

**IN THE COURT OF THE DISTRICT MUNSIF, DEVAKOTTAI**

**PRESENT: Thiru. A. DHARANIDHARAN, B.Sc., M.L., M.A., LL.M.**

District Munsif, Devakottai

Wednesday, the 24<sup>th</sup> day of August, 2022

**I.A. 06/2022**

in

**O.S.No. 96 / 2017**

Karuppaiah

..... Petitioner/ Plaintiff

--Vs--

1. Subramanian,
2. Shanmugam,
3. Kaliasammal

..... Respondents / Defendants

This petition having been finally heard on 22/08/2022 in the presence of Mr. N. Sekar, learned counsel for the petitioner/plaintiff and Mr. B. Siva, learned counsel for respondents/defendants and upon hearing the enquiry of both sides and after perusal of the entire records and having stood over for my consideration till this day, this Court delivers the following:

**ORDER**

This is a petition filed under Order XXVI Rule 9 r/w Sec 151 of Civil Procedure code seeking to appoint an Advocate Commissioner to inspect the petition-mentioned property and to find the possession and to file the Commissioner's report and plan.

- 2. The averments set out in the petition/affidavit filed by the petitioner is as follows:**

2.1 The Petitioner states that a suit has been instituted seeking the relief of permanent injunction, which is pending before this Court.

2.2 The petitioner states that the petitioner's brother was one Poosaidurai had executed a sale deed on 11/11/2003 before the Notary Public. The petitioner further states that as per the decree of O.S. No. 105/1988 dated 26/03/1991, the petitioner and his brothers were entitled for 1/3rd of the property, which includes the suit property. The petitioner states that the respondents were never in possession of the suit property. The petitioner states that the respondent's brother Poosathurai had executed a sale deed in favor of the petitioner on 11/11/2003 and the respondent is in possession of his share along with the share of the petitioner. Hence prayed for appointment of Advocate Commissioner.

**3. The averments set out in the counter filed by the respondents are as follows:**

3.1 The Respondents denies all the para-wise remarks and averments of the petition except the admitted facts. The Respondents contends that the petitioner had prayed for appointment of Advocate Commissioner for the purpose of proving the possession which shall be dismissed with costs.

**4. Now the point for consideration is, whether the petition filed by the Petitioner / Plaintiff to appoint an Advocate Commissioner to find out the possession is to be allowed or not?**

5. No oral or documentary evidence was adduced on the side of the Petitioner/Plaintiff.

6. No oral or documentary evidence was adduced on the side of the Respondents/Defendants.

7. Both side enquiry heard. Both side learned counsels have contended by reiterating the averments made in the petition, affidavit and counter.

8. On perusal of the records, it comes to know that, the suit has been filed for the relief of permanent injunction over the suit property. The present petition has been filed for appointment of advocate commissioner for finding the possession.

**9. Advocate-Commissioner cannot be appointed for making an enquiry about factum of possession:-**

9.1 This Court relies on the following Judgment of Hon'ble High Court of Madras, In Re *Chinnathambi and others Vs Anjalai in 2006 (5) CTC 494 (Mad)*, where the Hon'ble High Court of Madras had held that Advocate Commissioner cannot be appointed for local investigation where possession of property sought to be inspected and investigated by commissioner is in dispute, Court cannot assist either party to suit in collecting evidence where such evidence can be collected by party himself. Possession of property has to be adjudicated only by oral and documentary evidences. Plaintiff in suit for permanent injunction sought appointment of commissioner long after having obtained interim injunction to inspect property alleging that defendants was attempting to obliterate cart track and no allegation of encroachment was made in plaint. Order of Trial Court appointing Advocate Commissioner set aside in Revision.

9.2 This Court also refers to the case of *Sevugan Arumugam Vs Chinnathambi in 2016 (3) MWN (civil) 527* where the Hon'ble High Court of

Madras had stated that “An advocate commissioner cannot be appointed to collect evidence and prove the case of litigant.”

9.3 Decision in ***Krishnamoorthy Vs TNWDB, 2006 (5) CTC 178***, relied upon application of plaintiff/petitioner purporting appointment of Advocate Commissioner for gathering evidence for their case application, held rightly dismissed by trial court. Revision dismissed.

9.4 In Re ***K.M.A. Wahab and 5 others Vs. Easwaran and another in 2008 (3) CTC 597 (Mad)*** where the Hon'ble High Court of Madras had held that Advocate Commissioner cannot be appointed to collect evidence to find out factum of possession. No prejudice will be caused to other side is not at all relevant factor. His Lordship, A. Kulasekaran, J, has held that the appointment of Advocate Commissioner for making enquiry about the factum of possession of the property in dispute is improper since the same has to be adjudicated upon framing issues and on appreciation of evidence. The Advocate-Commissioner cannot be appointed to find out the factum, as to who is in possession of the property. Even if an Advocate-Commissioner is appointed and his report is filed, it can be questioned by the other side by filing objections, as the dispute in the Suit could be resolved only on the basis of oral and documentary evidence let in by the parties.

9.5 In Re ***Rajendran Vs Lilly Ammal @ Nelli Ammal, reported in 1998 (II) CTC 163***, His Lordship S. Jagadeesan, J, has held that Advocate Commissioner cannot be appointed to find out the fact as to who is in possession of suit property in a case.

9.6 In another case, in ***Kuttiyappan, D. vs. Meenakshiammal Polytechnic Unit of M/s. Meenakshiammal Trust, reported in 2005 (4) CTC 676***, Her Lordship

held that the defendants therein were not entitled to seek for appointment of Advocate Commissioner to note their possession, as it is well settled that Commissioner cannot be appointed for noting down the factum of possession or the enjoyment of property.

**10. Material issue of determining the possession cannot be left to an Advocate-Commissioner :-**

10.1 Since the parties should prove their case by letting in legally acceptable evidence and the report of the Commissioner can only aid the Court in evaluating the evidence to come to just conclusion.

Hence, this court is of the considered opinion that appointment of Advocate Commissioner to find out the possession is not just and necessary.

**In the result, this petition is dismissed. No order as to costs.**

This Order was directly typed by me in my official laptop, corrected by me and pronounced by me in the open Court on this the 24<sup>st</sup> day of August, 2022.

**District Munsif,  
Devakottai**

**Annexure:**

List of witnesses on the side of the Petitioner/Plaintiff  
NIL

List of documents on the side of the Petitioner/Plaintiff  
NIL

List of witnesses on the side of the Respondents/Defendants  
NIL

List of documents on the side of the Respondents/Defendants  
NIL

**District Munsif,**  
Devakottai