

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.02.2019

C O R A M

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

CRP NPD No.863 of 2009
and M.P.No.1 of 2009

1. Elumalai
2. Nagappan
3. Muniyappan
4. Govindan
5. Subbarayan

..... Revision Petitioners

Vs.

1. Shanmugha Achari
2. Viruthambal Ammal
3. Pavadaisamy
4. Selvamani
5. The Tamil Nadu Electricity Board,
represented by its Superintending Engineer,
Villupuram

... Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India against the order dated 22.12.2008 passed by the Principal District Judge, Villupuram in I.A.No.108 of 2008 in A.S.No.14 of 2007.

For petitioners : Mr. N.A.Nissar Ahamed

For 1st Respondent : Mr.S.Sounthar

Respondents 4 and 5 : No appearance

ORDER

This civil revision petition has been filed against the order or dismissal passed by the first appellate court in I.A.No.108 of 2008 in A.S.No.14 of 2007, which was filed to appoint an advocate commissioner to measure and note down the physical features of the Item No.1 of the suit properties and also to note down the nature of property.

2. The revision petitioners are the plaintiffs before the trial court and appellants before the first appellate court. The suit had been filed for partition of the suit properties and the trial court decreed the suit in respect of the Item No.1 and 2 to 8 of the suit properties, however dismissed in respect of the Item No.1(a) of the suit properties. Against which, the plaintiffs have filed the first appeal in A.S.No.14 of 2007 before the District Judge, Villupuram. Pending first appeal, the revision petitioners filed an application to appoint an advocate commissioner to measure and note down the physical features of the Item No.1 of the suit properties and to find out, in which portion, the 4th respondent has been in possession.

3. The main contention of the revision petitioners is that the 4th respondent, who is said to be a purchaser of the property through court auction sale, has taken possession of the different property, other than the property, he purchased. Hence, he prayed for appointment of an advocate commissioner, which is necessary to find out, in which portion of the properties, the 4th respondent has been in possession.

4. After analysing the evidence on record, the first appellate court dismissed the said petition, against which, the revision petitioner came up with this revision.

5. The learned counsel appearing for the revision petitioners would submit that the item No.1 of the suit properties alone was mortgaged and the same was sold through court action and the 4th respondent purchased the said property, however, he took possession of the different portion of the properties. He would further submit that unless those aspects have been established, the substantial right of the appellants will be defeated.

6. Per contra, the learned counsel appearing for the respondents would contend that the application to appoint an

advocate commissioner was filed only to gather evidence, which is not permissible and hence, he prayed for dismissal of the revision.

7. I have perused the order of the court below and also materials before this court. Originally, the suit had been filed by the plaintiffs, the revision petitioners herein for partition of the suit properties. After full contest, the trial court decreed the suit in respect of the Item No.1 and 2 to 8 of the suit properties and thereby passed preliminary decree in favour of the plaintiffs and dismissed the suit in respect of the Item No.1(a) of the suit properties. The plaintiffs have filed first appeal and during pendency of the first appeal, they filed the application for appointment of advocate commissioner.

8. It is curious to note that, even before the trial court, the plaintiffs have filed an application for appointment of advocate commissioner and the trial court after enquiry, dismissed the said application. Such order has not been challenged by the petitioners/ the revision petitioners herein. Without challenging the said order passed by the trial court, during pendency of the first appeal, once again the petitioners filed similar application, to achieve, what they could not achieve in the trial court. Such application, in my view, is

not maintainable for the simple reason that the orders passed by the trial court for appointment of advocate commissioner reached finality. Without challenging the same by way of appeal or revision, one cannot seek remedy by filing similar petition before the first appellate court. Further, the very suit itself was filed for partition. The contention of the revision petitioner that the auction purchaser, took possession of the different property, other than the property which had been originally mortgaged, has to be proved before the first appellate court. Therefore, unless and until the plaintiffs' right in respect of Item No.1(a) is proved, the application for appointment of advocate commissioner to find out, who is in possession of such property does not serve any purpose. When the plaintiffs are able to establish their right in respect of Item No.1 to get partition, they can very well enforce the preliminary decree and final decree also at the time of delivery of possession. Hence, appointing advocate commissioner for gathering evidence in the appeal stage cannot be permitted. This court does not find any illegality of infirmity on the orders passed by the first appellate court.

9. In the result,

(i) The Civil Revision Petition is dismissed. No costs.

The connected miscellaneous petition is closed.

(ii) The fair and decretal order of the first appellate court are upheld.

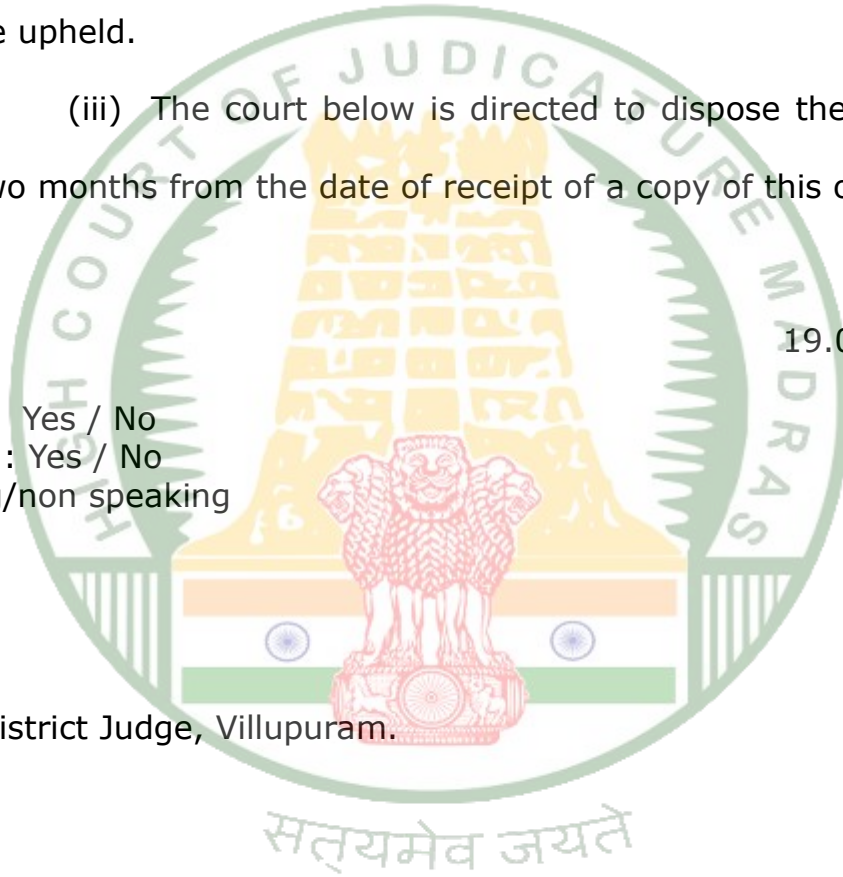
(iii) The court below is directed to dispose the appeal within two months from the date of receipt of a copy of this order.

19.02.2019

Index : Yes / No
Internet : Yes / No
speaking/non speaking
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To

1. The District Judge, Villupuram.



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N.SATHISHKUMAR, J.
mst



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