

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.03.2018

CORAM:

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

Rev.ApIn.No.172 of 2014
in S.A.No.1890 of 2002

R.V.Ganesa Naicker .. Petitioner/Appellant

Vs.

1. Painter Selvaraj
2. Selvakumari .. Respondents/Respondents

* * *

Prayer : Review Petition filed under Order 47, Rule 1 read with Section 114 of the Code of Civil Procedure, praying to review the judgement dated 29.04.2014 made in S.A.No.1890 of 2002 and set aside the same.

* * *

For Petitioner : Mr.D.Murthi
for M/s.K.Bhasker

For Respondents : Mr.K.Mohanamurali

ORDER

सत्यमेव जयते

The review petition is filed by the plaintiff in the suit, who had come to Court seeking declaration of title and mandatory injunction.

2. The plaintiff claimed title to the suit property by virtue of a sale deed dated 24.09.1963 and claimed to be in possession and

enjoyment of the same by paying taxes. As the defendants were trying to encroach upon the property and disturb his possession, the suit in O.S.No.5 of 1996 on the file of the District Munsif-cum-Judicial Magistrate Court, Arcot, came to be filed. The trial court dismissed the suit on 28.04.1999 and on appeal in A.S.No.37 of 1999, the lower appellate court, i.e., the Subordinate Court, Vellore, being the final fact finding Court, confirmed it. In the Second Appeal also, the said concurrent decisions were confirmed by this Court. The review petition is now filed by the plaintiff/appellant contending that an Advocate Commissioner was appointed by this Court vide order dated 11.08.2011, who had filed a report, which was not considered by this Court, while passing the judgment in the instant Second appeal.

3. First of all, it has been well-settled that a review petition can be filed only by the counsel, who appeared for the petitioner/appellant earlier. Change of counsel is deprecated, as the new counsel may not know what transpired between the Court and the counsel, when the matter was argued. The present review petition is one such case, where, the ground on which, the review petition was filed is that pending the Second Appeal, an Advocate Commissioner was appointed to go along with the Surveyor to measure the suit property, correlate

the same with Exs.A.2 and A.5 and other documents, that were indicated in the order dated 11.08.2011, and to file a report. It is stated that the Advocate Commissioner so appointed by this Court had executed his warrant and filed a report on 30.11.2011 and the said report had not been adverted to by this Court in the judgement delivered in the second appeal is the complaint made now.

4. Learned counsel for the petitioner/appellant admitted that the report of the second Advocate Commissioner, who was appointed at the second appeal stage, was not brought to the notice of this Court, while making submissions in the instant appeal. Learned counsel for the respondents also affirmed it. Since the appointment of the Commissioner at the second appeal stage was not brought to the knowledge of this Court, this Court had no opportunity to consider the same. Further, the jurisdiction under Section 100 of the Code of Civil Procedure (CPC) cannot be usurped to appoint an Advocate Commissioner at the second appeal stage, when the second appellate court has to deal with only question of law, that is, substantial question of law.

5. No doubt, it is true that the report of the Advocate Commissioner will be evidence and the same shall form part of the records and it is not binding on the Court and the same does not affect the right of parties. It is also open to the parties to examine the Commissioner in open Court with reference to the minutes made in the report. The Commissioner's report and evidence bring before the Court a set of facts, which are subject to the same process of evaluation, acceptance or rejection by the Court as any other piece of evidence. It is only an instrument, which helps in decision making and it is not the decision itself. A commissioner appointed is not performing a judicial act, but only a ministerial act.

6. Learned counsel for the petitioner drew the attention of this Court to Sub Rule (3) of Rule 10, Order 26 of the CPC, which reads thus :

"10. Procedure of Commissioner - (1)

(2)

(3) Commissioner may be examined in person - Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit."

7. It is pointed out that this Court had issued second commission only after recording its dissatisfaction that the report of the first Commissioner was not correct. This Court, in the order dated 11.08.2011, while appointing the second commission, had stated as follows :

"..... 2. But the Commissioner did not measure the respective properties covered under the documents with reference to the field map. Instead he has measured the property at random without taking into account the Survey stones put up under the Survey and Boundaries Act. A comparison of Ex.A.15 and C.4 would go a long way to show that Ex.C.4 was not drawn to the scales as per the Field Map of the Survey Department. Therefore, in my considered opinion, it is difficult to decide the issues involved in this appeal, solely based on Ex.C.4, which has not been drawn based on the field Map of the Survey Department. In such view of the matter, in my considered opinion, in order to resolve the issues involved in this appeal, it is absolutely necessary to appoint another Advocate Commissioner of considerable experience in the field Survey also with a direction to him to measure the suit property and and other properties in that locality with the help of a town surveyor, who shall measure the properties based on the field map of the Survey

Department. By making such measurement, the Commissioner shall also correlate the properties covered under Exs.A.2 and A.5 and submit a report. When this was pointed out, learned counsel on either side submitted that they are agreeable for the said course and they have got no objection.

....."

Based on the above observations, the second commissioner was appointed by this Court.

8. The propriety of the said order itself is questionable. The question of issuing a second commission is based on the satisfaction of the Court. It is open to the Court to issue second commission, whenever an objection to the commissioner's report is received that the report is totally misconceived and new Commissioner is to be appointed and a report is to be obtained superseding the earlier report. If the court has got power to issue a series of commissions for the same purpose, and the reports of the commissions be treated like an evidence, then, selection of anyone of the reports is within the power of the court. It is also settled that a second commissioner cannot be appointed without formally recording the objections to the first commissioner's report and without superseding the same. The reason for superseding the first commissioner's report also must be

given in writing. As noted above, in the order dated 11.08.2001, this Court had issued a second commission without recalling or scrapping the earlier report. No doubt, in the said order it is recorded that the first commissioner's report is not satisfactory. However, the Court should have wiped out the first commissioner's report and then, issued a second commission.

9. Issuance of the second commission without recalling the report of the first commissioner will be against the provisions of Order 26, Rule 10(3) of the CPC. Even if the Court is dissatisfied with the report of the first Commissioner, it is only open to the Court to reissue the same commission.

10. Learned counsel for the petitioner would argue that the provisions of Order 26, Rule 10(3) of the CPC has been complied with, as the order dated 11.08.2011, has specifically expressed dissatisfaction with the first Commissioner's report and therefore, the second commission was issued, without setting aside the first commissioner's report. When there are two reports available on the file, it is open to the court to accept one report and disregard the other. This cannot be the procedure contemplated under Order 26.

Though Order 26, Rule 10(3) of the CPC does not specifically provide that the report of the first commissioner has to be set aside, before issuing the second commission, the Court will not have jurisdiction to issue a second commission, without setting aside the first commissioner's report. This is the reason that the Courts are reissuing the same warrant of the commission, in the event the Court requires some more particulars to be gathered.

11. Thus, while expressing dissatisfaction on the first commissioner's report, the Court is expected to set aside the first commissioner's report, especially when a fresh commission is issued, as the same would be illegal and would result in jurisdictional error. In this regard, it will be useful to refer to the judgement of the Division Bench of the Kerala High Court in **Swami Premananda Bharathi Vs Swami Yogananda Bharathi And Anr., AIR 1985 Kerala 83**, wherein, it was held that the issuance of a second commission without passing order under Order 26, Rule 10(3) of the CPC is a vital or flagrant violation of law and that the same amounts to a jurisdictional error. The relevant portion of the judgment reads thus :

"Appointment of second Commissioner, without setting aside previous Commissioner's report and proceedings, being illegal or otherwise

beset with a jurisdictional error, S.99 of C.P.C. can be of no avail. In this context, it is to be remembered that the word "jurisdiction" has acquired a wide meaning in recent times. The word "jurisdiction" is a "verbal cast of many colours", and the dividing line between lack of jurisdiction or power and erroneous exercise of it, is very thin, but nonetheless the distinction between the two has not been completely wiped out and in the final analysis, the concept of jurisdiction for the purpose of judicial review, has been one of public policy. It appears that, if the error of law, committed by the Court or Tribunal is "vital" or a "flagrant one", it is considered to be a jurisdictional error."

12. Issuance of several commissions and arriving at a decision on the basis of several reports is improper. While so, the review petition filed on the ground that the report of the second commissioner was not adverted to, especially when the counsel who appeared at the time of arguing the second appeal is not before this Court, is unacceptable.

13. Learned counsel for the respondents would argue that the review petition itself is not maintainable. He has placed his reliance on the judgement of the Supreme Court in **Kamlesh Verma V. Mayawati and others, (2013) 8 SCC 320.**

13.1. Paragraph 20.1 of the said judgment stipulates the following conditions on which a review is maintainable : (i) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the petitioner or could not be produced by him ; (ii) mistake or error apparent on the face of the record ; and (iii) any other sufficient reason.

13.2. Paragraph 20.2 of the said judgment enlists the situation under which review will not be maintainable, which reads as follows :

"20.2. When the review will not be maintainable :

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential important.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an Appeal in disguise whereby an erroneous decision is re-heard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the Appellate Court, it cannot be permitted to be advanced in the Review Petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negated."

13.3. As per condition No.(vi), the possibility of two views cannot be a ground for review.

14. In this case, it is specifically stated that this Court had adverted to only the report of the first commissioner, which was not set aside while appointing the second commission and this Court had not looked into the second report of the Commissioner, which is totally in support of the plaintiff. As stated above, when there are two views are possible, a review cannot be entertained.

15. When a judgement is delivered after appreciation of evidence on record, a review seeking to re-appreciate the evidence on the ground that it was omitted to be adverted to, is not maintainable. If

the petitioner is in disagreement with the judgement, the only remedy open to him is to go on appeal and not filing a review.

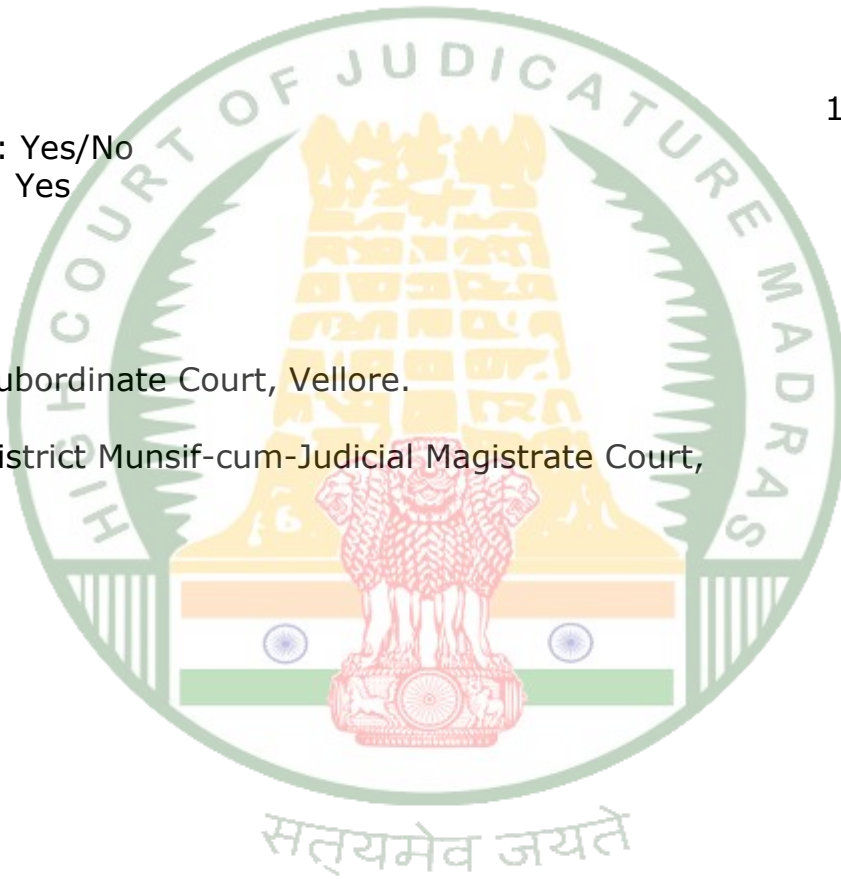
16. In the result, the review petition is dismissed. No costs.

15.03.2018

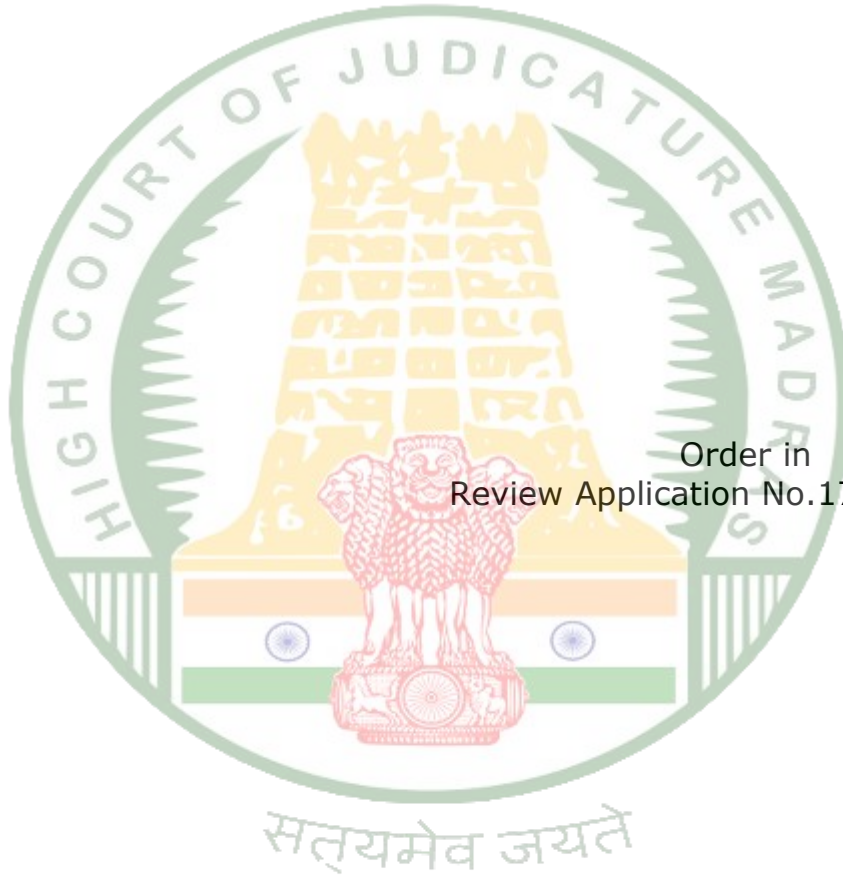
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To

1. The Subordinate Court, Vellore.
2. The District Munsif-cum-Judicial Magistrate Court, Arcot.



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Order in
Review Application No.172 of 2014

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