

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.04.2016

CORAM

THE HONOURABLE MR. JUSTICE D.KRISHNAKUMAR

C.R.P.(PD) No.2149 of 2007
and
M.P.No.1 of 2007

Ganapathi

... Petitioner

vs.

1.R.Rajeswari
2.Kannan

... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India against the order dated 3.7.2007 made in I.A.No.1320 of 2007 in O.S.No.2092 of 2001 on the file of the District Munsif, Coimbatore.

For Petitioner : Mr.R.T.Doraisamy

For 1st Respondent : No appearance

ORDER

This Civil Revision Petition arises against the order dated 03.07.2007 made in I.A.No.1320 of 2007 in O.S.No.2092 of 2001 on the file of the District Munsif, Coimbatore.

2. The first respondent herein filed the suit in O.S.No.2092 of 2001 on the file of the District Munsif, Coimbatore, *inter alia* against the revision petitioner and the second respondent herein for permanent

injunction restraining them from in any manner interfering with the plaintiff's possession, enjoyment and occupation of the suit property and for costs. With reference to the same property, the first respondent filed another suit in O.S.No.3440 of 2004 on the file of the District Munsif, Coimbatore, against the Town Panchayat for injunction. In the said suit, an Advocate Commissioner was appointed to note down the physical features of the property.

3. When the suit in O.S.No.2092 of 2001 was taken up for trial, the revision petitioner obtained certified copy of the Advocate Commissioner's report and sketch filed in O.S.No.3440 of 2004, and marked them in O.S.No.2092 of 2001 as Exs.B.11 to B.13. Further, the revision petitioner took out summons to the Advocate Commissioner, the author of the documents, for examining him as a witness.

4. In the meantime, the first respondent/plaintiff filed I.A.No.1320 of 2007 under section 151 of C.P.C. to pass an order not to permit the defendants 2 and 3, namely, the revision petitioner and the second respondent herein, to examine the said Advocate Commissioner. The revision petitioner filed his counter affidavit. According to the revision petitioner, without considering the merits of the case, the learned District Munsif, Coimbatore, allowed the Interlocutory Application, and thereby, he was prevented from examining the Advocate Commissioner. Against this

order dated 3.7.2007 made in I.A.No.1320 of 2007 in O.S.No.2092 of 2001, the present Civil Revision Petition has been filed.

5. It is seen from the records that the first respondent was served with notice on 11.09.2007. Though notice was served on the first respondent and her name was also printed in the cause list, there was no representation on behalf of the first respondent. Insofar as the second respondent is concerned, the Civil Revision Petition is dismissed vide order of this Court dated 24.07.2015.

6. It is to be noted that the second and third defendants, namely, the revision petitioner and second respondent herein filed an Interlocutory Application in I.A.No.439 of 2002 in O.S.No.2092 of 2001 under Order 26 Rule 9 CPC before the Trial Court to appoint an Advocate Commissioner to inspect the suit property, note down the physical features and submit his report. The said Application was dismissed by the Trial Court vide order dated 23.9.2004. Against that order, Civil Revision Petition (PD) No.147 of 2005 was filed before this Court by the revision petitioner and the second respondent herein and the said Revision Petition was dismissed confirming the order of the Trial Court passed in the Interlocutory Application No.439 of 2002 in O.S.No.2092 of 2001 thereby rejecting the claim of the revision petitioner for appointment of Advocate Commissioner.

7. However, in the suit in O.S.No.3440 of 2004 filed by the plaintiff/first respondent herein against the Town Panchayat for injunction, an Advocate Commissioner was appointed and he noted down the physical features of the property. The revision petitioner obtained certified copy of the Advocate Commissioner's report and sketch filed in O.S.No.3440 of 2004 and marked them in O.S.No.2092 of 2001 as Exs.B.11 to B.13. Further, the revision petitioner took out summons to the said Advocate Commissioner, for examining him as a witness.

8. On the other hand, the first respondent herein filed the Interlocutory Application in I.A.No.1320 of 2007 in O.S.No.2092 of 2001 before the District Munsif, Coimbatore, praying not to permit the revision petitioner to examine the Advocate Commissioner. However, the revision petitioner filed his counter affidavit wherein he has specifically stated that as he has marked the documents Exs.B.11 to B.13, the author of the documents, namely, Advocate Commissioner, requires to be examined, and as the revision petitioner is a defendant in the suit, it is the prerogative right of the defendant to examine a witness in support of his case and produce before the Court for examination.

9. In Civil Revision Petition (PD) No.147 of 2005, this Court has observed that the suit was only for bare injunction and the same can be decided by the parties by letting evidence to the effect that who was in

possession at the time of filing of the suit and that the Advocate Commissioner need not be appointed to collect the evidence. Relying on the orders passed by this Court in Civil Revision Petition (PD) No.147 of 2005, the Trial Court has allowed the Interlocutory Application in I.A.No.1320 of 2007 and thereby, the revision petitioner was not entitled to examine the Advocate Commissioner appointed in O.S.No.3440 of 2004.

10. However, it is the specific case of the revision petitioner that documents Exs.B.11 to B.13 were marked before the Trial Court and once the documents were marked, the author of those documents has to be examined. As rightly pointed out by the revision petitioner, once the documents were marked, the Trial Court cannot refuse to examine the author of such documents, as a witness in the suit. While disposing of the Civil Revision Petition (PD)No.147 of 2005, there was no occasion for this Court to deal with the issue now raised i.e. with regard to the examination of the Advocate Commissioner in respect of the documents marked as Exs.B.11 to B.13. In such circumstances, the impugned order passed in the Interlocutory Application No.1320 of 2007 based on the order passed in C.R.P. (PD) No.147 of 2005 cannot be sustained and needs to be interfered with.

11. Therefore, the impugned order dated 03.07.2007 passed in Interlocutory Application No.1320 of 2007 in O.S.No.2092 of 2001 is set aside and the matter is remanded to the Trial Court to consider the facts of

the case and decide as to whether the revision petitioner is entitled to examine the Advocate Commissioner appointed in O.S.No.3440 of 2004 and pass appropriate orders on merits and in accordance with the provisions of law, without being influenced by the observations made in this order.

12. Accordingly, the Civil Revision Petition is allowed. No costs.

The connected Miscellaneous Petition is closed.

27.04.2016

Index : yes / no

Internet :yes / no

asvm

To

The First Additional District Munsif,
Coimbatore.

D.KRISHNAKUMAR, J.

(asvm)

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and
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