

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 06.06.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

**CRP(PD)No.3401 of 2012
and
M.P.No.1 of 2012**

Muni Reddy

.. Petitioner

Vs.

1.Papi Reddy

2.Nagi Reddy

3.Sampang Reddy

.. Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the judgment and decretal order in I.A.No.53 of 2012 in O.S.No.160 of 2011, dated 07.03.2012, on the file of the District Munsif-cum-Judicial Magistrate, Denkanikotta.

For Petitioner : Mr.V.Raghavachari

For Respondents : Mr.M.V.Krishnan

ORDER

The plaintiff in O.S.No.160 of 2011 is the civil revision petitioner before this Court, challenging the order passed in I.A.No.53 of 2012 in O.S.No.160 of 2011, dated 07.03.2012, on the file of the District Munsif-cum-Judicial Magistrate, Denkanikotta.

2.The case of the petitioner/plaintiff is that he has filed the suit in O.S.No.160 of 2011, against the respondents for declaration of title and for delivery of possession.

3.In the pending suit, the petitioner/plaintiff has filed I.A.No.53 of 2012 under Order 39 Rule 6 CPC for appointing an Advocate Commissioner directing him to visit the suit properties, take charge of the Tamarind tree situate therein and auction the usufructs of the said tree by way of public auction and deposit the sale proceeds into the Court and file a detailed report in the interest of justice.

4.In the said I.A., the petitioner/plaintiff stated that there is a big tree in the Survey No.24/2 and the same is belongs to the petitioner/plaintiff only. Every year, he has been harvesting the

usufructs from the same and whenever the same was not possible for the petitioner, on account of the petitioner's employment at Bangalore, he used to orally lease out the usufructs of the said tree to some third parties. Therefore, on account of misunderstandings and enmity between the petitioner/plaintiff and the respondents/defendants, this year, they are not allowing the petitioner even to go near the said tree.

5.The petitioner/plaintiff also states that this year, the yield in the suit tamarind tree is very good and in all likelihood, it will yield not less than 20 sacks of tamarind fruit. At the present market rate, the value of those fruits is about Rs.4,000/- only, but the respondents/defendants illegal occupation of the suit lands is preventing the petitioner from harvesting the suit tamarind tree. The tree is to be harvested not later than the 2nd week of February 2012 as otherwise, the fruits will wither away and get wasted. Therefore, in such an event, the petitioner/plaintiff will suffer loss and hardships and the respondents/defendants have absolutely no manner of whatsoever to the suit properties and also the tamarind tree situate therein.

6.The petitioner/plaintiff also states in the affidavit that on

receiving of the suit summons have become more aggressive and the respondents/defendants have not allowing the petitioner to harvest the suit tree. In fact on 31.01.2012 when the petitioner/plaintiff tried to harvest the tree, but the respondents/defendants have obstructed the petitioner/plaintiff. Therefore, he had lodged a complaint with the Thally Police and they have also issued acknowledgment, but they are refusing to take action against the respondents/defendants, as the matter is pending in a competent Civil Court. Therefore, the petitioner/plaintiff has filed the above said application for appointment of Advocate Commissioner in the prayer that if a Commissioner is appointed for selling away the usufructs of the suit tamarind tree, the respondents/defendants are in no way be prejudiced, since the suit tamarind tree is in suit item No.2 in Survey No.24/2.

7. On receipt of the notice, a counter affidavit has been filed by the 2nd respondent that the 2nd respondent has denied the entire allegations set out in the affidavit in support of I.A.No.53 of 2012. The 2nd respondent/defendant also states that when the suit itself was filed by the petitioner/plaintiff for declaration of title and for delivery of possession, he made false allegations in the affidavit that he used

the fruits of the tamarind tree in suit item No.2, S.No.24/2 is totally false.

8.The respondents/defendants also states that it is totally false that the petitioner/plaintiff leased out the said tamarind tree to the third parties. The respondents/defendants also denied all the other things contained in the affidavit and states that he himself is possession and enjoyment of the suit properties and also the tamarind tree by virtue of a muchalika executed in the village panchayat. Hence, the petitioner/plaintiff has no right or possession over the suit properties. Without any semblance of right, the claim of the petitioner is not entertainable, hence, the 2nd respondent/defendant prays to dismiss the application.

9.The claim of the petitioner/plaintiff is to auction the usufructs through the process of the Court and deposit the sale proceeds. Since, the lis is pending over the title of the same, nothing would prejudice to the respondents, if the usufructs are auctioned and the sale proceeds are deposited in the Court. Therefore, the trial Court has considered that an important question arose before the Court is whether a Commissioner can be send to sell the usufructs of a tree or not? Pursuant to the order passed by this Court in the case of

Kristamneni Kristnayya v. Karnedhhan Kothari reported in ***AIR 1930 MADRAS 224*** that Order 39 Rule 6 of CPC to gives power to Court to sell a perishable article and certainly does not authorize it to send a Commissioner to sell any crop. The proper course would be apply for a receiver. Therefore, following the said dictum laid down by this Court, the learned Judge has not inclined to allow the application. Accordingly, the trial Court has dismissed the said application on 07.03.2012. Challenging the said order, the present civil revision petition has been filed.

10.I heard Mr.V.Raghavachari, learned counsel appearing for the petitioner and Mr.M.V.Krishnan, learned counsel appearing for the respondents and perused all the records.

11.It is the case of the petitioner/plaintiff is that he filed the suit for declaring the right of title and delivery of possession. While pendency of the above suit, he has filed an application in I.A.No.53 of 2012 for appointment of Advocate Commissioner to direct to visit the suit property and take charge of the Tamarind tree situated in suit 2nd item auction the usufructs of the said tree by way of public auction and to deposit the sale proceeds and file a detailed report. In this case, the questions arose whether the suit for declaration or delivery

of possession is pending and the Court can see the same is true or not? The Order 39 Rule 6 of CPC has stated as follows:

"6. Power to order interim sale.-The Court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any movable property, being the subject-matter of such suit, or attached before judgment in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to have sold at once."

12. It is further stated by the learned counsel appearing for the petitioner/plaintiff that the application under Order 39 and 40 are inter chargeable and the Court has compensated an application for injunction under Order 40 of CPC. Order 40 of CPC has stated as follows:

"Order 40 – Appointment of Receivers

1. Appointment of receivers.-(1) Where it appears to the Court to be just and convenient, the Court may by order-

(a) appoint a receiver of any property, whether before or after decree;

(b) remove any person from the possession or custody of the property;

(c) commit the same to the possession, custody or management of the receiver; and

(d) confer upon the receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.

(2) Nothing in this rule shall authorize the Court to remove from the possession or custody of property, any person whom any party to the suit has not a present right so to remove.

2.Remuneration.- The Court may by general or special order fix the amount to be paid as remuneration for the services of the receiver.

3.Duties.- Every receiver so appointed shall-

(a) furnish such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property;

(b) submit his accounts at such periods and in such form as the Court directs;

(c) pay the amount due from him as the Court directs; and

(d) be responsible for any loss occasioned to the property by his willful default or gross negligence.

4.Enforcement of receiver's duties.- Where a receiver-

(a) fails to submit his accounts at such periods and in such form as the Court directs, or

(b) fails to pay the amount due from him as the Court directs, or

(c) occasions loss to the property by his willful default or gross negligence, the Court may direct his property to be attached and may sell such property, and may apply the proceeds to make good any amount found

to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver.

5. When Collector may be appointed receiver.- Where the property is land paying revenue to the Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector, appoint him to be receiver of such property."

13. During the course of arguments, the learned counsel appearing for the petitioner has filed the written arguments and judgment rendered by this Court in **Subbae Gounder v. Palanathal** reported in **LAW (MAD)-1968-2-10**, this Court in the said judgment has passed the orders as follows:

"The order of the lower Court cannot be supported. The Court certainly has no jurisdiction under Order XXVI, Rule 9, Schedule I, Civil Procedure Code. There is nothing in the affidavit to attract Order XXXIX, Rule 1, and Order XXXIX, Rule 6 merely gives power to a Court to sell a perishable article and certainly does not authorize it to

send a Commissioner to sell any crop. Nor is this a matter in which Section 151 should be invoked. The proper course for the respondent would be to apply for a Receiver, if he has right to apply and if he has no right to apply for a Receiver, he has no right to apply for a Commissioner.”

14. In this case, the learned Judge says that the petitioner/plaintiff has no right to appoint an Advocate Commissioner, but he can seek for appointment of Advocate Receiver. It is my view that under Order 39 Rule 6 of C.P.C., enables the Court to file an application of any party to a suit, to appoint a person to sell movable properties, which is subject to decay and which is the subject matter of the suit. Such person appointed is terminology called a Commissioner. Therefore, it is my absolute view that as per the Order 39 Rule 6 C.P.C., the Court may, on the application of any party to a suit, Order the sale, by any person named in such order and in such manner and on such terms as it thinks fit, of any movable property, being the subject matter of such suit, or attached before judgment in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to have sold at once. Therefore, the Civil Procedure Code has empower the Court has appointed any person to sell the movable properties. In this case, the

petitioner/plaintiff prayed for appointment of Advocate Commissioner for the purpose of visit the suit property and take charge of the Tamarind tree situated in suit 2nd item and auction the usufructs of the said tree by way of public auction and deposit the sale proceeds into this Court to file a detailed report in the interest of justice. Therefore, the prayer sought for in I.A.No.53 of 2012, no prejudiced would be caused to the respondent. In fact, when a claim was made in respect of suit 2nd item and the Tamarind tree in the schedule of property, in the interest of justice, the Court should have the power to appoint an Advocate Commissioner or receiver as per Order 39 Rule 6 of C.P.C. for the purpose of auction sale of the fruits of the Tamarind tree has deposited the sale proceeds into the Court and in future, if the suit is decreed to either parties, they have right to collect the amount from the Court.

15. Since the Order 39 Rule 6 C.P.C., the Advocate Commissioner cannot be appointed, but receiver can be appointed. But, the Court can take charge of the Tamarind tree situated in the suit 2nd item can appoint the permanent receiver for the purpose of the sale proceeds, the public auction sale and the deposit the sale proceeds into the Court and file a detailed report. Therefore, the learned Judge without noting the orders passed by this Court had

simply dismissed the application by saying that the petitioner has not given any valid reason, because the petitioner only sought for the appointment of receiver. The Court himself having power to mould the order to appoint the receiver in this case for the purpose of public auction sale and deposit the sale proceeds in the Court in the interest of both the parties.

16. Therefore, in the interest of justice, it is just and necessary, I am inclined to allow the civil revision petition by setting aside the order passed in I.A.No.53 of 2012 in O.S.No.160 of 2011, dated 07.03.2012, on the file of the District Munsif-cum-Judicial Magistrate, Denkanikottai, and directing the learned Judge to appoint the Advocate Receiver for the purpose of selling the fruits of Tamarind tree situated in the suit item No.2 in Survey No.24/2.

17. In the result:

(a) this civil revision petition is allowed by setting aside the order passed in I.A.No.53 of 2012 in O.S.No.160 of 2011, dated 07.03.2012, on the file of the District Munsif-cum-Judicial Magistrate, Denkanikottai;

(b) the matter is remanded back to the

Court and learned Judge is directed to pass appropriate orders in I.A.No.53 of 2012 in O.S.No.160 of 2011 by appointing the Advocate Receiver, within a period of two weeks from the date of receipt of a copy of this order, and further direct the Advocate Receiver to visit the suit properties and to take charge of the Tamarind trees mentioning in the suit item No.2 in Survey No.24/2 and thereafter, to bring the fruits in public auction sale and to deposit the sale proceeds in the Court until further orders;

(c) the learned Judge is directed to dispose of the suit within a period of four months from the date of appointment of Advocate Receiver.

18.Accordingly, this Civil Revision Petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

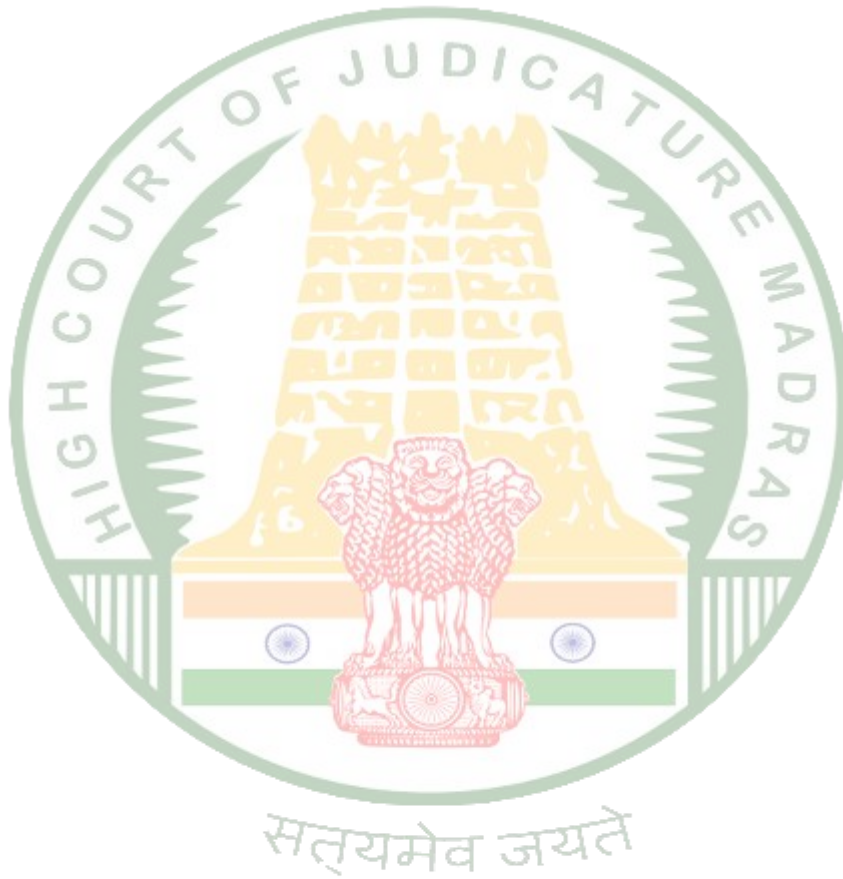
06.06.2017

Note:Issue order copy on 24.07.2017
Index:Yes
Speaking Order

VS

To

The District Munsif-cum-Judicial Magistrate,
Denkanikotta.



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M.V.MURALIDARAN, J.

VS



Pre-Delivery order made in
CRP(PD)No.3401 of 2012
and
M.P.No.1 of 2012

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