

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.04.2019

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

C.R.P.(PD).No.1673 of 2015
and
M.P.No.1 of 2015

1.K.V.Perumal
S/o.Krishna Gounder
2.Devaki
W/o.K.V.Perumal
3.Madesh
S/o.Nallathambi Gounder
All are residing at:
Vellandi Valasai
Chinnamanali Village,
Edapadi Taluk, Salem District.

... Petitioners

Vs.

1.N.Gokulavasan
S/o.Narayanasamy

2.N.Meivel @ Mayilvaganan
S/o.Narayanasamy

3.N.Kannan @ Kathiravan
S/o.Narayanasamy

4.Malarvizhi
W/o.N.Gokulavasan

All are residing at:
Nainampatti Road Street,
Avaniperur East Village,
Edappadi Taluk, Salem District.

... Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the fair and decreetal order of the District Munsif Court at Sankari, dated 18.09.2014 in I.A.No.549 of 2013 in O.S.No.83 of 2006.

For Petitioner : Mr.P.Valliappan

For Respondents : Mr.R.Marudhachalamurhty

ORDER

This petition has been filed to set aside the fair and decreetal order of the District Munsif Court at Sankari, dated 18.09.2014, in I.A.No.549 of 2013 in O.S.No.83 of 2006.

2.The revision petitioners filed I.A.No.549 of 2013 in O.S.No.83 of 2006 for appointment of Advocate Commissioner to measure the properties mentioned in the suit schedule with the help of a qualified surveyor in respect of boundary, extent and note down the physical features in and around the suit properties and file a report and plan. The same was dismissed by the learned District Munsif, Sankari. Against the order of dismissal, the petitioners are before this Court.

3.The suit itself filed by the petitioners/plaintiffs for permanent injunction restraining the respondents/defendants from any manner interfering with the possession of the property. Pending suit, the

petitioners/plaintiffs filed petition on the ground that the identification of

property is essential, for that purpose, they sought for appointment of an Advocate Commissioner with assistance of Village Administrative Officer and Town Surveyor to inspect and measure the property and file report based on the revenue records and sale deeds. The said petition was dismissed on the ground that plaintiffs were attempted to collect evidence through Advocate Commissioner's report, against which, the present Civil Revision Petition has been filed.

4.The learned counsel appearing for the petitioners would submit that the suit was filed in the year 2006 and IA.No.549 of 2013 was filed in the year 2013, wherein written statement also filed by the respondents/defendants. Though the plaintiffs filed rough plan along with affidavit and the defendants also filed rough plan along with written statement, both the rough plans filed by plaintiffs and defendants are not useful to find out the property. Hence, it is necessary to measure the property with qualified surveyor from the revenue department and no prejudice will be caused to the defendants. Accordingly, he prayed for allowing this petition.

5.In support of his contentions, the learned counsel for the petitioners relied on the following judgments:

(i)In the case of *V.K.Ramanathan (deceased D3) and others Vs.*

Jayalakshmi and 5 others reported in 2009 (4) CTC 271, wherein it was held as follows:

“The trial Court on receipt of the records shall appoint preferably the very same Advocate Commissioner, who already visited the suit property and submitted a report in respect of O.S.No.2 of 2003, to visit the suit property in connection with this case with the help of Inspector of Surveyors and locate the first item of the suit property herein with specific reference to Ex.A2 to the extent of 416 sq. ft. in commensurate with Ex.A3 and also find out the physical features therein and whereupon, the Trial Court after hearing both sides based on evidence already recorded and if any more evidence to be adduced by both sides, dispose of the matter within a period of three months from the date of receipt of a copy of this order.”

(ii) In the case of *Andal Vs. Ajjai Alva and others* reported in 2012 (2)

MWN 255, wherein it was held as follows:

“In the light of the above said decisions, it is well settled that the order of remand for re-trial can be done only in exceptional cases and if there are sufficient evidence before the Appellate Court the Court itself can decide the case as the First Appellate Court is the last Court on facts. I the order of remand is only for the purpose of appointment of Commissioner, the Appellate Court itself can appoint a Commissioner to assist the Court or it can direct the Trial Court to appoint a Commissioner, call for the report and decide the matter on merits”

(iii) In the case of *Rangasamy Gounder and others Vs. Valliammal and others* reported in 2012 (3) MWN (civil) 823, wherein it was held as follows:

“24. The Plaintiffs, no doubt simply claimed 20 cents in the suit property as their property, for which, there is no back up of recitals in Ex.A1-the Sale Deed dated 16.10.1917. It might be so that the Plaintiffs might be owning, adjacent to the Government allotted lands to D1 to D6. In such a case, if the properties of the Plaintiffs, and D1 to D6 are identified with reference to Ex.A1-the Sale Deed dated 16.10.1917, as well as the Revenue Records, then the dispute would come to an end. But such an exercise was not undertaken.

*...
28. Not to put too fine a point on it, I would like to observe that sticking on to the punctilious of Court procedures cases should not be thrown away, but it is the duty of the Court to see that the actual dispute is resolved, if a dispute is resolvable. In my considered opinion, the dispute involved in this case is resolvable. Owing to misconception alone the parties are fighting at arms length all along. Hence, I am of the considered view that the matter should necessarily be remitted back to the First Appellate Court with the following direction.*

29. On balance, the judgment and decree of the First Appellate Court is set aside and the matter is remitted back to the First Appellate Court, with the direction to appoint an Advocate Commissioner, at the cost of the Plaintiffs, to visit the suit property and measure the same with the assistance of a Government surveyor and with reference to Ex.A1-the Sale

Deed dated 16.10.1917 as well as the Revenue records and other documents and locate the same precisely and submit his report detailing the physical features also. Whereupon, after giving due opportunity to both sides, the First Appellate Court shall render its reasoned judgment.”

(iv) In the case of *Thangammal Vs. K.Kumarasamy and another* reported in 2015 (3) CTC 689, wherein it was held as follows:

“19. The said decisions may not be applicable to the present case. No doubt, in every Suit, the Court is not bound to appoint a Commissioner. The Commissioner's Report is only a piece of evidence and the same is not binding on the Court. A Commissioner cannot be appointed in a Suit for injunction to find out who is in possession and also to gather evidence. However, in the Suit like the present one, if the Commissioner is appointed, it would minimize the evidence for easy adjudication.

20. As stated earlier, the Trial Court has got discretion to Order a Commission or not and such discretion should be exercised judicially. As stated earlier, the Report of the Commissioner is only a piece of evidence and not necessary it is not binding on the Court. The Trial Court being one of the fact finding Courts should give an opportunity to the parties to establish their case. In the present case, the First Plaintiff, is the wife of the First Defendant who alleges to have been defrauded. Therefore, the appointment of Commissioner at this stage is an effective need which would go to the adjudication of the Suit.”

(v) In the case of *Semitta Kounder and another Vs. Murugesan*

reported in 2016 (6) CTC 66, wherein in it was held as follows:

“9.No doubt, as a matter of routine, there cannot be any Order for re-issue of Commissioner's Warrant in filling up any lacuna since it is always open to the aggrieved party to file Objections and cross-examine the Advocate-Commissioner concerned on his Report. However, in the instant case on hand, the claim of the Petitioners for re-issue of Commissioner's Warrant appears to be bona fide since it is only in regard to the proper identification and measurement of the Suit property as both the Petitioners and Respondent happened to be the neighbours and claiming rights over a portion of the property. In the absence of proper measurement and identification of the Suit property, the Trial Court may not be able to resolve the issue and give a quietus to the dispute between the parties. Mere opportunity to raise Objections and cross-examine the Advocate Commissioner on his Report, in the circumstances of the case, will be of no assistance to the Trial Judge for resolving the issue. Further, no prejudice would be caused to either side if the same Advocate-Commissioner is directed to properly measure and identify the physical features of the property with the active assistance of the Surveyor and if proper Report is submitted on such re-issue of Warrant and the Trial Court would be in a better position to adjudicate the claim and resolve the issues in favour of either parties. Therefore, this Court is of the view that the dismissal of the subject I.A. by the Judge, is not in order and the same is required interference of this Court.”

6.The learned counsel appearing for the respondents would submit

that the trial Court after considering the matter elaborately arrived at a conclusion that the petitioners can not be allowed to collect evidence from the Advocate Commissioner's report. Further, the present Revision Petition is filed to drag on the proceedings and collect fresh evidence as there is no documents available to prove their title and the Interlocutory Application is not permissible one. Accordingly, the learned counsel prayed for dismissal of this Revision Petition. In support of his contentions he relied upon an unreported decision in CRP.(NPD)MD.No.465 of 2009, dated 06.04.2009.

7.On perusal of the unreported judgement produced by the learned counsel for the respondents reveals that it is not applicable to the present case.

8.The learned Judge while dealing with the question of appointing the Advocate Commissioner, stated that with regard to identification of property, there is no dispute between the parties and the petitioners/plaintiffs cannot be permitted to collect evidence through Advocate commissioner's report and there is no proper reason explained in the affidavit for appointment of Advocate Commissioner. Accordingly, the learned Judge has dismissed the Interlocutory Application.

9.Considering the facts and circumstances of the present case, I am

of the view that the reasons stated by the Court below cannot be accepted, as there is no dispute with regard to the identification of the property, it does not mean that the petitioners/plaintiffs cannot seek for appointment of Advocate Commissioner under Order 26 Rule 9 and Section 151 of CPC. The measurement and identification of property is useful to the Court to arrive at a proper conclusion in respect of the property and the Advocate Commissioner will not measure the property on its own, but with the help of Village Administrative Officer and Surveyor, on basis of revenue records. Hence, if the Advocate Commissioner visited the property and note down the physical features and measured the property with the help of Surveyor on the basis of the rival documents produced by the parties, it would not cause any prejudice to the respondents/defendants and it would be necessary and it is only a guiding factor to the trial Court to arrive at a conclusion about the property. In this regard, it is useful to extract below the observation of this Court in the case of *Saraswathy and another Vs. Viswanathan* reported in 2002 (4) LW 142.

“9. Generally speaking, in a suit filed by the plaintiff, he is a dominus litus and further, this is not an universal rule, in the considered opinion of this Court.

10. At best, an Advocate Commissioner's report can be taken note of by the first appellate Court along with the other oral and documentary evidence on record. Even if an Advocate Commissioner is appointed, the report filed by the

Advocate Commissioner is not binding on a Court of law and a Court is entitled to act independently basing its conclusions on the strength of the documentary and oral evidence on record. It is also an axiomatic fact that a possession has to be proved by a litigating party and not by a Commissioner through his appointment made by a Court of law.”

10. Here also, even though the Advocate Commissioner is appointed, the Court is entitled to act independently based on the documents produced and oral evidence adduced by the parties. Hence, appointment of Advocate Commissioner will not cause any prejudice to the respondents/defendants.

11. In view of the aforesaid facts and circumstances, I am inclined to issue a direction to the trial Court to appoint an Advocate Commissioner and pass appropriate orders. The Advocate Commissioner shall measure the properties mentioned in the suit schedule with the help of a qualified surveyor and note down the physical features in and around the suit properties and file a report and plan. The parties shall file a copy of the respective title deeds and also plans to enable the Advocate Commissioner and Town Surveyor to inspect the suit property and file a report.

Consequently, connected Miscellaneous Petition is also closed.

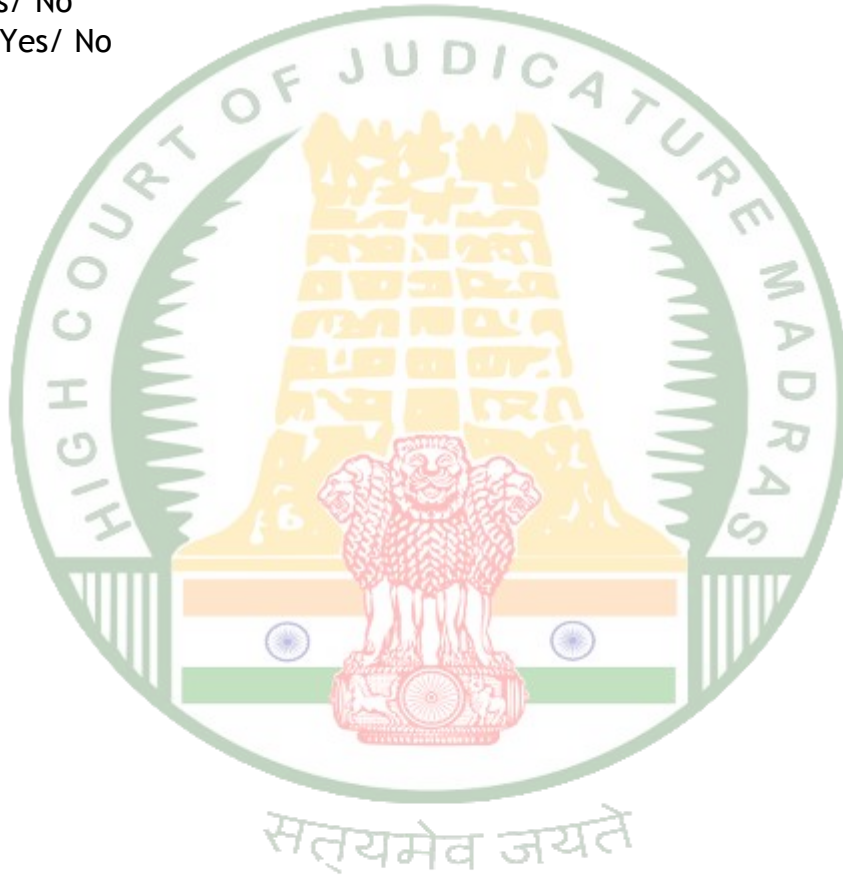
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Speaking Order/ Non Speaking Order

Index: Yes/ No

Internet: Yes/ No



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M.DHANDAPANI, J.

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To

The District Munsif,
District Munsif Court,
Sankari.



C.R.P.(PD).No.1673 of 2015

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Dated: 09.04.2019