



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 13.08.2018

DELIVERED ON : 01.10.2018

CORAM

THE HONOURABLE MRS. JUSTICE R. THARANI

C.R.P. (NPD) (MD) No.1300 of 2015

Mahalingam @ Ganesan

.. Petitioner/ Petitioner/Plaintiff

Vs.

1. Paulpandi
2. Kailasakumar
3. Manonmani
4. P.P. Selvam
5. Daisy Selvam
6. Rasaiah
7. Neelakandan
8. Perumal
9. Unnikrishnan Nair
10. Nageswari
11. The Commissioner,
Nagercoil Municipality,
Nagercoil,
Kanniyakumari District.
12. Thiyagarajan
13. Vimala

.. Respondents/Respondents/Defendants

(Respondents 6, 11 to 13 are set exparte in the lower Court. Hence, they are given up in this C.R.P.)

(Respondents 6, 11 to 13 are given up endorsement is cancelled vide Court order dated 24.11.2016, made in C.M.P.No.10140 of 2016 in C.R.P. (MD) no.1300 of 2015)

Prayer : This Civil revision petition is filed under Article 227 of the Constitution of India, to call for the records in order dated 28.01.2015 passed in I.A.No.293 of 2013 in O.S.No.128 of 2011 on the file of the Principal Subordinate Court, Nagercoil, Kanniyakumari District and set aside the said order dated 28.01.2015.

For Petitioner	: Mr.C.Dhanaseelan
For Respondents 1 and 2	: Mr.C.Godwin
For Respondents 3,4,5 and 9	: Mr.S.Sureshkumar
For Respondents 7 and 8	: Mr.N.Dilip Kumar
For Respondent No.6	: Mr.D.Nalla Thambi
For Respondent No.11	: Mr.P.Athimoola Pandian
For Respondents 10, 12 and 13	: No Appearance

ORDER

Heard the learned counsel on either side.

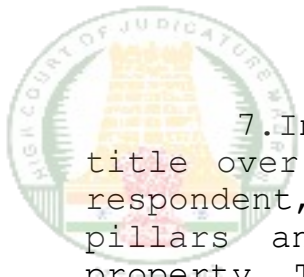
2. This petition has been filed to set aside the order dated 28.01.2015 passed in I.A.No.293 of 2013 in O.S.No.128 of 2011 on the file of the Principal Subordinate Court, Nagercoil, Kanniyakumari District.

3. The petitioner is the plaintiff and the respondents are the defendants in the suit. The petitioner filed the suit in O.S.No.128 of 2011 to declare the sale deed executed by the first respondent in favour of the second respondent as null and void and to declare that the petitioner is the absolute owner of the second schedule property and for permanent injunction. The petitioner filed I.A.No.293 of 2013 for appointment of an Advocate Commissioner under Order 26 Rule 9 of CPC to note down the physical features of the suit schedule property. This petition was dismissed by the trial Court. Against the dismissal order, the petitioner filed the present petition.

4. On the side of the petitioner, it is stated that the property belonged to the petitioner and the petitioner executed a General Power Deed in favour of the first respondent on 08.02.2007. As the first respondent acted against the Will of the petitioner, the petitioner cancelled the power deed on 18.04.2007 and sent a notice to the first respondent through his counsel on 24.04.2007. Even after knowing that the power deed was cancelled, the first respondent executed a sale deed in favour of the second respondent and the second respondent executed a sale deed in the name of various persons and the respondents 12 and 13 herein constructed a building in the suit property. To note down the physical features, the appointment of the Advocate Commissioner is necessary.

5. On the side of the respondents 1 and 2, it is stated that the petitioner executed a sale agreement in favour of the first respondent and he received the amount from the first respondent and has issued a receipt and an irrevocable general power deed was executed in favour of the first respondent. On the basis of the deed, the first respondent executed a sale deed in favour of the second respondent and the other respondents. The suit is ready for trial. In the above circumstances, to drag on the case, this petition was filed.

6. On the side of the respondents 3, 4, 5 and 9, it is stated that the first respondent is the power agent and the power deed is a irrevocable deed. On the basis of the power deed, these respondents purchased the property for valuable sale consideration. The contention of the respondents 7, 8 and 10 is that they purchased the property for valuable consideration and the contention of the respondents is that the appointment of the Commissioner is not necessary and the petition is to be dismissed.



7. In the counter claim, the respondents 12 and 13 claimed title over the property and in the written statement of the sixth respondent, it is stated that the sixth respondent erected stone pillars and constructed a compound wall in a portion of the property. The respondents 1 to 5, 7 and 10 filed counter whereas the respondents 12 and 13 remained exparte. In the revision petition, there is no representation for the respondents 12 and 13, however, in the written statement of the respondents 12 and 13, it is admitted that there was a house with a measurement of 575 sq. ft. and the respondents 12 and 13 made a improvement for a sum of Rs.6,00,000/- (Rupees Six Lakhs only).

8. On the side of the petitioner, it is stated that the suit property is 67 cents and the petitioner executed a general power deed in favour of the first respondent on 08.02.2007 and cancelled the same on 18.04.2007, after duly informing the first respondent by way of registered post. After the cancellation of the power deed, the first respondent executed the sale deed in favour of the second respondent on 26.04.2007 and subsequently sold the property to the respondents 2 to 13. There are some super structure in the property and to note down the physical features, appointment of the Advocate Commissioner is necessary and in the written statement of the respondents 12 and 13, it is stated that the respondents are entitled to make improvement in the property.

9. The learned counsel appearing for the petitioner relied on the Judgment passed by this Court in the case of Anwar Batcha and another v. S. Mahuedoom reported in 2014 (5) CTC 85, which reads as follows:

"Held, contention of Revision Petitioner clearly demonstrates that object of appointment of Advocate Commissioner is to elucidate matter in dispute."

10. The learned counsel appearing for the petitioner relied on the Judgment passed by this Court in the case of Thangammal v. K. Kumarasamy and other reported in 2015 (3) CTC 689, which reads as follows:

"If, Commissioner is appointed, it would minimize evidence for easy adjudication"

11. The learned counsel appearing for the petitioner relied on the Judgment passed by this Court in the case of V. Selvam and other v. Rajathi and others reported in Civil Revision Petition (PD) No. 1433 of 2016, which reads as follows:

"In allowing the petition, the Court below has reasoned that since the suit is for grant of mandatory injunction to remove the encroachment, the report of the Advocate Commissioner is necessary. This Court finds the reasoning of the Court below justified"

12. On the side of the respondents, it is stated that the suit is for declaration and for recovery of possession. Already the



respondents 12 and 13 admitted the construction in the written statement itself. Hence, construction need not be ascertained by way of appointment of Commissioner.

13. The learned counsel appearing for the respondents 3, 5 and 9 relied on the Judgment passed by this Court in the case of Aziz Snack Bar v. Prashanth Kumar J. Jain and other reported in Civil Revision Petition (PD) No. 2814 of 2010, which reads as follows:

"It is well settled law that the appointment of Commissioner cannot be used for gathering evidence in the case. Therefore, the prayer of the tenant seeking appointment of Commissioner in appellate stage cannot be done since it is in the nature of gathering of evidence. Therefore, the order passed by the Rent Control Appellate Authority need not be interfered."

14. On the side of the petitioner, it is stated that the respondents 12 and 13 put up the super structure and constructed a house with an extent of 565 sq. ft and raised a compound wall with stone pillars and levelled the ground by pouring the fresh new soil. To prove these facts, physical features of the property is to be noted.

15. Records perused. A perusal of the records reveals that this case is based on the general power of attorney executed by the petitioner in favour of the first respondent. The subject matter to be decided is the validity of the general power of attorney and the sale deed executed by the first respondent. The suit is pending from the year 2011 onwards. There is no dispute regarding the identity of the property or regarding the physical features. The respondents 12 and 13 admitted that there is a super structure with an extent of 575 sq. ft. and they have accepted that there is a compound wall in the suit property and admitted facts need not be proved. The appointment of the Advocate Commissioner will further delay the disposal of the suit.

16. In the above circumstances, the appointment of the Advocate Commissioner is not necessary. There is nothing sufficient enough to interfere with the order passed by the lower Court. This Civil Revision Petition is dismissed. No Costs.

Sd/-

Assistant Registrar (AD-I)

/True Copy/

Sub Assistant Registrar (CS-III)



To

The Principal Subordinate Judge,
Nagercoil,
Kanniyakumari District.

- 1 CC TO Mr.C.Dhanaseelan, ADVOCATE IN SR No.88043.
+ 1 CC TO Mr.C.Godwin , ADVOCATE IN SR No.88018.
- + 1 CC TO Mr.S.Krishnamoorthy , ADVOCATE IN SR No. 88028.
- + 1 CC TO Mr.D.Nallathambi , ADVOCATE IN SR No.88246.
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- Mrn
- DS SKN SAR3 08 11 2018 5P 6C

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