

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 01.11.2016

Delivered on: 09.11.2016

CORAM

THE HONOURABLE THIRU JUSTICE **V. PARTHIBAN**

C.R.P.(PD)No.4189 of 2010 &
M.P.No.1 of 2010

Chandra Prabha

.... Petitioner

vs

D.Sarojini

.... Respondent

Civil Revision Petition is filed under Article 227 of the Constitution of India against the proceedings, dated 3.11.2010 of the learned Subordinate Judge, Coimbatore made in I.A.No.547 of 2008 in A.S.No.50 of 2008.

For petitioner : Mr.K.Venkatasubban for
M/s.Sarvabhauman Associates
For respondent : No representation

ORDER

This Civil Revision Petition has been filed against the proceedings, dated 3.11.2010 of the learned Subordinate Judge, Coimbatore made in I.A.No.547 of 2008 in A.S.No.50 of 2008, directing the Advocate Commissioner to inspect the properties both belonging to the petitioner and respondent herein.

2. Heard the learned counsel appearing for the revision petitioner. There was no representation on behalf of the respondent though it appears that the notice has been served on the respondent.

3. The petitioner is the plaintiff. She filed a suit in O.S.No.453 of 2003, against the respondent/defendant, for the relief of permanent injunction, restraining the defendant and her men, agents and her relatives from attempting to demolish north-south compound wall situated on western side of the plaintiff's property, in any manner.

4. Resisting the suit, a written statement was filed on behalf of the respondent/defendant.

5. Pending the suit, the respondent/defendant had moved an interlocutory application in I.A.No.840 of 2003, seeking appointment of Advocate-Commissioner for the purpose of measuring the suit property. However, despite the order was passed in the said application, appointing the Advocate-Commissioner, the same was not pursued to its logical end and hence, there was no report of the Advocate-Commissioner.

6. Thereafter, on consideration of the evidence and on hearing the parties, the learned trial Court, vide judgment dated 31.1.2007, decreed the suit. Aggrieved by the same, the respondent/defendant preferred an appeal in A.S.No.50 of 2008 before the learned Subordinate Judge, Coimbatore. In the appeal, once again, the respondent/defendant moved an interlocutory application in I.A.No.547 of 2008, seeking appointment of Advocate Commissioner, to note down the physical features and measure the suit property. As per the averments made in the said application, appointment of Advocate Commissioner was necessitated in view of the fact that before the trial Court, the learned counsel for the respondent/defendant did not inform the party and failed to take steps for executing the warrant and hence, the Advocate Commissioner could not measure the property. However, the prayer in I.A.No.547 of 2008 to appoint Advocate-Commissioner to make inspection of the property belonging to both petitioner/plaintiff and respondent/defendant, which according to the petitioner/plaintiff, was contrary to the earlier prayer made in I.A.No.840 of 2003 filed before the trial Court and also such prayer in the present I.A.No.547 of 2008, was beyond the scope of the suit and the appeal.

7. The above said interlocutory application was sought to be resisted by the petitioner/plaintiff by way of counter affidavit, *inter alia* stating that the respondent/defendant had already obtained the relief of appointment of Advocate-Commissioner before the trial Court, however, the respondent/defendant failed to take the Commissioner to the suit property and measure the same and therefore, her right to seek the same relief once again at the appellate stage, stands barred. The respondent also cannot blame her erstwhile Advocate for the lapses on his part, which according to the respondent, he failed to diligently prosecute the case before the trial Court.

8. After advertng to the averments on either side, the learned Subordinate Judge, Coimbatore allowed the I.A.547 of 2008 in A.S.No.50 of 2008 vide order dated 3.12.2008. Aggrieved by the same, the petitioner herein, approached this Court by way of filing revision petition in C.R.P.(NPD) No.112 of 2009.

9. This Court, vide order dated 6.9.2010, allowed the above said revision petition, with a direction to the Advocate-Commissioner who was appointed by the trial Court, to immediately execute the warrant, take measurements in respect of the property as per the description of

the same in the plaint and submit a report within a period of three weeks to the first appellate Court.

10. According to the learned counsel for the petitioner, the impugned proceedings of the learned Subordinate Judge, is contrary to the specific direction issued by this Court, vide order dated 06.09.2010 in CRP (NPD) No.112 of 2009, wherein, the Advocate-Commissioner was specifically directed only to measure the property as described in the plaint, whereas, the learned Subordinate Judge, by the impugned proceedings, directed the Commissioner to inspect both the properties which belong to the petitioner/plaintiff and respondent/defendant.

11. Having heard the learned counsel for the petitioner and on perusing the entire pleadings made before the trial Court as well as before this Court, it could be seen that the scope of the original appointment of the Advocate-Commissioner, was in fact, only with reference to the inspection in respect of suit property alone and not beyond that. Even in the averments which contained in the appeal filed before the respondent/defendant, the same was only with reference to the suit property and not the properties belonging to both plaintiff and defendant. Therefore, the impugned proceedings clearly

enlarged the scope of the investigation and goes beyond the prayer sought for in the original suit, which is impermissible in law and it would certainly cause prejudice to the petitioner/plaintiff and more over, it is in violation of the specific direction passed by this Court in para 11 of the order, dated 6.9.2010 in earlier I.A.No.112 of 2010.

12. In view of the foregoing discussion, the proceedings dated 3.11.2010 of the learned Subordinate Judge in I.A.No.547 of 2008 in A.S.No.40 of 2008, are set aside.

In the result, the Civil Revision Petition is allowed. No costs. Consequently, connected M.P. is closed. Taking note of the fact that the appeal suit was of the year, 2008, the learned first appellate Court is directed to dispose of the appeal, within a period of four months from the date of receipt of a copy of tis order, after proceeding with the appointment of the Advocate-Commissioner in terms of the specific directions given by this Court in para 11 of the order dated 6.9.2010 in CRP (NPD) No.112 of 2009.

Internet: yes/no
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09-11-2016

V.PARTHIBAN, J.

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Pre delivery Order in
CRP NPD No.4189 of 2010

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