

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 26.10.2016

Delivered on: 04.11.2016

CORAM

THE HONOURABLE THIRU JUSTICE **V. PARTHIBAN**

C.R.P.(PD)No.453 of 2013 &
M.P.No.1 of 2013

R.Madhavan

.... Petitioner

vs

M.Manimozhi

.... Respondent

Civil Revision Petition filed under Article 227 of the Constitution of India against the order of the learned District Munsif, Chengalpattu passed on 5.3.2012 in I.A.No.1756 of 2010 in O.S.No.302 of 2008.

For petitioner : Mr.M.Rajasekhar

For respondent : Mr.P.Thiagarajan

ORDER

This Civil Revision Petition has been filed against the order, dated 5.3.2012 passed by the learned District Munsif, Chengalpattu in I.A.No.1756 of 2010 in O.S.No.302 of 2008 dismissing the said application filed by the petitioner herein under Order 26 Rule 9 CPC, seeking appointment of Advocate-Commissioner to measure the suit property with the help of the Taluk Surveyor.

2. Heard the learned counsel appearing for both sides and perused the entire material available on record.

3. The petitioner herein is the plaintiff in the above said suit in O.S.No.302 of 2008, filed before the trial Court, for permanent injunction as against the defendant, the respondent herein, restraining her and her henchmen, agents and nominees from interfering with the petitioner's peaceful possession and enjoyment of the suit property.

4. According to the description of the suit property given by the petitioner/plaintiff, the same is situated at Srinivasa Nagar in Survey No.89/1 sub divided as S.No.89/7, Guduvancherry village, Kancheepuram District. Resisting the suit, on behalf of the respondent/defendant, a written statement was filed, contending that the petitioner/plaintiff has never been in possession of the suit property and according to the respondent/defendant, the suit property was not situated at Srinivasa Nagar, but the same is situated at Kanniappa Nagar in Plot No.14, Guduvancherry village and the said property belongs absolutely to the respondent/defendant. According to the respondent/defendant, the petitioner/plaintiff's vendor had tampered with the original Kanniappa Nagar layout and

plots including the respondent/defendant's plot and fabricated new layout at Srinivasa Nagar and cheated the petitioner/plaintiff by selling the same as if genuine property.

5. From the above averments it would emerge that there seems to be some confusion regarding the identity of the suit property whether the same is situated at Srinivasa Nagar or at Kanniappa Nagar as claimed by rival parties. This was necessitated the filing of the interlocutory application (IA 1756 of 2010) by the petitioner/plaintiff before the trial Court under Order 26 Rule 9 CPC r/w 151 CPC, seeking appointment of the Advocate-Commissioner, to measure the suit property with the help of the Taluk Surveyor and file a report along with a plan by incorporating all the particulars.

6. The above said interlocutory application was resisted by the respondent/defendant by way of counter affidavit, stating that there was no *prima facie* case in the claim of the petitioner/plaintiff and that the application was filed only with an intention to collect the evidence on behalf of the petitioner/plaintiff much against the spirit of the Order 26 Rule 9 CPC. It was further contended that the filing of the application was intended only to drag on the proceedings indefinitely.

7. On behalf of the respondent/defendant, the following decisions, rendered by this Court, have been cited, viz.,

- i) 2008(5) CTC 181 (***Meenakshi versus Vennila and another***)
- ii) 2009(5) LW 709 (***Elango versus Akasthuri***)
- iii) 2013 (1) MWN (Civil) 248 (***Santha Satheesh versus H.J.Walter and others***)
- iv) 2014 (5) LW 361 (***Jagadeswari versus Kandasamy & others***)

8. A perusal of the above, it would reveal that the above cases dealt with different facts and they are pertaining to the issue of proving the factum of possession through the Advocate Commissioner and collection of evidence in support of the plaintiffs' claim therein. Though no one could have quarrel with the ratio decided in the above referred to decisions, however, the same cannot be applied to the factual matrix of the present case.

9. The learned trial Judge passed the order, dismissing the interlocutory application, after adverting to the submissions made by the parties and having held that the petitioner/plaintiff has not made out a case in order to substantiate his prayer for appointment of an Advocate Commissioner and that the Commissioner cannot be

appointed to find out who is in possession and to collect evidence. The learned trial Judge has also reasoned that both the plaintiff's and defendant's properties are separate and have different survey numbers and therefore, there was no need to appoint Advocate Commissioner for measuring the property. The learned trial Court has also relied upon a judgment reported in 2009(5) CTC 706 (cited *supra*), wherein, it was held that the Advocate Commissioner cannot be appointed to note down the factum of possession under the pretext of noting down the physical features and the Court alone can gather evidence regarding the factum of possession and it cannot entrust the matter to the Advocate Commissioner.

10. The learned trial Court has misdirected itself while dismissing the interlocutory application on the ground that the application for appointment Advocate Commissioner was intended to collect the evidence as to the factum of possession of the suit property. But on the other hand, it is pertinent to note that the appointment of Advocate Commissioner was sought only for the purpose of identifying the property in question as there seems to be some discrepancy as to the very location of the suit property *vis-a-vis* survey numbers. Therefore, the decision relied upon by the learned trial Judge is not proper since the same cannot be applied to

the facts of the present case. The other reason quoted by the learned trial Judge that there is no dispute regarding the identity of the property is factually not sustainable since the bone of the contention of the parties before the trial Court was only with regard to the identification of the property. In such circumstances, this Court is of the view that the learned trial Judge has failed to appreciate the case of the petitioner/plaintiff in proper perspective and erred in dismissing the application without legally acceptable reasons, which cannot be sustained.

11. In the light of the above discussion and on consideration of all the facts and circumstances of the case, this Court is of the view that the order passed by the trial Judge, is liable to be set aside.

12. Accordingly, the order passed by the trial Judge, dated 5.3.2012 in I.A.No.1756 of 2010 in O.S.No.302 of 2008 is set aside. The Civil Revision Petition is allowed. No costs. Consequently, connected MP is closed. However, taking note of the fact that the suit is of the year 2009, the trial Judge is directed to expedite the trial and dispose of the suit within a period of six months from the date of a copy of this order, after proceeding with the appointment of Advocate Commissioner in terms of the prayer sought for by the

petitioner/plaintiff.

Internet: yes/no

Index: Yes/no

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V.PARTHIBAN, J.

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