

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 08.02.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

**CRP(PD)No.2305 of 2013
and
M.P.No.1 of 2013**

- 1.Ramamurthy
- 2.Rajendiran
- 3.Anjalakshmi
- 4.Kannammal

... Petitioners

Vs.

Arumugam (died)

- 1.Jayammal
- 2.Jayapalan
- 3.Krishnan
- 4.Ashok kumar
- 5.Vasantha
- 6.Nithiyanandam
- 7.Ravi
- 8.Govindarajan

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9.Kavitha

10.Vetri

.. Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the order and decree dated 15.11.2012, made in I.A.No.771 of 2012 in O.S.No.561 of 2003, on the file of the Principal District Munsif, Vellore.

For Petitioners : Mr.A.Gouthaman

For Respondents : No Appearance

ORDER

The petitioner has filed this Civil Revision Petition to set aside the fair and final order dated 15.11.2012 made in I.A.No.771 of 2012 in O.S.No.561 of 2003, on the file of the District Munsif Court, Vellore.

2.The case of the revision petitioners is that they have filed the above suit for declaration and injunction in respect of 'B' schedule property or in alternate prayed for partition and separate possession in respect of their undivided share over the 'A' schedule property. The suit properties originally were under joint possession of Machi Mandiri, the paternal great grandfather of the revision petitioners and his three

sons namely Ayyasamy Mandiri alias Munisamy Mandiri, Chinnapaya Mandiri alias Varadha Mandiri and Raju Mandiri. During their family partition the western portion of suit 'A' schedule property comprised in three Survey Numbers in S.No.716/51, New S.Nos.716/52 and 716/53 were allotted to Ayyasamy Mandiri and Varadha Mandiri, whereas the eastern side portion was allotted to Raju Mandiri, the revision petitioners' grandfather. The partition was made orally and the same was not reduced into writing. The suit 'B' schedule property is a vacant space which was under the exclusive possession of Raju Mandiri. After the demise of said Raju Mandhiri, his only son Munirathna Mandhiri, the father of the petitioners 1 to 3 has inherited the same and he was in exclusive possession of the 'B' schedule property. However, the respondents being legal heirs of Ayyasamy Mandiri and Varadha Mandiri taking advantage of the oral partition and in the absence of record of division of properties during family partition, started proclaiming as if they too have right over the suit 'B' Schedule property. Hence the revision petitioners came up with the above suit.

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3.In the above suit revision petitioners filed an Interlocutory Application under Order 26 Rule 9 of Civil Procedure Code praying for appointment of an advocate commissioner, for a local inspection with

the aid of surveyor to note down the physical features of plaint scheduled properties. However, the Learned Trial Judge having held that the application was made belatedly when the suit was posted for trial has dismissed the revision petitioners' application made under Order 26 Rule 9 of Civil Procedure Code. It was further held that the revision petitioners' application cannot be entertained, since the revision petitioners prayed for appointment of such advocate commissioner for the purpose of proving possession. Challenging the same, the petitioners herein filed the present civil revision petition.

4.I heard Mr.A.Gouthaman, learned counsel appearing for the petitioners and there is no representation on the side of the respondents and perused the entire materials available on record.

5.The learned counsel for the revision petitioner submitted that the suit 'B' schedule property remains vacant. It is the absolute property of the revision petitioners and the respondents herein have no right or interest over the suit property. The description of property stated by the respondents in their written statement, as if 'B' schedule property is a cattle shed is untrue, in field there is no such cattle shed in 'B' schedule property. Only an appointment of a advocate

commissioner and a survey with demarcation and noting down of the physical features therein in the suit schedule property will enable the Trial court for proper appreciation of facts and ascertainment of the nature and the extent therein, so as to arrive at a right decision. Unless an advocate commissioner is appointed and a survey cum demarcation is done, the trial court will not be able to arrive at a faultless decision.

6. The learned counsel for the respondents submitted that the suit 'B' schedule property is wrongly described as a vacant space. It is a cattle shed under the enjoyment of the respondents. The revision petitioners do not have any right over it. Further the cattle shed is not numbered as S.No.716/53 as claimed in the plaint by the revision petitioners. Since the four boundaries of the suit properties are mentioned in the plaint, there is no necessity for appointment of advocate commissioner in this regard. Further the revision petitioners' application for appointment of an Advocate commissioner is made belatedly when the suit was posted for trial, with a motive to prolong the case. Furthermore in a suit for declaration and injunction an application for advocate commissioner is not necessary and if the same is permitted it would result in collection of evidence, which is

impermissible.

7.Per contra the learned counsel for the revision petitioners submitted that the noting of physical features of the suit property is inevitable, when it is specifically contended by this revision petitioners that suit 'B' Schedule property is a vacant site, whereas the respondents dispute it as a cattle shed.

8.In this regard the learned counsel for the revision petitioners relied upon the decision of this court dated 30.09.2008 in C.R.P.No 3304 of 2008 in the matter of **Periya Kaliyappa Gounder & ors. Vs. Karumalaiappa Gounder**, holding that in a suit for bare injunction the appointment the appointment of advocate commissioner to note down the physical features would not cause any prejudice to the other side and it would only reduce the burden of the court in arriving at a right conclusion.

9.Further the learned counsel for the revision petitioners relied upon the one another decision of this court dated 07.01.2016 in C.R.P.No 2548of 2015 in the matter of **Vasuki & anr. Vs. K.Sarvesawasra Rao**, wherein this court held in a suit for bare

injunction, when one of the parties claimed the suit property as a vacant land and the other contends it as a compounded house property, the appointment of advocate commissioner is necessary to note down the physical feature of the suit property as vacant or not.

10. On plain reading of the impugned order, this court finds that the revision petitioner's application for appointment of advocate commissioner is dismissed on two grounds viz the application is made belatedly and the application cannot be entertained, as the same was intended to prove their possession, hence it is not required for appointment of advocate commissioner to demarcate and note down the physical features.

11. Further on perusal of the Plaint filed by the revision petitioners/plaintiffs this court finds that it is claimed as a vacant space, whereas the respondents/defendants filed written statement and claims it to be a cattle shed. Further from the contentions of the either side, this court finds that there is a serious dispute with regard to the old survey numbers and their corresponding new survey numbers.

12. At this juncture, it is noteworthy that the importance of appointment of an advocate commissioner has been elaborately discussed by this court in the matter of **S.Palanisamy Gounder Vs. N.Palanisamy Gounder & ors.**, reported in **2007 (1) CTC 611** whereby this court held even if no application is made by either of parties, in the interest of justice so as to arrive at a correct decision the court on its own can appoint a commissioner for local investigation regarding identification, location, measurement of land. Such report is to be used for appraisal of situation and for better understanding of evidence of parties.

13. In the context of suit for injunction, it is noteworthy to refer a judgment of Andhra Pradesh High Court reported in **2013 (1) ALT 548** in the matter of **Donadulu Uma Devi Vs Girika Katamaiah @ Basaiah**, holding that when there is a dispute or issue with regard to identity of property in a litigation, it is necessary to appoint a commissioner for localizing the property which may be even taking necessary assistance from a qualified surveyor which will not amount to collecting evidence which is prohibited.

14. Further, the Hon'ble Apex Court vide its decision reported in

2008 AIR SCW 6500, Haryana Wakh Board Vs. Shanti Sarup & ors. held that in a suit for Injunction, the appointment of advocate commissioner to note down the physical features of suit property becomes indispensable and the same is permissible, if there exist a quarrel in respect of suit schedule properties.

15. Insofar as the contention that the application is made belatedly, it is noteworthy to refer a reported decision of the Andhra Pradesh High court in **2011 (4) ALD 389** in the matter of **Shaik Zareena Kasam Vs Patan Sadab Khan & Ors**, holding that if there is any delay in filing of application to appoint an advocate commissioner and if there are some latches on the part of the party, the court may impose reasonable costs, but it is not desirable to dismiss an application on the ground of mere delay in filing.

16. I have also passed the judgment in the case of

17. For the foregoing reasons, this court finds that appointment of advocate commissioner to note down the physical features of the suit property neither cause prejudice to the respondent nor it amount to collection of evidence. When there is a quarrel regarding the nature,

extent and features of the suit property, then it is appropriate for the courts to appoint an advocate commissioner in this regard to note down the physical features of the suit property.

18.In the result:

(a) this Civil Revision Petition is allowed by setting aside the order passed in I.A.No.771 of 2012 in O.S.No.561 of 2003, dated 15.11.2012, on the file of the District Munsif Court, Vellore;

(b) the learned trial Court is directed to appoint an Advocate Commissioner within a period of two weeks from the date of receipt of a copy of this order and directing the Advocate Commissioner to inspect and file his report within a period of one month thereafter, by giving notice to both the parties;

(c) on filing the Advocate Commissioner's report, the learned trial Court is directed to take up the suit on day to day basis, without giving any adjournment to either parties and to dispose of the same within a period of two months.

Both the parties are hereby directed to give their fullest co-operation for early disposal of the suit. No costs. Consequently, connected miscellaneous petition is closed.

08.02.2017

Note: Issue order copy on 26.07.2017.

Internet: Yes

Index: Yes

vs

To

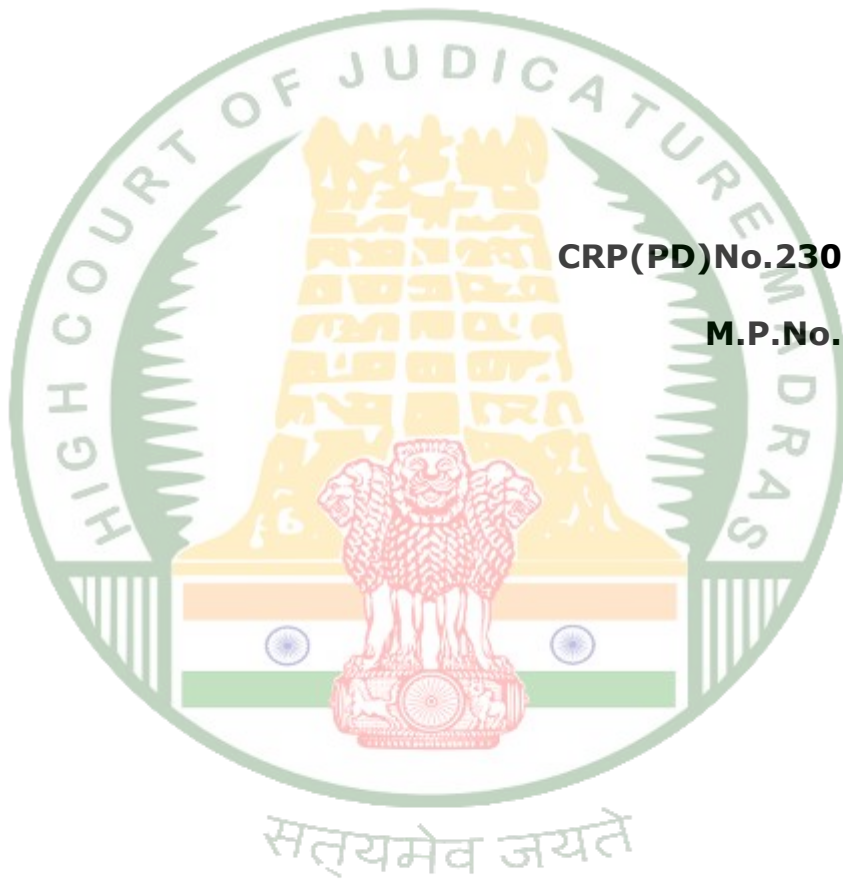
The Principal District Munsif,
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M.V.MURALIDARAN, J.

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