

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **02.12.2016**

CORAM:

THE HONOURABLE MR. **JUSTICE K.K.SASIDHARAN**

**C.R.P.(P.D.) Nos.1207 and 1208 of 2016 and
CMP.No.6599 of 2016**

Lakshmi Sudersan ...Petitioner in both petitions
versus

Pavadai Samy ...Respondent in both petitions

PRAYER: Civil Revision Petitions filed under Article 227 of the Constitution of India, against the fair and decreetal order dated 22.09.2015 passed in I.A.No.576 of 2014 and I.A.No.545 of 2013 respectively in O.S.No.282 of 2011 on the file of Additional District Munsif, Chidambaram, Cuddalore District.

For Petitioner : Mr.S.Kadarkarai

For Respondent : Mr.S.Sathish Rajan

COMMON ORDER

These two Civil Revision Petitions are at the instance of the defendant in O.S.No.282 of 2011 on the file of learned Additional District Munsif, Chidambaram.

2. The respondent filed a suit for declaration and injunction in respect of the suit property. The respondent, in his plaint in O.S.No.282

of 2011, contended that he purchased the property bearing Plot No.1 in Thillai Kali Amman Nagar, by document dated 08.07.2003. The petitioner, on the other hand, purchased Plot Nos.22 and 23 in Thillai Kali Amman Nagar, by document dated 22.08.2003. There was a clear boundary dividing the property in Plot No.1 and Plot Nos.22 and 23. The respondent raised a dispute with regard to a portion of the property and the same necessitated in filing the suit for declaration and injunction.

3. The petitioner filed written statement before the Trial Court and contended that there was an earlier suit in O.S.No.135 of 2005 filed by her for injunction. The Trial Court, granted ex parte decree and directed the respondent to remove the encroachment. According to the petitioner, in view of the decree in O.S.No.135 of 2005, the subsequent suit filed by the respondent is not maintainable.

4. The respondent filed application in I.A.No.545 of 2013, seeking appointment of Advocate Commissioner to inspect the suit property and note down its physical features. The application was opposed by the petitioner by filing counter affidavit.

5. The petitioner filed an application in I.A.No.576 of 2014 under Order 7 Rule 11 of C.P.C., to reject the plaint in O.S.No.282 of 2011.

6. Before the Trial Court, the petitioner contended that in view of the decree dated 30 April 2009 in O.S.No.135 of 2005 on the file of District Munsif, Chidambaram, the subsequent suit filed by the respondent is barred by the principles of *res judicata*. The petitioner further contended that the Trial Court earlier appointed Advocate Commissioner in O.S.No.135 of 2005 and as such, the present application for appointment of Advocate Commissioner is legally not maintainable.

7. The learned Additional District Munsif, Chidambaram, allowed the application filed by the respondent in I.A.No.545 of 2013, primarily on the ground that it would be in the interest of both parties to appoint an Advocate Commissioner to inspect the suit property with the assistance of Surveyor. The unsuccessful respondent in I.A.No.545 of 2013 is before this Court in CRP (PD) No.1208 of 2016.

8. The interlocutory application filed by the petitioner in I.A.No.576 of 2015 was dismissed by the learned Additional District Munsif, Chidambaram, with an observation that the present suit is a comprehensive suit for declaration and injunction and as such, the matter requires evidence. The order dated 22 September 2015 in I.A.No.576 of 2014 is challenged in CRP (PD) No.1207 of 2016.

9. I have heard the learned counsel for the petitioner and the learned counsel for the respondent in both the Civil Revision Petitions.

CRP (PD) No.1207 of 2016

10. The petitioner filed interlocutory application under Order 7 Rule 11 C.P.C., with a contention that in view of the judgment and decree in O.S.No.135 of 2005, the subsequent suit is barred by the principles of *res judicata*. According to the petitioner, the respondent was a party to the suit in O.S.No.135 of 2005 and as such, he is bound by the decree.

11. The respondent, on the other hand contended that summons was not served on him and as such, he failed to appear before the Trial Court. According to the respondent, the present suit is a

comprehensive suit for declaration and injunction. There is a dispute with regard to a portion of the suit property and as such, the said issue requires to be adjudicated on merits. Since the earlier suit was a suit for injunction, the Trial Court had no occasion to consider the issue with regard to title.

12. The respondent purchased Plot No.1 by document dated 08.07.2003. It was only thereafter, the petitioner purchased Plot Nos.22 and 23, by document dated 22.08.2003. There is a dispute with regard to a portion of the suit property. It is true that the respondent was a party to the earlier suit. It was a simple suit for injunction. The question of title was not an issue in the earlier suit in O.S.No.135 of 2005. The learned District Munsif granted a decree of mandatory injunction, without there being a plea of declaration with respect to the ownership of the encroached portion.

13. The learned Trial Judge, while dismissing the application very clearly observed that the present suit being one for declaration and injunction, the entire issue would be at large. The Court wanted to put an end to the litigation. Since the earlier suit was a simple suit for injunction, there was no pleading with respect to title. Similarly, there

was no issue framed by the Trial Court with respect to title. Therefore, there was no adjudication with respect to title in the earlier suit. When there is a dispute with regard to the ownership of the encroached portion, necessarily, there should be a factual adjudication of the said issue on the basis of materials. It is only in the present suit, the respondent has produced materials to show that the petitioner has no justifiable claim in respect of the disputed portion.

14. The respondent, being the plaintiff in the suit for declaration and injunction is bound to prove that he is entitled to the property in question on the strength of his title. The petitioner filed the application under Order 7 Rule 11 of CPC only on the basis of the earlier judgment and decree. The petitioner, nowhere, touched about her right in respect of the encroached portion. I am therefore of the view that the Trial Court was perfectly correct in dismissing the application filed under Order 7 Rule 11 CPC and directing the petitioner to face trial. I do not find any error or illegality in the order warranting interference by this Court. The Civil Revision Petition is therefore liable to be dismissed.

CRP (PD) No.1208 of 2016

15. The application filed by the respondent for appointment of Advocate Commissioner was allowed by the Trial Court.

16. Before the Trial Court, the petitioner contended that there is no need for appointment of another Commissioner, in view of the report filed by the Advocate Commissioner in O.S.No.135 of 2005. There is no question of summoning the report submitted by the Advocate Commissioner in another suit. Since the present suit is one for declaration and injunction, the respondent was correct in contending that appointment of Advocate Commissioner to inspect the suit property with the help of Surveyor is absolutely necessary. This aspect was considered by the learned Trial Judge, resulting in allowing the application in I.A.No.545 of 2013. I do not find any error or illegality in the order warranting interference by this Court.

17. In the up shot, I dismiss the Civil Revision Petitions. No costs. Consequently, connected miscellaneous petition is closed.

02.12.2016

Index : Yes/No
svki

To

The Additional District Munsif Court,
Chidambaram

K.K.SASIDHARAN, J.
(svki)

C.R.P.(P.D.) Nos.1207 and 1208 of 2016

02.12.2016

<http://www.judis.nic.in>