

IN THE COURT OF THE I<sup>st</sup> ADDITIONAL DISTRICT MUNSIF, NAGERCOIL

Present: Thiru. V.Agavithan, B.A.,B.L.(Hon's),  
I<sup>st</sup> Additional District Munsif,  
Nagercoil.

Friday the 13<sup>th</sup> day of March 2020

**I.A. No. 422 OF 2018**  
**IN**  
**O.S. No. 224 OF 2018**

T.Saroja Justus,

rep by her power holder A.Regu Anantharaj ... Petitioner/Plaintiff

Vs.

D.Lazarus

... Respondent/Defendant

This Petition is coming before this Court for final hearing on 06.03.2020 in the presence of Thiru.T.Shanmugam, Advocate for the Petitioner/Plaintiff and the Defendant called absent set ex parte. Heard Petitioner side contentions and having stood over for consideration till this day, this Court delivered the following:

**ORDER**

1.This is the Commission Application Under Order 26 Rule 9 of the Civil Procedure Code, which was filed by the Petitioner/Plaintiff.

**2.Brief contentions of the Petitioner:-**

The Petitioner is the power holder of the Plaintiff in this suit. The Plaintiff has filed this suit seeking for mandatory, permanent injunctions and other relieves. The Petitioner has alleged that for effectively and properly adjudicating the issues in the suit and upon considering the nature and circumstances of the suit, it is necessary for appointment of an advocate commissioner. Hence, the Petitioner has filed this petition.

### 3. Contentions of the Respondent:-

In both O.S. No. 224 of 2018 and in this petition the respondent was set ex parte on 07.01.2020. Thus, there exists no counter of the respondent with rival contentions.

### 4. Points for consideration of this Court are:-

- (1) Whether an Advocate Commissioner be appointed in a suit for injunction?
- (2) Whether if the Petition is allowed, will it amount to collection of evidence in favour of one party?
- (3) Whether this Petition is liable to be allowed?

### 5. DECISION Point No. 1 :-

The Hon'ble High Court of Andhra Pradesh in *K. Dayanand and another vs. P. Sampath kumar*, after considering the dicta observed in various rulings of the Hon'ble Apex Court and other Hon'ble High Court's has held that there is no absolute bar on appointment of Commissioner in a suit for injunction. Also as per the law laid down in the above judgment nor in the provisions laid down in Section 75 and Order XXVI Rule 9 do impose such a prohibition.

Therefore, this point is decided in affirmative and in favour of the Petitioner.

### 6. DECISION Point No. 2:-

The Hon'ble High Court of Madras in *Saraswathy v. Viswanathan, 2002 (2) CTC 199* has held that the object of appointment of Commissioner is not to collect evidence but to elucidate the matter which are local in character and which can be done only by local investigation at spot. On

perusal of the plaint, documents filed, relief claimed and the real controversy in the suit it is evident that the Petitioner in the suit have already filed certain documents and is relying upon the same to establish his right, title and possession over their respective properties. Hence, appointing an Advocate Commissioner to note the physical features of the petition/plaint 'A' and 'B' schedule properties, note the construction made by the defendant on the plaint 'B' schedule compound wall, note the fencing stone available in the souther side of the plaint B schedule compound wall and such other points which would be brought to the to his notice during the visit will not amount to collection of evidence, rather it will only elucidate the matter in dispute, which is local in nature. Hence, the same is decided in favour of the Petitioner.

Therefore, this point is decided in affirmative and in favour of the Petitioner.

#### 7.DECISION Point No. 3 :-

Upon considering that the suit is in the stage of ex parte evidence and the Petitioner/Plaintiff has not closed his evidence. Thus, appointing an advocate commissioner to make local investigation at this stage will not amount to fishing out evidence and filling up the lacuna.

Therefore, this point is also decided in affirmative and in favour of the Petitioner.

8. Upon consideration that all the above three points have been decided in affirmative and in favour of the Petitioner this Court is inclined to allow this Petition.

#### 9.Result:-

In the result, Advocate Mr.A.Arzath Khan is appointed as Commissioner. The Commissioner's remuneration fixed as Rs. 4,000/- ( Rupees Four Thousand only) and it shall be deposited on or before

27.03.2020. If such remuneration is not deposited within such stipulated period, the petition shall stand dismissed automatically. After the receipt of such Commissioner's warrant, the Commissioner shall inspect the petition Schedule properties with the help of surveyor and submit his report and plan if any. The Commissioner can act on the basis of work memo if any submitted by either of the parties. For Deposit of the Commissioner's Remuneration. Call on 27.03.2020

Dictated by me to the Typist, directly typed by her, corrected and pronounced by me in open court this the 13<sup>th</sup> day of March 2020.

1st Additional District Munsif,  
Nagercoil.

- 1) Both side witnesses, :- Nil
- 2) Petitioners side Exhibits :- Nil
- 3) Respondents side Exhibits :- Nil

1stA.D.M.