



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
RESERVED ON : 05.03.2018
DELIVERED ON : 28.04.2018
CORAM :

THE HONOURABLE MRS.JUSTICE J.NISHA BANU
C.R.P. (NPD) (MD)No.2318 of 2017
and
C.M.P. (MD)No.11205 of 2017

1.O.S.Sahul Hammeed

2.O.S.Syed Muhameed Buhari

3.O.S.Myhammeed Abubaker : Petitioners / Petitioners /
Respondents / Plaintiffs

vs.

M.A.Y.Beer Mohammed
Through his Power Agent
M.N.Mohaideen Pillai

: Respondent / Respondent /
Appellant / Defendant

PRAYER: Petition filed under Article 227 of the Constitution of India, to set aside the petition and order, dated 27.10.2017, passed in I.A.No.90 of 2017 in A.S.No.79 of 2010 on the file of the Principal Sub Court, Tirunelveli.

For Petitioners : Mr.D.Nallathambi
For Respondent : Mr.Balasubramanian

ORDER

This Civil Revision Petition has been filed as against the order stating that the petition seeking to examine the Commissioner and Surveyor will be heard along with the appeal.

2. The facts of the case, as averred in the affidavit filed in support of the petition, are as follows:

2.1. The petitioners herein, as plaintiffs, have instituted the suit in O.S.No.864 of 2004, seeking the relief of permanent injunction and the same was decreed on 09.03.2010. Challenging the said decree, the respondent herein, as appellant, has filed A.S.No.79 of 2010 and the same is pending. Pending A.S., the petitioners herein have filed I.A.No.188 of 2010 for appointment of an Advocate Commissioner, which was dismissed by the Court below and later, the same was reversed by this Court and thereby, an Advocate Commissioner was appointed, who, in turn, has submitted his report on 28.03.2016 and 05.09.2017, for which, the petitioners have also filed their objections. Thereafter, the said I.A., was closed.



2.2. While so, the petitioners have filed I.A.No.90 of 2017 under Order 26 Rule 10(2)(3) of C.P.C., to examine the Commissioner and Surveyor. It is their case that I.A.No.90 of 2017 has to be heard first, before hearing the main appeal. But, the learned Judge, by order dated 27.10.2017, observed that whether additional evidence under Order 41 Rule 27 of C.P.C., is necessary or not has to be decided and therefore, the said application will be heard along with the main appeal. Aggrieved over the same, the petitioners are before this Court.

3. The arguments advanced by the learned Counsel appearing for the petitioners are as follows:

3.1. The learned Counsel for the petitioners drew the attention of this Court to Order 26 Rule 9 & 10 of C.P.C., which reads thus,

"9. Commissions to make local investigations:

In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

10. Procedure of Commissioner:

(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

(2) Report and deposition to be evidence in suit - The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to suit may examine the Commissioner personally in open Court touching any part of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(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."

3.2. The learned Counsel for the petitioners, relying upon the judgment reported in **1996 TLNJ 104** in the case of **Vemba Gounder Vs. Pooncholai Gounder**, would submit that the closure of Commissioner application, after obtaining Commissioner's report, is in violation of Order 26 Rule 9 & 10 of C.P.C.

3.3. In the judgment cited supra (Vemba Gounder case), it is held as follows:

"In the result, I dismiss the Revision with costs. I direct the Registry to communicate a copy of this Order to the Court below forthwith, with a direction to follow the procedure mentioned above not only in this case but also in all the cases where Commissioner's Report is obtained under order 26 Rule 10, C.P.C. I think it will be proper on the part of the trial Court to post the case for filing objections whenever a Commissioner's Report is filed, and thereafter take evidence on the objections without the party asking for the same. If the parties are not availing that opportunity, the case could be posted in the list for disposal, on merits. It is made clear that the dismissal of this Revision Petition will not bar the Plaintiff/Petitioner from taking appropriate steps for getting the Commissioner's Report set aside or for getting the Commission remitted to the same Commissioner, of course, subject to the satisfaction of the trial Court regarding the same, by following the procedure under Order 21 Rule 10, C.P.C."

3.4. Therefore, the learned counsel for the petitioners would submit that their application under Order 26 Rule 10 (2)(3) of C.P.C., is an application pursuant to the appointment of Advocate Commissioner and the same cannot be termed as an application for producing additional evidence under Order 41 Rule 27 C.P.C., in Appellate stage.

3.5. The learned Counsel for the petitioners further relied upon the judgement reported in **2003 (4) LW 77**, in the case of **PR.Chockalingam Vs. M.Pichai and another**, wherein, the difference between Order 26 Rule 9 and Order 41 Rule 27 of C.P.C. was explained.

3.6. In result, the learned Counsel for the petitioners before this Court prays for a direction to the first Appellate Court, to



hear the application in I.A.No.90 of 2017, independently, before hearing the main appeal.

4. The submissions countered on the side of the respondent are as follows:

4.1. Going by the merits of the case, the learned Counsel for the respondent, narrating the events that took place, would submit that the Advocate Commissioner has submitted two reports, for which, the petitioners have filed their objections and the same was duly recorded. Now, the petitioners have filed the present interlocutory application to examine the Commissioner and Surveyor, and to adduce additional evidence, if necessary, and the same amounts to leading of additional evidence under Order 41 Rule 27 C.P.C. Therefore, whether additional evidence is necessary or not, has to be decided while hearing of the main appeal only.

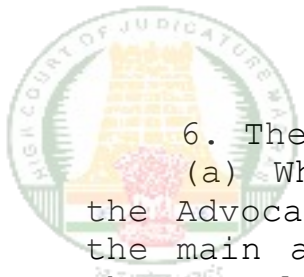
4.2. He would further submit that the respondent has filed I.A.No.25 of 2016 under Order 41 Rule 27 and Section 151 of C.P.C., to mark the Commissioner's Report. Unless and until the same is marked, the report shall not form part of the record, since, they are evidences and not pleadings.

4.3. With regard to the judgment cited by the learned Counsel for the petitioners in **1996 TLNJ 104** (Vemba Gounder case), the learned counsel for the respondent would submit that the procedures to be followed by the trial Court as to the report of the Commissioner was dealt with in the said judgment and the same cannot be extended to the appellate stage, because of Order 41 Rule 27 C.P.C. Based on the documents produced before the Trial Court, the appellate Court is bound to consider the matter.

4.4. He would contend that the judgment relied upon by the learned Counsel for the petitioners is not applicable to the present case on hand, since, in that case a plea was taken to treat the application under Order 26 Rule 9 as an application under Order 41 Rule 27 and to be heard along with the appeal, which was rejected, because the scope of Order 26 Rule 10(2)(3) and Order 41 Rule 27 is different.

4.5. In support of his contention, he would place reliance on the judgments reported in **2011 (1) LW 135 (SC)**, **2012 (4) LW 359 (SC)**, **216 (3) LW 914**, **2015 (4) LW 897**, **2014 (1) LW 824**, **2012 (1) LW 878 & 1999 (3) MLJ 393**. In result, he would contend that there is no illegality or infirmity in the order passed by the Court below and therefore, he prays for dismissal of the present Civil Revision Petition.

5. Heard the learned Counsel appearing for both sides and perused the documents placed on record.



6. The issues to be decided in this case :

(a) Whether application filed by the petitioners to examine the Advocate Commissioner and surveyor is to be heard along with the main appeal or is to be decided before the final hearing of the appeal?

7. When the issue as to whether an application for appointment of a Commissioner should be considered as an application for production of additional evidence under Order 41 Rule 27 of the Code of Civil Procedure came up for consideration, a learned Single Judge of this Court in **P.R.Chockalingam Vs. M.Pichai and others** reported in **2003-4-L.W. 77** has held in paragraph Nos.8 to 11 as follows:

"8. The question as to whether an application for appointment of a commissioner should be considered as an application under Order XLI Rule 27 of the Civil Procedure Code came up for consideration before this Court in the judgment reported in AIR 1969 Madras 144 (supra); Veeraswami, J (as he then was) held that the appointment of advocate commissioner is not authorised by Rule 27 of Order XLI of the Civil Procedure Code, as that relates to additional evidence and the language of Rule 27 (1)(b) does not lend itself to a construction that the report of the commissioner to be appointed and submitted in the appellate stage is regarded as additional evidence for the purpose of that rule.

9. Order XLI Rule 27 of the Civil Procedure Code relates to production of additional evidence in the appellate Court. The said Rule reads as under :

"(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or [(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or



for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

10. A reading of the said rule would indicate that it relates to only letting in additional evidence. The report of the commissioner is amenable to objections, which may be filed by both the parties, if require so. Then again, the parties are entitled to advance their arguments questioning the report. The Court need not necessarily accept the report of the commissioner in toto. More over, calling for a report even before the appeal is heard is only to enable the Court to consider the same at the time of disposal of the appeal and therefore, the report by itself cannot be considered as an additional evidence and the application filed seeking an order of appointment of commissioner can (not) be brought within the ambit of Order XLI Rule 27 of the Civil Procedure Code.

11. Order XXVI Rule 9 of the Civil Procedure Code reads thus:

"Commissions to make local investigations :

In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules."

From a reading of the above rule, it is clear that the Court, if it deems fit that a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, may issue commission. This rule is applicable to all fours to the appellate Court dealing with the appeal also. Hence, an application filed under Order XXVI Rule 9 of the



Civil Procedure Code cannot be equated to the application filed under Order XLI Rule 27 of the Civil Procedure Code."

8. However, in the very same decision, when it was pointed out that already the Advocate Commissioner submitted his report, the learned Single Judge has held in paragraph No.21 as follows:

"21. It is needless to mention that while hearing the appeal, the appellate Court is entitled to consider the submissions of both the learned counsel for the appellants and the respondent and only if it is necessary that the report of the advocate commissioner should be relied upon for the disposal of the appeal, the same can be taken into consideration.

9. From the above dictum, it is clear that the appointment of Advocate Commissioner cannot be equated with an application seeking to produce additional documents at the appellate stage. As the appointment of the Commissioner is only for better appreciation of the evidence already on record, the report of the Commissioner cannot be termed as an additional evidence.

10. The report of the Commissioner does not automatically form part of evidence in the proceeding. Only on examination of the Commissioner, it shall form part of the record and evidence. The Court has power to confirm, vary or set aside the report or issue a new commission. The question as to whether the report of the Commissioner to be marked through evidence?, can be decided by the Court only after hearing both sides in the appeal. Even in the decision cited supra, when it is represented that the Commissioner has already submitted his report, this Court has held that while hearing the appeal, the appellate Court is entitled to consider the report of the Commissioner and if necessary, the same can be taken into consideration.

11. Going by the facts of this case, it is seen that though the first appellate Court has initially rejected the plea for appointment of Advocate Commissioner, the same got reversed by this Court in C.R.P.(MD)No.1030 of 2011, thereby, a Commissioner was appointed, who, in turn, filed his detailed report, for which, objections was raised and the same was duly recorded and thereafter, the Commission application was closed. While so, in the present case on hand, the petitioners have filed the interlocutory application to examine the Commissioner and surveyor. As stated earlier, the report of the Commissioner, only on examination, shall form part of the evidence. The appellate Court has only stated that the said application will be heard along with the appeal. There is no infirmity or illegality in the decision arrived at by the learned appellate Judge and the same does not warrant interference of this Court.



12. In the result, this civil revision petition is dismissed. No costs. Consequently, connected miscellaneous petition is also dismissed.

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Assistant Registrar (T&P)

/True Copy/

Sub Assistant Registrar

To

The Principal Sub Court,
Tirunelveli.

Copy to

The Section Officer, (2 COPIES)
VR Section,
Madurai Bench of Madras High Court,
Madurai.

+1cc to Mr.D.Nallathambi, Advocate Sr.No.64421

+1cc to Mr.K.Esakki, Advocate Sr.No.64752

GCG

VB/SV/MMS/SAR2/16/05/2018/8P/6C

order made in
C.R.P. (NPD) (MD) No.2318 of 2017
and
C.M.P. (MD) No.11205 of 2017
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