

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.11.2019

CORAM:

THE HONOURABLE Mr. JUSTICE R. SURESH KUMAR

C.R.P. (PD) No. 2351 of 2019

and

C.M.P. No. 15319 of 2019

P. Jayakumar ... Petitioner

-Vs-

Unnamalai ... Respondent

Prayer : Petition filed under Article 227 of the Constitution of India against the fair and decretal order dated 05.03.2019 made in I.A. No. 33 of 2018 in O.S. No. 7 of 2018 on the file of the District Munsif Court, Omalur.

For Petitioner : Mr. V. Sekar

For Respondent : Mr. C. Rajasekaran

ORDER

This Civil Revision Petition has been filed against the fair and decretal order made in I.A. No. 33 of 2018 in O.S. No. 7 of 2018 on the file of the District Munsif Court, Omalur, by order dated 05.03.2019.

2. Before the trial Court, the respondent filed suit O.S.No.7 of 2018 for mandatory injunction against the revision petitioner / defendant. In that suit, I.A. No. 33 of 2018 was filed under Order XXVI Rule 9 of the Civil Procedure Code to appoint an Advocate Commissioner to inspect the suit property, note down the existing physical features and to file a detailed report with plan drawn to scale with the help of a qualified surveyor.

3. The said application since has been allowed and an Advocate Commissioner has been appointed, aggrieved over the same, the defendant filed the present revision petition before this Court.

4. Heard Mr. V. Sekar, learned counsel appearing for the revision petitioner and Mr. C. Rajasekaran, learned counsel appearing for the respondent.

5. It is to be noted that, there is a larger extent of property at Dasasamudram Village, Omalur Taluk, Salem District, which originally belongs to the plaintiff one Unnamalai and the brothers of

the Unnamalai's husband. In this context, the said Unnamalai, i.e., plaintiff filed a suit for partition in O.S. No. 201 of 2016 on the file of the III Additional District Judge, Salem against the co-owners and also some third party purchasers. In this context, it is the case of the plaintiff before the Court below that, some of the properties has been sold by co-owners to the third parties, prior to the said laying of the suit in O.S. No. 201 of 2016. In this regard, an extent of 2.21 acres at various survey numbers in the said village form part of the estate had been sold to one Indhirani some time in the year 1989, from whom another third party seems to have purchased the same, from whom the present revision petitioner purchased the property by way of sale deed in the year 2014 and 2015.

6. In this context, it is the further case of the plaintiff before the Court below that, even the said sale deed made to original third party purchaser, namely Indhirani, who is the vendor's vendor of the revision petitioner itself is questionable.

7. Be that as it may, as per the sale deed dated 10.03.1989, when Indhirani is entitled to have the property only of 2.21 acres, beyond which, the said Indhirani did not have any right over the property belongs to the plaintiff and others.

8. When that being the position, if the revision petitioner claimed title from the Indhirani, by virtue of the sale taken place in the year 2014 and 2015, he can enjoy the property only with respect of 2.21 acres exactly the property purchased by Indhirani and not beyond that.

9. However, in that context, it is also the case of the plaintiff before the Court below that, the present revision petitioner / defendant instead of enjoying 2.21 acres, which is equal to 0.88.5 hectares, is trying to enjoy more area, for which, he is not entitled to and the additional area which he is enjoying i.e., defendant, is the property belongs to the plaintiff and others. Therefore in order to get possession of the said other portion beyond 2.21 acres, the present suit was filed by the plaintiff seeking for mandatory injunction.

10. In this juncture only, the present application was filed before the Court below seeking to appoint an Advocate Commissioner to visit the property, note down the physical features and also the measurement with the help of the surveyor and to file a report with sketch, so that, what was the alleged encroached portion on the part of the revision petitioner / defendant can be identified or ascertained and based on which, the issue to be framed in the suit can be decided by the Court below.

11. Only in that circumstances, the application has been filed and the same has been properly considered and decided by the Court below, which therefore does not require any interference, the learned counsel appearing for the respondent herein contended. Whereas the learned counsel appearing for the revision petitioner would submit that, the revision petitioner has claimed title through the sale deed of the year 2014 and 2015, under which, the suit property was purchased by the defendant from his vendors, who purchased the same from Indhirani who is the purchaser from original owners of the property. The original owners sold the property to the said Indhirani by sale deed

dated 10.03.1989, from that day, the suit property had been in continuous possession and enjoyment with the successive vendor and ultimately came to the possession of the revision petitioner / defendant from the year 2014 and 2015 i.e., from the sale, through which, he purchased the property.

12. It is also the case of the defendant that, what has been purchased by the said sale deed has been in enjoyment and possession of the defendant and the defendant has not in possession or encroachment of any other property beyond purchased by him.

13. When that being the position, absolutely there is no scope for appointment of any Advocate Commissioner to note down the physical features and assuming if the Advocate Commissioner file a report, he cannot file any report with regard to the entitlement and enjoyment of the property based on the sale deed, through which, the defendant claims title and therefore such an exercise for appointment of Advocate Commissioner is not only unwarranted and vexatious, but also in the move of collecting evidence which is impermissible in law.

Therefore, the learned counsel appearing for the revision petitioner submits that, the impugned order appointing an Advocate Commissioner in the aforesaid purpose mentioned cannot be sustained and therefore it requires interference from this Court.

14. I have considered the said rival submission made by the parties and gone through the materials placed before this Court.

15. As has been rightly pointed out by the learned counsel appearing for the revision petitioner that, the suit for partition has been filed by the present plaintiff, Unnamalai by filing O.S. No. 201 of 2016 only very recently in the year 2016, whereas, the present suit property was purchased by the said Indhirani by valid sale deed dated 10.03.1989, as the said sale and subsequent sale had taken place in the year 2014 and 2015, under which, the defendant purchased the property, had never been questioned so far.

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16. If at all the suit in O.S. No. 201 of 2016 is filed comprehensively for partition among the co-owners on the properties

available in the estate, prior to filing of the suit either jointly or individually, if any joint owners or owners created any third party right, that right accrued on the third party or third party purchaser cannot be affected or defeated by filing suit for partition subsequently in the year 2016. Therefore, insofar as the prayer sought for in the present suit in O.S. No. 201 of 2016 is concerned, if at all the plaintiff / respondent herein has got any case, apprehension to state that, the revision petitioner / defendant beyond what for he is entitled, he is enjoying any other portion of the property belongs to the plaintiff and others, the comprehensive suit for declaration of title to that aspect also could have been laid and in this regard, a suitable amendment could have been made. Those attempts since has not been taken by the respondent / plaintiff so far as by merely filing an application for appointing an Advocate Commissioner to note down the physical features and file a report, will no way help the Court to arrive at the conclusion, in the interest of justice about the issue raised in the present suit, therefore, this Court is of the considered view that, the present impugned order allowing the IA appointing an Advocate Commissioner as has been prayed by the respondent / plaintiff is not

only unwarranted and unjustifiable but also erroneous and hence the said order is liable to be interfered with.

17. In view of the aforesaid facts and circumstances as well as the discussions, this Court feels that the impugned order is liable to be set aside, accordingly the same is set aside and the Civil Revision Petition is allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

18. It is made clear that, whatever observations made by this Court in this order shall only be construed for the purpose of disposing this Civil Revision Petition, hence these observations shall not stand in the way to decide the suit by the Court below on merits.

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19.11.2019

Index: Yes / No

Speaking order / Non speaking order

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R. SURESH KUMAR, J.

vji

To
The District Munsif Court,
Omalur.



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