

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 28.02.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

**CRP(PD)Nos.772 of 2012 & 3126 of 2013
and
M.P.Nos.1/2012 and 1/2013**

V.Ramalingam .. Petitioner in both CRPs

Vs.

Ponnaiyan @ Ponnusamy ..Respondent in both CRPs

Common Prayer: Civil Revision Petitions filed under Article 227 of the Constitution of India, against the Fair and Decreetal order of the District Munsif cum Judicial Magistrate at Paramathy, dated 10.01.2012 and 14.08.2012 in I.A.Nos.845 and 580 of 2011 in O.S.No.140 of 2011 respectively.

For Petitioner : Mr.P.Valliappan

For Respondent : Mr.R.Sundaramurthy

COMMON ORDER

The issue involved in these two Civil Revision Petitions are inter related each other, hence, both the Civil Revision Petitions are taken up for final hearing and they have been disposed of by way of this common order.

2.As for as the Civil Revision Petition No.772 of 2012 is concerned it has been filed as against the fair and decreetal order passed in I.A.No.845 of 2011 in O.S.No.140 of 2011 by the Learned District Munsif cum Judicial Magistrate, Paramathy. The revision petitioner herein is the Respondent/Plaintiff in the aforesaid I.A.No.845 of 2011 filed under Order XXVI Rule IX and 151 of Code of Civil Procedure for the appointment of Advocate Commissioner to inspect the suit property and to note down the physical features of the suit property, the learned trial Court having considered the rival submissions made therein, ultimately allowed the said application which is impugned in the Civil Revision Petition No.772 of 2012.

3.As for as the Civil Revision Petition No.3126 of 2013 is concerned that it is filed by the very same petitioner who is Plaintiff in the original suit and filed the said petition in I.A.No.580 of 2011 under Order XXXIX Rule 1 of Code of Civil Procedure for the relief of ad-interim injunction. Here in the said IA No.580 of 2017 a memo was filed on the side of the Respondent/Defendant stating that though an order of stay was passed by this Court in the Civil Revision Petition No.772 of 2012 there is no impediment to the parties concerned to

proceed further with the suit as the order of stay was passed only as against the order passed in the I.A.No.845 of 2011 for the appointment of Advocate Commissioner. Having considered the revival submissions, here also the learned trial judge by the order dated 14.08.2012 directed the parties concerned to extend their co-operation for the disposal of the interim application in I.A.No.580 of 2011 as because of the stay order passed by this Court in the Civil Revision Petition No.772 of 2012 will not stand in the way of the further proceedings of the injunction application. The fair and decretal order passed in the memo filed in I.A.No.580 of 2011 is impugned in the Civil Revision Petition No.312 of 2013.

4.The brief averments and the contention of the learned Counsel for the revision petitioner herein is that the suit was filed for the relief of declaration and permanent injunction. Further, the extent of 25 cents land was purchased to use the said land as pathway to reach other lands belonged to the parties concerned. It was the further contention that the said land was in the possession of the respective land owners and therefore the existence or the non-existence of the pathway in a portion of land in survey No.138/1 not deserved for any consideration for the just decision of the suit. On the other hand, the

Learned Trial Judge without considered the fact that though there was no necessity for the appointment of Advocate Commissioner, instead said application was allowed which needs interference by using power of this Court enumerated under Article 227 of the Constitution of India.

5.Per contra, the Learned Counsel for the Respondent herein has contended that as for as the suit relating to the relief declaration and also even in a suit filed for the relief permanent injunction the appointment of Advocate commissioner would render legal assistant definitely to the Learned Trial Court, so by considering the necessity for the appointment of Advocate Commissioner the application filed by the Respondent/Defendant was considered in favour of the respondent herein who is the Defendant in the Original Suit.

6.He further contented that the order passed in the Memo filed in I.A.No.580 of 2011 does not require any interference of this Court as the findings is perfectly correct as per law.

7.I heard Mr.P.Valliappan, learned counsel for the petitioner and Mr.R.Sundaramurthy, learned counsel for the respondent in both the Civil Revision Petitions and perused the entire materials available on

record.

8. In both the Civil Revision Petitions, the Plaintiff is the Revision Petitioner. In the original suit the Respondent herein who is the Defendant in the Original Suit had taken out an application for the appointment of Advocate Commissioner. The said application was allowed which resulted the filing of the Civil Revision Petition No.772 of 2012. The counsel for the Civil Revision Petitioner has relied on the following judgments reported in 2006 (2) Law Weekly 159, 2008 (3) CTC 597, 2002 (3) CTC 748, 2006 (4) Law Weekly 516.

9. It is settled legal position, that the appointment of Advocate Commissioner, certainly would render assistance for the just decision of the Original Suit and thereby to arrive at a conclusion in a justifiable manner. At the same time the appointment of Advocate Commissioner shall never be for the purpose to the collection of evidence to any of the party's concerned. Here in the instant case the Respondent/ Defendant has made a plea before the Learned Trial Court stating that the total larger extant of the suit property was 6.41 hectare out of which 27.¼ cents owned by one Chinnappa Gounder on 17.02.1988. The said extant of the property was purchased by 3 person namely

Karruppana Gounder, Paulsamy, and Subramaniyam hence they have independent right to the extent of 1/3rd each. At the same time a piece of land was retained by the said Chinnappa Gounder to the extent of 2¼. Apart from that it was the plea raised before the Learned Trial Court that the said property was in the enjoyment without any dispute as pathway. So he had taken out an application for the appointment of Advocate Commissioner to depict the topo sketch of the property. Having considered the submissions, the Learned Trial Court allowed the said application and appointed Advocate Commissioner. The perusal of the order passed by the Learned Trial Court would show that though Advocate Commissioner was appointed to note down the physical features of the property concerned the same would indirectly served the purpose as to whether the property in dispute is used as a pathway or not. It is for the Respondent/ Defendant to prove his right of enjoyment of the disputed property as a pathway or not would be the different cause that cannot be equated in the name of appointment of Advocate Commissioner. This Court is conscious that the Judicial pronouncements in this regard that the appointment of Advocate Commissioner could be for the purpose to note down the physical features but at the same time in the name of appointment of Advocate commissioner, the parties concerned shall not restart in to collection of

evidence. If at all in the instant case if the disputed property is used as pathway and the ingress and egress of the said pathway is disputed, hence, it is for the parties concerned to prove the first and import fact, that as to whether property is used as common pathway or not. This factor cannot be and shall not be allowed to prove by way of appointing Advocate Commissioner.

10.However, the Learned Trial Judge is failed to appreciate totality of the case and the purpose for which the appointment of the Advocate Commissioner was sought for. Hence this Court is having no option except to interfere in the Fair and decreetal order passed in I.A.No.845 of 2011 in O.S No.140 of 2011 and set-aside the same.

11.In the result:

CRP(PD)No.772 of 2012:

(a) the civil revision petition is allowed by setting aside the order in I.A.No.845 of 2011 in O.S.No.140 of 2011, dated 10.01.2012 on the file of the District Munsif Court, Paramathy;

(b) the learned District Munsif Court, Paramathy is directed to dispose of the suit and the injunction application within a period of three months from the date of receipt of a

copy of this order. No costs. Consequently, connected miscellaneous petition is closed.

CRP.No.3126 of 2013 - In view of the order passed in CRP(PD)No.772 of 2012, this civil revision petition is infructuous and the same is hereby dismissed. No costs. Consequently, connected miscellaneous petition is closed.

28.02.2017

vs

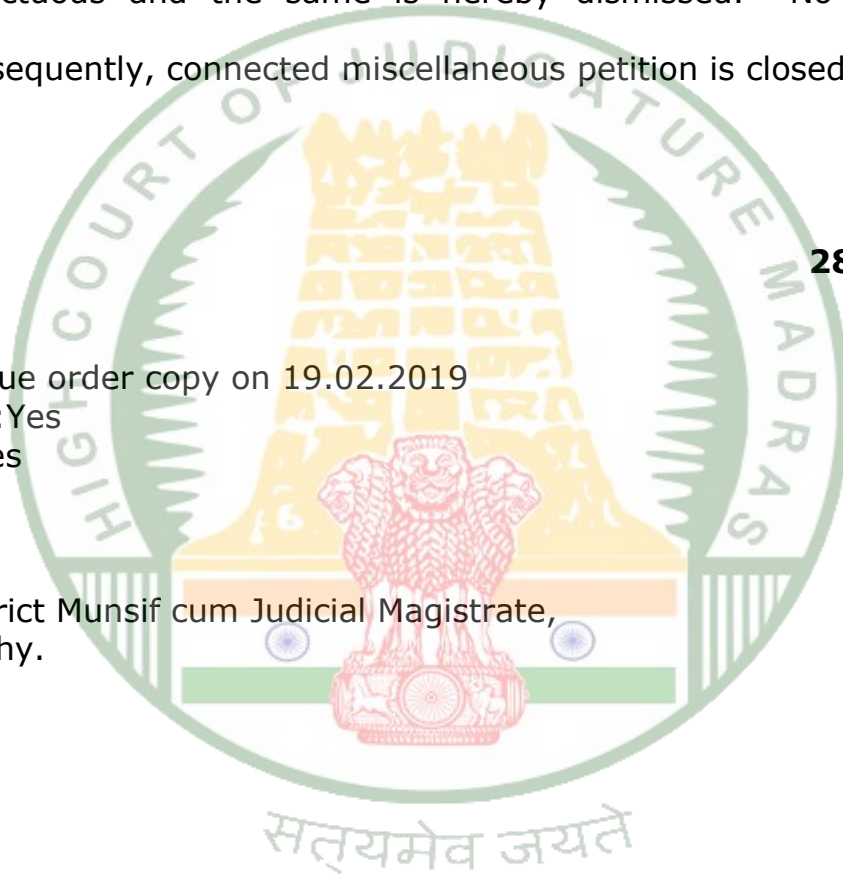
Note:Issue order copy on 19.02.2019

Internet:Yes

Index:Yes

To

The District Munsif cum Judicial Magistrate,
Paramathy.



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M.V.MURALIDARAN, J.

VS



Pre-Delivery order made in
CRP(PD)Nos.772 of 2012 & 3126 of 2013
and
M.P.Nos.1/2012 and 1/2013

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