

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 18.11.2020

Pronounced on : 23.12.2020

Coram:

THE HONOURABLE MR.JUSTICE P. RAJAMANICKAM

CRP(PD)No.3062 of 2017

and

CMP.No.14373 of 2017

1.K.Sugamathi
2.A.Rubha Rani

...Petitioners/Defendants

Vs.

1.M.Manoharan
2.M.Senthilvelu
3.S.Usharani

... Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the Fair and Decretal order of the District Munsif Court at Mettur, dated 23.11.2016 in I.A.No.400 of 2015 in O.S.No.104 of 2015.

For Petitioners : Mr.P.Valliappan

For Respondents : Mr.J.Ramakrishnan for R1
No appearance for R2 & R3

ORDER

This Civil Revision Petition has been filed by the respondents 3 and 4/defendants 3 and 4 against the order passed by the District Munsif, Mettur in I.A.No.400 of 2015 in O.S.No.104 of 2015 dated 23.11.2016.

2. The first respondent herein / plaintiff had filed an application in I.A.No.400 of 2015 in O.S.No.104 of 2015 on the file of the District Munsif, Mettur, under Order 26 Rule 9 and Section 151 of CPC to appoint an Advocate Commissioner to inspect the suit property and measure the same with the help of the Village Administrative Officer and a qualified surveyor and also note down the physical features and existence of the cart track and the construction made by the respondents by encroaching the suit property and file a report with plan. The learned District Munsif by the order dated 23.11.2016, had allowed the said application and appointed an Advocate Commissioner, to inspect the suit property and note down the physical features and measure the entire area in S.F.Nos.50/1 to 50/4 by considering the partition deed dated 15.12.1981 with the help of the concerned Village Administrative Officer and a qualified surveyor and find out the suit property and file a

detailed report with plan. Feeling aggrieved, the respondents 3 and 4 / defendants 3 and 4 have filed the present Civil Revision Petition.

3. Heard Mr.P.Valliappan, the learned counsel for the petitioners and Mr.J.Ramakrishnan, the learned counsel for the first respondent.

4. The learned counsel for the petitioners has submitted that the first respondent herein had filed a suit in O.S.No.104 of 2015 on the file of the District Munsif, Mettur, for declaration and other reliefs relying upon the partition deed dated 15.12.1981. He further submitted that since neither the first respondent nor his family members are parties in the said partition deed, he cannot claim any right based on the said partition deed. He further submitted that as per the revenue records produced by the first respondent, there is no pathway existing as alleged by the petitioner. He further submitted that the first respondent had already made representations to measure the land in S.No.50/1 before the Tahsildar on 09.01.2012 and 13.03.2012 and accordingly, the said land was measured by the Taluk Surveyor. But, not being satisfied with the said measurement, he filed an appeal on 26.03.2012 before the District Collector for fresh measurement. After that, the land in S.No.50/1 was

again measured by the concerned surveyor and the said surveyor gave a statement to the Tahsildar stating that a common revised plan by including the sub-division Survey Nos.50/1 to 4 has to be prepared and measure the same and then only, a clear cut finding can be given with regard to whether any encroachment is made. He further submitted that the Tahsildar, Mettur and the Assistant Director of land survey also issued memos to the plaintiff to take steps for getting a revised plan. But the plaintiff had not taken any steps for getting a revised plan. He further submitted that unless a common plan is prepared as mentioned in the aforesaid memos, the properties cannot be measured and without considering the said facts, the trial court had allowed the application filed by the first respondent and appointed an Advocate Commissioner to measure the properties and file a report. He further submitted that since suit is for declaration, permanent injunction and mandatory injunction, the first respondent has to prove his title over the suit property by producing oral and documentary evidence. He further submitted that an Advocate Commissioner cannot be appointed to find out who is in possession of the suit property. He further submitted that unless a combined survey plan is prepared by the concerned department by

combining the lands situated in S.Nos.50/1 to 4, the properties cannot be measured and therefore, he prayed to allow this CRP and set aside the order passed by the trial court in I.A.No.400 of 2015 in O.S.No.104 of 2015.

5. In support of the aforesaid contentions, the learned counsel for the petitioners has relied upon the following decisions:

- 1. R. Justin Arulappa Vs. R. Xavier Arulappa and another, 2010 (1) MWN (Civil) 840;***
- 2. Thangaraj Vs. Pappathi, 2014 (2) CTC 68;***
- 3. Sevugan & Another Vs. Chinnathambi, 2016 (3) MWN (Civil) 527 and***
- 4. K. Suresh Napoleon Vs D. Mohan and another 2017 (6) CTC 19.***

6. Per contra, the learned counsel for the first respondent has submitted that since the suit has been filed to declare that the plaintiffs having cart track right which is shown in the partition deed dated 15.12.1981, for permanent injunction to restrain the defendants from obliterating the said cart track for mandatory injunction directing the

defendants to remove the foundation laid by them in 'B' schedule property and for recovery of possession of the said 'B' schedule property, in order to prove the existence of the said cart track in the land and to prove the encroachment made in the said cart track, appointment of an Advocate Commissioner is absolutely necessary. He further submitted that even at the time of filing the suit itself, the first respondent had filed the said application seeking appointment of an Advocate Commissioner. He further submitted that since the Tahsildar and Assistant Director of land survey issued memos to the plaintiff stating that the measurements can be taken only after consolidating the Survey Nos.50/1 to 4, the truth would come out by combined measurement of the aforesaid sub-divisions and taking into consideration the said facts, the learned trial court had allowed the application filed by the first respondent and appointed an Advocate Commissioner to measure the land situated in the aforesaid Survey Nos. He further submitted that the lands situated in the aforesaid Survey numbers belonged to the parties to the suits and the petitioners cannot object to measure the land situated in the aforesaid sub-divisions. He further submitted that appointment of an Advocate Commissioner to find out the encroachment, cannot be said as only to prove the possession, Commissioner is appointed and taking into

consideration all the aforesaid facts, the learned trial court had appointed an Advocate Commissioner and in the said order, this court need not interfere and therefore, he prayed to dismiss this Civil Revision Petition.

7. The learned counsel for the first respondent in support of his contention has relied upon the following decisions:-

1. *Ganesa Gounder Vs. Chakkaravarthy and Others*, (2013) 7 MLJ 600;

2. *M. Samuvel Vs. Suyambukani and Others*, CRP.(PD) (MD) No.1106 of 2014 dated 28.09.2020.

8. A perusal of the typed set of papers filed by the petitioners shows that the first respondent herein had filed a suit to declare that he is having the cart track right which is shown in the partition deed dated 15.12.1981; for permanent injunction restraining the defendants therein from disturbing his peaceful possession and enjoyment of the suit 'A' schedule property, obliterate the cart track, laying any foundation in the suit 'A' schedule property; for mandatory injunction directing the defendants therein to remove the foundation laid in 'B' schedule property and for delivery of vacant possession of the 'B' schedule

property. He claimed right over the said cart track relying upon the recitals found in partition deed dated 15.12.1981. According to the petitioners, neither the first respondent nor his family members were parties in the said partition deed and hence the first respondent is not entitled to claim any right based on the said partition deed. But they have not denied the existence of the cart track. The issue as to whether the first respondent is entitled to have right over the said cart track has to be decided in the suit. Since the first respondent claimed mandatory injunction and also for delivery of possession stating that the petitioners had encroached the said cart track and laid foundation unless an Advocate Commissioner is appointed and measure the properties with the help of a qualified surveyor by referring to the FMB and other revenue records, the court cannot come to the conclusion whether any encroachment has been made.

9. In ***R. Justin Arulappa Vs. R. Xavier Arulappa and another***, (cited supra), this court in paragraph Nos.9 & 10 has observed as follows:

“9. In the instant case, the Court below has not even chosen to give a *prima facie* finding for the purpose of issuance of commission without notice to the other party. The need to

have resorted to Order 26, Rule 9 of C.P.C ought to be felt by the court for the purpose of elucidating certain details and it cannot mechanically appoint an Advocate Commissioner without focusing attention as to what are the questions of dispute and whether for deciding the disputed question the appointment was necessary. But, in this case, utter disregard to the above said principles, the Court below had appointed an Advocate Commissioner to make local investigation as requested by the 1st respondent without even considering whether such issuance of commission is warranted at this stage.

10. Therefore, I have no hesitation to hold that the impugned order of the Court below is improper and suffers from illegality. In the event of a local investigation being made by the Advocate Commissioner pursuant to the issuance of such a commission, then the said report will be regarded as inadmissible and *non-est*.”

10. From the aforesaid decision, it is clear that in that case, the trial court had appointed an Advocate Commissioner without giving notice to other side and also has not recorded any valid reasons. But, in the case on hand, the trial court had passed orders appointing Advocate Commissioner after hearing both sides and also recorded cogent reasons for appointment of an Advocate Commissioner. Hence, the aforesaid decision will not apply to the facts of this case.

11. In *Thangaraj Vs. Pappathi*, (cited supra), before the trial court itself, the revision petitioner filed an application for appointment of an Advocate Commissioner for submitting a report and plan after noting the physical features of the suit property and accordingly, the trial court had appointed an Advocate Commissioner and the Advocate Commissioner also inspected the suit property and filed a report with plan and the same were marked as Exs.C1 and C2 respectively. After considering the entire evidence, the trial court had dismissed the suit. As against the same, the revision petitioner had filed an appeal and also filed an application for appointment of an Advocate Commissioner to measure the suit property and to fix the boundary line demarketing the suit property. The Appellate court had dismissed the said application. As against the same, the plaintiff had filed a revision before this court. This court after taking into consideration of the aforesaid facts, had dismissed the said civil revision. But in this case, the trial court after considering the entire facts and circumstances of the case had appointed an Advocate Commissioner to measure the suit property and also the properties situated in other sub-division survey numbers. Further, in this case, for the first time, Advocate Commissioner has been appointed. Therefore, the aforesaid decision will not apply to the facts of this case.

12. In *Sevugan & Another Vs. Chinnathambi*, (cited supra), the plaintiffs had filed a suit for declaration of their title and for permanent injunction and also filed an application to appoint an Advocate Commissioner to inspect and measure the suit property with the help of a surveyor and file a report with plan. The trial court had dismissed the said petition holding that the Advocate Commissioner cannot be appointed to collect the evidence to prove the possession of the suit property. Aggrieved by the same, the plaintiff had filed a revision before this court. This court had dismissed the said revision upholding the view of the trial court that the Advocate Commissioner cannot be appointed to collect the evidence to prove the possession of the suit property. In this case, the respondents have not filed any application to appoint an Advocate Commissioner to note down their possession over the suit property. On the contrary, they had filed an application before the trial court to note down the physical features especially the existence of the cart track and to measure the property to find out the fact that in which survey numbers the said cart track runs. Therefore, the aforesaid decision also will not apply to the facts of this case.

13. In ***K. Suresh Napoleon Vs D. Mohan and another***, (cited supra) the respondents therein had filed a suit for declaration, possession and mandatory injunction. In that suit, they also filed an application to appoint an Advocate Commissioner to make inspection of the suit property with the help of a surveyor so as to point out/identify the encroachment made in the suit property by the defendant and the compound wall put up by way of encroachments. The trial court had allowed the said application and appointed an Advocate Commissioner. Accordingly, the Advocate Commissioner also inspected the suit property and measured the same with the help of a surveyor and filed his report and thereafter, the plaintiffs had filed objections to the said report and plan and also filed another application to scrap the said report and to appoint a new Advocate Commissioner. The trial court had allowed the said application. Aggrieved by the same, the defendant had filed a revision before this court. This court, taking into consideration of the aforesaid facts and circumstances of the said case, had held that the trial court should not have scrap the Advocate Commissioner's report and appoint a new Advocate Commissioner. It had further observed that if at all necessary, the plaintiff can examine the Advocate Commissioner and prove the fact that how the said report is defect. In this case, for the first

time, Advocate Commissioner has been appointed and challenging the said order, the present revision has been filed and hence the aforesaid decision also will not apply to the facts and circumstances of the case.

14. In **Ganesa Gounder Vs. Chakkaravarthy and Others**, (cited supra) in paragraph No.6, this court has held as follows:-

“6. At any event, it is only an application seeking for appointment of Advocate Commissioner to note down the physical features of the suit property. Admittedly, the suit is one for mandatory injunction for restoration of the pipeline and for damages. Whether the pipeline was in existence or not in the suit property can be ascertained by appointing an Advocate Commissioner and such appointment will not prejudice the interest of the other side and on the other hand it would help the Court below to decide the issue. No doubt the petitioner has filed the application at the appellate stage. He has also given sufficient reason for filing such application at the appellate stage. It is well settled that commission application can be filed even at the appellate stage. Therefore, the delay cannot be the reason for rejecting such application, when the petitioner has given valid reasons for appointment of Advocate Commissioner”.

15. From the aforesaid decision, it is clear that to note down the physical features and also to ascertain the encroachment if any, an Advocate Commissioner can be appointed.

16. In ***M. Samuvel Vs. Suyambukani and Others***, (cited supra), in paragraph No.7, this court has held as follows:

“7. A perusal of the plaint shows that the first respondent / plaintiff has filed the aforesaid suit for declaration of her title, permanent injunction and for mandatory injunction. According to her, the petitioner herein has encroached a portion of the property in Survey No.1259/3A of Arasoor Village and in such a case, the properties of both the parties have to be measured with the help of a qualified Surveyor and with reference to the title deeds of both the parties, FMB and other revenue records and for that purpose, a Commissioner has to be appointed. If the Commissioner measured the properties of both the parties with reference to the documents of both parties and revenue records, that would help the Court to take a decision whether there is any encroachment in the said property as alleged by the first respondent / plaintiff or not. In case the Commissioner finds that there is no encroachment, the petitioner will get favourable order in the suit and therefore, this Court is of the view that no prejudice will be caused to the petitioner. Further, the Commissioner's report and Surveyor's plan will reduce the oral evidence and also minimize the Court's time. “

17. From the aforesaid decision also, it is clear that if the Advocate Commissioner measured the properties of both the parties with reference to the documents of both the parties and revenue records that would help the court to take a decision whether there is any encroachment in the suit property as alleged by the plaintiff or not. In case, the Advocate Commissioner finds that there is no encroachment, the defendants will

get favourable order in the suit. Further, the Advocate Commissioner's report and surveyor's plan will reduce the oral evidence and also minimize the court's time.

18. In this case as already pointed out that in the trial court, the first respondent herein had asked mandatory injunction and also delivery of possession of a portion of the property and that being so, if the property is measured as pointed out by the trial court, that would help the court to take a decision whether any encroachment has been made as alleged by the respondents. In case the Advocate Commissioner finds that there is no encroachments/obliteration of cart track, ultimately the petitioners herein will get favourable order in the suit and therefore, this court is of the view that no prejudice would be caused to the petitioner.

19. Further, though the suit is filed in respect of the property situated in S.Nos.50/1 and 50/3, considering the fact that the Tahsildar and the Assistant Director of land survey had issued memos to the first respondent stating that measurements can be taken only after preparing a consolidating plan with regard to the sub-division Nos.50/1 to 4, the learned trial court had appointed the Advocate Commissioner with a

direction to measure the aforesaid sub-division survey numbers. Further, there is no dispute that the entire land situated in S.Nos.50/1 to 50/4 belongs to both the parties. Therefore, this court does not find any infirmity in the said order and hence, this Civil Revision Petition is liable to be dismissed.

20. In the result, this Civil Revision Petition is dismissed. Consequently, connected miscellaneous petition is closed. No costs.

23.12.2020

Index:Yes / No
Speaking Order/Non-Speaking Order
gv

To

The District Munsif Court,
Mettur.

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P.RAJAMANICKAM.,J.

gv



**Pre-delivery Order made in
CRP(PD)No.3062 of 2017
and
CMP.No.14373 of 2017**

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23.12.2020