



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On : 09.01.2020

Delivered On : 13.07.2020

WEB COPY

CORAM:

THE HONOURABLE MRS. JUSTICE R.THARANI

C.M.A. (MD)No.866 of 2019 and C.R.P. (MD)No.2128 of 2019
and
C.M.P. (MD)Nos.11165 and 11409 of 2019

Viswam ... Appellant in C.M.A.(MD)No.866 of 2019/
Respondent/Plaintiff
and Petitioner in C.R.P.(MD)No.2128 of 2019/
Respondent/Plaintiff

Vs.

1.Singarayan
2.Mani

Represented by power holder,

T.Russel Raj ... Respondents in C.M.A.(MD)No.866 of 2019
and in C.R.P.(MD)No.2128 of 2019/
Plaintiff/Defendants

PRAYER in C.R.P. (MD)No.2128 of 2019 : The civil revision petition has been filed under Article 227 of the Constitution of India, to set aside the fair and decretal order dated 30.08.2019 passed in I.A.No.1 of 2019 in O.S.No.31 of 2017 on the file of the learned Additional District and Sessions Judge (Fast Track Court), Kanyakumari District at Nagercoil.

PRAYER in C.M.A. (MD)No.866 of 2019 : The civil miscellaneous appeal has been filed under Section 104 r/w Order 43(1) of Civil Procedure Code, to set aside the fair and decreetal order dated 30.08.2019 passed in I.A.No.2 of 2019 in O.S.No.31 of 2017 on the file of the Additional District and Sessions Judge (Fast Track Court), Kanyakumari District at Nagercoil.

For Appellant and for Petitioner : Mr.V.Meenakshi Sundaram

For 2nd Respondent
(in both C.M.A. & C.R.P) : Mr.Ramanlal



COMMON JUDGMENT

Heard the learned counsel on either side.

2. This civil miscellaneous appeal and the civil revision petition have been filed against the order dated 30.08.2019 passed in I.A.Nos.1 and 2 of 2019 in O.S.No.31 of 2017 on the file of Additional District and Sessions Judge (Fast Track Court), Kanyakumari at Nagercoil.

3. For the sake of convenience, C.M.A. (MD) No. 866 of 2019 is taken as the lead case.

4. The appellant herein is the plaintiff. The respondents herein are the defendants in the suit. The appellant herein has filed a suit in O.S.No.31 of 2017 for a prayer of bare injunction. He has filed I.A.No.125 of 2017 for a prayer of ad interim injunction and I.A.No.127 of 2017 for a prayer of appointment of a Court Commissioner. A Commissioner was appointed and a Status quo order was passed by the Court on 16.02.2018. The defendants have filed an application in I.A.No.1 of 2019 to set aside the report of the Advocate Commissioner and had filed another application in I.A.No.2 of 2019 to vacate the status quo order passed in I.A.No.125 of 2017. Both the petitions were allowed by the trial Court on 30.08.2019. Against which, the appellant herein has preferred this civil miscellaneous appeal and civil revision petition.

5. Brief substance of the petitions in I.A.Nos.1 and 2 of 2019 is as follows:

The petitioners are the defendants. The suit was filed for permanent injunction. One Russel Raj was the power agent of the defendants. The power agent of the defendants was a businessman having business contacts all over South India and Saudi Arabia. The plaintiff is a financier. The defendants approached the plaintiff in the year 2011 for financial help. The plaintiff has agreed to pay a sum of Rs.40,00,000/- (Rupees Forty Lakhs only) as a loan on condition that the property has to be transferred to the name of the plaintiff as a security and promised to re-transfer the same after the loan amount was repaid. On that condition, the power agent of the defendants has executed a sale deed on 02.06.2011. The plaintiff released a sum of Rs.10,00,000/- (Rupees Ten Lakhs only) out of Rs.40,00,000/- (Rupees Forty Lakhs only) and regarding the same, he sent a letter dated 02.06.2011 to the power agent of the defendants. Thereafter, the appellant released Rs.30,00,000/- (Rupees Thirty Lakhs only) in three installments to the power agent of the defendants and advised him to repay the same to civil interest within five years.

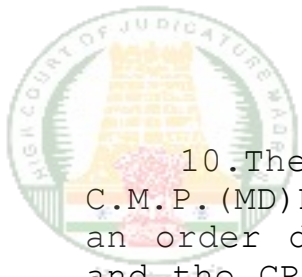


6. The power agent of the defendants repaid the amount regularly in installments. The plaintiff increased the rate of interest during the month of September 2013 and instructed the power agent of the defendants to pay a further sum of Rs.75,00,000/- (Rupees Seventy Five Lakhs only) besides Rs.28,00,000/- (Rupees Twenty Eight Lakhs only) already paid by the power agent of the defendants till the month of July 2013. The power agent of the defendants has paid Rs.1,48,000/- (Rupees One Lakh Forty Eight Thousand only) in 56 months under duress and threat. All the documents relating to the property were with the plaintiff.

7. Suppressing the above facts, the plaintiff has filed a suit in O.S.No.47 of 2016 before the learned Sub Judge, Padmanabhapuram. The power agent of the defendants filed a petition in I.A.No.493 of 2016 for the appointment of an Advocate Commissioner. On the basis of a transfer O.P. Filed by the power agent of the defendants, the suit in O.S.No.47 of 2016 on the file of the Sub Judge, Padmanabhapuram was transferred to the file of the Additional District Court, Nagercoil and the suit was re-numbered as O.S.No.31 of 2017.

8. The power agent of the defendants filed a separate suit for a prayer of specific performance in O.S.No.14 of 2016 before the learned District Judge, Kanyakumari. An order of status quo was passed in I.A.No.102 of 2016 in O.S.No.14 of 2016. The plaintiff misguided the Court, as if the power agent has not complied with the order under Order 39 Rule 3 of CPC and the petition in I.A.No.102 of 2016 was closed. Against that order, the power agent of the defendants preferred a revision in C.R.P.(MD)No.1579 of 2016 and the same was allowed and the matter was remitted back to the trial Court for fresh consideration. The learned District Judge, Kanyakumari passed an order of status quo till the disposal of the suit.

9. The petition for appointment of an Advocate Commissioner filed by the defendants was re-numbered as I.A.No.127 of 2017 in O.S.No.31 of 2017 and the petition was dismissed as withdrawn on 09.04.2018. Though the plaintiff has made an endorsement that he may be permitted to file a petition for appointment of an Advocate Commissioner, he has not filed any petition. But an Advocate Commissioner was suo moto appointed by the Court and the power agent of the defendants has filed Tr.C.M.P.(MD)Nos.412 and 413 of 2018 before this Court. This Court passed an order dated 25.10.2018 transferring both the suits in O.S.Nos.31 of 2017 and 14 of 2016 to the file of the Additional District Judge, Kanyakumari and gave a findings that the order dated 16.02.2018 passed in I.A.No.125 of 2017 was illegal and improper.



10. There is an order of status quo against the plaintiff in C.M.P. (MD) No. 7706 of 2016 dated 12.08.2016, which was extended by an order dated 06.09.2016 and it was made absolute on 12.09.2016 and the CRP was finally disposed on 17.11.2016 with a direction to dispose of the I.A. Petition within a particular period and the interim order was also extended till the I.A. Petitions are disposed of. The plaintiff is trying to trespass into the property. Hence, the order of status quo passed in I.A. No. 125 of 2017 has to be vacated and the report of the Advocate Commissioner dated 08.10.2018 is to be set aside.

11. Brief substance of the counter in I.A. Nos. 1 and 2 of 2019 is as follows:

A suit in O.S. No. 47 of 2016 was filed by the plaintiff against the power agent of the defendants for a relief of permanent injunction before the Sub Judge, Padmanabhapuram and subsequently it was transferred to the Principal District Court and was re-numbered as O.S. No. 31 of 2017. The second defendant in O.S. No. 31 of 2017 has filed another suit in O.S. No. 14 of 2016 before the Principal District Court, Kanyakumari against this plaintiff and his family members for a relief of specific performance. Both the cases were taken for joint trial.

12. The plaintiff is not a financier but only a licensed broker. The power agent of the defendants approached this plaintiff for sale of the suit property in February 2011. He submitted two sale deeds dated 29.05.1984 and 17.08.2006, settlement deed dated 05.03.2007, encumbrance certificate dated 04.02.2011 and patta dated 19.02.2008 and after negotiations, the sale consideration was fixed as Rs. 8,34,694/- (Rupees Eight Lakhs Thirty Four Thousand Six Hundred and Ninety Four only) and on 02.06.2011, the power agent of the defendants executed a registered sale deed. Even in the recitals of the sale deed, no loan transaction was mentioned.

13. The signature of the power agent of the defendants was not denied by the defendants. The power agent of the defendants has disturbed the possession of this plaintiff and he demolished the iron fence on 07.02.2016 and that the plaintiff has filed a suit in O.S. No. 47 of 2016. After verifying the records, the Court has granted an order of ad interim injunction. In the order dated 22.03.2016 in O.S. No. 14 of 2016, the Court granted an order of status quo and order to comply with the provision under Order 39 Rule 3 of CPC. The power agent of the defendants filed a petition in I.A. No. 127 of 2017 in O.S. No. 31 of 2017 for the appointment of an Advocate Commissioner. Later he has filed a memo to withdraw I.A. No. 127 of 2017 and the Court dismissed the petition in I.A. No. 127 of 2017 as withdrawn.



14.Subsequently the Court suo moto appointed an Advocate Commissioner on 09.04.2018. This Court has observed that the power agent of the defendants has not filed any objection before challenging the order dated 16.02.2018. The learned Principal Sub Judge has passed an ad interim injunction order in O.S.No.47 of 2016. That order was in force till further orders were passed in I.A.No.125 of 2017.

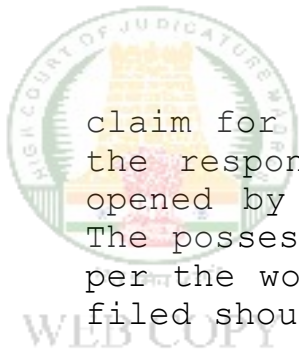
15.The trial Court after considering both sides, allowed both the I.A. Petitions. Against which, the appellant has preferred this civil miscellaneous appeal and the civil revision petition.

16.On the side of the appellant, it is stated that the Court ought to have clarified what is the 'status' as on 16.02.2018 and ought to have set aside the order in I.A.No.125 of 2017. The Court ought to have considered I.A.No.125 of 2017 afresh, after setting aside the status quo order dated 16.02.2018 and non consideration of I.A.No.125 of 2017 is incorrect.

17.On the side of the appellant, it is stated that the appellant filed a suit in O.S.No.47 of 2016. The defendants filed a written statement with a counter claim for damages to the tune of Rs.5,00,000/- (Rupees Five Lakhs only). The sale deed was executed only as a collateral security. The defendants failed to keep up his promise. In the suit for specific performance in O.S.No.14 of 2016, there is an order of status quo. The power of the Court to appoint an Advocate Commissioner suo moto is not agitated by the other side. The Commissioner report was filed in April 2018. The Commissioner has recorded that the plaintiff was in possession of the property. Since the Commissioner was appointed suo moto by the learned District Judge, the Commissioner has given evidence regarding the possession.

18.The power of the Court to suo moto appoint an Advocate Commissioner was confirmed by the order of this Court in Tr.C.M.P. (MD)Nos.412 and 413 of 2018. Without disputing the main order, the order of status quo cannot be set aside. The Court can re-issue the warrant or appoint another Commissioner. When the order in I.A.No.127 of 2017 was not challenged, a new Commissioner may be appointed or warrant may be re-issued to the old Commissioner.

19.A Commissioner petition was filed by the respondents. On 09.04.2019, the respondents filed a memo and the Commissioner petition was dismissed as withdrawn. The Court suo moto appointed a Commissioner. A status quo order was passed on the basis of the Commissioner report dated 04.09.2018. The appellant filed a counter for the appointment of the Commissioner. The appellant wants to re-issue the warrant to the same Commissioner. A counter



claim for damages was raised by the respondents. It is the duty of the respondents to prove the counter claim. The words 'lock was opened by the plaintiff' was unnecessarily given in the report. The possession of the respondents was admitted by the appellant as per the wording in Ex.P2. For that reason, the Commissioner report filed should not be recorded and it should be struck off.

20. The learned counsel for the respondents would rely upon the judgment passed by this Court in the case of **Jagadeswari v. Kandasamy and others** reported in **2014-5-1.w. 361**, wherein it reads as follows:

"10.5. In the decision reported in 2009 (5) CTC 706, *Elango v. Kasthuri*, it was held that as far as the factum of possession is concerned, Court alone could gather evidence through parties and it cannot entrust the matter to Advocate Commissioner to collect the evidence. It is appropriate to incorporate paragraph 12 of the said decision.....

13. Thus, considering the facts and circumstances of the present case in the light of the decisions relied on by the learned counsel for the revision petitions and the dictum laid down by the Hon'ble Apex Court that an Advocate Commissioner cannot be appointed to collect materials evidence to prove the case, that too to prove the factum of possession, I am of the view that the trial Court has committed an error in allowing the applications for appointment of Advocate Commissioner. So mere filing of the report by the Advocate Commissioner will not vitiate the right of the revision petitions. Once the appointment of Advocate Commissioner itself is set aside, the report filed by the Commissioner become non est in the eye of law."

21. It is stated that the Commissioner report is non est in the eye of law and the Commissioner report is of no value to decide the matter in dispute.

22. On the side of the defendants, it is stated that the plaintiff admitted the possession of the defendants in Ex.P2 and a status quo order based on the Commissioner report is not valid. The learned counsel for the defendants would rely upon the judgment passed by this Court in the case of **D. Albert v. Lalitha and others** reported in **AIR 1989 Madras 73**, wherein it reads as follows:



"Interim injunction - vacation of - status quo - meaning - trial court vacating ex parte interim injunction and ordering status quo - both the parties claiming possession and ownership of the property - court must specify possession while or ordering status quo."

23. On the side of the respondents, it is stated that both the civil miscellaneous appeal and the civil revision petition are to be dismissed. It is not open for the appellant to seek for re-issuance of the Commissioner warrant. There is no chance for the appellant to be in possession and the status quo order already passed was made absolute and there is no chance for the appellant to be in possession as the status quo order was already passed.

24. It is seen that the two civil suits are pending regarding the same suit property. One suit in O.S.No.47 of 2016 was renumbered as O.S.No.31 of 2017 and the other suit is O.S.No.14 of 2016. I.A.No.125 of 2017 in O.S.No.31 of 2017 was filed for appointment of Advocate Commissioner. But that petition was dismissed as withdrawn. Subsequently a Court Commissioner was suo moto appointed by the Court. Both the parties are claiming to be in possession of the property. The Commissioner in his report made some observation regarding possession in favour of one of the parties to the suit.

25. It is seen that both parties are trying to drag on the matter and are in the habit of filing various I.A. petitions. The Advocate Commissioner report is to be taken into account only for valuing the damages caused to the suit property and to find out the physical feature of the property and certainly not for fixing possession. The Commissioner report and his evidence as to possession is to be ignored by the trial Court. It is seen that the suit is pending from the year 2016 and hence, the trial Court is hereby directed to dispose of the main suits within a period of four months from the date of receipt of copy of this order.

26. There is no necessity to scrap the Commissioner report in toto and there is no necessity to re-issue the warrant to the Commissioner. There is no necessity for appointment of a fresh Commissioner. One of the suits is for bare injunction and it is the duty of that plaintiff to prove that he is in possession without depending upon the report of the Commissioner. Both the parties have to prove their possession with relevant documents without adhering to the observations made by the Commissioner. The Commissioner report is to be scrapped only with regard to the portion regarding possession.



27. In the above circumstances, the civil miscellaneous appeal and the civil revision petition are disposed of. No Costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (Records)

// True Copy //

/ /2020

Sub Assistant Registrar (CS)

Mrn

Note : With the consent of both sides counsels, this order is pronounced in the open Court through video conference system on 13.07.2020.

In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1. The Additional District and Sessions Judge (Fast Track Court), Kanyakumari District, Nagercoil.
2. The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai (2 copies).

C.M.A. (MD) No. 866 of 2019 and C.R.P. (MD) No. 2128 of 2019

13.07.2020

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