



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 16.12.2016

CORAM:

THE HONOURABLE MS.JUSTICE V.M. VELUMANI

CRP(MD) No. 1786 of 2013 and
M.P(MD) No. 1 of 2013 & CMP(MD).No. 10937 of 2016

D. Sudarsan : Revision Petitioner/ 3rd Respondent/
/3rd Defendant

Vs.

1. Vishnushankar : 1st Respondent/ Petitioner/
Plaintiff

2. Commissioner,
Sivakasi Municipality,
Sivakasi.

3. General Manager,D.No.139,
Indian Oil Corporation
Nungambakkam High road,Chennai,
Chennai District. : 2nd & 3rd Respondent/ 1st & 2nd
Respondent/
1st & 2nd Defendants

Prayer: This Civil Revision Petition is filed under Article 226 of the Constitution of India praying to set aside the fair and executable order dated 27.08.2013 passed in IA.No.130 of 2013 in O.S.No.58 of 2013 on the file of the learned District Munsif, Sivakasi.

For Petitioner : Mr. S. Ramesh
For Respondents : Mr. J. Sulaiman Basha for
Mr. K. Gokul for R1
: Mr. T.S. Mohammed Mohideen for R2
Additional Government Pleader
: Mr. K. Muralidharan for R3

O R D E R

This Civil Revision Petition is filed to set aside the fair and executable order dated 27.08.2013 passed in I.A.No.130 of 2013 in OS.No.58 of 2013 on the file of the learned District Munsif, Sivakasi.

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2. The petitioner is the third defendant in the suit. The first respondent is the plaintiff. The respondents 2 and 3 are



the defendants 1 and 2.

3. The first respondent herein filed suit in O.S.No.58 of 2013, on the file of the learned District Munsif, Sivakasi, for permanent injunction restraining the petitioner not to put up any construction in the suit property and restraining the second respondent from granting permission to put up building. Along with the suit, the petitioner filed I.A.No.130 of 2013 for appointment of Advocate Commissioner to inspect the suit properties and to note down the physical features.

4. According to the petitioner, the first respondent filed suit in O.S.No.224 of 2012, on the file of the Principal District Court, Srivilliputtur, for partition against the petitioner and others and the suit property is one of the items in the said suit. Pending suit in O.S.No.224 of 2012, the petitioner is making arrangement to put up building. Therefore, he has filed the suit for injunction restraining the petitioner from putting up construction and it is necessary for appointment of Advocate Commissioner to inspect the suit property and note down the physical features.

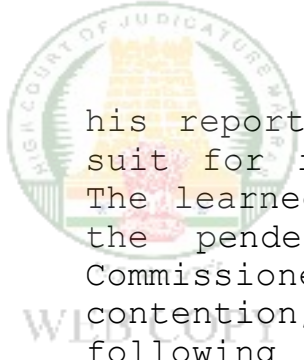
5. The respondents 2 and 3 did not file any counter and they were set ex parte on 29.04.2013.

6. The petitioner filed counter affidavit and opposed the said application and stated that the first respondent has no title or right over the suit property. The petitioner is the absolute owner of the suit property. The first respondent is trying to gather evidence through Advocate Commissioner to substantiate his claim in O.S.No.224 of 2012 filed by him, for partition. It is well settled that Advocate Commissioner cannot be appointed to collect evidence on behalf of one of the parties and prayed for dismissal of Interlocutory Application.

7. The learned Judge considered the averments made in the affidavit and counter affidavit and appointed an Advocate Commissioner to inspect the suit property and note down the physical features, with the help of qualified Surveyor and concerned Village Administrative Officer and to file his report with plan.

8. Against the said order dated 27.08.2013, the petitioner has filed the present Civil Revision Petition.

9. The learned counsel appearing for the petitioner submitted that learned Judge failed to consider the judgments relied on by the counsel for the petitioner and that the suit for partition is pending before the learned Principal District Judge, Srivilliputtur. The petitioner will be prejudiced if an Advocate Commissioner is permitted to inspect the suit property and file



his report. The Advocate Commissioner cannot be appointed in a suit for injunction to collect evidence to put forth his case. The learned counsel for the petitioner submitted that in view of the pendency of the Civil Revision Petition, the Advocate Commissioner did not inspect the suit property. In support of his contention, the learned counsel for the petitioner relied on the following Judgment reported in 2014-5 LW 361 (*Jagadeswari Vs. Kandasamy and others*), wherein at paragraph No.12 it has been held as follows:-

"12. As far as the factum of possession is concerned, the Court alone could gather evidence through the parties and it cannot entrust the said matter to the Advocate Commissioner to collect evidence."

10. The representing counsel for the first respondent submitted that the petitioner has no right to put up the building pending suit in O.S.No.224 of 2012, as well as the suit filed by the first respondent in O.S.No.58 of 2013, for injunction. Pending both suits, if the petitioner puts up building, the first respondent would be put to irreparable loss and hardship and no prejudice will be caused to the petitioner.

11. I have heard the learned counsel appearing on either side and perused the materials available on record.

12. From the materials on record, it is seen that the first respondent has filed O.S.No.224 of 2012 on the file of the Principal District Court, Srivilliputur, for partition. While the said suit is pending, the first respondent also filed present suit for injunction on the file of the District Munsif Cum Judicial Magistrate Court, Sivakasi. The petitioner has already filed written statement. The present suit is for permanent injunction restraining the petitioner not to put up any construction in the suit property till the disposal of the suit in O.S.No. 224 of 2012. In view of the relief sought for in the present suit, the application for appointment of Advocate Commissioner to inspect the suit property and to note down the physical features is not maintainable as per the Judgment relied on by the counsel for the petitioner. The learned Judge failed to properly exercise his jurisdiction, as he failed to consider the pendency of the suit pending on the file of the learned Principal District Judge, Srivilliputur, in O.S.No.224 of 2012 and the nature of relief sought for, in the present suit.

13. For these reasons, the order of the learned District Munsif Cum Judicial Magistrate, Sivakasi, passed in I.A.No.130 of 2013, is set aside. The Civil Revision Petition is allowed. No costs. Consequently, connected Miscellaneous Petitions are closed.

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14. The suit is of the year 2013, the learned District Munsif Cum Judicial Magistrate, Sivakasi is directed to dispose



the suit in O.S.No.58 of 2013, as expeditiously as possible, in any event, not later than 30th April 2017.

Sd/-

Assistant Registrar

/True copy/

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Sub Assistant Registrar.

To

1 Learned District Munsif, Sivakasi
2 The District Munsif-cum-Judicial Magistrate,
Sivakasi.
+1cc to Mr.K.Gokul,Advocate,Sr.81310
+1cc to Mr.V.Raghavachari,Advocate,SR.81649

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Trp

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