

IN THE HIGH COURT OF JUDICATURE AT MADRAS

[RESERVED ON : 06.11.2020]

[PRONOUNCED ON : 30.12.2020]

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

C.R.P.NPD.No.1890 of 2020

and

C.M.P.No.11360 of 2020

1. K.R. Kamalraj
2. K.R.Ravindran

... Petitioners/Defendants

.. Vs ..

C.Sridharan

... Respondent/Plaintiff

Prayer :- Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and decreetal order dated 21.02.2020 passed by the learned Subordinate Judge at Kangayam, in I.A.No.143 of 2018 in A.S.No.13 of 2017.

For Petitioners : Mr.P.Valliappan
for M/s.PV Law Associates
For Respondent : Mr.N.Manoharan

ORDER

This Civil Revision Petition is filed under Article 227 of the Constitution of India, against the fair and decreetal order dated 21.02.2020 passed by the learned Subordinate Judge at Kangayam, in I.A.No.143 of 2018 in A.S.No.13 of 2017.

2. The defendants in the suit in O.S.No.195 of 2010 are the revision petitioners herein.

3. The suit in O.S.No.195 of 2010 was dismissed and hence, the respondent herein/plaintiff has preferred the said appeal in A.S.No.13 of 2017 before the learned Subordinate Judge, Kangayam. Pending the said appeal, the plaintiff has also filed the above said application in I.A.No.143 of 2018 under Order 26 Rule 9 of CPC seeking appointment of Advocate Commissioner to measure the property and to file report with plan. The said I.A.No.143 of 2018 was filed at the appellate stage viz., in A.S.No.13 of 2017.

4. The averments in the application in I.A.No.143 of 2018 are as follows:-

[i] The suit was filed before District Munsif Court, Kangeyam, for declaration as well as for delivery of possession of the encroached portion by the defendants in S.F.No.359/1.

[ii] I.A.No.837/2010 was filed for appointment of an Advocate Commissioner and in the said visit, the encroached portion, the newly created pathway, the newly planted Coconut saplings and the common well were all referred.

[iii] I.A.No.531/2014 was filed and allowed for making out measurements, as the plaintiff had pleaded encroachment. The said report was filed and exhibited as Exs.C.3 and C.4.

[iv] The defendants have filed an interlocutory application in I.A.No.433/2015 to eschew the Commissioner's report and plan which

was allowed and the trial Court had ordered for scraping of the report and plan. In the very same application, another Advocate Commissioner was appointed who was to submit report regarding the encroachment along with physical features of the property. The report and plans were exhibited as Ex.C.3 to Ex.C.5. In the said report, the very same features as noted in the report scraped earlier were pointed out but the encroached portion was not properly brought out with necessary extent.

[v] The plaintiff again filed an application in I.A.No.1627/2015 for the limited purpose of bringing out the measurement of the encroached portion and the portion existing on the western side of the live fence and as well the run up of the live fence in the suit property. The said petition was dismissed. As against the said dismissal order, the plaintiff has preferred a revision and without going into the merits of the case, the revision was also dismissed as it was concluded that the said petition was filed only to drag on the proceedings. Without arriving at the extent of the encroached portions, the real dispute existing between the plaintiff and the defendants cannot be resolved and therefore, it is necessary to

appoint an Advocate Commissioner to measure the property with the help of a Surveyor as well as bring out the physical features, especially, the extent of property on the western side of the live fence and the eastern side. Hence, the application.

5. In the counter, the defendants have stated that before the trial Court, a similar application was filed and the same was dismissed and confirmed in the CRP and therefore, the second application is not maintainable.

6. Heard Mr.P.Valliappan, learned counsel for the petitioners and Mr.N.Manoharan, learned counsel appearing for the respondent.

7 [A]. Learned counsel for the respondent has filed typed set of papers inclusive of Advocate Commissioner's report that are marked as Exs.C.1 and C.2 and original report Exs.C.3 and C.4 which were subsequently scrapped. Thereafter, another Advocate Commissioner was appointed and Exs.C.3, C.4 and C.5 were marked.

7 [B]. Originally, the suit was filed by the plaintiff declaring him as absolute owner of the suit property as well as delivery of vacant possession and for mandatory injunction directing the defendants to restore the suit property by removing the coconut saplings planted on it and also the cart track found therein.

8 (a). The subject matter of the suit property is in old S.F.No.979, new S.F.No.359/1 within specific boundary measuring 1.44 acres. This smaller extent within specific boundary is claimed to be the encroached portion by the plaintiff.

8 (b). It is not in dispute between the plaintiff and the defendants that RSF No.359/1 actually measuring of a larger extent, was partitioned between the plaintiff's father Chidambaram and his paternal uncle Jagadeesan under Ex.A1-Partition Deed, dated 11.10.1982. Each of the brother, the father of the plaintiff Chidambaram and Jagadeesan were allotted 11.69 acres each. The western portion fell to Chidambaram while the eastern portion was owned by Jagadeesan.

9. The 1st defendant is a purchaser and he also traces his title to his vendor under Ex.A.1-Partition Deed only. The 1st defendant had purchased 7.19 acres. When partition was effected between Chidambaram and Jagadeesan, a demarcating fence was provided, as a live fence between the eastern and the western portions of the property. In such a situation, the plaintiff contends that the defendants obliterated the fence and annexed the suit property, formed the cart track and also planted Coconut saplings.

10. The said report was marked as Ex.C.1 and the plan was marked as Ex.C.2. Subsequently, when the suit was pending before District Munsif Court, Kangeyam, in I.A.No.531/2014, Commissioner was appointed who had measured the property with the help of a Surveyor and placed his report and plan which were marked as Ex.C.3 and C.4, later on scraped under order dated 06.02.2015.

11. After the earlier Commissioner's report and plan were scraped, the defendants came up with an application in I.A.No.933/2015, in

which, Commissioner was appointed, who had measured the property and placed his report and two plans, which were marked as Ex.C.3 to Ex.C.5.

12 (a). It is to be stated that when the suit argument was completed and when the matter was posted for judgment, it appears that the plaintiff has filed I.A. to re-open the plaintiff's case and for the purpose of appointment of Advocate Commissioner on the ground that Exs.C.3 and C.4 do not render any assistance to resolve the dispute. That application was dismissed on the ground that when the matter was posted for judgment, re-opening application was filed for the purpose of appointment of Advocate Commissioner only to drag on the proceedings and on that ground, the said I.A. for re-opening of the plaintiff's case was dismissed and consequently, the application filed for appointment of Advocate Commissioner was also dismissed.

12 (b). Aggrieved against the dismissal order, the plaintiff has preferred civil revision petitions before this Court in C.R.P.PD.Nos.1869

and 1870 of 2016 and by an order dated 15.07.2016, the above two civil revision petitions were also dismissed by this Court.

13. At this juncture, it is relevant to observe that in the said judgment passed in C.R.P.(PD).Nos.1869 and 1870 of 2016, this Court at paragraph Nos.4 and 5 has held as follows:-

"4. Further, the contention that the Exs.C.3, C.4 and C.5 do not render any aid to the Court for proper adjudication is liable to be rejected as it is falling in the domain of this Court to decide it.

5. By way of an additional proof affidavit dated 08.06.2015, the plaintiff had informed concurrence therewith. The case stood posted for judgment on 05.11.2015 when I.A.Nos.1626 and 1627 of 2015 have been moved towards reopening of the cases for the purpose of reappointment of the very same Advocate Commissioner. Though the case was last posted for judgment on 24.06.2016, the Court below was precluded from passing judgment on such date since as a consequence of entertaining the present revisions, an order of interim stay was passed on 22.06.2016."

14. In other words, the earlier application filed for reopen was dismissed and consequently, the application filed for appointment of Advocate Commissioner was also dismissed. While dismissing the request for appointment of Advocate Commissioner to revisit the suit property, the trial Court has observed that the contention that Exs.C.3, C.4 and C.5 do not render any aid to the Court for proper adjudication, is liable to be rejected as it is falling within the domain of this Court to decide it. The said finding has been confirmed in the above said Civil Revision Petition Nos.1869 and 1870 of 2016. Thereafter, the suit argument was heard and judgment was pronounced on 08.08.2016. In the said judgment passed in O.S.No.195 of 2010, the learned District Munsif, Kangayam, has observed as follows:-

"10. Thus, it appears from Exs.C.3 to C.5 that the property of the plaintiff is encapsulated with kiluvan fence on four sides.

The said canal to an extent of 18 cents is running West to East on the plaintiff's property and to an extent of

15 cents running in the 1st defendant's property. The Advocate/Commissioner as well as the surveyor has not given any measurements falling in excess in the 1st defendant's land. In other words there is no encroachment has been pointed out on the immediate west of the 1st defendant's land and also on the immediate east of the plaintiff's property.

14. For the reason that he has failed to bring on record the exact measurements of the suit property before this court even otherwise by way of Exs.C1 and C2. What has been brought under Exs.C1 and C2 is totally contra to the facts brought forth under Exs.C2 to C5. On the conjoint analysis of Exs.C1, C2 and C3 to C5 this court would be able to find out only the existence of kiluvan fence on all the four sides of plaintiff's property. In the absence of exact measurements of the suit property brought before this Court it is very hard to believe the version of the plaintiff."

15. On the dismissal of the suit, the plaintiff has preferred an appeal in A.S.No.13 of 2017. Pending the said appeal, he has preferred an Interlocutory Application in I.A.No.143 of 2018 for appointment of an

Advocate Commissioner to revisit the property and to give measurement, since there is a contradiction between Exs.C.1 to C.5 with regard to the margin or boundary between the two parties. That is the dispute. The learned Subordinate Judge, Kangayam, has allowed the said application and hence, the present civil revision petition has been filed by the defendants.

16. After perusing the typed set of papers filed by the petitioners and after perusing the documents Ex.C.1 and C.2, I find that the observation made by the learned Subordinate Judge, Kangayam, in the impugned order that it is necessary to render justice, since the present available Advocate Commissioner's report does not render any assistance to resolve the dispute is just and proper.

17. The admitted case of both the parties is that the suit property is in old S.F.No.979, new S.F.No.359/1 within specific boundary measuring 1.44 acres. This smaller extent within specific boundary is claimed to be the encroached portion by the plaintiff.

18. It is not in dispute between the plaintiff and the defendants that RSF No.359/1 actually measuring of a larger extent, was partitioned between the plaintiff's father Chidambaram and his paternal uncle Jagadeesan under Ex.A1-Partition Deed, dated 11.10.1982. Each of the brother, the father of the plaintiff Chidambaram and Jagadeesan were allotted 11.69 acres each. The western portion fell to Chidambaram while the eastern portion was owned by Jagadeesan.

19. The 1st defendant is a purchaser and he also traces his title to his vendor under Ex.A.1-Partition Deed only. The 1st defendant had purchased 7.19 acres. When partition was effected between Chidambaram and Jagadeesan, a demarcating fence was provided, as a live fence between the eastern and the western portions of the property. In such a situation, the plaintiff contends that the defendants obliterated the fence and annexed the suit property, formed the cart track and also planted Coconut saplings.

20. The said report was marked as Ex.C.1 and the plan was marked as Ex.C.2. Subsequently, when the suit was pending before District Munsif Court, Kangeyam under I.A.No.531/2014, Commissioner was appointed who had measured the property with the help of a Surveyor and placed his report and plan which were marked as Exs.C.3 and C.4, later on scraped under order dated 06.02.2015.

21. The respondent herein/plaintiff has relied on the following decisions of this Court reported in,

1) (2008) 1 MLJ 961 [K.Vadivel vs.Natarajan and Another]

2) (2011) 6 MLJ 920 [Manikandan vs. Nadan @ Gnanamuthu and Others]

3) (2013) 7 MLJ 600 [Ganesa Gounder v. Chakkaravarthy and Others]

22. In view of the above decisions, even at the appellate stage, in appropriate facts and circumstances of the case, the appellate Court can

appoint an Advocate Commissioner and appointment of Advocate Commissioner at the appellate stage is not barred.

23. After going through the present Commissioner's Report Exs.C.1 and C.2 coupled with Exs.C.3, C.4 and C.5, which are filed in the typed set of papers, I find that there are title deeds and the 1st respondent also had purchased the property from Jagadeesan, who had acquired title under Ex.A1-Partition Deed and hence, it is very much necessary to bring out the total extent on eastern side as well as on the western side, thereby arrive at the demarcating boundary between these two portions, which would clearly show whether there is any encroachment or not.

24. The demarcating boundary between the western portion belonging to the plaintiff and the eastern portion belonging to the defendants, is a straight line abutting the common Well. Whereas the rough plan Ex.C.4 filed by the Commissioner after bringing up the physical features existing in the suit property, the demarcating boundary

is not a straight line and after the well, the said boundary line has deviated further west and indeed this deviation is marked with a live fence and thus, the learned Appellate Judge has rightly observed that the present Exs.C.4 and C.5 do not clarify the real issue. It remains to be stated that the finding rendered by the learned trial Judge, as extracted supra, is to the effect that based upon the document filed before the Court, the Court could not be able to find out what is the extent of kiluvan fence on all four side. In the absence of exact measurement of the suit property, it is all hard believe the version of the plaintiff.

25. The object and purpose of appointment of Advocate Commissioner to note down the physical features and to measure the suit property with the help of Assistant Surveyor and to file F.M.D. sketch is only to enlighten or to give a replica of the what is available on site. The lower Appellate Court has categorically given the finding as extracted supra that Exs.C.1 and C.2 and C.3 and C.4 do not reflect any assistance to the Court and in the absence of measurement so also the earlier I.A. which was filed at the fake end of the trial, the learned Judge has

observed the domain of determining whether the Advocate Commissioner's report is sufficient enough to render any aid or assistance to resolve the dispute is within the domain of the Judge or the Presiding Officer. Subsequently, this order has been confirmed by this Court in the civil revision petition not on merits but on the ground that since such application was filed at the time when the matter was reserved for orders. In other words, the real controversy was not gone into in the said civil revision petition.

26. The observation made by the learned trial Judge in dismissing the earlier I.A. that whether the present existing Exs.C.3, C.4 and C.5 Commissioner's Report is sufficient or not is left to the discretion of the Judicial Officer since it falls under the domain. Subsequently, in the judgment, he has observed that the learned trial Judge, as extracted above, also found that the documents Exs.C.1, C.2, C.3, C.4 and C.5, are unable to give the exact picture and unable to give the exact measurement thereon also assumes significance that is the specific grievance of the petitioner/plaintiff.

27. As stated supra, the defendants have derived the title from the brother of the plaintiff also assumes significance. There are title deeds, and the 1st respondent also had purchased the property from Jagadeesan, who had acquired title under Ex.A1 partition deed and it is very much necessary to bring out the total extent on eastern side as well as on the western side, thereby arrive at the demarcating boundary between these two portions, which would clearly show whether there is any encroachment or not and thus, I find that the available Commissioner's report is silent about the lis. When the documents available viz., Exs.C.1 and C.3 are not sufficient to render any assistance or aid to the Court, the Court can very well appoint the Advocate Commissioner.

28. No doubt true that the earlier civil revision petition has been disposed of not on merits, as observed earlier. The finding and opinion given by the trial Court in rejecting the I.A. are that it is for the Court to determine as to whether the existing documents Exs.C.1 to C.4 are sufficient enough or not and the same is also been confirmed. The trial

Court has given a finding that the existing Exs.C.1 to C.4 do not render any assistance and on that sole ground, the suit was dismissed. Now, pending appeal, the plaintiff has filed the application for appointment of Advocate Commissioner. After going through the documents Exs.C.1, C.2, C.3, C.4 and C.5, the learned Appellate Judge has also come to the conclusion that to resolve the dispute between the parties, the measurement with respect to the deviation portion as found in Ex.C.2 which is said to be missing in Exs.C.4 and C.5 is to be taken into consideration. That is the crux of the suit viz., the area where the defendants alleged to have been encroached upon. When that being the case, the lower Appellate Court has rightly come to the conclusion that the appointment of Advocate Commissioner is necessary. After going through the report Exs.C.1, C.2 and C.3 to C.5, I am of the considered view that the view expressed by the learned Appellate Judge is just and proper and hence, I confirm the view expressed by the learned lower Appellate Judge and accordingly, this Civil Revision Petition is liable to be dismissed.

29. In the result, this Civil Revision Petition is dismissed.
However, there shall be no order as to costs. Consequently, connected
Miscellaneous Petition is closed.

30.12.2020

Index : Yes
Internet : Yes
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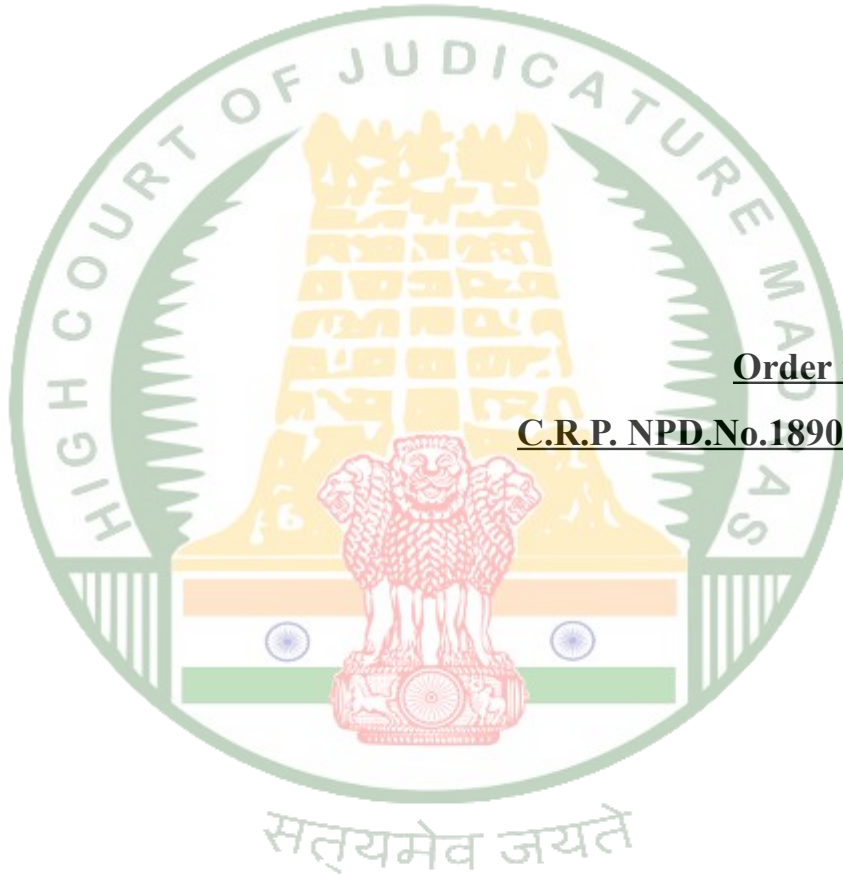
The Subordinate Judge,
Kangayam.



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RMT.TEEKAA RAMAN, J.

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Order made in
C.R.P. NPD.No.1890 of 2020

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