

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders reserved on 24.08.2021	Orders pronounced on 03.09.2021
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Coram
THE HONOURABLE Mr. JUSTICE G.CHANDRASEKHARAN

C.R.P.(PD) No.709 of 2021
and
C.M.P.No.5937 of 2021

Devaraj

... Petitioner

Vs

1. Krishnamurthy
2. Poongavanam
3. Elumalai
4. Saroja (died)

... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the order and decretal order dated 08.02.2021 made in I.A.No.132 of 2020 in O.S.No.307 of 2020 on the file of the learned District Munsif-cum-Judicial Magistrate, Thandarampattu.

For Petitioner

..

Mr.Jeremiah Gregory John

For Respondents

..

Mr.S.Kaithamalai Kumaran

ORDER

This Civil Revision Petition is filed against the order passed in I.A.No.132 of 2020 in O.S.No.307 of 2020 on the file of the learned District Munsif-cum-Judicial Magistrate, Thandarampatu.

2. Respondents filed the suit against the defendants (petitioner is third defendant in the suit) for the relief of declaration of respondents'/plaintiffs' title to the suit properties and for permanent injunction restraining the defendants, their men, agents and servants from in any manner interfering with the respondents'/plaintiffs' possession and enjoyment of the suit properties. Pending suit, petitioner/third defendant filed I.A.No.132 of 2020 under Order XXVI Rule 9 CPC for appointment of Advocate Commissioner to inspect item No.7 of the suit properties, with the help of a surveyor and file a report. This petition was resisted by the respondents. Learned District Munsif-cum-Judicial Magistrate considered the submissions and materials placed before him and dismissed the petition. Against the said dismissal order, the present Civil Revision Petition is filed.

3. Learned counsel for the petitioner submitted that there is a

genuine dispute with regard to the identity and location of item No.7 of the suit properties. Only if the Advocate Commissioner is appointed and inspect the property with the help of surveyor and measure the property, Item No.7 of the suit properties can be identified. The Hon'ble Supreme Court has held in the ruling reported in *2000 (6) Sup. 389 (Shreepal ..vs.. Rajendra Prasad and others)* that the identity and location of the disputed property can be identified by issuing commissions. However, without considering these aspects, the learned District Munsif-cum-Judicial Magistrate dismissed the petition. He prays for setting aside the order of learned District Munsif-cum-Judicial Magistrate and for allowing the Civil Revision Petition.

4. Learned counsel for the respondents opposed this petition on the ground that it is not necessary, in the facts and circumstances of the case, to appoint an Advocate Commissioner. It is for the respondents/plaintiffs to prove their title and possession in respect of the suit properties. If they are not able to prove their title and possession in the suit properties, the court will reject their case. The commission petition is filed only for gathering evidence, which is impermissible.

This petition is filed belatedly only with a view to protract the proceedings and the case is pending for cross-examination of DW.1. The suit was filed in the year 2004 and was transferred as per the order in Tr.O.P.No.8 of 2002, then again transferred on the point of pecuniary jurisdiction and now pending in O.S.No.307 of 2020. Therefore, the filing of commission petition at the stage of defence evidence is nothing but an exercise to protract the proceedings. Thus, the learned counsel for the respondents prays for confirming the order of learned District Munsif-cum-Judicial Magistrate and dismissal of this petition.

5. Considered the rival submissions. The case of the respondents/ plaintiffs is that the suit properties belong to fourth plaintiff Saroja. Plaintiffs 1 to 3 and fourth plaintiff entered into a sale agreement on 16.11.1998. In pursuance of the sale agreement, fourth plaintiff sold the suit properties to the plaintiffs 1 to 3 on 12.02.1999. Petitioner/ defendant is a junior paternal uncle of plaintiffs 1 to 3 and he is inimical towards the plaintiffs; He impersonated the fourth plaintiff and created a forged sale deed in his favour. Then started to give trouble to the respondents'/plaintiffs' enjoyment in the suit property. The case of

the petitioner/defendant is that the suit properties and some other properties originally belong to one Pachaiyappa Naicker. He executed a settlement deed in respect of his properties in favour of his wife Kamalammal. The said Kamalammal executed a settlement deed in favour of the fourth plaintiff Saroja on 03.09.1977. In a panchayat, fourth plaintiff had delivered possession of the suit properties to the second defendant. Thereafter, fourth plaintiff has no connection with the suit properties. The sale deed dated 12.02.1999 will not bind the second defendant. Second defendant had executed a Will on 22.09.2008 in favour of third defendant in respect of the suit properties. Second defendant died on 04.04.2011. Third defendant, being the owner of the suit properties, is in possession and enjoyment of the suit properties.

6. The narration of case of the parties shows that there are rival claims in respect of the suit properties. Plaintiffs claim on the basis of sale deed. Defendants claim on the basis of possession delivered to the second defendant by the fourth plaintiff, then on the basis of the Will said to have been executed by the second defendant in favour of third defendant. In the written statement, there is no mention about the

problem in identifying of suit properties, especially item No.7 of the suit properties. But, description of item No.7 of the suit properties is clearly given in the plaint. The issue involved in this case is whether the respondents/plaintiffs are entitled for the suit properties (or) the petitioner/defendant is entitled for the suit properties. These rival claims can be decided only on the basis of oral and documentary evidence. In the facts and circumstances of the case, it is not necessary for appointing an Advocate Commissioner, especially when there is no specific plea raised in the written statement with regard to the doubt in identifying item No.7 of the suit properties. That apart, as found from the order of the learned District Munsif-cum-Judicial Magistrate, the suit was filed in the year 2004. After two or three transfers, the suit has now reached the stage of defendants' evidence; DW1 was examined and the case is pending for his cross-examination. Petition filed for appointment of Advocate Commissioner to identify item No.7 of the suit properties, at this stage, is nothing but a clear attempt to procrastinate the proceedings. The learned District Munsif-cum-Judicial Magistrate has also found that the petition is filed only for procrastination and dismissed the petition. This Court finds no reason to differ from the views taken by the learned

District Munsif-cum-Judicial Magistrate.

7. In this view of the matter, the order of learned District Munsif-cum-Judicial Magistrate, Thandarampattu, dated 08.02.2021 passed in I.A.No.132 of 2020 in O.S.No.307 of 2020 is hereby confirmed and the Civil Revision Petition is dismissed. No costs. Consequently, connected Civil Miscellaneous Petition is closed.

mra

03.09.2021

Index : Yes / No
Internet : Yes / No
Speaking order : Yes / No

To,

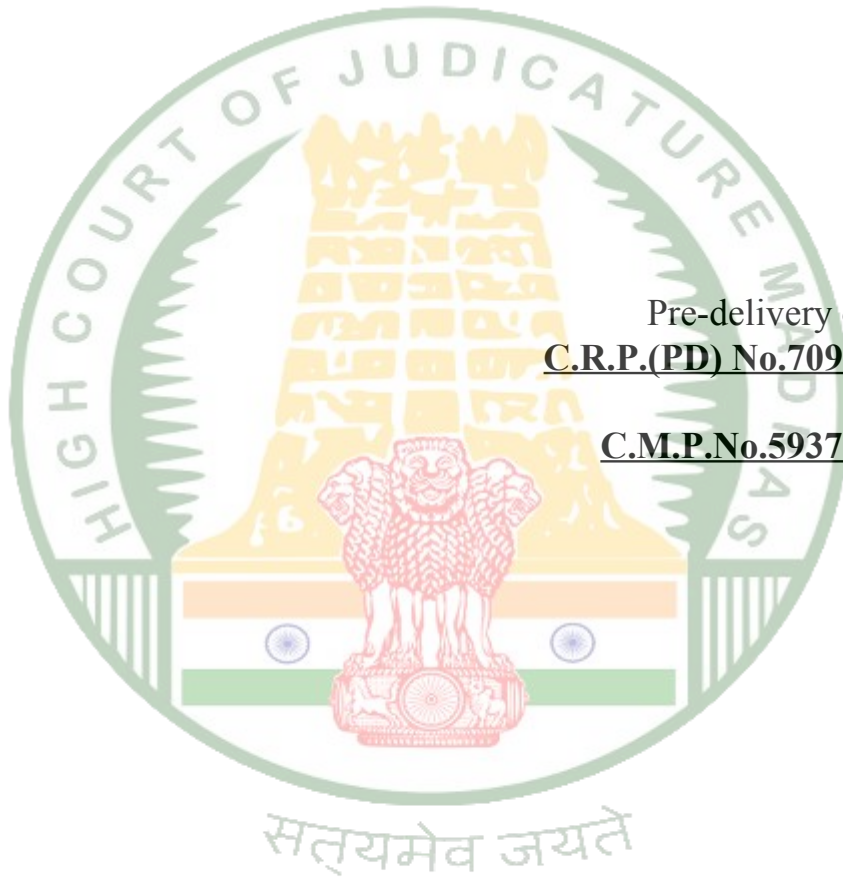
1. The District Munsif-cum-Judicial Magistrate,
Thandarampattu.

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G.CHANDRASEKHARAN, J.

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Pre-delivery order in
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