



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 10.12.2019

CORAM:

THE HONOURABLE **MRS.JUSTICE R.THARANI**

C.R.P (MD)No.1042 of 2019

and

C.M.P.(MD)No.5731 of 2019

R.Mani ... Petitioner / Respondent / Defendant

Vs.

1.Manikandan

2.Ramsingh

... Respondents / Petitioners / Plaintiffs

Prayer: Civil Revision Petition filed under Article 227 of Constitution of India, against the fair and decreetal order dated 12.09.2018 made in I.A.No.509 of 2018 in O.S.No.140 of 2015 on the file of the District Munsif Court, Nilakottai.

For Petitioner : Ms. G.Vidhya Maheswaran

For Respondents : Mr.B.Rooban

ORDER

The Civil Revision Petition is filed against the order dated 12.09.2018 made in I.A.No.509 of 2018 in O.S.No.140 of 2015 on the file of the District Munsif Court, Nilakottai.

2. The petitioner herein is the defendant and the respondents are the plaintiffs in the suit. The respondents herein filed a suit seeking a prayer of declaration and for mandatory injunction against the petitioner herein/ defendant, to demolish the superstructure thereon. In the suit, the respondents herein/plaintiffs filed a petition in I.A.No.509 of 2018 for appointment of Court Commissioner and the trial Court allowed the petition. Against which, the petitioner / defendant preferred this Civil Revision Petition.

3. Brief substance of the petition in I.A.No.509 of 2018 is as follows:

The defendant's house is adjoining the suit property. The defendant has deposed that his building is within 55 feet and he left one foot vacant space on the western side. As a matter of fact the defendant's building measures 62 feet and hence, the appointment of Court Commissioner is necessary.

4. Brief substance of counter affidavit is as follows:

Written statement was filed during the month of April -

<https://hcservices.ecourts.gov.in/hcservices/>



2016. The construction of the defendant is 22 years prior to the suit and the appointment of Court Commissioner is not necessary.

5. After hearing both sides, the lower Court allowed the petition. Against which, the revision petitioner preferred this Civil Revision Petition.

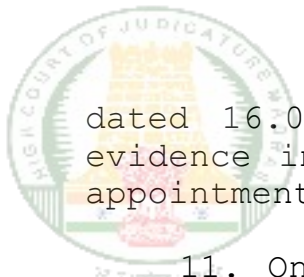
6. On the side of the revision petitioner, it is stated that the lower Court failed to consider that the petition for appointment of Court Commissioner was filed, after the examination of parties and after the evidence was closed and also when the suit was posted for argument and hence, it is highly belated. The lower Court had appointed the Court Commissioner without passing a speaking order, without considering the objection raised by the revision petitioner / defendant in his counter affidavit and the disputed construction is said to have been completed by the revision petitioner during April 2015 and the suit itself is barred by the principles of acquiescence. It is further stated that the petition for appointment of Court Commissioner was filed only on the date of arguments and hence, the petition for appointment of Court Commissioner is to be dismissed.

7. On the side of the revision petitioner, a judgment reported in **AIR 2004 Sikkim 39 (Tulamaya Chettri v. Younarayan Pradhan)** is cited wherein it is held that the prayer made by the defendants for local investigation, if allowed would amount to filling up lacunae in their evidence and such prayer should not be allowed.

8. On the side of the respondents, it is stated that the averments of the petitioner / defendant vide their statement and evidence in the suit are contradictory to their own stand in the evidence. The petitioner / defendant in his written statement has claimed that it is a clear case of acquiescence. Thereby, the defendant virtually had knowledge of the ownership of the land and he admitted the encroachment.

9. The defence of the defendant in the written statement is that he has constructed a building 25 years prior to the suit, but, in his evidence the defendant has admitted that he constructed the building only in the month of April-2015. The claim of the defendant is that he constructed the building within the measurement of 55 feet and he has left 1 feet vacant space on the western side. As a matter of fact, the defendant's building measures 62 feet including the vacant space of 1 feet on the western side of the building and only with the help of the Court Commissioner the property can be identified and then only the Court can come to a correct decision. Hence, the respondents prayed that the petition to be dismissed.

10. On the side of the respondents, a judgment of this Court in **S. Ar. No. 93 of 1993 (Vaithinattar and another Vs. Sakkubai Ammal)**,
<https://hc.services.e2court.gov.in/Services/>



dated 16.06.2004, is cited wherein it is held that the best of evidence in cases of such nature could have been obtained only by appointment of a Commissioner.

11. On the side of the respondents, a judgment of this Court in C.R.P.(PD)No.1509 of 2017 (R.Sivakumar and another Vs. K.P.N.Raajesh and another) is cited wherein it is held that "it is pertinent to note that from the document Ex.A13 and Ex.B7, the reports filed by the Inspector of Police, there are contradictions. In Ex.B7, the Inspector of Police has stated that there is no pipeline in the 'B' schedule property which was laid thirty years back. In view of these contradictions, it is necessary for the appointment of an Advocate Commissioner to inspect the property to find out whether there is pipeline as mentioned in Ex.A13 or there is no pipeline as mentioned in Ex.B7, submitted by the Inspector of Police."

12. It is seen that there is a prayer for mandatory injunction to demolish the construction made by the defendant in the suit property. In the above circumstances, an opportunity for the plaintiff to give the correct measurement of encroachment is to be given and the appointment of the Court Commissioner will not be a prejudice to the case of the defendant and the Commissioner Report and Plan will be helpful for the Court to decide the issue in dispute.

13. In the above circumstances, there is no reason sufficient enough to interfere with the order of the trial Court and hence, this Civil Revision Petition is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (AD-I)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

Ls

To

1.The District Munsif Court,
Nilakottai.

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

C.R.P (MD)No.1042 of 2019

10.12.2019

VB (22.01.2020) 3P 4C

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