



C.R.P.No.660 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 24.04.2023

Delivered On: .06.2023

CORAM :

THE HON'BLE MR. JUSTICE SATHI KUMAR SUKUMARA KURUP

C.R.P.No.660 of 2021

and

C.M.P.No.5659 of 2021

K.Kumarasamy

... Petitioner

Vs.

1.K.Ponnamal

2.Lakshmi

... Respondents

PRAYER: Civil Revision Petition filed under Article 227 of Constitution of India, to set aside the fair and decretal order dated 09.12.2020 made in I.A.No.3 of 2020 in A.S.No.38 of 2018 on the file of the learned Sub-Court, Sathyamangalam.

For Petitioner : Mr.N.Manoharan

For Respondents : Mr.P.V.Ramachandran



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ORDER

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This Civil Revision Petition has been filed to set aside the fair and decretal order dated 09.12.2020 made in I.A.No.3 of 2020 in A.S.No.38 of 2018 on the file of the Sub-Court, Sathyamangalam.

2. The Plaintiff had filed the suit in O.S.No.67 of 2001 against the father of the Defendants seeking relief of specific performance of contract for sale of the property. The suit was decreed in favour of the Plaintiff. The father of the Defendants had not filed any appeal against the decree granted in favour of the Plaintiff. Therefore, the judgment and decree in O.S.No.67 of 2001 had attained finality. Subsequently, the Plaintiff had filed E.P. No.46 of 2003 against the father of the Defendants. In the E.P.No. 46 of 2003, the father of the Defendants as Respondent did not come forward and execute the decree by executing sale deed. Therefore, the Executing Court had executed the sale deed. Subsequently, the suit for permanent injunction had been filed by the Plaintiff against the Defendant in O.S.No.64 of 2017 on the file of the learned District Munsif, Sathyamangalam. After full trial, the suit in O.S.No.64 of 2017 filed by the Plaintiff was dismissed by judgment dated 26.06.2018.



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3. Aggrieved by the judgment of dismissal of the suit in O.S.No.64 of 2017, the Plaintiff had filed an appeal in A.S.No.38 of 2018 on the file of the learned Sub-Judge, Sathyamangalam. During the pendency of the appeal in A.S.No.38 of 2018, the Plaintiff as Appellant had filed a petition in I.A.No.3 of 2020 under Order XXVI Rule-9 CPC for appointment of an Advocate Commissioner to note down the physical features of the suit property in O.S.No.64 of 2017.

4. The Defendants as Respondents in I.A.No.3 of 2020 in A.S.No.38 of 2018 resisted the petition. After due enquiry, the learned Sub-Judge, Sathyamangalam by order dated 09.12.2020, dismissed the I.A.No.3 of 2020 in A.S.No.38 of 2018. Aggrieved by the same, the Plaintiff as Petitioner in I.A.No.3 of 2020 in A.S.No.38 of 2018 had preferred this Revision Petition under Article 227 of Constitution of India seeking to set aside the order of the dismissal of the I.A.No.3 of 2020 in A.S.No.38 of 2018 dated 09.12.2020. It is the contention of the learned Counsel for the Revision Petitioner that allowing the petition seeking appointment of Advocate Commissioner and appointing an Advocate Commissioner at the stage of an appeal will not prejudice the Respondents.



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5. In support of his contentions, the learned Counsel for the Revision Petitioner relied upon the rulings reported in **2013 (2) TNCJ 338** in the case of ***Pakiyathai and others Vs Magesh Mani and Others***. He also relied upon the rulings of this Court reported in **2014(5) CTC 85** in the case of ***Anwar Batcha and another Vs S. Mahuedoom*** particularly relied Paragraph Nos. 11, 13 and 16 which are extracted hereunder:-

“11. The expression 'elucidate' means to make lucid or clear; throw light upon, explain, enlighten. Where the Court is satisfied on the materials available on the record that a party is not able to produce the desired evidence for reasonable circumstances, it may assist the party to appoint a 'Commissioner' to get the evidence. However, such evidence is not binding on the Court, which is to appreciate the same along with other evidence. The party can 'countermand' the evidence of Commissioner's report by giving any other evidence. This dictum is laid down in Ankura & Ankura Charan Sahu v. Arjuna Charan Palei, reported in 1998 AIHC 1702 (Ori-DB). Besides this, in Debendranath Nandi v. Natha Bhuiyan, reported in AIR 1973 Ori 240, it is held that the object of local investigation under rule is to obtain evidence which from it's peculiar nature can best be had from the spot”.

“13. In Payani Achuthan v. Chamballikundu Harijan Fisheries Development Co- operative



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Society, reported in AIR 1996 Ker 276, it has been held that 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 XXVI Rule 9 C.P.C., to make a local investigation in an appropriate case amounts to failure of exercise of jurisdiction vested in it. 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. Thus, in such a case Trial Court was not right in rejecting the prayer for appointment of Commissioner.”

“16. On the other hand, learned counsel appearing for the respondent/plaintiff has vehemently argued that the Order passed by the learned Trial Judge did not suffer with any infirmity and therefore the interference of this Court did not require. Further, he has submitted that it is settled principles of law that for procuring evidence Advocate Commissioner need not be appointed. This proposition will not be made applicable to the instant case on hand as the contention of the revision petitioners/defendants clearly demonstrates their object for elucidating the matter in dispute by local investigation of the Commissioner at the spot. Therefore, as contemplated under Rule 9 to Order XXVI C.P.C., this Court deems that a local investigation by the Advocate Commissioner is proper for the purpose of throwing more light or enlighten the Court to take a fair decision”



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6. The learned Counsel for the Respondents vehemently objected to the same stating the petition is devoid of merit. If the intention of the Plaintiff was bonafide he ought to have filed a petition under Order XXVI Rule-9 CPC at the first stage of the suit. He had not done so. He, after suffering the judgment of the dismissal, based on the appreciation of evidence, having filed the appeal, had as an after thought, filed the petition seeking appointment of an Advocate Commissioner only to note down the physical features. It is not for that purpose, it is a ploy to collect evidence and also to fill up the lacunae found out in the judgment in the appellate Court even if the Appellant undertakes to pay the remuneration that cannot be allowed as on the basis of evidence available before the Trial Court. It is an adventure of fishing which cannot be accepted. Considering the fact that the Plaintiff himself claims that he had purchased the property on the basis of sale agreement. Since the father of the Defendants did not execute the sale deed, the Plaintiff was forced to file the suit for specific performance in O.S.No.67 of 2001. Since no appeal was filed by the father of the Defendants, the Judgment and decree for specific performance in O.S.No.67 of 2001 had attained finality. Therefore, the Plaintiff had filed E.P.No.46 of



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2003. Based on the E.P.No.46 of 2003, the Executing Court had directed the Defendants in the suit in O.S.No.67 of 2001 as the Respondents in E.P.No.46 of 2003 to execute the sale deed within a specified time. Since the Defendants in the suit as Respondents in E.P.No.46 of 2003 did not come forward to execute the decree, the Executing Court itself had executed the sale deed. Therefore, only in continuation of the executing proceedings, the petitioner ought to have filed a E.P.No.46 of 2003 for delivery of possession. After executing the sale deed, how the Plaintiff had taken possession of the property had not been explained. Therefore, the Defendant in O.S.No.64 of 2017 had disputed the claim of the Plaintiff for injunction against the Defendant stating that the Plaintiff is not in possession.

7. In cases of this nature, when the Court had executed sale deed then either the decree holder has to file E.A in continuation of the E.P for delivery of the possession or file a separate E.P for delivery of possession of the property for which sale deed was executed. Here, those particulars are absent in the plaint in O.S.No.64 of 2017 how the Plaintiff entered possession of the property had not been properly explained. Therefore, the Defendant had disputed the claim of the Plaintiff seeking permanent



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injunction against the Defendant. Therefore, issues were framed and the suit came up for trial. In the course of the trial, on the basis of the evidence, the learned Judge had observed as follows:-

“13. மேலும், பிரதிவாதிகள் ஆஜரான கற்றறிருந்த வழக்கறிஞர், தாவா சொத்தில் உள்ள வீட்டின் கதவெண் 5/12. அதுவும் தற்போது ஒரே அறை கொண்ட அந்த வீட்டிற் கதவே இல்லை. அந்த வீட்டில் தற்போது வரை பிரதிவாதிகளும், அவர்களின் சகோதரியான பி.வா.சா.2 தான் குடியிருந்து சுவாதீனத்தில் இருந்து பி.வா.சா.ஆ.6, மற்றும் சா.த.சா.ஆ.2 ஆன வீட்டு வரி ரசீதுகள் மூலம் வீட்டு வரி செலுத்தி வருகிறார்கள். வாதி, தாவா சொத்தினையும், அதிலுள்ள வீட்டினையும் பார்க்காமலும், தாவா சொத்திற்கான மூல பத்திரங்களையும் பார்க்காமலும் அவரே கிரய ஒப்பந்த பத்திரத்தை மோசடியாக தயாரித்து கொண்டார். அதனால் தான், தாவா சொத்தின் விஸ்தீரணத்தை மிகைப்படுத்தி எழுதிக் கொண்டார். அதே போல கதவெண் 5/12 என்பதை மாற்றி 5/13 வா.சா.ஆ.1 ஆன கிரயப் பத்திரத்தில் எழுதி கொண்டதை வைத்து, துனது செல்வாக்கை பயன்படுத்தி, தாவா சொத்தில் சுவாதீனத்தில் உள்ளது போல் வா.சா.ஆ.2-ன் வரிசையான வீட்டு வரி ரசீதுகளை மோசடியாக உருவாக்கிக் கொண்டார் என வாதிட்டுள்ளார்

14. கடந்த 10.05.2014 தேதி தாவா சொத்தினை தான் சுவாதீனத்திற்காக எடுத்துக் கொண்ட பின்னர், தாவா சொத்து அமைந்துள்ள மாக்கினாங்கோம்பை பஞ்சாயத்தினை அணுகி, தகுந்த விபரத்தினை அளித்ததன் அடிப்படையில்,



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மேற்படி நிர்வாகமும் தகுந்த விசாரணை செய்து, தாவா சொத்தில் அமைந்துள்ள வீட்டிற்கு வரி விதிப்பு எண்ணினை பெயர் மாற்றம் செய்து, ஏனது பெயருக்கு தகுந்த வீட்டு வரியும் வழங்கினார்கள். அவை வா.சா.ஆ.2-ன் வரிசையான வீட்டு வரி ரசீதுகள் என வழக்குரையில் சொல்லப்பட்டவாறு வா.சா.1, தனது முதல் விசாரணையில் சாட்சியம் அளித்துள்ளார். அவ்வாறு சாட்சியம் அளித்த வா.சா.1, தனது குறுக்கு விசாரணையில், வா.சா.ஆ.2-ன் வரிசையான வீட்டு வரி ரசீதுகள் அனைத்தும் பஞ்சாயத்தினர் என்னிடம் வழங்க என்னிடம் விசாரணை எதுவும் செய்யவில்லை என ஒப்பு கொண்டு, முரண்பட்ட வகையில் சாட்சியம் அளித்துள்ளார். பிரதிவாதிகள் தரப்பில், ஆஜர் செய்யப்பட்ட பி.வா.சா.ஆ.6, 7 மற்றும் சா.த.சா.ஆ.2 ஆகிய வீட்டு வரி ரசீதுகளானது கதவெண் 5/12-க்கு ஆனது. பி.வா.சா.ஆ.6 ஆன கடந்த 17.03.2014 தேதியிட்டு வீட்டு வரி ரசீதும், சா.த.சா.ஆ.2 ஆன 21.03.2017 தேதியிட்ட வீட்டு வரி ரசீதும் பிரதிவாதிகளின் தகப்பனாரான ராமசாமி பெயரிலும், பி.வா.சா.ஆ.7 ஆன 14.05.2016 தேதியிட்ட வீட்டு வரி ரசீது 1-ம் பிரதிவாதி பெயரிலும் உள்ளது. வாதி தரப்பில் ஆஜர் செய்யப்பட்டுள்ள வா.சா.ஆ.2-ன் வரிசையான 29.01.2015, 25.01.2016 மற்றும் 22.02.2017 ஆகிய தேதிகளிட்ட வாதியின் பெயரிலுள்ள வீட்டு வரி ரசீதுகளில் கதவெண் முறையே 5/13, 5/13 மற்றும் 5/159-13 என மாறி மாறி உள்ளது. மேற்படி வீட்டு வரி ரசீதுகள் ஒரே பஞ்சாயத்து அலுவலகத்தால் வழங்கப்பட்டுள்ளது. இந்நிலையில், கதவெண் 5/12 என உள்ள மேற்படி பி.வா.சா.ஆ.6, 7 மற்றும் சா.த.சா.ஆ.2 ஆன வீட்டு வரி ரசீதுகள், தாவா சொத்திலுள்ள வீட்டுக்கான



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வீட்டு வரி ரசீதுகள் அல்ல. அதே போல வா.சா.ஆ.2-ன் வரிசையான மூன்று வீட்டு வரி ரசீதுகள் தான் தாவா சொத்திற்கான வீட்டு வரி ரசீதுகள் என்பதை உறுதிப்படுத்தவும், வா.சா.ஆ.2-ன் வரிசையான வீட்டு வரி ரசீதுகள் வாதி தான் தாவா சொத்தின் சுவாதீனத்தில் உள்ளார் என்பதை விசாரணை செய்து, கிராம பஞ்சாயத்தாரால் வழங்கப்பட்டது என்பதை உறுதிப்படுத்தவும், வீட்டு வரி ரசீது வழங்கிய கிராம பஞ்சாயத்து நிர்வாக அதிகாரிகள் யாரையும் வாதி முன்னிறுத்தி விசாரணை செய்யவில்லை. அவ்வாறு முன்னிறுத்தி விசாரணை செய்யப்படாததற்கு எத்தகைய காரணங்களும் வாதி தரப்பில் சொல்லப்படவில்லை.

15. மேலும், வாதியே தாவா சொத்தில் சுவாதீனத்தில் இருந்த பிரதிவாதிகளை தனது செல்வாக்கை பயன்படுத்தி, காவல்துறையினர் மூலம் வெளியேற்றினேன் என சாட்சியம் அளிக்கப்பட்டுள்ள தூழ்நிலையில், பிரதிவாதிகள் தரப்பில் சொல்லப்படுவது போல வா.சா.ஆ.2-ன் வரிசையான வீட்டு வரி ரசீதுகளும், வாதி தன் செல்வாக்கை பயன்படுத்தி கிராம பஞ்சாயத்தாரிடமிருந்து வா.சா.ஆ.1 ஆன கிரய ஆவணத்தில் உள்ள கதவெண்ணை வைத்து சுவாதீனம் இருப்பது போல நிரூபணம் செய்ய வேண்டி தவறாக பெற்றாரா? என்ற சந்தேகத்தை ஏற்படுத்துகின்றது. எனவே, வா.சா.ஆ.2-ன் வரிசையான வீட்டு வரி ரசீதுகள் வாதி தரப்பு வழக்கிற்கு ஆதரவாக ஏற்புடையதாகயில்லை. மேலும், பி.வா.சா.ஆ.6, 7 மற்றும் சா.த.சா.ஆ.2 ஆகிய வீட்டு வரி ரசீதுகள் பிரதிவாதிகள் தரப்பில் குறியீடு செய்ய ஆட்சேபணை தெரிவித்திருந்த வாதி, மேற்படி ஆவணங்கள் வழக்கிற்காக தவறாக



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உருவாக்கப்பட்டது என்ற சிறு சந்தேகத்தை கூட இந்த வழக்கில் உருவாக்கவில்லை. எனவே, மேற்படி பிரதிவாதிகள் தரப்பில் தாக்கல் செய்யப்பட்ட வீட்டு வரி ரசீதுகள், பிரதிவாதிகள் மற்றும் பி.வா.சா.2-ன் மூலம் குறியீடு செய்ய வாதி தரப்பில் தெரிவித்திருந்த ஆட்சேபணை சட்டப்படி நிலைக்கதக்கதல்ல என்று இந்நீதிமன்றம் தீர்மானிக்கின்றது. மேலும், பிரதிவாதிகள் தாவா சொத்திற்கு சென்று வருகிறார்கள் என வா.சா.1-ஏ தனது குறுக்கு விசாரணையில் ஒப்பு கொள்வதால், மேற்படி பி.வா.சா.ஆ.6, 7 மற்றும் சா.த.சா.ஆ.2 ஆகிய வீட்டு வரி ரசீதுகள் தாவா சொத்திலுள்ள வீட்டிற்கான ரசீதுகள் என பிரதிவாதிகள் கூறுவது ஏற்புடையதாக உள்ளது.

8. Under those circumstances, the objection of the Respondents in I.A.No.3 of 2020 in A.S.No.38 of 2018 seeking appointment of an Advocate Commissioner as it is nothing but fishing expedition is found acceptable and reasonable. When the Plaintiff was unable to explain how he had taken possession of the property when the Court had executed a sale deed, the suit for permanent injunction against the Defendant is found suspicious. Under those circumstances, on the basis of the appreciation of evidence, the learned Trial Judge, District Munsif, Sathyamangalam, had dismissed the suit against which, appeal had been filed. During the pendency of the appeal, it is found that the Plaintiff as Appellant is seeking appointment of



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the Advocate Commissioner only to fill up the lacunae.

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9. The rulings cited by the learned Counsel for the Revision Petitioner will not help the petitioner's case as the facts are different. Here, it is the clear case of the Plaintiff that the Plaintiff had obtained a decree for specific performance of contract for sale of the property against the father of the Defendants in O.S.No.67 of 2001. In continuation of the same, the Plaintiff herein had filed EP for execution of sale deed. Since the Defendant/the present Defendants father in the previous suit in O.S.No. 67 of 2001 did not come forward to execute the sale deed, the Executing Court itself had executed the sale deed. When the Court itself had executed sale deed, how the Plaintiff taken possession of the property is found suspicious. It has not been clearly explained in the plaint averments. When that be the case, the Defendant had disputed the claim of possession. During the evidence, the learned Judge, on appreciation of evidence arrived at a conclusion that the Plaintiff is not in possession of the property. Under those circumstances, the facts of the reported ruling will not help the case of the Plaintiff.



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10. As rightly pointed out by the learned Counsel for the Respondent if the intentions of the Plaintiff was bonafide, he ought to have filed a petition under Order XXVI Rule-9 CPC at the first instance immediately after filing of the suit in O.S.No.64 of 2017. He had not done so. After suffering a judgment of dismissal, he cannot seek appointment of an Advocate Commissioner to note down the physical features. It is to be treated as filling up the lacunae.

11. This Court, on an earlier occasion, to allow the petition for appointment of Advocate Commissioner at the stage of appeal where the Appellant claimed that the Defendant had encroached the portion of the natham land which was in enjoyment of the Plaintiff in the suit. The petition filed in the suit for appointment of Advocate Commissioner was dismissed by the learned Trial Judge, against which appeal was not filed. After disposal of the suit during the pendency of the appeal again the Plaintiff as Appellant filed I.A.No.3 of 2020 under Order XXVI Rule-9 CPC to note down the physical features of the property. In that case, the adjacent owner of the site, who is the Defendant had after getting a sale deed for his property approached the revenue authorities for cancellation of the patta in



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favour of the Plaintiff's father natham land patta and has encroached the property. Regarding the encroachment, the physical features of the property had to be brought to the Court only through an Advocate Commissioner and not on mere oral evidence. Therefore, the dismissal of the petition under Order XXVI Rule-9 CPC in the appeal by the learned Appellate Judge was set aside by this Court exercising power under Article 227 of Constitution of India to render justice to the Plaintiff who was Appellant. Here, in this case, the facts are different. Here, the Plaintiff had benefit of a decree for specific performance. The Trial Court, as Executing Court had also executed the sale deed in favour of the Plaintiff. While so, the Plaintiff is unable to explain how he got possession of the said property without filing any petition before the Court for delivery of possession. In the course of the evidence, it was admitted that he had exercised police power using his influence which was not appreciated by the learned Trial Judge. Therefore, the suit was dismissed against which appeal is now pending before the learned Sub-Judge, Sathyamangalam. Therefore, the appointment of an Advocate Commissioner for noting down the physical features in this case is found unacceptable and unreasonable.



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12. The well reasoned order of the learned Sub-Judge, Sathyamangalam, dismissing the petition for appointment of an Advocate Commissioner even though the Plaintiff undertook to pay remuneration for the Advocate Commissioner, does not warrant any interference by this Court exercising discretion under Article 227 of the Constitution of India.

13. In the light of the above, this petition lacks merits and hence, this Civil Revision Petition is dismissed. The order passed by the learned Sub-Judge, Sathyamangalam in I.A.No.3 of 2020 in A.S.No.38 of 2018 dated 09.12.2020 is confirmed. Consequently, connected miscellaneous petition is closed.

.06.2023

Index: Yes/No
Internet: Yes/No
Speaking Order/Non-speaking Order
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SATHI KUMAR SUKUMARA KURUP, J.

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To

1. The learned Sub-Court, Sathyamangalam.
2. Section Officer,
V.R.Section,
High Court, Madras.

Pre-delivery Order made in
C.R.P.No.660 of 2021
and
C.M.P.No.5659 of 2021

.06.2023