

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 23.03.2015

Pronounced on : 26.03.2015

C O R A M

THE HONOURABLE MR.JUSTICE P.R.SHIVAKUMAR

C.R.P.(NPD) Nos.3728 of 2013 and 3985 of 2013
and
M.P.Nos.1 of 2013

1.N.Ravi
2.N.Suresh Kumar
3.N.Murali
4.N.Sasikumar

... Petitioners in both
the revisions

Vs.

1.S.K.Thirunavukkarasu (died)
2.Mrs.Chandra
3.T.Vasudevan
4.D.Lakshmi
5.R.Leelavathi

... Respondents in both
the revisions

Civil Revision Petitions filed under Article 227 of the Constitution of India against the order and decretal order of the learned Subordinate Judge at Tambaram dated 12.08.2013 made in I.A.No.102 of 2012 in A.S.No.18 of 2012 and order dated 06.09.2013 made in I.A.No.100 of 2012 in A.S.No.18 of 2012.

For Petitioners : Dr.A.E.Chelliah, Senior Counsel
in both CRPs for Mrs.C.Vasanthakumari Chelliah

For Respondents : Mr.V.Meenakshisundaram
in both CRPs

COMMON ORDER

These revisions have been preferred under Article 227 of the Constitution of India questioning the legality of the orders of the learned Subordinate Judge at Tambaram dated 12.08.2013 and 06.09.2013 passed respectively in I.A.Nos.102/2012 and 100/2012 both in A.S.No.18 of 2012 on the file of the said court.

2. The arguments advanced by Dr.A.E.Chelliah, learned senior counsel appearing for Mrs.Vasanthakumari Chelliah, learned counsel on record for the petitioners in both the revisions and by Mr.V.Meenakshisundaram, learned counsel for the respondents in both the revisions were heard. The impugned orders and the materials produced in the form of typed set of papers and also the materials available on record sent for from the court below were also taken into consideration.

3. The revision petitioners are the defendants in the original suit O.S.No.144/1998 filed on the file of the then Judicial Magistrate-cum-District Munsif, Alandur by S.K.Thirunavukkarasu (since deceased) against the revision petitioners herein for the relief of partition and separate possession claiming half share in the suit properties. During the pendency of the suit, the said Thirunavukkarasu died and the respondents 2 to 5 herein, being the legal representatives of the said

Thirunavukkarasu, were impleaded as plaintiffs 2 to 5 by order dated 12.03.2010. After trial, the learned trial Judge pronounced a judgment on 01.02.2012 sustaining the claim of the plaintiffs and granted a preliminary decree declaring that the plaintiffs were entitled to 50% of the share (half share) in the suit properties and directing division of the suit properties in to two equal shares and allotment of one such share to the respondents herein/plaintiffs.

4. Aggrieved by the grant of preliminary decree, the revision petitioners preferred the above said appeal A.S.No.18 of 2012 on the file of the Sub Court, Tambaram. Pending disposal of the appeal, they filed two applications 1) seeking for permission to adduce additional evidence in the form of documents and 2) for appointment of an Advocate-Commissioner to inspect the suit properties and submit a report regarding the physical features of the suit property and for receiving additional evidence. The application for reception of additional evidence filed under Order XLI Rule 27 was numbered as I.A.No.100/2012, whereas the application filed under Order XXVI Rule 9 and Section 151 CPC and also under Order XLI Rule 27 was numbered as I.A.No.102/2012.

5. The learned lower appellate judge (Subordinate Judge, Tambaram), after hearing, dismissed both the applications by separate orders dated 12.08.2013 and 06.09.2013. As against the dismissal of

I.A.No.100/2012, C.R.P.(NPD) No.3985 of 2013 has been filed. As against the dismissal of I.A.No.102/2012, C.R.P.(NPD) No.3728 of 2013 has been filed.

6. For the sake of convenience, C.R.P.(NPD) No.3728 of 2013, which has been filed against the order passed in I.A.No.102/2012, is taken up for discussion at the first instance.

7. A common supporting affidavit was filed in both the applications. In the supporting affidavit, the reason for seeking appointment of Advocate-Commissioner at the appellate stage has been stated that the suit properties are shown as dry land measuring 15 cents with tamarind, bamboo and neem trees and another extent of 4.5 cents in grama natham land; that whereas they are not mere vacant lands and there are buildings in both the lands which has been clarified in the written statement as well as the proof affidavit of the revision petitioners. In fact, an Advocate-Commissioner was appointed for inspecting the suit properties and to hand over two wills of Kullappa Gounder marked as Ex.A11 and Ex.B1 to the forensic expert for his report. But unfortunately, the Advocate-Commissioner did not fully comply with the trial court's direction and the same was ignored by everyone. A perusal of the entire affidavit would show that the revision petitioners sought appointment of an Advocate-Commissioner in the appellate stage for inspecting the suit properties and submitting a report

regarding the physical features in order to show that the suit properties are not mere vacant lands, but there are buildings in both the suit items.

8. It is obvious from the records that the trial court, by its order dated 11.01.2011 made in I.A.No.1741 of 2010 in the suit, appointed one Mr.S.Rajendran as Advocate-Commissioner, with a direction to take Exhibits B1 and A11 and present the same to the appropriate authority in the Forensic Laboratory for the comparison of the signature of Kullappa Naicker for opinion. However, for issuing the warrant to the Advocate Commissioner, a cyclostyled form was used in which the following sentence also had been included in the printed matter:

"The Commissioner is directed to give notice to both parties before visiting the suit property"

The same is meant for use in respect of appointment of Commissioners to inspect the suit properties to note the physical features or any other purpose like suggesting mode of division in respect of the suit property. When a Commissioner is appointed for taking a disputed and admitted document in a sealed cover to the Forensic Laboratory for the opinion of the Handwriting Expert, the above said part of the printed matter should have been deleted as inapplicable. But the same was not done in the instant case. Though the scope of the direction issued to the Commissioner's warrant had been clearly stated, the trial court failed to

score out the inapplicable portion in the form for the issuance of the warrant. This was misinterpreted and claimed by the revision petitioners herein in their I.A.No.102/2012, as if the scope of the appointment of the Advocate Commissioner in I.A.No.1741/2010 made by the trial court was two fold, namely 1) to inspect the suit properties and submit a report regarding its physical features and 2) to take the documents Exs.B1 and A11 to the Forensic Laboratory for the opinion of the expert. Such a contention came to be made to give a twist to the order passed by the trial court appointing Advocate-Commissioner for one purpose, as if such order was passed for another purpose also and the Commissioner did not fully comply with the direction issued to him.

9. The said contention is highly untenable. It appears that the petitioners have consciously filed the interlocutory application I.A.No.102/2012 with the following prayer:

"to pass order, appointing an Advocate Commissioner to inspect the suit properties shown in the schedule of the plaint as, schedule and submit a report with physical features of the lands shown therein for receiving additional evidence."

The relevant portion of the common affidavit citing the reason for seeking such appointment of an Advocate Commissioner in the appellate stage reads as follows:

"Unfortunately, the Advocate Commissioner did not comply with the trial Court's direction and it was also ignored by everyone".

After making such an averment, the contents of the warrant issued to the Advocate Commissioner, which included the inapplicable portion in the printed form and was omitted to be deleted, came to be reproduced. Taking advantage of the said mistake committed by inadvertence in issuing the warrant to the Commissioner, the revision petitioners have made it as the foundation for seeking appointment of a Commissioner at the appellate stage for inspecting the suit properties and submit a report regarding their physical features.

10. The revision petitioners, in fact, intend to establish their contention that the suit properties are not vacant lands and there are buildings in both the items of suit properties. The said contentious question was one of the basis on which the suit for partition was contested by the revision petitioners. While they chose to file a petition for appointment of a commissioner to take the disputed and admitted documents for the opinion of the handwriting expert, they did not file any application for appointment of a Commissioner to visit the suit properties to note the physical features. As such, the parties were content with leading evidence in proof of their respective stands. Now, having suffered a preliminary decree, the revision petitioners, in the

appellate stage, have chosen to file I.A.No.1741/2010 for appointment of a Commissioner.

11. The said appointment sought for, as rightly contended by the respondents, is to collect evidence through the Advocate-Commissioner, which should not be normally allowed even in the trial stage. Whether the suit properties are vacant lands or there are buildings in them - could have been proved by adducing oral and documentary evidence rather than seeking appointment of an Advocate-Commissioner and in fact, the revision petitioners had also made such an attempt in the trial before the trial court. Under the said circumstances, the learned lower appellate judge came to a correct conclusion that the interlocutory application seeking appointment of a Commissioner in the appellate stage to inspect the suit properties and submit a report regarding their physical features cannot be allowed even without hearing the appeal on merits. This court does not find any defect or infirmity, much less illegality, in the said order passed by the learned lower appellate judge dismissing I.A.No.102/2012 in A.S.No.18/2012. Hence C.R.P.(NPD) No.3728 of 2013 is bound to fail. However the power of the appellate court to appoint a Commissioner at a later point of time, this court is of the view that the issue cannot be decided without getting a report regarding the physical features of the property from a Commissioner to be appointed.

12. C.R.P.(NPD) No.3985/2013 has been filed against the order passed in I.A.No.100/2012 in A.S.No.18/2012. The said petition was filed under Order XLI Rule 27 CPC for reception of additional evidence. When such an application for reception of additional evidence in the appellate court is moved, then after giving notice to the parties concerned, the appellate court should hear the said application along with the the appeal on its merits and either allowing or dismissing the same, without considering the merits of the appeal, shall be against interpretation of the provision made by the Supreme Court.

13. In ***Union of India vs. Ibrahim Uddin and Another*** reported in **(2012) 8 SCC 148** , the Supreme Court has made the following observation:

"An application under Order 41 Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find out whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved."

"The true test, therefore is, whether the appellate court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the court."

14. In ***K.R.Mohan Reddy vs Net Work Inc. Represented through MD*** reported in **(2007) 14 SCC 257**, the Supreme Court made the following observation:

" It is now a trite law that the conditions precedent for application of clause (aa) of sub-rule (1) of Rule 27 of Order 41 is different from that of clause (b). In the event the former is to be applied, it would be for the applicant to show that the ingredients or conditions precedent mentioned therein are satisfied. On the other hand if clause (b) to sub-rule (1) of Rule 27 of Order 41 CPC is to be taken recourse to, the appellate court is bound to consider the entire evidence on record and come to an independent finding for arriving at a just decision; adduction of additional evidence as has been prayed by the appellant was necessary."

15. Hence the procedure adopted by the lower appellate court to dismiss the application filed under Order XLI Rule 27 CPC without even considering the entire evidence and the appeal on its merits to find out whether the adduction of additional evidence is necessary to enable the lower appellate court to pronounce the judgment or for any other substantial cause. The requirement of hearing the application for adducing additional evidence along with the appeal on merits does not mean that in all cases the order in the application Under Order XLI Rule 27 should be incorporated in the judgment itself. In case, the lower appellate court decides to allow the application, a separate order should be passed and thereafter recording of additional evidence should be made following the procedure contemplated under Order 41 Rule 28 CPC. In case, the lower appellate court, after hearing the application along with the appeal and after considering the entire evidence, comes to the conclusion that the application under Order XLI Rule 27 CPC cannot be allowed, it can incorporate the order with reasons in the judgment itself and proceed with the pronouncement of the judgment.

16. Apart from the said mistake committed by the lower appellate

court in hearing the application filed under Order XLI Rule 27 separately and not along with the appeal on merits, learned lower appellate judge has committed a blunder, as it is obvious from the order passed in the said application that there was misconception and non-application of mind regarding the nature of the prayer made in the interlocutory application. The prayer made in the said application reads as follows:

"For the reasons set out in the accompanying affidavit, it is prayed that this Hon'ble Court may be pleased to pass order permitting the petitioners/appellants to produce additional evidence oral and documentary which are Patta, Voter IDs and Family cards, Driving License etc. of the petitioners/appellants and pass such further or other orders..."

The order of the lower appellate court proceeds on the erroneous assumption that I.A.No.100/2012 was also for appointment of an Advocate Commissioner to inspect the suit properties and submit a report regarding their physical features. Such a total non-application of mind on the part of the learned lower appellate judge is writ large. Hence the said order dated 06.09.2013 made in I.A.No.100/2012 in A.S.No.18/2012 cannot be sustained and there shall be every justification for interference with it and setting aside the same in exercise of the power of this court under Article 227 of the Constitution of India. The illegality caused by the misconception and the non-application of mind cannot be condoned. For the said reason alone, this

court comes to the conclusion that the order dated 06.09.2013 dismissing I.A.No.100/2012 in A.S.No.18/2012 on the file of the Sub Court at Tambaraman is liable to be set aside and the said application shall be remitted back to the lower appellate court with a direction to hear it along with the appeal and then take a decision.

In the result, C.R.P.(NPD) No.3728/2013 is dismissed. C.R.P.(NPD) No.3985/2013 is allowed. The order of the Sub Judge, Tambaram dated 06.09.2013 made in I.A.No.100/2012 in A.S.No.18/2012 shall stand set aside. I.A.No.100/2012 is remitted back to the trial court to hear it along with the appeal and then take a decision. It is made clear that the dismissal of the C.R.P.(NPD) No.3728/2013 confirming the dismissal of I.A.No.102/2012 shall not preclude the appellate court from resorting to appointment of a Commissioner at a later stage, if the circumstances so warrant. However, there shall be no order as to cost. Consequently, the connected miscellaneous petitions are closed.

26.03.2015

Index : Yes
Internet : Yes
asr/-

To
The Subordinate Judge, Tambaram

P.R.SHIVAKUMAR,J.

asr/-

C.R.P.(NPD) Nos.3728 of 2013
and
C.R.P.(NPD) Nos.3985 of 2013

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