

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.06.2021

CORAM

THE HON'BLE MR. JUSTICE A.D. JAGADISH CHANDIRA

**C.R.P. (PD) No. 3633 of 2016
and
C.R.P. (NPD) No. 605 of 2021
and
C.M.P. No. 18523 of 2016
and
C.M.P. No. 5221 of 2021**

C.R.P. (PD) No. 3633 of 2016:-

Madhesan

... Petitioner

-VS-

1. Vijaya

2. Chinnapillai

3. Pachamuthu

... Respondents

Prayer:- Civil Revision Petition filed under Article 227 of the Constitution of India, 1950, praying to set aside the fair and decretal order dated 12.10.2015 passed in I.A. No. 715 of 1997 in O.S. No. 134 of 1984 on the file of the District Munsif Court, Mettur.

For Petitioner : Mr. P.Mathivanan

For Respondents : Mr. A.Sundaravadanan (for R1)

No appearance (for R2 & R3)

C.R.P. (NPD) No. 605 of 2021:-

Madhesan

... Petitioner

-VS-

1. Vijaya

2. Pachamuthu

3. Vijaya

4. Rangasamy

5. Padma

6. Rani

7. Latha

8. Sudha

... Respondents

Prayer:- Civil Revision Petition filed under Article 227 of the Constitution of India, 1950, praying to set aside the fair and decretal order dated 12.10.2015 passed in I.A. No. 715 of 1997 in O.S. No. 134 of 1984 on the file of the District Munsif Court, Mettur.

For Petitioner : Mr. P.Mathivanan

For Respondents : Mr. A.Sundaravadanan (for R1)

R2 to R8 set ex-parte vide verified petition
S.R. No. 31411 of 2021 dated 19.03.2021.

COMMON ORDER
(The case has been heard through video conference)

By consent of both parties, the Civil Revision Petition has been taken up for final disposal.

2. Brief facts of the case:-

The suit in O.S. No. 134 of 1984 on the file of the Learned District Munsif Court, Mettur, was instituted by one Poochiammal against one Pakkukara Pachiammal for partition of the suit scheduled properties owned by one Mari Gounder. The said Mari Gounder had two wives, viz., Poochiammal and Chinnu @ Vauriammal. The Plaintiff is the daughter of the said Poochiammal and the Defendants are the daughters of the said Chinnu @ Vauriammal. The Defendants had filed their written statement and contested the suit. During the pendency of the suit, the original Plaintiff had passed away and her legal heir was brought on record. The suit was decreed on 19.10.1994 directing the Defendants to divide the suit property into three equal shares and allot one such share to the Plaintiff. Subsequent to the death of the First Defendant, the share had been enhanced to $\frac{1}{2}$ share. The Plaintiff had filed an application in I.A. No. 715 of 1997 for appointment of Advocate Commissioner to divide the suit properties into two equal shares. The Respondents had filed

their counter and contested the same. The Trial Court after enquiry, appointed one Mr. P.Soundaram as the Advocate Commissioner for division of the suit scheduled properties into two equal shares. Against the appointment of the Advocate Commissioner, the Petitioner/Third Defendant had filed C.R.P. (PD) No. 2866 of 1998 before this Court, which was dismissed by order dated 13.02.2008 confirming the order passed by the Trial Court. After the dismissal of that Civil Revision Petition, Mr. P.Soundaram, Advocate Commissioner had filed a memo before the Trial Court in I.A. No. 715 of 1997 stating that the parties to the suit are not co-operating and hence, he had surrendered the warrant by memo dated 31.09.2009. Subsequently, Mr. P. Soundaram had also passed away. Thereafter, the Trial Court by order dated 12.10.2015, appointed one Mr. M.Kumaraswamy as the Advocate Commissioner with a specific direction to divide the suit scheduled properties into two equal share and provide pathway and water usage right in the land and allot one such share to the Plaintiff/First Respondent. Aggrieved over that order, the present Civil Revision Petition in C.R.P. (PD) No. 3633 of 2016 has been filed by the Petitioner/Third Defendant. Meanwhile, the Advocate Commissioner had visited the suit property after issuing notice to the parties to the suit and their respective Counsels and he has filed a report dated 29.04.2016. The Petitioner/Third Defendant had filed objection to the report of the Advocate

Commissioner, stating that the Advocate Commissioner had visited the property in the absence of his Counsel and that the Advocate Commissioner being the owner of the adjacent land acted in favour of one Ganesan who is a third party to the suit. Further, it is stated that the boundaries had not been identified by fixing survey stones. It was also averred that the Advocate Commissioner failed to note that there is pathway for the property which has not been referred to in the report. Thereafter, the Petitioner/Third Defendant had filed I.A. No. 711 of 2016 under Section 151 of the Code of Civil Procedure, 1908, before the Trial Court praying to scrap the report of the Advocate Commissioner and appoint new Advocate Commissioner. The Trial Court by order dated 03.12.2020 had dismissed the same. Aggrieved by the same, the present Civil Revision Petition in C.R.P. (NPD) No. 605 of 2021 has been filed.

3. Mr. P.Mathivanan, Learned Counsel for the Petitioner would submit that the Petitioner herein is the legal heir of one Chinnapillai and during the pendency of the proceedings his aunt, viz., Pakkukara Pachiammal, executed a will dated 31.10.1983 bequeathing her property in favour of the Petitioner/Third Defendant and thereby, the Petitioner/Third Defendant became entitled to 2/3 share in the suit scheduled properties. He would further submit

that during the course of the trial, the Petitioner had marked the will as Exhibit R-9, whereas the Trial Court has not rendered any finding with regard to the same. He would further submit that the Plaintiff has filed I.A. No. 715 of 1997 for appointment of Advocate Commissioner to divide the land into two equal shares. He would further submit that though the Plaintiff is entitled to only 1/3 share of the suit schedule property, the Trial Court directed the Advocate Commissioner to divide the suit schedule property into two equal share and allot one such share to the Petitioner/Third Defendant against which the Petitioner has filed C.R.P. (PD) No. 3633 of 2016. He would further submit that the suit schedule property consists of rocky area in between. He would further submit that the Trial Court had directed the Advocate Commissioner to find out the extent of rocky area available in the suit schedule properties and also to find out pathway and waterway with regard to the suit schedule properties, whereas the Advocate Commissioner's Report is silent on that aspect. He would further submit that the Petitioner has filed his objection to the Advocate Commissioner's Report and filed I.A. No. 711 of 2016 to scrap the Advocate Commissioner's Report and appoint new Advocate Commissioner on the ground that the Advocate Commissioner was interested on the other side and that he is also the owner of the adjacent land and thereby, he had acted with motives for the interest of some third parties.

4. Per contra, the Learned Counsel for the First Respondent/Plaintiff would submit that the suit is of the year 1984 and the Petitioner/Third Defendant had been repeatedly filing petitions after petitions to cause harassment to prevent the Respondents from getting the share and enjoying it. He would further submit that earlier, the Trial Court had appointed one Mr. P.Soundaram as the Advocate Commissioner for division of the suit schedule properties into two equal shares and challenging the same, the Petitioner has filed C.R.P. (PD) No. 2866 of 1988 before this Court, which was dismissed by order dated 13.02.2008 confirming the order of the Trial Court. He would further submit that the Trial Court finding that the order of dismissal passed by this Court has not been challenged and thereby, taken a view that the order of the Trial Court has been confirmed. He would further submit that the earlier dismissal order dated 13.02.2008 in C.R.P. (PD) No. 2866 of 1998 passed by this Court has been referred in the order of the Trial Court and that is the reason why the Trial Court has not gone into that aspect. He would further submit that the Trial Court cannot go into the merits of the matter which has already been adjudicated, finalized and confirmed by this Court in the Civil Revision Petition, whereas in respect of other averments against the Advocate Commissioner, the Trial Court had rendered a categoric finding that the

Advocate Commissioner had issued proper notice to the parties and only after notice to the parties, inspection was conducted and the properties were partitioned accordingly. He would further submit that since there is no pathway and waterway to the entire property, the Advocate Commissioner had not marked the same. He would further submit that the Advocate Commissioner had made a mention about the rocky area at paragraph no. 7 of his report and he had stated that the rocky area is in the center of the suit scheduled properties equally divided between two portions one on the North and another on the South and thereby, he had split up the same. However, he would further submit that since the Advocate Commissioner has specifically stated that there is no well or other water body found in the suit scheduled properties, he had not made any mention about the same. He would further submit that since the suit scheduled properties does not have access from any side, he was unable to show the pathway. He would further submit that the Trial Court had rightly taken into consideration the Advocate Commissioner's Report and refused to scrap the same. He would further submit that there is no infirmity in the order passed by the Trial Court. He would reiterate that the case is of the year 1984 and that the Petitioner had been filing petitions after petitions to deny the partition to the Respondent and thereby, he would seek to dismiss the Civil Revision Petition.

5. Heard the Learned Counsels and perused the Advocate Commissioner's Report dated 29.04.2016.

6. The suit is of the year 1984. The suit was decreed on 19.10.1984 granting 1/3 share each to the Plaintiff and the Defendants and subsequent to the death of the First Defendant, the share had been enhanced to 1/2 share each to the Plaintiff and the Second Defendant. Subsequently, the Plaintiff had filed an application in I.A. No. 715 of 1997 for appointment of Advocate Commissioner to divide the suit scheduled properties into two equal shares. The Defendants had filed counter and contested the same and the Trial Court had appointed one Mr. P.Soundaram as the Advocate Commissioner for division of the suit properties into two equal shares. Against the appointment of the Advocate Commissioner, the Petitioner/Third Defendant had filed C.R.P. (PD) No. 2866 of 1998 before this Court, which was dismissed by order dated 13.02.2008 confirming the order passed by the Trial Court. After the dismissal of that Civil Revision Petition, Mr. P.Soundaram, Advocate Commissioner had filed a memo before the Trial Court in I.A. No. 715 of 1997 stating that the parties to the suit are not co-operating and hence, he had surrendered the warrant by memo dated 31.09.2009. Subsequently, Mr. P. Soundaram had also

passed away after few hearings of the case. Therefore, the Trial Court by order dated 12.10.2015 appointed one Mr. M.Kumaraswamy as the Advocate Commissioner with a specific direction to divide the suit scheduled properties into two equal share and provide pathway and water usage right in the land and allot one such share to the Plaintiff. Aggrieved against that order, the present Civil Revision Petition in C.R.P. (PD) No. 3633 of 2016 has been filed by the Petitioner/Third Defendant. It is pertinent to mention that in respect of division of suit scheduled properties into two equal share by the Advocate Commissioner, the Petitioner had earlier approached this Court in C.R.P. (PD) No. 2866 of 1998 which has been dismissed by order dated 13.02.2008. Therefore, the present Civil Revision Petition in C.R.P. (PD) No. 3633 of 2016 will amount to second Civil Revision Petition in respect of the very same issue and cause of action. The principle of *res judicata* applies when a litigant attempts to file a subsequent suit on the same matter, after having received a judgment in a previous case involving the same parties. Since the relief sought for by the Petitioner in C.R.P. (PD) No. 3633 of 2016 has been already considered and decided by this Court in C.R.P. (PD) No. 2866 of 1998, C.R.P. (PD) No. 3633 of 2016 could not be entertained.

7. Subsequent to the filing of C.R.P. (PD) No. 3633 of 2016, the Advocate Commissioner had visited the suit property after issuing notice to the parties to the suit and their respective Counsels and he had filed a report dated 29.04.2016. The Petitioner/Third Defendant had filed objection to the report of the Advocate Commissioner, stating that the Advocate Commissioner had visited the property in the absence of his Counsel and that the Advocate Commissioner being the owner of the adjacent land acted in favour of one Ganesan who is a third party to the suit. Further, it is stated that the boundaries had not been identified by fixing survey stones. It was also averred that the Advocate Commissioner failed to note that there is pathway for the property which has not been referred to in the report. Thereafter, the Petitioner/Third Defendant had filed I.A. No. 711 of 2016 under Section 151 of the Code of Civil Procedure, 1908, before the Trial Court praying to scrap the report of the Advocate Commissioner and appoint new Advocate Commissioner. The Trial Court by order dated 03.12.2020 had dismissed the same. Aggrieved by the same, the present Civil Revision Petition in C.R.P. (NPD) No. 605 of 2021 has been filed. This Court is of the view that that there is no infirmity in the Advocate Commissioner's Report and that the objection of the Petitioner to the Advocate Commissioner's Report and the allegations of bias have been duly considered by the Trial Court.

8. In view of the above discussion, the order dated 12.10.2015 in I.A. No. 715 of 1997 in O.S. No. 134 of 1984 and the order dated 03.12.2020 in I.A. No. 711 of 2016 in I.A. No. 715 of 1997 in O.S. No. 134 of 1984 is confirmed and the Civil Revision Petitions are dismissed. Consequently, the connected Miscellaneous Petitions are closed. No costs.

25.06.2021

vjt

Index: Yes/No

Internet: Yes/No

Speaking Order/Non-speaking Order

To

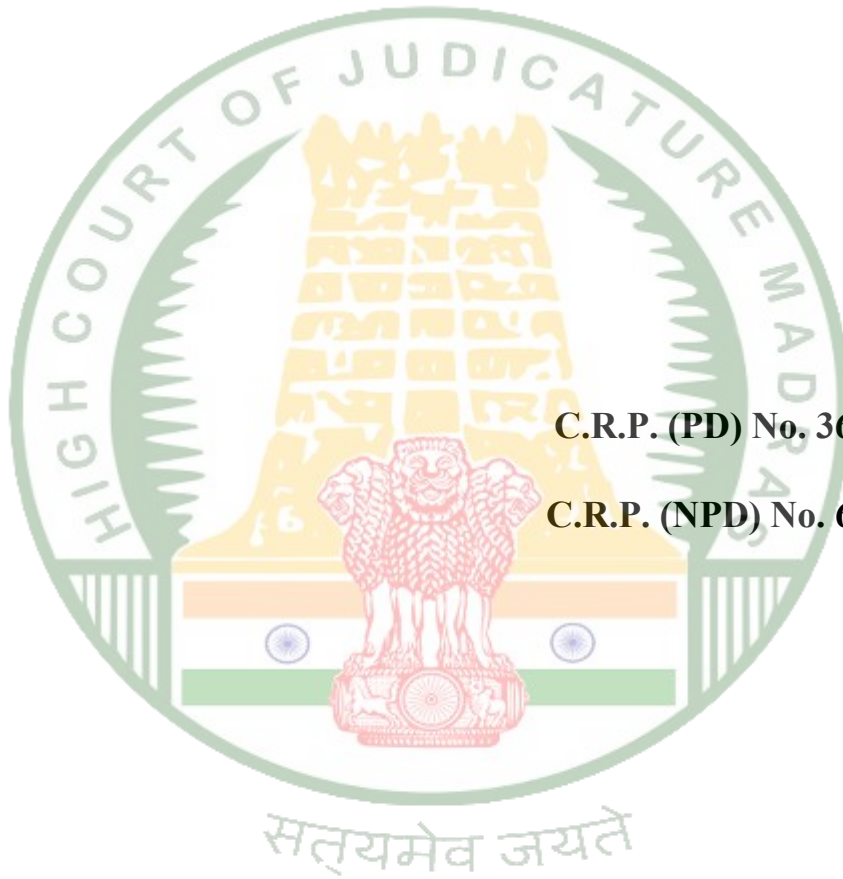
1. The District Munsif Court,
Mettur.



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A.D. JAGADISH CHANDIRA, J.

vjt



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and
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