for the building in usage.
3. To note the incumbents in the building in the schedule property and their utilisation of the said building.
4. To fix the rent of the building through the assistance of Assistant Engineer, PWD (Building) at Nagercoil.
5. To note such other points as the plaintiff requires at the time of commission visit.

The above said features cannot be noted down by the Advocate Commissioner, as it would amount to collection of evidence in favour of one party.

7. This court in the case of Rangasamy v. The Superintending Engineer, TNEB, Mettur Electricity System, Mettur Dam, Salem District and Ors. 2006 5 CTC 501 has held that the object of the local investigation under Order 26 Rule 9 of CPC is

not to collect evidence and the court should not appoint an Advocate Commissioner for taking measurement of the suit property in a mechanical manner without considering the need for such an appointment.

8. In yet another decision reported in the case of S. Palanisamy Gounder v. N. Palanisamy and three Ors. 2007 1 CTC 611, this court has observed that though the said local investigation by the Advocate Commissioner can be done at the earlier stage of litigation regarding identification, location and measurement of land or premises, the report can be used as a guiding factor in the process of decision making and not to be used as a basis of decision making.

9. In the instant case, the court below has not even chosen to give a prima facie finding for the purpose of issuance of commission without notice to the other party. The need to have resorted to Order 26 Rule 9 of CPC ought to be felt by the court for the purpose of elucidating certain details and it cannot mechanically appoint an Advocate Commissioner without focussing attention as to what are the questions of dispute and whether for deciding the disputed question the appointment was necessary. But, in this case, utter disregard to the above said principles, the court below had appointed an Advocate Commissioner to make local investigation as requested by the 1st respondent without even considering whether such issuance of commission is warranted at this stage.

10. Therefore, I have no hesitation to hold that the impugned order of the court below is improper and suffers from illegality. In the event of a local investigation being made by the Advocate Commissioner pursuant to the issuance of such a commission, then the said report will be regarded as inadmissible and non est.

11. For the reasons aforesaid, the impugned order passed by the court below is liable to be set aside and accordingly, it is set aside and this Civil Revision Petition is allowed. No costs. Consequently, the connected MP is closed.