

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on : 03.02.2020

Pronounced on : 25.02.2020

CORAM :

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

CRP.(NPD).No.3561 of 2014

and

MP.No.1 of 2014

Kanniappan ... Petitioner

Versus

1.Parimala

2.Vasanthi

3.Padmavathi Ammal

... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India, against the order of eviction dated 14.03.2009 passed in I.A.No.66 of 2002 in O.S.No.120 of 2000 on the file of the Subordinate Court, Ponneri.

For petitioner : Mr.A.Palaniappan

For Respondents : Mr.K.Prabhakaran, (for R1)

: No Appearance - R2 & R3

ORDER

This Civil Revision Petition has been filed against the order dated 14.03.2009 passed in I.A.No.66 of 2002 in O.S.No.120 of 2000, passed by the Subordinate Court, Ponneri under Order XXXIV and Rule 4 of CPC.

2.The first defendant in the suit in O.S.No.254 of 1992 is the revision petitioner herein. The suit in O.S.No.254 of 1992 was subsequently stood transferred to Sub-Court, Ponneri and re-numbered as O.S.No.120 of 2000.

3.The first respondent/plaintiff has filed the suit in O.S.No.120 of 2000, before the learned Sub-Ordinate Judge, Tiruvellore, for a preliminary decree of partition for 2/3rd share, alleging that he has received a portion of the property by way of settlement of 1/3rd share from the third defendant and therefore she is entitled to 2/3rd share in the suit property. After contest, preliminary decree was passed on 26.06.2001 and

thereafter, no appeal has been preferred before any other Court. Thereafter, the plaintiff has filed an application in I.A.No.66 of 2002, before the learned Subordinate Judge, Ponneri, for appointment of Advocate Commissioner to divide the suit property and allot separate possession of her 2/4th share. The first respondent in the said I.A.No.66 of 2002, has filed a counter for passing of final decree in respect of his 1/4 share in the suit property.

4. Consequent to the same, an Advocate Commissioner was appointed and he had inspected the property on 30.10.2008. With regard to the report of the Advocate Commissioner, the first defendant has raised objection stating that as per the Development Control Rules, the minimum area of passage for continuous building area for single plot must be 1 meter for two plots i.e., 1.5 meter. Furthermore, there is only one access to Kamarajar Street and the Advocate Commissioner has allotted the area on the premise that the adjacent viz., Northern portion of the site, which has already been possessed by the first defendant/revision petitioner herein and further he has relied upon the Standing Orders issued by the Chennai Metropolitan Development Authority that it should be a minimum pathway between the two plots is 1.5 meters or otherwise 5 feet for any development or for constructions of building. Since it had only 3 feet, he could be in the disadvantage position to develop the property. Without analysing the Chennai Metropolitan Development Authority, the commissioner has submitted his report which was erroneously accepted by the Trial Court and allowed the said I.A.No.66 of 2002, by rejecting the contentions raised by the first defendant/petitioner herein. Thereafter, an Execution Petition was filed in E.P.No.74 of 2014, wherein, the first defendant filed a counter stating and during the pendency of the execution petition, the present Civil Revision Petition has been filed.

5. The learned counsel for the revision petitioner/first defendant would contend that in view of the statutory bar contained in the Developmental Control Rules, he will not in a position to make any constructions or building in the plot in the site now allotted to him, thereby, the allotment made to him is a "fruit less allotment". Despite his objection raised at the earliest point of time as to the report of the Advocate Commissioner, his equitable relief under the partition has been defeated and hence by the report of the Advocate Commissioner, they want to make the plaintiff to get unlawful enrichment by allotting the building site leaving 5 feet passage in front of the house which will make the allotment as useless allotment, which is unlawful and arbitrary. The Advocate Commissioner ought not to have filed such report without taking note of notice of reference, in respect of the CMDA Rules, however, further he

submitted that the reasons assigned by the Advocate Commissioner in allotting the present allotment was an adjacent site, which was already belonged to him. However, without giving necessary passage, he could not be in a position to put up any constructions either in the allotted site or in his existing pre-owned site.

6. Per contra, the learned counsel for the respondent/plaintiff would contend that the entire suit property is to the extent of 1654 sq.ft., and as the plaintiff is entitled to $2/4^{\text{th}}$ equal to $1/2$ share, he ought to have been allotted 827 sq.ft. However, the Advocate Commissioner allotted only 622 sq.ft., while, the appellant/first defendant though entitled for 103 sq.ft., the Advocate Commissioner has allotted 184 sq.ft., since it is vacant land. The next contention of the respondent is that in the absence of any Regular Appeal being preferred against the final decree, the revision petition is not maintainable. The learned counsel appearing for the respondent would rely upon the following judgments reported in

- (i) AIR 1984 SC 38 - [Mohemed Yunus Vs. Mohemed Mustaqim and others]
- (ii) 2016 (4) CTC 103 (SC) - [Rishabh Chand Jain and others Vs. Ginesh Chandran Jain]
- (iii) AIR 1986 MP 140 - [Lala Lalsingh Vs. Seth Shobhagchand]

7. In reply to the contention raised by the learned counsel for the respondent, the learned counsel for the petitioner would contend that since execution proceedings have been set in motion, as such, when there is glaring error apparent on the face of the record, revision petition is maintainable and he want equitable relief since the relief sought for in the suit is a comprehensive one.

8. After perusing the Advocate Commissioner's report and also objection by the present revision petitioner at the earliest point of time and explanation offered by the Advocate Commissioner in granting larger vacant site and in leaving lesser built up area allotted to the opposite party, this Court is of the view that the Advocate Commissioner has miserably failed to note that the 5 feet passage, though allotted in the report will not serve the parties since the revision petitioner/first defendant cannot make any improvements in the site for want of building sanction. In the suit for partition parties are entitled for equitable relief. Each party has to enjoy the fruit of decree and giving fruitless decree to one of the sharers arbitrarily is not correct. In the interest of justice, merely because, there was a existence of old building that does not means passage should be restricted to 5 feet, despite the developmental rules of CMDA mentioned by the revision petitioner. Hence, the Civil Revision Petition is

allowed and the order passed dated 14.03.2009 passed in I.A.No.66 of 2002 in O.S.No.120 of 2000 on the file of the Subordinate Court, Ponneri is set aside and the execution Court is hereby is directed to appoint a fresh Advocate Commissioner to make proper and just allotment. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

klt

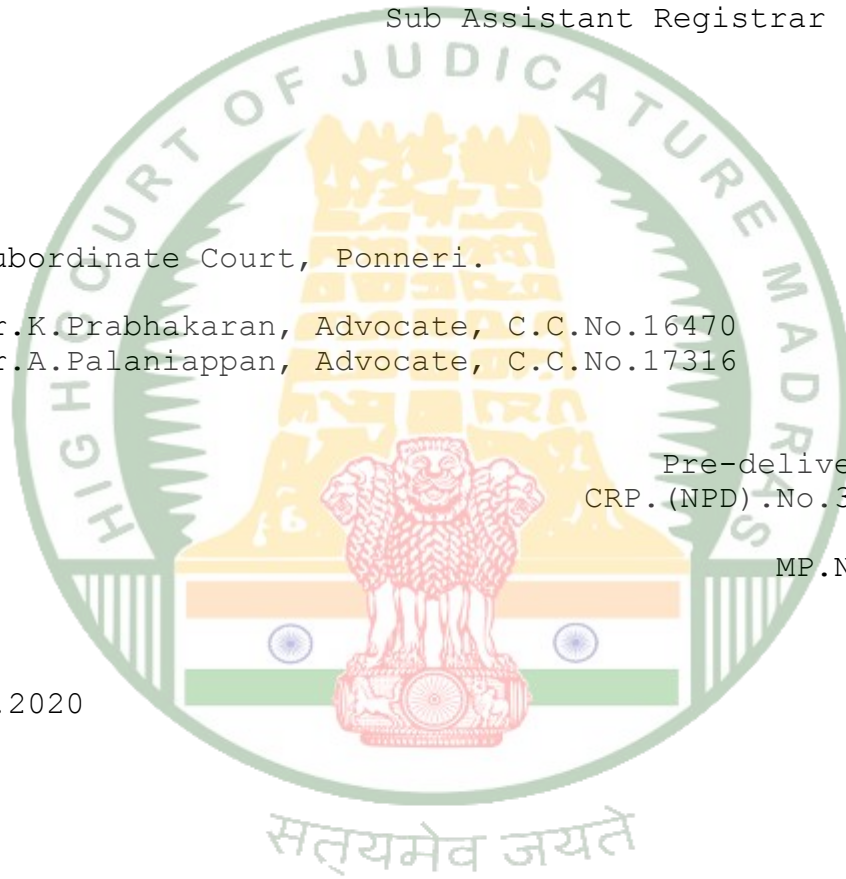
To
The the Subordinate Court, Ponneri.

+1cc to Mr.K.Prabhakaran, Advocate, C.C.No.16470

+1cc to Mr.A.Palaniappan, Advocate, C.C.No.17316

Pre-delivery order in
CRP.(NPD).No.3561 of 2014
and
MP.No.1 of 2014

BS(CO)
nvi/29.05.2020



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