

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.02.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

C.R.P.(PD)No.3504 of 2012
and
M.P.No.1 of 2012

1.Janakiraman

2.Latha

.. Petitioners

Vs.

Manimegalai

.. Respondent

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the Fair and Final order dated 15.06.2012 in I.A.No.106 of 2011 in O.S.No.97 of 2011, on the file of the Judicial Magistrate-cum-District Munsif, Needamangalam.

For Petitioners : M/s.P.T.Ramadevi

For Respondent : Mr.Mohamed Ismail

ORDER

The petitioners have filed this Civil Revision Petition to set aside the fair and decreetal order dated 15.06.2012 passed in I.A.No.106 of 2011 in O.S.No.97 of 2011 by the District Munsif-cum-Judicial Magistrate, Needamangalam.

2.The case of the revision petitioners is that the respondent herein has filed the suit in O.S.No.97 of 2011 against the revision petitioners for the relief of declaration to declare the suit "C" schedule property as a common pathway belonging to both the revision petitioner and the respondent and further sought for permanent injunction restraining the revision petitioner from making any block over the "C" schedule property. Though the respondent have no right whatsoever, over the "C" schedule property but has filed the above suit as if suit 'C' schedule property is a common pathway. Originally the respondent own the stretch of property comprised in suit "A" schedule alone, whereas the "B" schedule and the "C" schedule belonged to the revision petitioners. The "C" schedule property belongs to the revision petitioners, which was exclusively purchased by him, so as to have access over his property situated in "B" schedule. The said

contention of the revision petitioners was also substantiated by him through documentary evidence before the trial Court. Being so, the respondent herein has filed the above Interlocutory Application in I.A.No.160 of 2011 under Order 26 Rule 9 of CPC, for appointment of an advocate commissioner for the purpose of noting down its physical features. However, the learned trial judge without considering the scope of Oder 26, Rule 9 of CPC, besides on misconception of Law and fact has erroneously allowed the application filed by the respondent to find out the existence of "C" schedule property and thereby appointed an advocate commissioner to note down the physical features of suit property. The said order is impugned herein.

3.I heard M/s.P.T.Ramadevi, learned counsel appearing for the revision petitioners and Mr.Mohamed Ismail, learned counsel appearing for the respondent and perused the entire records.

4.The learned counsel for the petitioners would submit that the respondent have no right whatsoever, over the "C" schedule property, however has filed the above suit as if suit "C" schedule property is a common pathway. The "B" and C" suit schedule properties belonged to the revision petitioner and the respondent owns the suit "A" scheduled

property alone. The said contention of the revision petitioners was also substantiated by them through documentary evidence before the trial Court. However, the learned trial judge without considering the scope of Order 26, Rule 9 CPC, besides on misconception of law and fact has erroneously allowed the application and appointed an Advocate Commissioner to note down the physical features of suit properties.

5. Per contra, the learned counsel for the respondent would submit that the suit "C" scheduled property is a common pathway and the same right from her purchase was jointly enjoyed by the revision petitioners and the respondent. The existence of common pathway is also found mentioned in the sale deed of the revision petitioners. Furthermore since the properties belonging to the petitioners in "B" schedule and of the respondent in "A" schedule stood purchased from one and the same vendor, the field survey and the noting down of the physical features of the suit "C" schedule property is indispensable for the trial Court to arrive at a right decision. Only on proper appreciation of the fact the trial Court was pleased to allow the respondent's application for appointment of Advocate Commissioner to note down the physical features of the suit "C" scheduled property.

6. On perusal entire records and upon hearing either side, this Court finds that it is the case of the respondent that the "C" scheduled property is a common pathway, which remain as common passage for both suit "A" and "B" schedule properties. The presence of such common passage is also mentioned in the sale deed pertaining to suit "B" schedule property.

7. Whereas it is the specific case of the revision petitioner that originally there is no such pathway available in the field and further there is no such arrangement in the surface. The said contention of the respondent is noticeable at page No.16 of the typed set of papers in para No.5 of the counter affidavit filed by the revision petitioners in I.A.No.106 of 2011 filed by the respondent for appointment of Advocate Commissioner to note down the physical features of suit property. Therefore it is obvious for this Court to find that there is a serious dispute raised by the revision petitioners with regard to the existence of the 'C' Schedule property in the field.

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8. At this juncture it is pertinent to look into the decision of this Court dated 07.01.2016 in C.R.P.No.2548 of 2015 in the matter of **Vasuki & anr. v. K.Sarvesawasa Rao**, wherein this Court held that

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?

9. Further it would be noteworthy to refer a judgment of Hon'ble 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.

10. The same was reiterated by our Hon'ble Apex Court, vide its decision reported in **2008 AIR SCW 6500**, in the case of **Haryana Wakh Board v. Shanti Sarup & ors.**, holding that 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.

11.This Court also like to emphasis the decision of this Court made in C.R.P.No.3304 of 2008, dated 30.09.2008 in the matter of **Periya Kaliyappa Gounder & ors. v. Karumalaiappa Gounder**, holding that 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.

12.For the foregoing reasons, this Court finds that appointment of Advocate Commissioner to note down the physical features of the suit properties would not cause prejudice the revision petitioners in any way. 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 to note down the physical features of the suit property. In view of the same, this Court does not find any merits in this Civil Revision Petition.

13.In the result:

(a) this Civil Revision Petition is dismissed by confirming the order passed in I.A.No.106 of 2011 in O.S.No.97 of 2011, dated 15.06.2012, on the file of the

learned Judicial Magistrate-cum-District Munsif,
Needamangalam;

(b) the trial Court is directed to pass orders directing the Advocate Commissioner to file his report within a period of one month;

(c) based on the report filed by the Advocate Commissioner, the trial Court is directed to dispose the suit within a period of three months thereafter. No costs. Consequently, connected miscellaneous petition is closed.

06.02.2017

Note: Issue order copy on 17.08.2017

vs

Index: Yes

Internet: Yes

To

The Judicial Magistrate-cum-District Munsif,
Needamangalam.

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M.V.MURALIDARAN,J.

VS



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