



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 28.03.2018

(Reserved on : 03.01.2018)

CORAM :

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

C.R.P(PD) (MD)No.1787 of 2017

and

C.M.P(MD)No.9562 of 2017

O.K.S.Balasubramanian : Revision Petitioner / Petitioner /
Defendant
vs.

Murugan : Respondent / Respondent / Plaintiff

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, to call for the records relating to the fair and decreetal order passed by Sub Court, Aruppukottai in I.A.No.130/2017 in O.S.No.24/2017 dated 09.06.2017 and set aside the same by allowing this Civil Revision Petition.

For Petitioner : Mr.S.Parthasarathy
For Respondent : Mr.R.Ramadurai

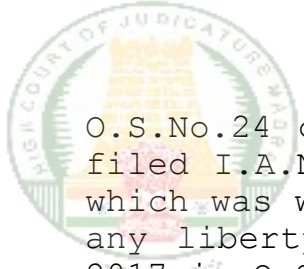
ORDER

This Civil Revision Petition has been filed challenging the order passed in I.A.No.130/2017 in O.S.No.24/2017 dated 09.06.2017, appointing an Advocate Commissioner to inspect the suit property.

2.The facts of the case, in nutshell, are as follows:

The petitioner herein is the defendant in O.S.No.24 of 2017, which was filed by the respondent/plaintiff for declaration and consequential mandatory injunction. Along with the said suit, an interlocutory application in I.A.No.130 of 2017 has been filed, for appointment of Advocate Commissioner, under Order 26 Rule 9 CPC and the Trial Court, after hearing detailed and elaborate arguments, has allowed the said I.A., by impugned order dated 09.06.2017, holding that appointment of Advocate Commissioner will not prejudice the rights of the parties and thereby, appointed Advocate Commissioner to inspect the suit property and directed him to file a detailed report along with plan by 01.07.2017. Aggrieved against the said order, the present revision petition has been filed.

3.Learned counsel for the revision petitioner would submit that originally, the plaintiff has filed a suit in O.S.No.13 of 2017, before the learned District Munsif, Arupukkottai, which was subsequently transferred to the learned Subordinate Judge, Arupukkottai, for want of pecuniary jurisdiction and renumbered as



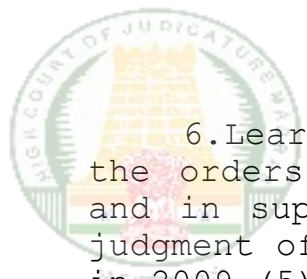
O.S.No.24 of 2017. Along with O.S.No.13 of 2017, the plaintiff has filed I.A.No.148 of 2017, for appointment of Advocate Commissioner, which was withdrawn by the plaintiff, prior to the transfer, without any liberty to file fresh application. Thereafter, I.A.No.130 of 2017 in O.S.No.24 of 2017 has been filed, for the same relief, i.e., appointment of Advocate Commissioner, without quoting the change in circumstances and therefore, the said interlocutory application itself ought not to have been entertained.

4.It is the specific submission of the learned counsel for the revision petitioner that the respondent/plaintiff is making contradictory statements. In his plaint, the respondent/plaintiff, on one hand, has submitted that he is in possession and enjoyment of the suit property and on the other hand, submitted that the petitioner/defendant is attempting to make construction.

5.Learned counsel for the revision petitioner further submitted that the period of the impugned construction can very well be ascertained by production of various documents, viz., Tax receipts, Electricity receipts, etc., for which, appointment of Advocate Commissioner is not necessary. Moreover, in the present case on hand, official documents like patta, etc., are very well available, which shows the measurements of the property in question. Therefore, appointment of Advocate Commissioner is not warranted and relied on the judgment reported in 2006 (5) CTC 501 in the case of Rangasamy Vs. The Superintending Engineer, TNEB, Mettur and others (C.R.P.No.1461 of 2005, decided on 13.09.2006), wherein, it is observed as follows:

"6. The lower Court considered that the revenue records like FMB, 'A' register of R.S.No.208/1B of Koneripatti Village and R.S.No.209/10 of Kaveripatti Village are already available. The location of the well has been already admitted by the plaintiff and in that event, there is no doubt about the identity.

7. The object of the local investigation under Order 26 Rule 9 is not to collect evidence. Such materials enable the Court to properly and correctly understand and assess the evidence on record, which clarifies or explains any point, which is doubtful on the evidence on record. The Court shall not appoint an Advocate Commissioner for taking measurement of the suit properties in a mechanical manner without considering the need for appointment of an Advocate Commissioner. If the Court deems fit that local investigation is requisite or proper, for the purpose of elucidating the matter in dispute, then the appointment of an Advocate Commissioner is justified. If there is any doubt about the area of the land, identification or location of an object, then local investigation is necessary. In the instant case, there is absolutely no doubt about the location of the well in R.S.No.209/10 and that therefore, there is no necessity for measurement."



6. Learned counsel for the respondent/plaintiff submitted that the orders passed in the interlocutory applications are not final and in support of the said contention, he placed reliance on the judgment of this Court in Mangayarkarasi Ammal vs. Nagammal reported in 2009 (5) CTC 444, wherein, it is observed as follows:

"8. ...A pertinent point has been raised by the learned Counsel for the petitioners that a similar petition is not maintainable for the same purpose when the earlier application is dismissed by the Trial Court. In response to the said contention, the learned Counsel for the respondents submitted that the dismissal order in the interlocutory stage would not operate as res judicata and it is always open to the Trial Court to require evidence, if it feels necessary to appoint an Advocate Commissioner to make local investigation and ascertain the market value of the suit property.

9. ...

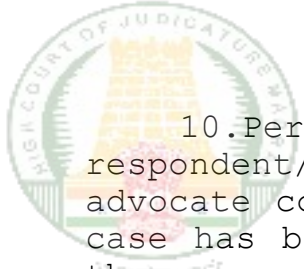
10. A Division Bench of the Karnataka High Court in 1983(1)KLJ Short Notes of Cases has held that "so far as the interlocutory matters are concerned, the principles of res judicata do not strictly apply".

11. Their Lordships in the case of U.P.E. Supply Co. V. T.N. Chatterjee, AIR 1972 SC 1201, has held that the principles of res judicata is not applicable to interlocutory orders as they are not final orders."

7. Learned counsel appearing for the respondent/plaintiff would submit that the suit property belongs to him and the revision petitioner, having illegally obtained patta in his name, is putting up illegal construction in the suit property and therefore, he filed the suit for declaration as well as for consequential injunction. It is the specific contention of the learned counsel for the respondent/plaintiff that after filing of the suit, the revision petitioner/defendant had started construction in the suit property and therefore, he has prayed for mandatory injunction to remove the illegal construction.

8. Learned counsel for the respondent/plaintiff would further submit that during the course of the proceedings, the petitioner/defendant by virtue of the present construction, would contest the suit as if construction was made by him long before the filing of the suit and therefore, in order to ascertain the actual scenario at the time of institution of the suit, appointment of an Advocate Commissioner is necessary and the Trial Court, after considering the facts and circumstances of the case has rightly allowed the petition for appointment of Advocate Commissioner which does not need interference by this Court.

9. Heard the learned counsel appearing on both sides and perused the documents placed on record.



10. Perusal of the record shows that earlier the respondent/plaintiff has filed application for appointment of advocate commissioner and that has been withdrawn. Thereafter, the case has been transferred to another Court and after the transfer, the respondent has filed a fresh petition for advocate commissioner. Though the respondent has filed application for appointment of advocate commissioner to note down the physical features of the suit property and also the property around the schedule property, the learned Judge has allowed only to note down the features of schedule mentioned property and to file report. Perusal of the judgments relied on by the learned counsel for the respondent would go to show that in an interlocutory application, there cannot be any res judicata as there is no order passed in the earlier commissioner application which has been withdrawn as not pressed. Now, according to the respondent, the petitioner is constructing a building in the suit property and therefore, he sought for commissioner appointment. In my considered opinion, the learned Judge has rightly allowed the commissioner application and therefore, the interference of this Court is not necessary. The judgment relied on by the learned counsel for the petitioner is not applicable to the present case.

11. Accordingly, this Civil Revision Petition is dismissed. No costs. Interim order already granted is vacated. Consequently, connected miscellaneous petition is dismissed.

Sd/-

Assistant Registrar (CS-II)

/True Copy/

Sub Assistant Registrar

To

The Subordinate Judge,
Aruppukottai.

COPY TO:

The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai. **(Two Copies)**

+1cc to M/S.S. Parthasarathy, Advocate SR.No. 58635

+1cc to M/S.R. Ramadurai, Advocate SR.No. 58642

order made in
C.R.P. (PD) (MD) No. 1787 of 2017
28.03.2018