

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 19.01.2021

CORAM

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.R.P.No.763 of 2020 and
C.M.P.No.4060 of 2020

R.Arivuchelvam

... Petitioner/Petitioner/
Plaintiff/Petitioner

Vs.

1. S.Jayaprakash

2. S.Chenthilampathi

... Respondents/Respondents/
Defendants/Respondent

Civil Revision Petition is filed under Article 227 of the Constitution of India to set aside the fair and final order dated 16.09.2019 made in I.A.No.18 of 2016 in I.A.No.3710 of 2013 in O.S.No.224 of 2013 on the file of V Additional District Munsif Court, Coimbatore.

For Petitioner : Mr.M.Aswinkumar for
Mr.S.Mukunth

For Respondents : No appearance

O R D E R

The present Civil Revision Petition has been filed to set aside the fair and final order dated 16.09.2019 made in I.A.18 of 2016 in I.A.No.3710 of 2013 in O.S.No.224 of 2013 on the file of V Additional District Munsif Court, Coimbatore, by raising various grounds.

2. The case of the petitioner is that originally a suit was filed by the petitioner, namely, Arivuselvam against the respondents / defendants seeking to declare the petitioner / plaintiff as absolute and exclusive owner of the suit property pursuant to the sale deed dated 17.09.2007 under document no.4709 of 2007 with regard to the south-north wall to an extent of 2 feet breadth 49 feet width 9 feet height in the petitioner / plaintiff's eastern boundary limit on its eastern

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side boundary of the suit property ; to grant permanent injunction restraining the respondents and their men from disturbing or interfering with the petitioner's peaceful possession and enjoyment of the suit property either by finishing the construction work on the eastern boundary of the suit property and to grant Mandatory Injunction directing the defendants and their men to re-construct the south-north wall to an extent of 2 feet breadth 40 feet width 9 feet height in the plaintiff's eastern boundary limit on its eastern side of suit property at their cost.

3. In contrary, a written statement was filed by the respondents / defendants stating that the cause of action does not arise for filing the suit. In the said written statement, it has been stated that already a Commissioner was appointed by the court below and the Commissioner visited the suit property with the help of surveyor, found the actual state of affairs and the Commissioner has clearly come to a conclusion that the said north south wall absolutely belongs to the respondents and the report filed by the Commissioner also clearly shows that these respondents are entitled to further space on the western side of the north south wall.

4. That being the statements by the respondents / defendants, the petitioner / plaintiff filed I.A.No.3710 of 2013 in O.S.No.224 of 2013 to scrap the Advocate Commissioner's report and Surveyor Report in I.A.No.152 of 2013 and to appoint a fresh advocate commissioner to note down the physical features of the suit property and also with the assistance of the surveyor to fix the boundaries and measures the suit properties properly, as per deed and find out the encroachment made by the respondents and to take photos by proper photograph and fix report with plan.

5. Under Order 26 Rule 9 r/w Section 151 of CPC, this application, viz., I.A.No.3710 of 2013 in O.S.No.224 of 2013 was dismissed by the learned I Additional District Munsif, Coimbatore by an order dated 03.02.2014 to scrap the advocate commissioner report to note down the physical features of the suit property with the assistance of a surveyor to fix the boundaries, measure the suit property and to find out the encroachment made by the respondents.

6. Challenging the said dismissal, the petitioner has filed a C.R.P.No.2980 of 2014 and M.P.No.1 of 2014 before this Court and on 14.10.2014, this Court, has considered the said Revision Petition and allowed the said Petition by holding that the "impugned order is set aside and the matter is remanded back

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to the trial court for considering the matter afresh based on the application as well as the counter that has been made by petitioner as well as the respondents and further stated that the Court has not expressed any view on the advocate commissioner's report and trial court has to consider the application afresh on merits and in accordance with law within a period of 30 days." Thereafter, the petitioner has filed I.A.No.18 of 2016 to reopen the petition in I.A.No.3710 of 2013, which was closed by the court below on 16.12.2015 to enable the Advocate Commissioner to file a report.

7. Further, to the said I.A.No.18 of 2016 a counter was filed by the 1st respondent, adopted by the 2nd respondent by contending that (I) the Taluk Surveyor, who accompanied the advocate commissioner has not fixed the boundary stone after measurements and therefore, he has not properly measured the suit property and the adjacent properties properly in accordance with the survey maps in survey records of Coimbatore Municipal Corporation; (ii) the learned Advocate Commissioner has not followed the petitioner's instructions and the further averments that due to the personal inconvenience and non-availability of the proper taluk surveyor, the petitioner was not able to take the advocate commissioner to inspect and measure the suit property, as per the title deeds to find out the encroachment made by the respondent and since the counsel of the petitioner was in other court, he could not make his representation on 16.12.2015 and hence the I.A.No.3710 of 2013 was closed on 16.12.2015 and therefore, pleaded that I.A.No.3710 of 2013 has to be reopened, are all false.

8. Also, the counter proceeds to state that from the very beginning, the intention of the petitioner is to drag on the proceedings without any end. When the commissioner visited the property along with the surveyor herein, the petitioner did not objected, but participated in the survey through out and on coming to know that the petitioner has no case, he filed I.A.No.3710 of 2013 for scrapping the report and rightly, the court below has dismissed the same. Against which the CRP No.2980 of 2014 was filed and this Court has allowed the same. As per the directions of this Court, again on 23.12.2014, one Mr.S.Kalichamy, Advocate was appointed as Commissioner with a direction to visit the property. Even though the said commissioner was appointed on 23.12.2014, the petitioner has not taken any efforts to take the Commissioner to the property and was dragging the matter, thereby pleaded to dismiss the I.A.No.18 of 2016. The court below by considering all the pleadings and counter statement, has dismissed the petition, against which, the present Civil Revision Petition has been

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filed.

9. The learned counsel for the petitioner submitted that if the present Civil Revision Petition is not allowed, it will cause great hardship to the petitioner and the court below has erred in dismissing the application in I.A.No.18 of 2016 to reopen I.A.No.3710 of 2013 in O.S.204 of 2013 without appreciating the facts of the case from the correct perspective. Further the court below has failed to appreciate that the earlier report of the advocate commissioner and town surveyor stands scrapped and an advocate commissioner report is necessary to adjudicate the case on hand and the said application ought not to have dismissed based on mere technicalities. That apart, the court below ought to have appreciated the fact that Advocate commissioner's report is inevitable in the present case and ought to have given an opportunity to the advocate commissioner to honour his warrant and file his report.

10. Though the respondents were served as early as on 28.02.2020 and their names have been printed in the cause list, there is no representation for them either in-person or through learned counsel.

11. Heard the learned counsel appearing for the petitioner and perused the counter affidavit filed by the respondents, which was filed before the court below and the materials placed on record.

12. From the perusal of the pleadings and the documents, it is clear that originally one Ms.P.Rani, Advocate was appointed as advocate commissioner based on earlier application, viz., I.A.No.152 of 2013 and the said advocate commissioner has also filed her report on 22.07.2013. Thereafter, the petitioner, again, filed a petition, viz., I.A.No.3710 of 2013 to scrap the said commissioner report and plan, the said petition was dismissed on 03.02.2014. Subsequently, the petitioner filed a Revision Petition No.2980 of 2014 before this Court to set aside the exparte order passed and the same was allowed. In view of the directions by this Court, again, the court below has appointed a fresh Advocate Commissioner, namely, one Mr.Kalichamy, Advocate on 23.12.2014. Further, the said petition was closed due to fact that there was no representation from the petitioner / plaintiff. Yet another application, viz., I.A.No.18 of 2016 has been filed, seeking for reopening the application no.3710 of 2013, which was closed on 16.12.2015 to direct the advocate commissioner to inspect the property along with the surveyor and to file his report and plan, the same was dismissed by the court below by narrating all the facts and by

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observing the averment of the petitioner that "due to some personal inconvenience and the non-availability of the taluk surveyor I did not take the advocate commissioner to inspect and measure the suit property" and the court below further observed that "nearly one year the petitioner / plaintiff not taken any efforts to take the advocate commissioner to suit property" and dismissed the petition.

13. It is pertinent to mention that when the petitioner is not prudent to proceed further in the case at the time when the prayer of the petitioner to appoint advocate commissioner was considered and allowed by the court below and directed the Commissioner to visit the property, investigate and file a report, this Court is of the view that the petitioner has not utilised the opportunity, which was granted by the Court and delayed it for a period of one year. That being the case, it is crystal clear that the attitude of the petitioner is only to drag on the proceedings and here is no valid reason stated by the petitioner to interfere with the order passed by the court below. Apart from that, during the course of arguments, the learned counsel for the petitioner contended that the respondents have not filed any objection for appointment of an Advocate Commissioner and the same would reveal that the respondents are also in need of getting the problem solved, is not acceptable by this Court. Moreover, when the suit has been filed in the year 2013 and that the petitioner's intention is to drag on the matter further and that he has successfully dragged on the matter for almost seven years by filing one petition or the other, this Court is not inclined to interfere with the order passed by the court below in I.A.No.18 of 2016 in O.S.No.224 of 2013 dated 16.09.2019.

In view of the above, there is no merit in the present Revision and the same fails. Accordingly, the present Civil Revision petition is dismissed. Consequently, connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar (CS-VI)

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Sub Assistant Registrar

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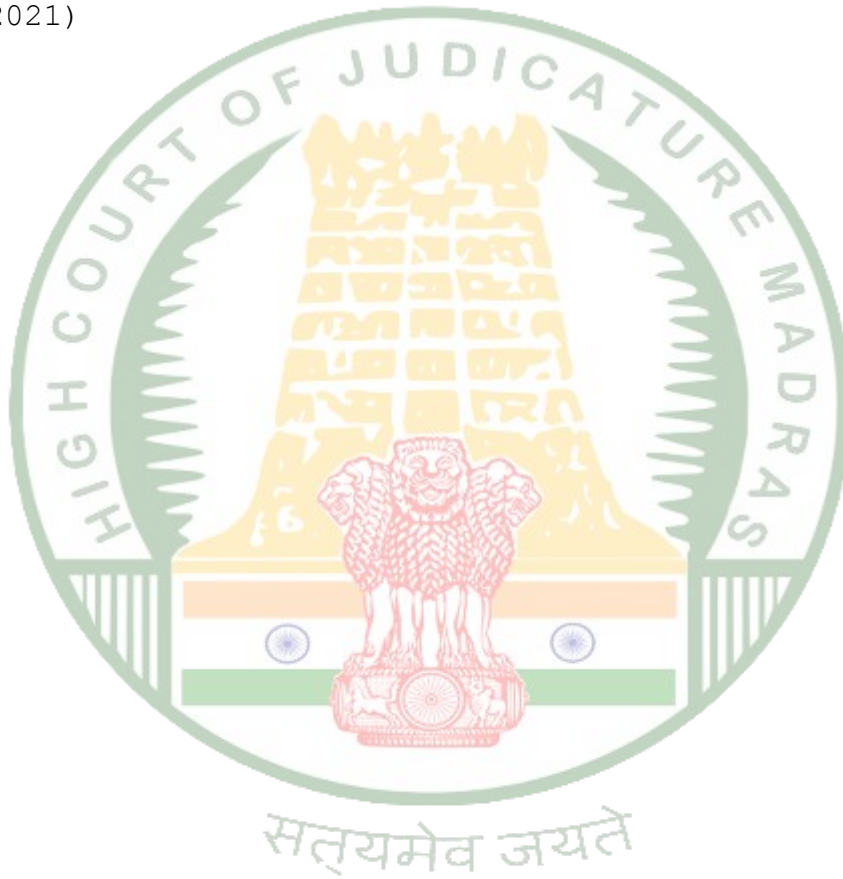
To

The V Additional District Munsif Court,
Coimbatore.

+1cc to M/s.Sarvabhauman Associates, Advocate SR.2533

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