

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.01.2016

CORAM

THE HON'BLE MS. JUSTICE R.MALA

C.R.P.(PD).No.4365 of 2015

and

M.P.No.1 of 2015

C.Rajendra Kumar
S/o.B.Chanchal Raj

.. Petitioner/Respondent/Plaintiff

Vs.

N.Badrinath
S/o.S.T.Narayanamurthy

.. Respondent/Petitioner/Defendant

Prayer:

Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decreetal order dated 18.03.2015 made in I.A.No.451 of 2014 in O.S.No.153 of 2010 on the file of the learned Subordinate Judge, Chidambaram.

For Petitioner : Mr.A.Thiyagarajan

For Respondent : M/s. Rank Associates

ORDER

The present Civil Revision Petition has been filed challenging the impugned order passed in I.A.No.451 of 2014 in O.S.No.153 of 2010, wherein the application filed by the defendant under Order 26 Rule 14(3) CPC to re-issue the warrant to the commissioner to rectify the defect in the earlier report of the Advocate Commissioner and file an additional report with sketch and photographs, after measuring the physical features of the property, came to be allowed.

2. The learned counsel appearing for the petitioner would submit that the petitioner herein as plaintiff had filed the suit in O.S.No.153 of 2010 for declaration of title of the plaintiff to the suit property marked as "A,B,C,D" in the plaint plan and also for permanent injunction. The defendant filed his written statement and contested the suit. While so, during the pendency of the suit, an application in I.A.No.333 of 2010 came to be filed for appointment of an Advocate commissioner. Pursuant to the order passed in the said application, an Advocate commissioner was appointed and he filed his report. Immediately, the respondent/defendant filed an application in I.A.No.192 of 2011 to condone the delay in receiving

the objections to the report of the Advocate Commissioner and filed another application in I.A.No.193 of 2011 to scrap the earlier report of the Advocate Commissioner and to re-issue the warrant to the same Advocate Commissioner to inspect the property. The said application in I.A.No.193 of 2011 came to be dismissed and as against the same, the respondent/defendant filed a Civil Revision Petition in CRP.(PD).No.4753 of 2011 before this Court and this Court issued a direction to the Trial court to scrap the earlier report of the Advocate commissioner dated 22.11.2011 and re-issue the warrant to the same Advocate commissioner for inspecting the property again, after due notice to all the parties concerned with a direction to file a report along with the sketch. In pursuance of the said order dated 26.09.2012 passed by this Court, the warrant had been reissued to the Advocate Commissioner. Accordingly, the Advocate commissioner re-inspected the said property and filed the report on 16.12.2013.

3. Now, the respondent herein who is the defendant in the suit has filed an application in I.A. No. 451 of 2014 to reissue the warrant to the same Advocate Commissioner or appoint another Advocate Commissioner to measure the same property and file a report along with plan. The said application in I.A. No. 451 of 2014

came to be allowed by the learned Trial Judge and as against the same, the present Civil Revision Petition has been preferred.

4. Challenging the impugned order dated 18.03.2015, the learned counsel for the revision petitioner would raise the following points.

(i) Without filing objections to the Commissioner's report, the respondent/defendant is not entitled to file an application to reissue the warrant to the same Commissioner to once again measure the property.

(ii) Since the petitioner herein as plaintiff has filed the suit for declaration of title and permanent injunction, the petitioner has to prove his case and hence, there is no necessity for the defendant to prove his case in this suit and that factum was not considered by the Trial Court.

5. To substantiate his argument, learned counsel for the petitioner relied upon the decision of the Hon'ble Apex Court reported in **(2006) 5 Supreme Court Cases 466, Subhaga and Others v. Shobha and Others** and submitted that the Commissioner need not measure any other property except the suit property. However, in the instant case, the Trial Court without

considering the same had directed the Advocate Commissioner to measure other properties of the defendant, apart from the suit scheduled property in order to ascertain the real factum. Therefore, the learned counsel for the revision petitioner would submit that the Trial Court has committed an error and hence, he prayed for setting aside the impugned order.

6. Resisting the same, the learned counsel for the respondent would submit that since the suit is for declaration of title and permanent injunction and the Advocate Commissioner has not properly measured the suit property, the respondent has filed the present application to reissue the warrant. In the petition, he has specifically stated that the Advocate Commissioner has not measured the property comprised in Survey Nos. 926 and 927 which was situated on eastern side and hence, it is necessary to reissue the warrant for the disposal of the main suit. That factum was rightly considered by the Trial Court and hence, the learned counsel for the respondent prayed for dismissal of this Civil Revision Petition.

7. Considered the rival submissions made by both sides and perused the typed set of papers.

8. The petitioner herein as plaintiff has filed the suit for declaration of title to the suit property marked in "A,B,C,D" in the plaint plan and also for permanent injunction, stating that the suit property comprises of the eastern part of the entire building marked "H,A,B,C,D,G" in the plaint plan and comprised in T.S.No.926 measuring 3357 Sq.ft and T.S.No.927 measuring 220 Sq.ft originally belonged to one Kuppusamy Iyer. After his death, the property devolved upon his two sons Muthusamy and Mahadevan and on their death, it devolved upon Nagalakshmi and Sundarambal who are the daughter-in-laws of the Kuppusamy and one Rajalakshmi, the grand daughter of Kuppusamy. The said Nagalakshmi died on 12.01.2010 leaving a Will dated 03.12.2009 under which her share in the suit property devolved upon Rajalakshmi. Thereafter, Sundarambal and Rajalakshmi became the owners of the entire building. While so, they entered into a sale agreement with the plaintiff on 04.05.2009 and sold the said property under the registered sale deed dated 05.04.2010 and handed over the possession. Hence, the petitioner/plaintiff is in peaceful possession and enjoyment of the said property from 05.04.2010. The eastern portion of the entire building is Marked as "A,B,C,D" in the plaint plan. It comprises T.S.No.926 on the

northern side and T.S.No.927 on the southern side. The suit property measures east-west 4 feet and north-south 174½ feet.

9. Now, the defendant claims title to the suit property "A,B,C,D" under the sale deed dated 20.12.1990, said to have been executed by Muthusamy Iyer Vagaiyara and he is attempting to interfere with the possession of the petitioner/plaintiff and hence, the petitioner/plaintiff filed the suit in O.S.No.119 of 2010 for declaration for the sale deed dated 05.04.2010 is null and void and the said suit is still pending. Now the defendant attempted to interfere with his possession and hence, he filed the suit for declaration of title in respect of the suit property. The defendant filed written statement and contested the suit. While so, during pendency of the suit, an application in I.A.No.333 of 2010 was filed by the petitioner/plaintiff, wherein the Advocate Commissioner was appointed and he also filed his report. After filing objection by the respondent/defendant, he filed an application in I.A.No.193 of 2011 in O.S. No. 153 of 2010 for scraping the report of the Advocate Commissioner and to reissue the warrant to the same Commissioner. The said application was dismissed and as against the same, he preferred a Civil Revision Petition in C.R.P.(PD).No.4753 of 2011 which was allowed after setting aside

the order passed in I.A. No. 193 of 2011. Further, the Trial Court was directed to scrap the earlier report of the Advocate Commissioner and reissue the warrant to the same Advocate Commissioner for inspecting the property again, after issuance of due notice to both the parties. In pursuance of the said order, he reinspected the property and filed the report along with plan.

10. Now the respondent/defendant has come up with another application viz., I.A. No. 451 of 2014 in O.S. No. 153 of 2010 to re-issue the warrant to the commissioner to rectify the defect in the earlier report of the Advocate Commissioner and file an additional report with sketch and photographs, after measuring the physical features of the property. It is admitted fact that the respondent/defendant has not filed any objection to the earlier report of the Advocate Commissioner. Without filing objections to the report of the Advocate Commissioner, the respondent/defendant has come forward with an application to re-issue the warrant.

11. Before advertng to the facts of the present case, it would be appropriate to consider the decision relied on by the learned counsel for the revision petitioner reported in **(2006) 5 Supreme Court Cases 466, Subhaga and Others v. Shobha and Others.**

Much emphasis was placed on paragraph 6 of the said decision and the same is extracted hereunder:

"6. The High Court has also upheld the title claimed by the plaintiff over the plot, Plot No. 1301/1 Ba. Once we accept the identification made by the Commissioner as was done by the first appellate court, it is clear that the plaintiff has the right to have the disputed construction removed and the well filled up. That a property can be identified either by boundary or by any other specific description is well established. Here the attempt had been to identify the suit property with reference to the boundaries and the Commissioner has identified that property with reference to such boundaries. Even if there was any discrepancy, normally, the boundaries should prevail. There was no occasion to spin a theory that it was necessary in this suit to survey all the adjacent lands to find out whether an encroachment was made in the land belonging to the plaintiff. In this situation, we are satisfied that the judgment and decree of the High Court calls for interference. We are also satisfied that the lower appellate court was justified in affirming the decree

granted in favour of the plaintiff on the pleadings and the evidence in the case.”

But the above decision is not applicable to the facts of the present case because in the above case, the suit has been filed for declaration of title and injunction and in that, both the Trial Court and the first appellate Court had decreed the suit on the basis of the report filed by the Advocate Commissioner. However, the High court reversed the judgment and decree of the first appellate court and dismissed the suit on a finding that there was no proper identification of the suit property by the plaintiff either in the plaint or at the spot and since the boundaries cannot be ascertained without surveying the adjoining plots, no decree could be granted. But the Hon'ble Apex Court had set aside the judgment and decree of the High court holding that when the description of the boundaries in the plaint is admitted by the defendant as well as the Advocate Commissioner, there is no necessity to measure the other properties

12. However, in the instant case, the identity of the property itself is disputed. It is the case of the defendant that he had purchased the property in the year 1990 from the legal heirs of the

true owner Muthusamy Iyer. Further, each and every time the defendant had stated that there was an encroachment. In such circumstances, I am of the view that the above citation is not applicable.

13. Now this Court has to decide whether without filing an objection to the Commissioner's report and filing an application for scraping the earlier report filed by the Advocate Commissioner, the respondent/defendant is entitled to file an application for re-issuance of warrant to the Commissioner to rectify the defect?

When the Advocate Commissioner inspected the property on the earlier occasion, the respondent/defendant has stated that no notice has been issued and the property has not been properly identified and therefore, on that basis the revision has been allowed. Now the respondent/defendant would state that the measurement was not properly made on the eastern side of the suit property. This attitude of the defendant would clearly show his malafide intention to protract the proceedings and to file consecutive applications for re-issuance of warrant and for scraping of report of the Advocate Commissioner unless he gets a favourable report. If anything has to be clarified, the respondent/defendant could have very well examined the Advocate Commissioner before

this Court and clarified the defect in the report filed by him before the Court. However, without doing so, the respondent/defendant had filed consecutive applications to reissue the warrant.

14. In these circumstances, I am of the view that the attitude of the defendant is not appreciable and by way of reissuing the warrant, the defendant wants to collect the material to prove his case. Further, it is well settled dictum of the Hon'ble Apex Court that the plaintiff must prove his case on the basis of the oral and documentary evidence and that he cannot take the loop holes in the case of the defendant and seek for remedy. In the instant case, it is the duty of the petitioner/plaintiff to prove his case and the defendant need not prove his case. It is also pertinent to note that already respondent/defendant has filed a suit in O.S.No.119 of 2010 on the file of the Principal District Munsif, Chidambaram for declaration that the sale deed dated 05.04.2010 executed in favour of the petitioner/plaintiff is null and void, so far as, the portion of the property i.e. the suit property is concerned. In such circumstances, I am of the view that the respondent is not entitled to take the law in his own hands by way of filing series of application of reissuing the warrant or to appoint the Advocate Commissioner.

15. Furthermore, it is appropriate to consider the portion of the impugned order dated 18.03.2015, enlightened by the learned counsel for the petitioner in the last but one paragraph, wherein the Trial Court had directed the Advocate Commissioner to measure the suit property along with the defendant's other properties. The respondent/defendant is not entitled to do so and therefore, I am also of the view that the impugned order passed by the Trial Court is unsustainable.

16. In the result, the impugned order dated 18.03.2015 passed in I.A.No.451 of 2014 in O.S.No.153 of 2010 on the file of the learned Subordinate Judge, Chidambaram is set aside and the Civil Revision Petition stands allowed. Consequently, connected miscellaneous petition is closed. No costs.

21.01.2016

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To
The learned Subordinate Judge,
Chidambaram.

R.MALA, J.

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