

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.08.2017

CORAM

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

C.R.P. (NPD) No.1045 of 2011

and

M.P.No.1 of 2011

Chinnasami

.. Petitioner

vs

1.Amudha

2.S.Palanisamy

3.N.Palanisamy

4.Gopi

5.Ravi Kumar

6.Malathi

7.Uma

8.The District Collector,
Collectorate, Salem.

9.The Revenue Divisional Officer,
Collectorate, Salem.

10.The Thasildhar,

Taluk Office, Salem.

सत्यमेव जयते

Respondents

Revision filed under Article 227 of Constitution of India

against the order passed in I.A.No.162 of 2006 in A.S.No.78 of 2004,

dated 29.9.2009 on the file of I Additional Subordinate Judge, Salem.

For Petitioner : Mr.Kandasamy
for M/s.Srividhya

For Respondent : Mr.D.Shivakumaran
(for R1 to R7)
No Appearance
(for R8 to R10)

ORDER

This Civil Revision Petition is filed by the plaintiff to set aside the order and decretal order passed in I.A.No.162 of 2006 in A.S.No.78 of 2004, dated 29.9.2009 on the file of the I Additional Sub Judge, Salem appointing an Advocate Commissioner to visit the suit locality and to verify whether plots on ground including the plots of the plaintiff and the first defendant tally with Ex.A19.

2. The plaintiff has filed the suit for declaration to declare that he is the absolute owner of the house plot No.15 described in the suit schedule property and permanent injunction. He has also sought for mandatory injunction directing the defendants 1 to 4 to demolish the superstructure put up by them over the suit property and for possession of the encroached portion of the suit property. The suit

was decreed on 29.7.2004.

3. Aggrieved by the decree and judgment in O.S.No.1114 of 1992, the defendants 1, 3, 4 and the legal heirs of the second defendant have preferred first appeal being A.S.No.78 of 2004 before I Additional Sub Judge, Salem.

4. Pending appeal, the private defendants have filed I.A.No.162 of 2006 under Order 26, Rule 9 of C.P.C., praying to appoint a Commissioner to visit the suit locality and suit property and draw a plan to scale mentioning the number of plots available with their measurements and to find out whether plots and roads exist on grounds as detailed or described in the plan marked as Ex.A19 in the lower court.

5. Refuting the averments in the affidavit filed in support of the petition, the plaintiff has filed counter stating that there is no necessity to appoint an Advocate Commissioner and the petition seeking appointment of Advocate Commissioner on the second time was liable to be dismissed.

6. Upon consideration of the rival submissions, the learned I Additional District Judge, Salem allowed I.A.No.162 of 2006 appointing the Advocate Commissioner to visit the suit locality and to verify whether the plots on ground including the plots of the plaintiff and the first defendant tally with Ex.A19. Challenging the same, the plaintiff has filed the Civil Revision Petition.

7. I heard Mr.Kandasamy, learned counsel appearing for the petitioner and Mr.D.Shivakumaran, learned counsel appearing for the respondents 1 to 7 and also perused the materials available on record. No representation on behalf of the respondents 8 to 10.

8. The learned counsel for the petitioner submitted that the learned Judge has failed to see that already a Commissioner was appointed in I.A.No.1891 of 1992 by the trial Court and the report filed by the Advocate Commissioner was found to be satisfactory by the trial Court. The judgment of the trial Court is based on the report of the Advocate Commissioner and such a report cannot be nullified by the First Appellate Court. He submitted that I.A.No.426 of 1999 filed by the plaintiff before the trial Court seeking to appoint Advocate Commissioner again to measure the suit property with the help of

Surveyor, Village Administrative Officer was dismissed by the trial Court on the ground that second Commissioner cannot be appointed. He also submitted that as against the order made in I.A.No.426 of 1999, dated 5.10.1999, the plaintiff filed C.R.P.No.3344 of 1999 and the same was also dismissed by this Court. Finally, he argued that there cannot be an appointment of Advocate Commissioner for the second time unless and otherwise the report of the first one is liable to be scarped as unsatisfactory.

9. Per contra, the learned counsel appearing for the respondents 1 to 7 submitted that the learned Judge was right in allowing the application filed by the respondents. He argued that in order to put an end to the controversy to the matter, the learned Judge appointed the Advocate Commissioner and there is no need to interfere with the order of the learned Judge.

10. It appears that before the trial Court an Advocate Commissioner was appointed and he had filed his report and sketch, which were marked as Exs.C1 and C2 during trial. The defendants 1 to 4 have also filed their objections to the Commissioner's report and the trial Court has also discussed Exs.C1 and C2 and the objection

submitted by the defendants 1 to 4 in its judgment.

11. It appears that pending appeal, the contesting defendants have filed I.A.No.162 of 2006 seeking to appoint an Advocate Commissioner to visit the suit locality and the suit property and draw a plan to scale mentioning the number of plots available with their measurements and to find out whether plots and roads exist on grounds as detailed or described in the plan marked as Ex.A19 in the lower court.

12. The learned counsel for the petitioner submitted that the petition filed by the defendants before the First Appellate Court seeking to appoint an Advocate Commissioner is hit by the principles of *res judicata*.

13. Citing the decision in *Mangayarkarasi Ammal and two others v. Nagmamal and two others*, reported in 2009 (5) CTC 444, the learned counsel for the respondents 1 to 7 submitted that the principles of *res judicata* will not apply to interlocutory proceedings.

14. In *Mangayarkarasi Ammal*, supra, the learned Single

Judge of this Court held as under:

"9.It is relevant to refer to the some of the decisions on this aspect. In the case of Pandurang Ramachandra Mandlik and another v. Shanta Bai Ramachandras Ghatge and others, AIR 1989 SC 2240, it is held that Section 11 of C.P.C. is applicable only to the Suit and not to the other proceedings.

10.A Division Bench of the Karnataka High Court in 1983 (1) KLT Short Notes of Cases, has held that "so far as the interlocutory matters are concerned, the principles of res judicata do not strictly apply.

11.Their Lordships in the case of U.P.E. Supply Co. v. T.N.Chatterjee, AIR 1972 SC 1201, has held that the principles of res judicata is not applicable to interlocutory orders as they are not final orders."

15. It is true that principles of *re judicata* will not apply to interlocutory orders. But in the case on hand, the defendants sought appointment of an Advocate Commissioner for second time to visit the suit locality and to verify whether plots on ground including the plots of the plaintiff and the first defendant tally with Ex.A19. As stated supra, already an Advocate Commissioner was appointed before the trial Court and had filed his report and based on the same, the trial

Court had delivered the judgment. When the judgment of the trial Court is based on the report of the Advocate Commissioner earlier appointed, such report cannot be nullified by the First Appellate Court.

16. It appears that earlier the plaintiff had filed I.A.No.426 of 1999 seeking appointment of an Advocate Commissioner to measure the suit property with the help of Surveyor, Village Administrative Officer and the same was dismissed by the trial Court. Aggrieved by the order of the trial Court, the plaintiff preferred C.R.P.No.3344 of 1999 and the same was also dismissed by this Court.

17. It is well settled that until the Court is dissatisfied with the report of the Commissioner earlier appointed, it will not be proper to ignore the same and direct even further enquiry, much less the scrapping of the earlier report as a whole and appoint a fresh Commissioner. The power is circumscribed by the principles under Order 26, Rule 10(3) of C.P.C.

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18. Appointment of second Commissioner and the report filed by him without setting aside first Commissioner's report, is wholly illegal and without jurisdiction.

19. A second Commissioner must not be appointed without hearing objections to first Commissioner's report and superseding it for reasons to be recorded. If the report of the first Commissioner is found to be deficient and/or defective on any point, the proper course would be to direct the same Commissioner to cure the defects.

20. It appears that in order to collect materials as to the identity of the property, the defendant has filed the petition seeking to appoint an Advocate Commissioner for the second time and the First Appellate Court erred in appointing the Advocate Commissioner to collect the materials, which was impermissible in law. There is an erroneous assumption of jurisdiction by the First Appellate Court. Therefore, the order of the First Appellate Court impugned in this Civil Revision Petition is liable to be set aside.

21. In the result,

(a) This Civil Revision Petition is allowed by setting aside the order passed in I.A.No.162 of 2006 in A.S.No.78 of 2004, dated 29.9.2009 on the file of the I Additional Subordinate Court, Salem.

(b) The learned I Additional Subordinate Judge, Salem is directed to take up the appeal in A.S.No.78 of 2004 on day today basis without giving any adjournments to either parties and dispose the same within a period of two months from the date of receipt of a copy of this order, since the appeal is of the year 2004.

(c) The learned I Additional Subordinate Judge, Salem is directed to report before this Court within ten days from the date of pronouncing the judgment in A.S.No.78 of 2004.

(d) No costs. Consequently, M.P.No.1 of 2011 is closed.

17.08.2017

Note: Issue order copy on 05.07.2018

vs

Index : Yes

Internet : Yes

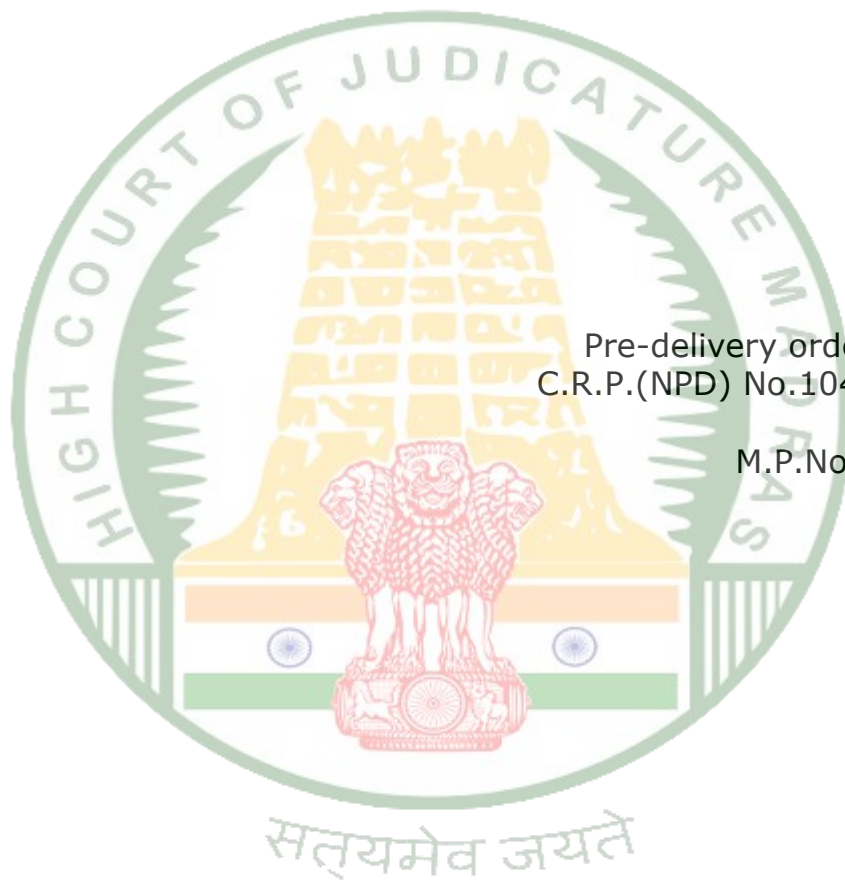
To

The I Additional Subordinate Judge,
Salem.

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M.V.MURALIDARAN, J.

VS



Pre-delivery order made in
C.R.P.(NPD) No.1045 of 2011
and
M.P.No.1 of 2011

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