

(2009) 10 MAD CK 0144

In the Madras High Court

Case No : C.R.P. (NPD) No. 2503 of 2009 and M.P. No. 1 of 2009

The Principal St. Patrick School and College

APPELLANT

Vs

Mrs. Amaravathi (deceased Mrs. Kanniammal and Others)

RESPONDENT

Date of Decision : 21-10-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Evidence Act, 1872 — Section 91

Citation : (2009) 5 LW 809 : (2010) 1 MLJ 1381

Hon'ble Judges : M. Venugopal, J

Bench : Single Bench

Advocate : AR. L. Sundaresan, S.C. for M.L. Ganesh and S. Arunkumar, for the Appellant; P.S. Raman, General for K.P. Sanjeev Kumar and Sathish Kuamr, for the Respondent

Final Decision : Allowed

Judgement

M. Venugopal, J.—The civil revision petitioner/respondent/defendant has preferred this civil revision petition as against the order dated 7.8.2009 in I.A. No. 855 of 2007 in A.S. No. 244 of 2007 passed by the learned III Additional Judge, City Civil Court, Chennai in allowing the application filed by the respondents/appellants/petitioners/plaintiffs under Order 26 Rule 1 of CPC praying for appointment of an Advocate Commissioner along with Government Surveyor to measure the suit land.

2. The learned III Additional Judge, City Civil Court, Chennai, while passing orders in I.A. No. 855 of 2007, has, inter alia opined that "... measuring of the property or noting down the physical features of the property will not cause prejudice to the parties. On the other hand, from the documents filed by the plaintiff as well as the defendants, even though this Court is not in a position to discuss the point in a detailed manner, but some of the documents showing the title of the respondents are not covered the full extent of the survey numbers and on the other hand, revenue records also entered in the predecessor of the

petitioners name, which was not accepted by the trial Court and in these circumstances, the appointment of Advocate Commissioner will not in any way prejudice to the parties and on the other hand, it would be helpful to both sides will know the actual extent of the properties and hence, it is just and necessary to appoint an Advocate Commissioner to decide the issue in a proper manner and allowed the application by appointing Mr. C. Kasirajan, 239, New Law Chamber, High Court, Chennai-104 is appointed as Advocate Commissioner and has directed him to inspect the suit property after giving due notice to both sides and further he has been directed to note down the demarcation of the property with the help of Government Surveyor without collecting any evidence on either side and without noting who is in possession of the property and he has been directed to note down only the physical features of each area of the property and to submit his report on or before 19.8.2009 and the remuneration of Rs. 10,000/- has been fixed and it is ordered to be paid by the respondents/petitioners and the matter has been directed to be called on 19.8.2009."

3. The learned Counsel for the revision petitioner/ respondent/defendant submits that the order of the First Appellate Court dated 7.8.2009 passed in I.A. No. 855 of 2007 in A.S. No. 244 of 2007 in allowing the application for appointment of an Advocate Commissioner to inspect the suit property is an arbitrary, illegal one and contrary to law and against the principles of natural justice and moreover, the First Appellate Court should have observed that the application for appointment of an Advocate Commissioner has been filed by the respondents/petitioners in the year 2007 and moved the same only in the year 2009 for obvious reasons when as a matter of fact, the appeal itself has been listed for final arguments and in fact, the trial Court has given a finding that the respondents/petitioners have failed to establish that they do have a valid title over the suit property measuring an extent of 16 acres situated in the city of Chennai and added further, the First Appellate Court should have observed that the trial Court has given a categorical finding that the respondents have fabricated the revenue records as confirmed by the Tahsildar, Mylapore-Triplicane Taluk and in fact, the revision petitioner/ Institution will be subjected to hardship, mental agony and irreparable loss if an Advocate Commissioner physically measures the suit property, since educational activities are going on in the suit property and these aspect of the matter has not been looked into by the trial Court in right perspective and indeed, the report of an Advocate Commissioner will in no way help or to assist the Court but it prejudices the revision petitioner and the petitioner school has been in existence for more than 10 decades and the criminal complaints filed against the respondents, represented by their power agent for criminal trespass, damages, forgery and fabrication of documents have not been adverted to by the First Appellate Court and as a matter of fact, how the respondents/petitioners/appellants had derived a title of the suit property measuring an extent of 16 acres in the city of Chennai has not been looked into by the First Appellate Court and the first Appellate Court also has committed an error in coming to the conclusion that it is not in a position to discuss the merits

and demerits of the appeal before deciding an application for appointment of an Advocate Commissioner and therefore, prays for allowing the civil revision petition in furtherance of substantial cause of justice.

4. In support of the contention that there must be a sufficient basis and justification and also an effective need for an appointment of an Advocate Commissioner, the learned Counsel for the revision petitioner cites the decision of this Court in *S. Anthonidoss and Another Vs. Sabesthiyan and Another*, wherein at para 7 it is among other things observed that "... The question of appointment of a Commissioner does not depend upon merely whether any prejudice will be caused to the other side or not. Instead, there should be sufficient basis and justification as also an effective need and an appointment of Commissioner cannot be sought for or obtained as a matter of course and that too to achieve an ulterior object or motive. In this case, if the object and purport of the petitioners - plaintiffs is to ascertain the factum of deposit of materials on the site, that factum stood admitted by the respondents in the Court below and there is no dispute or controversy over the same. If the object of the plaintiffs is to use the Commissioner to be appointed to project or prove his claim of ownership of the materials deposited on the land, the claim is thoroughly a misconceived one and there cannot be any appointment of Commissioner for such purpose, since ownership of the materials has to be proved otherwise than through report of the Commissioner. Equally the appointment of Commissioner cannot be availed of to ensure that there is no construction put up during the pendency of the proceedings, when it is not even the case of the plaintiffs that the construction is already in progress and on the contrary, the common case appears to be as disclosed from the materials placed before this Court that the land is only vacant. If the object of the petitioners is to ensure that the respondents do not put up any construction, he should, if at all, try to get an order of injunction and this cannot be achieved by a short circuit method of getting such orders by seeking for the appointment of a Commissioner. In my view, the application appears to be not only frivolous but a misconceived one with no genuine motive. The learned Judge in the Court below was well justified in rejecting the such an application."

5. He also relies on the decision in *B.S. Nazir Hassan Khan Vs. Aswathanarayana Rao and Others*, wherein it is observed as follows:

...To my mind, it is necessary that all applications of this type even if they are bona fide and genuine, have to be filed at a proper point of time in the proceedings. This is very necessary also from the point of view of the stage of the proceedings because, the learned trial Judge is perfectly right when he pointed out that if this application were to be entertained, even assuming that was the position, it would mean that the trial which has reached the argument stage, would get dilated, evidence will have to be reopened and all the procedures from that stage onwards would again have to be recommenced. The law does not permit such ill-timed applications which would only have the effect

of disrupting the trial and dilating the proceedings. The Courts have been virtually struggling to ensure that civil proceedings are heard and disposed of within a reasonable time and applications of this type only disrupt the proceedings and dilate them. Under these circumstances, not only was the trial Court fully justified but, to my mind, the challenge presented through the Civil Revision Petition to that order is totally misconceived. Having regard to this position, the Civil Revision Petition is dismissed with costs quantified at Rs. 1,000/-.

6. He also presses into service the decision in *Puttappa Vs. Ramappa*, wherein it is held as follows:

...Under Order 26, C.P.C., a Commissioner can be appointed to make local investigation to investigate the facts or other materials which are found in the property and to make a report in regard to that matter to the Court. In a suit for injunction the question as to who is in possession of the property, is a matter to be decided by the Court on the basis of the evidence, either oral or documentary, to be adduced by the parties. That function cannot be delegated to a Commissioner who cannot find out as to who is in possession of the property. Accordingly, the lower Court was right in rejecting the application.

In the aforesaid decision, it is held that "A Commissioner will not be in a position to determine the question as to who is in possession of the property when there is dispute between the parties regarding the same. The Court will have to decide the matter on the basis of the evidence to be adduced by the parties. It is not the function of the Commissioner to determine or to report to the Court as to who is in possession of the same."

7. He brings it to the notice of this Court to the decision of Calcutta High Court in *Sohanlal Salman v. Smt. Shyama Debi and Ors.* In C.R.P. No. 4494 of 1967 decided on 02.01.1969 [Eq. Cit: *Sohanlal Salman Vs. Smt. Shyama Debi and Others*,] wherein it is inter alia observed as follows:

...The Present petitioner objected to the issue of such a commission on the ground that the Commissioner's evidence, if any, would be hit by Section 91 of the Indian Evidence Act and would not be admissible for the purpose of proving the said details of the alleged partition. This objection was rejected by the learned trial Judge.

In our view, the purpose of the commission would be to prove the details of the alleged partition, for which there was, admittedly, an unregistered deed of partition, which was inadmissible for want of registration. In the circumstances, the commission, for the purpose, for which it was sought to be taken out, would not be permissible under the law.

8. Continuing further, the learned Counsel for the revision petitioner seeks in aid of the decision in *Shantadevi Pratapsingh Gaekwad and Another Vs. Shrimant Sangramsingh Pratapsingh*, wherein it is held that "The learned trial Judge has

rejected the application for appointment of a Commissioner for inventory. Appointment of a Commissioner for the purpose would certainly depend upon the establishment of a prima facie case in favour of the plaintiff. In view of my aforesaid discussion, the plaintiff is not found to have any prima facie case in his favour. In that view of the matter, appointment of a Commissioner for the purpose of inventory would be a futile and meaningless exercise. The order passed by the learned trial Judge rejecting such application deserves to be affirmed though on a different reasoning."

9. Apart from the above, the learned Counsel for the revision petitioner cites the decision in Union of India (UOI) and Another Vs. Kripal Industries, wherein it is held that "Disputed question of fact which can conveniently be decided by the parties by leading evidence, cannot be referred to Commissioner under Order 26 Rule 9 - Rule 67 of the General Rules (Civil) 1986 bars such a reference, which rule is not ultra vires - Trial Court was not justified in issuing Commission for investigation as to whether it was the plaintiff or the defendant who was in possession of the suit plot."

10. Also the learned Counsel for the revision petitioner relies on the decision in D.S. Reddy rep. By his power agent, 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, wherein it is held that "Advocate Commissioner can be appointed to take inventory in order to safeguard interest of parties pending disputes and taking of inventories is not necessary to decide issues arising in suit and order directing taking of inventory is not valid and order appointing Commissioner is discretionary order and there should be sufficient reasons for an order appointing advocate commissioner."

11. Per contra, the learned Counsel for the respondents/ petitioners/appellants supports the order of the trial Court in appointing an Advocate Commissioner in I.A. No. 855 of 2007 and according to him, it is the case of the respondents/ petitioners/appellants that the land has been gifted to V. Ponnusamy Nadar for his loyalty by Vicar Apostle of madras who was also their cultivating tenant for two decades and that the name of the said V. Ponnusamy Nadar figures in the town survey register from the year 1910 onwards which is suffice to prove the possession of said V. Ponnusamy Nadar and thereafter he has been in possession and enjoyment of the suit property and subsequently his legal heirs who are the respondents/petitioners/appellants have inherited the suit property and they have been in peaceful enjoyment and possession of the suit property and in fact, the said Vicar Apostle of Madras out of 158 acres in Survey No. 49/1, 49/3 in Kottur Village has gifted an extent of 16.5 acres to the said Ponnusamy Nadar, a cultivating tenant for two decades by means of settlement deed dated 12.9.1985 and the donee the said Ponnusamy Nadar has accepted the same and the revision petitioner/respondent/defendant with a view to grab the respondents suit property has obtained a patta in a suspicious manner in the year 2003 and the same is not valid in law and that the revision petitioner/respondent has

managed to enter their name jointly in the SLR copy with a view to defeat the respondents/petitioners right on the suit property and the petitioner's/ respondent's/defendant's building is not in the respondents/petitioners/plaintiffs suit land and the school building is located in a different land and the revision petitioner/respondent/defendant is now attempting to throw the respondents/petitioners/plaintiffs from the suit property and therefore, it is just necessary to appoint an Advocate Commissioner along with a Government Surveyor to measure the respondents/petitioners suit land.

12. The learned Counsel for the respondents relies on the decision of this in Pormusamy Pandaram Vs. The Salem Vaiyappamalai Jangamar Sangam, wherein it is held that "Defendant's request for appointment of Commissioner for local investigate is proper and refusal amounts to failure to exercise jurisdiction and High Court will interfere u/s 115 of Civil Procedure Code." In the aforesaid decision, it is also observed that "A party has a right to place evidence which he could require to substantiate his case before the Court and it is the duty of the Court to receive such evidence unless there are other justifiable factors in law to decline to receive it. This right of the party to adduce evidence gets adjudicated in the interlocutory proceedings under Order 26 Rule 9. When the Court declines to issue the Commission asked for to make local investigation that order certainly disposes of the right claimed by the party to place the requisite evidence on his behalf. Therefore, an order refusing to appoint a commissioner under Order 26 Rule 9 to make local investigation and report is a "case decided" and hence revisable u/s 115."

13. He also cites the decision of this Court in Sivabackyam and Anr. v. Muthu 2008 (5) CTC 330 wherein it is held that "... it is clear that the learned District Munsif, Aranthangi, has not acted in accordance with law. All that he has done in the disposal of the three Applications, one for an interim injunction and two for appointment of an Advocate Commissioner, is to harass the petitioners by throwing out the Petitions on flimsy reasons. The reason adduced by him for rejecting the second Application for appointment of an Advocate Commissioner, is actually no reason at all. I do not know if the learned District Munsif has acted with any balance in disposing all these Applications."

14. He draws the attention of this Court to the decision in Payani Achuthan Vs. Chamballikundu Harijan Fisheries Development Co-operative Society and Others, wherein it is held thus:

In a suit for injunction to restrain the defendants from interfering with the possession due to alleged encroachment into the land of the plaintiff, one of the methods to find out as to whether or not there is encroachment is to have the local investigation done by a competent Commissioner. The Court cannot prevent a party from adducing the best evidence, if such evidence can be gathered with the help of a Commissioner. Refusal of the request of the party to appoint a Commissioner under Order 26 Rule 9, C.P.C. to make a local investigation in an appropriate case amounts to failure of exercise of jurisdiction vested in it. The

plaintiff filed a suit for permanent injunction restraining defendants from entering into plaintiffs land. He filed an application therein for appointment of local commissioner for measurement and demarcation of land. Held, that the same was entitled to be allowed and could not have been refused.

15. Moreover, he relies on the decision in Chintapatla Arvind Babu and another Vs. Smt. K. Balakristamma alias Bhargavi and another, wherein it is held as follows:

When a party complains that the opposite party was attempting to disturb the features and applies for appointment of a Commissioner under Order 26 Rule 9, C.P.C. Refusal to allow such petition prevents the party from having clinching evidence in proving the said fact. There may be cases where the matter in dispute can be resolved by appointment of a Commissioner for localising the site is one such case. If the Court declines to appoint a Commissioner, it may result in the perpetration of gross injustice if the relief is denied to the aggrieved litigant where it is most needed.

16. Admittedly, the power of a Court of law to appoint an Advocate Commissioner is a discretionary one and in law, this discretion has to be exercised judicially by the Court, of course on well established judicial principles. If a Court of law fails to exercise the discretion judicially, such failure is of itself no ground for interfering with the order in appeal. As a matter of fact, the Revisional Authority ought not to interfere, unless it is established that if the First Appellate Court has exercised its discretion judicially, the decision would have been different from what it was. The aim of local inspection is not so much to procure evidence, which can be taken in Court but to obtain the same, which due to strange nature, can be only had at this spot.

17. In this connection, this Court recalls the decision in V.G. Tari v. Nikonta S Xete AIR 1975 Goa 32 wherein it is held that "where the identity of the suit property is in doubt by reason of its bearing two registration numbers the proper thing to do is to appoint a Surveyor as the Commissioner to do local inspection." It is to be noted that an order appointing a commissioner for making local investigation on matters extraneous to the suit is bad and liable to be set aside in revision as per decision in Ramkirpal Missir and Others Vs. Mahesh Pandey and Others, . Furthermore, the object of a commission as per Order 26 Rule 9 of CPC is not to collect evidence which can be taken in Court, but to obtain evidence for elucidating matters which are local in character and it is in the discretion of the Court to issue it or not as per decision S KUPPUSWAMI Vs. COMMISSIONER OF Income Tax, MADRAS. OCTOBER 20, 1953., .

18. The respondents/petitioners/appellants/plaintiffs in their plaint in suit in para 7 have averred that "the cause of action for the suit has arisen within the jurisdiction of this Honourable court and in the year 1885 when the plaintiff ancestors acquired title viz. Ponnusamy Nadar got the property by way of gift, by Arch Bishop and subsequently when the act of possession and ownership is

established by due entry in favour of the plaintiff on public document viz., land register and also on subsequent dated on 2.6.2004 when the defendant is making attempt to commit encroachment and trespass within the property of plaintiff by proceeding with the act of putting sewerage tank by making attempt to have connection thereon for the building now under existence of the defendant without any legal basis and even without establishing the legal right in the manner known to law and subsequent attempt on the part of the plaintiff to approach police authorities on 2.6.2004 and police authorities have issued L.P. Receipt in 68/CSR/04 J.2, J.2 Adayar police station dated 2.4.2004 as evidenced etc."

19. A perusal of the plaint shows that the respondents/ appellants/plaintiffs have sought a relief of permanent injunction restraining the revision petitioner/ defendant, their men and agents, subordinates or anybody else claiming under or through them from interfering with the peaceful possession and enjoyment of suit property by committing the act of trespass unless and until the right of the revision petitioner/defendant is duly established and determined in the manner known to law.

20. In the written statement, the revision petitioner/ defendant has, among other things, mentioned that it denies the averment made in para 3 of the plaint that originally the lands including the suit property was owned and possessed by one Ponnusamy Nadar who was gifted with the lands by Arch Bishop of Madras in the year 1885 for which no documents have been filed and in fact the Arch Bishop of Madras has purchased the lands situate at Uroor and Kottur villages as per two registered documents bearing Nos. 2118/1885 and 2085/1886 in the office of District Registrar, North-Madras measuring an extent of more than 180 acres together with Bungalows and the Arch Bishop of Madras had settled the portion of land comprised in S. Nos. 1 and 9/1 of Kottur village admeasuring an extent of 22 acres and 10 cents in favour of the first defendant's society as per document No. 2571/1947 for religious and charitable purpose and the Arch Bishop of Madras had sold out major portion of lands measuring an extent of 131 acres and 2 cents to Madras Co-operative House Construction Limited, which is now being called as Gandhi Nagar Co-operative House Construction Limited and the said society had formed a housing layout and sold to its members who are residing there and ever since from the date of the settlement deed to till date, the revision petitioner/defendant school is in absolute, continuous and uninterrupted possession and enjoyment of the lands which includes the suit property as evident from the revenue records etc.

21. It is the further stand of the revision petitioner/ defendant that the revenue authorities have confirmed that the revision petitioner/defendant is the sole and absolute owners of the land and building situate at old S. No. 1 (part), 9/1(part), T.S. No. 2/1, Block No. 25 of Kottur Village, measuring an extent of more than 22 acres and the respondents/plaintiffs have failed to place any documents issued by the revenue authorities to confirm their title and possession over the suit

property and that the survey number mentioned in the suit property is misleading and incorrect one and also that the respondents/plaintiffs have failed to prove their proximity with their ancestors and failed to establish the origin of title to the suit property and that the revision petitioner has established its claim, interest and title in respect of the suit property which is under their possession and enjoyment since 1885.

22. The trial Court, while answering the issue No. 1 whether the respondents/plaintiffs are entitled to the relief of permanent injunction as observed in para 10 of its judgment, has observed that "in the suit property there is a school building and that the civil revision petitioner/defendant is in possession of the same and that the respondents/ plaintiffs are not in possession and enjoyment of the same etc. and has come to the ultimate conclusion that the suit property is not in possession and enjoyment of the respondents/plaintiffs and accordingly, the respondents/plaintiffs are not entitled to the relief of permanent injunction and dismissed the suit with costs." As against the said judgment and decree of the trial Court, admittedly A.S. No. 244 of 2007 is pending on the file of learned III Additional Judge, City Civil Court, Chennai.

23. At this stage, this Court worth recalls the decision in Swaroop Sekhar Joe and Ors. v. Ghanashyam Panda 1997 A I H C 2258 whereby and whereunder it is observed as follows:

...The lower appellate Court should have considered the question of appointment of a survey-knowing Commissioner only after scanning the evidence and if it would have considered that the evidence on record was not sufficient to dispose of the matter, the question of appointing a survey-knowing Commissioner for the purpose of identification should have been considered. I agree with the contention of the learned Counsel for the petitioners that the impugned order has been passed with material irregularity. Accordingly, while setting aside the impugned order of the lower appellate Court, I direct that the application of the defendant-appellant for appointment of a survey-knowing Commissioner is to be considered by the lower appellate Court at the time of hearing of the appeal and if after scanning the evidence on record, the lower appellate Court comes to a conclusion that the question cannot be resolved on the basis of evidence on record, the question of appointment of a survey-knowing Commissioner shall be considered.

24. Also this Court points out the decision in Tulamaya Chettri and Anr. v. Younarayan Pradhan AIR 2004 Sikkim 39 wherein it is observed as follows:

Ordinarily we would not have interfered with an order appointing an amin commissioner but in the case at hand parties have closed their evidence and when the matter was at the stage of arguments the respondents came up with prayer for appointment of a commissioner. In view of the admitted fact that parties have already closed their evidence, acceding to the prayer for appointment of an amin commissioner at this belated stage would amount to

permitting the respondents to fill up lacunae in their evidence thus leading to a roving inquiry. A learned single Judge of the Calcutta High Court in *Satish Agarwal v. Tirath Singh* 1996 AIHC 1791 has held that when the matter awaits arguments, the prayer made by the defendants for local investigation, if allowed would amount to filling up lacunae in their evidence and such prayer should not be allowed.

25. As far as the present case is concerned, the respondents/plaintiffs claim right to the ownership of the property coupled with possession by means of gift deed in the year 1885 purported to have been executed in favour of Ponnusamy Nadar and according to the plaintiffs, even PLR register attested by Tahsildar will substantiate their rights even after the death of Ponnusamy Nadar etc. which will reveal their status to claim the property etc. and it is their case that the revision petitioner/defendant is attempting to encroach the property described in the schedule of the property etc. In the present case on hand, the affidavit in I.A. No. 855 of 2007 has been sworn in by the Power of Attorney V. Santhanam representing the respondents/ plaintiffs is dated 19.3.2007 and when the appeal itself has been posted for final arguments, it appears that an order in I.A. No. 855 of 2007 has been passed by the First Appellate Court on 07.8.2009.

26. Be that as it may, in view of the divergent stand taken by the parties and also bearing in mind of another fact admittedly A.S. No. 244 of 2007 is pending on the file of First Appellate Court, without expressing any opinion on the merits of the case, this Court is of the considered view that I.A. No. 855 of 2007 has been disposed of on 07.8.2009 even though it has been filed in the year 2007, when the appeal itself is ripe for hearing of the final arguments of the respective sides and it is for the Court of law to act based on the available oral and documentary evidence on record in a given case and as a matter of fact, on the basis of the facts and circumstances of the present case, the Commissioner cannot be permitted to perform the functions of a Court of law and as such, the Commissioner cannot be appointed to procure or gather evidence by filling up the lacuna at the appellate stage (when it is not the case of the First Appellate Court that there is insufficient or doubtful evidence available on record) and in that view of the matter, the order passed by the First Appellate Court in I.A. No. 855 of 2007 is not correct in the eye of law and resultantly, the civil revision petition is allowed.

27. In the result, the Civil Revision Petition is allowed. The order of the First Appellate Authority in I.A. No. 855 of 2007 dated 07.8.2009, appointing an Advocate Commissioner to inspect the suit property and directing him to note down the demarcation of the property with the help of Government Surveyor without collecting any evidence on either side and without noting who is in possession of the property and with a further direction to note down only the physical features of each area of the property and to submit his report on or before 19.8.2009, is set aside and the said I.A. No. 855 of 2007 is dismissed as not maintainable. The First Appellate Authority is directed to take up the A.S. No.

244 of 2007 for hearing finally and to dispose of the same within two months from the date of receipt of copy of this order and to report compliance to this Court without fail. Considering the facts and circumstances of the case, the parties are directed to bear their own costs in this revision. Consequently, connected miscellaneous petition is closed.