

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :04.02.2019

Delivered on :22.02.2019
Coram

THE HONOURABLE MS. JUSTICE P.T. ASHA

C.R.P.(NPD).No.386 of 2019
and
C.M.P.No.2652 of 2019

S. Thangavelu

...

Petitioner/Appellant
/ Plaintiff

Versus

Nagamalai Gounder (Died)

1.Venkatachalam

Ganesan (Died)

2.Pappathi

3.Palaniammal

4.Pavayee

5.Sarasu

6.Sudha

7.Suresh

...

Respondents/ Respondents/
Defendants.

Prayer: Civil Revision Petition is filed under Article 227 of the Constitution of India, against the Order and Decretal Order dated 03.01.2019 passed by the learned Subordinate Judge, Tiruchengode made in I.A.No.124 of 2018 in A.S.No.13 of 2008.

For Petitioner : Mr.S. Natanarajan

ORDER

The plaintiff is the Revision Petitioner before this Court. The plaintiff has filed a suit in O.S.No.498 of 96 for bare injunction. This revision is filed challenging the dismissal of the application filed by the revision petitioner in I.A.No.124 of 2018 in A.S.No.13 of 2008 before the learned Subordinate Judge, Tiruchengode, for appointing an Advocate Commissioner to inspect the suit property along with the Government Surveyor and measure the suit property and submit a detailed report along with a plan drawn to scale in the light of the Field Maps of the years by and prior to 1996 concerning the Tiruchengode village and Seetharampalayam village regarding the existence of the cart track for a very long period and also observing that the said cart track is only facility available by the petitioner as egress and ingress to reach his land in Survey Nos.49/1 and 49/2 of Tiruchengode Village from Mankuttaipalayam Panchayat road.

2. Before proceeding to discuss the above petition, it is necessary to briefly allude to the facts of the case. The revision petitioner had filed O.S.No.498 of 1996 on the file of the learned District Munsif cum Judicial Magistrate, Tiruchengode, for a permanent injunction restraining the defendants from interfering with the

plaintiff's use of the suit cart track situated in Survey Nos.49/1 and 49/2 which has been used by the plaintiff to access his lands from the Mankuttaipalayam Panchayat road. The said suit was dismissed by the learned District Munsif by holding that the plaintiff had an alternative access through a 15 feet pathway on the western side of his property situated in Survey Nos.54/1 and 54/2 and holding that the suit pathway was not in existence and use.

3. Challenging the said Judgment and Decree, the plaintiff had filed an appeal in A.S.No.13/2008 on the file of the learned Subordinate Judge, Tiruchengode. The revision petitioner/plaintiff has taken out the petition in I.A.No.124 of 2018 under Order 26 Rule 9 read with Section 94 and 151 of Code of Civil Procedure. In the above petition, the reason for filing the above petition has been detailed in paragraph No.7 of the affidavit filed in support of the said interlocutory application, wherein the revision petitioner has contented that the respondent/defendant had filed an application in I.A.No. 255/1999, seeking the visit of the Presiding Officer to the suit property and this petition was dismissed. Thereafter, the defendants/respondents herein had filed another application in I.A.No.601 of 1999 seeking for appointment of an Advocate Commissioner which was also dismissed on the very date of the Judgment by Trial Court. The petitioner further

submits that the Trial Court had failed to appreciate the grounds raised by him for seeking an inspection of the suit property either by a personal visit of the Presiding Officer or through an Advocate Commissioner. The respondents counsel had endorsed 'No counter' in the impugned petition but however the learned Judge after perusing the records relating to the lower Court, had proceeded to dismiss the said application. The learned Judge has held that the application for a visit by the Trial court as taken out by the respondent in I.A.No.255 of 1999 was dismissed by the learned Judge by observing that the same was strongly opposed by the learned counsel appearing on behalf of the revision petitioner herein by stating that it is the job of the Advocate Commissioner and the Trial court cannot be used as a substitute for an Advocate Commissioner. Thereafter, the learned Judge has observed that when the Respondent herein filed an I.A.No.601 of 1991 to appoint an Advocate Commissioner to make a spot inspection the same was also vehemently opposed by the revision petitioner herein. IN the above circumstances it, it does not lie in the mouth of the petitioner/ revision petitioner to now file such a petition. Challenging the said order the revision petitioner is before this Court.

4. Mr. S. Natarajan, learned counsel appearing on behalf of the revision petitioner would contend that the respondent had

themselves taken up application for appointing an Advocate Commissioner and had in fact endorsed "no counter" in the instant proceedings and this being the case, the Appellate Court had erred in dismissing the application for appointing an Advocate Commissioner. He also relied upon the Judgment of this Court reported in 2017 2 LW 119 in support of his contention that an appointment of Advocate Commissioner would definitely help the Court to analyse and understand as to who is speaking the truth with regard to the "actualities" of the case.

5. Heard the learned counsel and persuade the papers.

6. Admittedly, the suit is one for a bare injunction where the revision petitioner /plaintiff would come forward with the case that he has been in possession and enjoyment of the cart track situated in Survey Nos.54/1 and 54/2 to reach the lands of the revision petitioner situated in Survey Nos.49/1 and 49/2. The revision petitioner has contended that he and his predecessors in interest have been enjoying this cart track for over 100 years. It was well open to the revision petitioner to produce the Field Maps by taking certified copies from the authorities concerned and the present application appears to be an attempt to fill up the lacuna. It is also seen that it was the revision

petitioner who had vehemently opposed the application that was earlier moved by the respondent/defendant for appointing an Advocate Commissioner to note down the physical features of the suit properties.

7. In these circumstances, the learned Subordinate Judge, Tiruchengode was right in dismissing the said application and having failed to evince interest in having the application moved, pending the suit the petitioner cannot be allowed to now fill up the lacuna by filing the application. Further, earlier application having been dismissed, this application is clearly barred by the principles of res-judicata. The orders in I.A.No.255/1999 and in I.A.No.601 of 1999 is confirmed and this Civil Revision Petition stands dismissed. No costs. Connected Civil Miscellaneous Petition is closed.

सत्यमेव जयते

22.02.2019

jrs

Index : Yes/No

Internet: Yes/No

Speaking / Non Speaking

To

The learned Subordinate Judge,

Tiruchengode.



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P.T.ASHA, J,

jrs



Pre-Delivery Order in
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