

**V.R.Devanathan Vs. K.Prema**

**V.R.Devanathan Vs. K.Prema**

**SooperKanoon Citation :** [sooperkanoon.com/1168622](http://sooperkanoon.com/1168622)

**Court :** Chennai

**Decided On :** Jun-26-2014

**Judge :** The Hon'ble Ms.Justice R.Mala

**Appellant :** V.R.Devanathan

**Respondent :** K.Prema

**Judgement :**

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED:26.06.2014  
CORAM: THE HONOURABLE MS.JUSTICE R.MALA CRP (PD) No.4304 of 2012  
and M.P.No.1 of 2012 V.R.Devanathan .. Petitioner Vs. K.Prema Rep. by her  
General Power of Attorney Agent J.Rani .. Respondent Prayer : Revision Petition  
is filed under Article 227 of the Constitution of India, against the fair and decreetal  
order dated 02.08.2012 passed in I.A.No.76 of 2012 in O.S.No.115 of 2010 on the  
file of the Principal District Munsif Court, Cuddalore. For Petitioner : Mr.P.Mani For  
Respondent : Mr.N.Suresh

**ORDER**

This Civil Revision Petition has been filed against the fair and decreetal order  
dated 02.08.2012 passed in I.A.No.76 of 2012 in O.S.No.115 of 2010 by the  
Principal District Munsif Court, Cuddalore.

2. The respondent herein as plaintiff filed a suit for declaration and also for  
permanent injunction in respect of 6 = cents of the suit property. The total extent of

the suit property is 66 cents, which was owned by the plaintiff/respondent herein and subsequently, the plaintiff/respondent herein sold 59 = cents to the defendant and she retained 6 = cents in her possession. After filing the suit, the plaintiff obtained ad-interim injunction and she encroached upon the property of the defendant/revision petitioner herein. Hence, the defendant/revision petitioner herein filed an application in I.A.No.76 of 2012 in O.S.No.115 of 2010, for appointment of an Advocate Commissioner to inspect the property and to note down the physical features and to measure the property with the help of a surveyor and to file a report and plan. The trial Court after considering the objection raised by the respondent herein, has dismissed the application, against which, the present Civil Revision Petition has been filed.

3. The learned counsel appearing for the revision petitioner submitted that there is a dispute in respect of identity of property, so, the Commissioner has to be appointed. He further submitted that in para-4 of the plaint, it was stated that in pursuance of the power deed, the Power Agent constructed a small thatched shed in 6 = cents, whereas, in para-11 of the written statement, it was stated that after obtaining Ad-interim injunction, the plaintiff encroached upon the property of the defendant/revision petitioner herein and made a construction. To find out as to whether the thatched shed is situated in 6 = cents owned by the plaintiff or whether it is situated in 59 = cents owned by the defendant/revision petitioner, the appointment of an Advocate Commissioner is necessary. Hence, he prayed for setting aside the impugned order. To substantiate his argument, the learned counsel appearing for the revision petitioner relied upon the following Judgments. (i) AIR1986 Madras 33 (Ponnusamy Pandaram vs. The Salem Vaiyappamalai Jangamar Sangam) (ii) 2000 (1) CTC279(Pillaiyar vs. Ganesan and another) (iii) 2008 (6) MLJ359(A.Sulthan and another vs. Mohammed Dasthagir) 4. The learned counsel appearing for the respondent submitted that the case of the plaintiff is that she put up the thatched shed in 6 = cents and since the defendant /revision petitioner herein attempted to interfere with her possession, then only, she filed the suit for declaration and also for injunction, wherein, Ad-interim injunction has been granted. Furthermore, the said shed is situated within the property owned by the plaintiff/respondent herein. But, the defendant/revision petitioner herein filed the application for appointment of Commissioner to collect the material evidence for

filing a fresh suit. He further submitted that it is the duty of the plaintiff/respondent herein to prove her case that she is the owner of 6 = cents and the thatched shed is situated in the suit property owned by her. Furthermore, a Commissioner cannot be appointed for collecting material evidence. He also relied upon the following decisions: (i) 2005 (3) MLJ473(Chandrasekaran and others vs. V.Doss Naidu) (ii) 2009 (1) MLJ516(Meenakshi vs. Vennila and another) and prayed for dismissal of this civil revision petition.

5. I have considered the submissions made by both sides and perused the typed set of papers.

6. The respondent herein as plaintiff filed a suit for declaration of title and also for injunction in respect of 6 = cents of the suit property. It is also admitted by both sides that the property measuring to an extent of 66 cents was originally owned by the plaintiff/respondent herein and she sold 59 = cents to the defendant/revision petitioner herein and she retained 6 = cents in her possession.

7. At the time of filing the suit, the plaintiff in para-4 of the plaint stated as follows:  
4. . In pursuance of the Power Deed, the Power Agent has put up a small thatched shed in the suit property which is also assessed to property tax by the Thiruvanthipuram Panchayat under its Assessment Number 733. The patta for the entire extent namely 0.66 cents stands in the name of plaintiff alone. ... 8. The defendant/revision petitioner herein filed a written statement, wherein, in para 11, he stated as follows: 11. The defendant submits that the plaintiff after obtaining an order of ad interim injunction has trespassed into the defendant's property i.e. in S.No.106/13A 0.59 = cents and have put up a thatched hut in the property (in plot Nos.19 & 20) without any right or whatsoever. The act of the plaintiff is highly illegal, ultra vires and out of jurisdiction. The defendant immediately preferred a complaint before the Thirupapuliyur Police Station and the police has registered a case against the plaintiff and her husband in Cr.No.The plaintiff is not in possession and enjoyment of the suit property. 9. Now, it is appropriate to consider the decisions relied upon by the learned counsel appearing for the revision petitioner.

10. In the case of Ponnusamy Pandaram v. The Salem Vaiyappamalai Jangamar Sangam, reported in AIR1986 Madras 33, which is relied upon by the learned counsel appearing for the revision petitioner, in para-9, it has been held as under:

9. Coming to the question as to whether, on the basis that the order passed by the Court below is a case decided, there is a warrant for interference within the meaning of S.115 of the Code, I find that it is so. A controversy, as we could see from the pleadings, has arisen as to whether the constructions put up by the third defendant are within his land or whether they have encroached into the lands of the plaintiff. A local investigation is the best way to find out the position and the party, namely, the third defendant coveting to place the evidence before the court through local investigation by the Commissioner cannot be shut out of that right. A misconception has weighed in the mind of the Court below when it reasoned that there is no dispute about the ownership of S.No.289/1 by the third defendant. That is not the point in issue. Shutting out the evidence which a party is entitled to place before Court to substantiate his case, definitely decides that right of the party, adversely against him and in this view, the order passed by the Court below is a 'case decided' and apart from that, on merits the order passed by the Court below comes within the mischief of the ratio adumbrated in S.115 of the Code. There has been a failure to exercise jurisdiction vested in it by the Court below to a patent misconception of the position and this obliges me to interfere in revision.

11. In another decision of this Court reported in 2000 (1) CTC279(Pillaiyar vs. Ganesan and another), in paras 10 and 17, it has been held as follows:

10. In the instant case, as already noticed, the lower court after merely paraphrasing the earlier contentions directed the appointment of an Advocate Commissioner. In my view, this is a case where one has to travel beyond the order of lower court to find out whether the ultimate decision by the lower court to appoint an Advocate Commissioner can be justified. The respondents have clearly stated in their affidavit in support of the application for the appointment of an Advocate Commissioner that the revision petitioner themselves have been using the suit second item as common pathway for generations, that this has been suppressed by the revision petitioner/plaintiff and he had filed the suit and the injunction application with false details and that after filing of the suit he was making attempt to block the common pathway. Having regard to this specific stand taken by the

respondents in my view, the lower court was justified in appointing an Advocate Commissioner to visit the suit property, note down the physical and other features and file a report along with a plan. Merely because the learned District Munsif has not given elaborate reasons for ordering the application, the order need not be set aside and it will be inequitable. The apprehension entertained by the respondents may be justified and unless the commissioner visited the property and noted down the physical and other features and filed a report along with a plan, the petitioner might obliterate the state of affairs obtaining at the time of the filing of the suit. It is not an uncommon occurrence that under the cloak of interim orders parties attempt to create the state of affairs matching their case.

11. .

12. .

13. .

14. .

15. .

16. .

17. This is a clear case where it is necessary to obtain evidence which from its peculiar nature can only be had on the spot. The order of the lower Court does not suffer from any illegality or irregularity nor has it been passed in error of jurisdiction though supportive reasons for the conclusion could have been given by the lower court. But, the above citation is not applicable to the facts of the present case, because, in that case, the suit was filed in respect of common pathway.

12. In yet another decision of this Court reported in 2008 (6) MLJ359(A.Sulthan and another vs. Mohammed Dasthagir), which is relied upon by the learned counsel appearing for the revision petitioner, it has been held as follows: I. Even in a suit for bare injunction, an Advocate Commissioner can be appointed to make local investigation. Such local investigation would facilitate the Court to decide the issue more effectively rather than shutting out the remedy and driving the parties

to initiate fresh legal proceedings. II. To have a local investigation is the best way and to shut out that evidence would amount to denying him the right to adduce evidence and the Court also will be denied of the first hand knowledge about the allegation and counter allegations. 13. In the case on hand, in the plaint itself, it was stated that the power agent put up a thatched shed in the suit property, which is also assessed to property tax by the Thiruvanthipuram Panchayat under its Assessment Number 733, which stands in the name of the plaintiff. But the case of the revision petitioner herein is that after obtaining ad interim injunction only, the plaintiff had trespassed into the property and put up the thatched shed. In such circumstances, I am of the view that the above citations relied upon by the learned counsel appearing for the revision petitioner are not applicable to the facts of the present case. It is specifically stated that prima facie proved that the thatched shed was constructed much before the date of filing of the suit and the assessment number is given, which clearly proved the intention of the revision petitioner herein to collect the material evidence to file a fresh suit.

14. At this juncture, it is appropriate to consider the decisions relied upon by the learned counsel appearing for the respondent.

15. In the decision of this Court reported in 2005 (3) MLJ473(Chandrasekaran and others vs. V.Doss Naidu), it was held that no commissioner can be appointed to collect the evidence, but, a party can prove his case by letting evidence. Para 17 of the judgment is extracted hereunder:

17. The Commissioner is sought for to note down the existence of the house, age of the house, guava trees and coconut trees and their age. Though the appointment of Advocate Commissioner is sought for under the pretext of noting down the physical features, indirectly it only seeks to find out the factum of possession. The material issue in the suit is relating to the nature of possession and lawful right of the defendants (if any). That material issue of determining the possession cannot be left to the Advocate Commissioner. 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 recording the evidence.

18. In the decision of this Court reported in 2009 (1) MLJ516(Meenakshi vs. Vennila and another), which is relied upon by the learned counsel appearing for the respondent, it was held that the litigant can himself gather the evidence. He cannot sought for appointment of Commissioner to collect the material evidence. Para-9 of the Judgment is extracted hereunder: 9. It is true that Order 26 Rule 9 of C.P.C. empowers the Court to appoint commissioner to make local investigation as it finds fit and proper based on the facts and circumstances of the case. At this stage, it is pertinent to point out that it is not the aim of Order 26 Rule 9 of C.P.C. to assist a litigant to collect evidence, where the litigant can get evidence himself. In the instant case, the suit has been filed only for permanent injunction and as such in regard to the factum of possession, this Court opines that the lower Court alone can gather evidence through the parties to the litigation and therefore, the same cannot be entrusted to the Advocate Commissioner to gather evidence and in that view of the matter, the Civil Revision Petition fails and the same is hereby dismissed in the interest of Justice.

19. Considering the above citations relied upon by the learned counsel appearing for the respondent herein, it is clear that no Commissioner can be appointed to collect the material evidence.

20. In the present case, there is no dispute in respect of identity of property, because, the respondent herein sold 59 = cents to the revision petitioner herein and she retained 6 = cents. At the time of filing of the suit, a thatched shed is there and tax assessment has been made. Furthermore, in the plaint also, the assessment number is mentioned. So, the statment made by the revision petitioner herein in his written statement that after obtaining ad interim injunction, the respondent herein had encroached upon the property of the respondent and put up thatched shed, does not merit acceptance. Hence, the trial Court has rightly considered those aspects in paras 7 and 8 of its order and has come to the correct conclusion. So, the impugned order passed by the trial Court does not suffer any illegality and irregularity. Hence, the Civil Revision Petition is liable to be dismissed as devoid of merits. The findings of this Court will not be influenced by the trial Court.

21. Accordingly, this Civil Revision Petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed. 26.06.2014 ogy To The Principal District Munsif Court, Cuddalore. R.MALA,J.

ogy CRP (PD) No.4304 of 2012 26.06.2014

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**