

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 28.10.2021

Pronounced on : **02.11.2021**

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

C.R.P (PD).No.4036 of 2016

and

C.M.P.No.20363 of 2016

Kathavarayan

... Petitioner

Versus

1.Thirunavukkarasu

2.Kathirvel

... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India, to allow this revision petition and to set aside the fair and final order, dated 03.11.2016 made in I.A.No.89 of 2012 in O.S.No.108 of 2008, on the file of the Additional Sub-Court, Pondicherry.

For Petitioner : Mr.R.Jayaprakash

For Respondents : Mr.Dinesh Kumar (for R1)

: No Appearance (for R2)

WEB COPY

ORDER

This Civil Revision Petition arises against the fair and decreetal order passed in I.A.No.89 of 2012 in O.S.No.108 of 2008, on the file of the learned Additional Subordinate Judge, Puducherry, wherein by an order dated 03.11.2016, the application filed by the petitioner/plaintiff, to appoint an Advocate Commissioner to inspect the suit property, note down the physical features and extent of construction made by the respondent in the suit properties and measure the suit properties with the help of Government Surveyor, was rejected by the Trial Court.

2.Heard Mr.R.Jeyaprakash, learned counsel for the petitioner and Mr.P.Dineshkumar, learned counsel appearing for the second respondent.

3.The learned counsel for the petitioner submitted that it is a suit for declaration and consequential permanent injunction. The first defendant being a purchaser, from his brother had encroached into the schedule B portion of the schedule A property. Similarly, the second defendant had also encroached into the schedule A property and as such an application for appointment of an Advocate Commissioner with the above mentioned prayer was made. But, the same was rejected by the Trial Court, only on the

ground that the application should have been filed at the time of filing the suit itself, in the year 2008, but, it has been filed only in the year 2012. It is the contention of the counsel that such a reasoning is incorrect and the Trial Court ought to have seen that the appointment of the Advocate Commissioner is essential in this case.

4.Per contra, Mr.P.Dineshkumar, learned counsel appearing for the second respondent would submit that the instant case has been filed by the plaintiff stating that he is entitled to the scheduled property as the same fell to his share in the partition between himself and his brother. On the other hand, his clients' case is that they are entitled to the schedule property as the same originally belongs to his forefathers. Drawing attention to Paragraph No.7 of the written statement filed by the defendant, he would submit that in the above suit, the entire dispute is one of title. Further, he would also submit that the second defendant's house was built fifteen years ago and therefore, the issue to be decided in the suit is only the question as to who has got the title over the suit property and therefore, the appointment of the Advocate Commissioner can be of no assistance to the Trial Court and as such, he would submit the order of the Trial Court is to be sustained for the above said reason, apart from the reasons mentioned in the order

assailed in the Civil Revision Petition.

5.In reply to the arguments, the learned counsel for the second respondent the learned counsel for the petitioner, drew attention of this Court to Paragraph No.3 of the plaint and submitted that it is the case of the first defendant, he has purchased the property from his brother, however, without putting up constructions in the extent belonging to his brother, he actually put up construction to an extent of 11 x 80 ft., and another Cow shed to the extent of 11 x 40 ft., both in the property belonging to the plaintiff. As such, if only an Advocate Commissioner is appointed to visit the suit property, the extent of encroachment into his piece of land, can be ascertained. Therefore, he would impress upon this Court to allow the above Civil Revision Petition.

6.It is seen from the plaint filed in O.S.No.108 of 2008, the plaintiff has filed a suit for declaring that he is the absolute owner of the schedule mentioned property (i.e., the schedule A property ad-measuring 3600 sq.ft.,) and consequentially to direct the defendants to vacate the schedule B property and to handover the vacant possession to the plaintiff

and also permanent injunction and mandatory injunction to remove the superstructure in the schedule B property. In the schedule B property to the plaintiff, he has described 11 x 80 ft., construction made by the first defendant and 11 x 40 ft., Cow shed made by the first defendant. Therefore, it is seen that the consequential relief of recovery of possession and mandatory injunction is prayed only as against the schedule B property. As per the averments made in the plaint it is the first defendant, who is the purchaser from his brother Pavadai, who had made those constructions in the schedule B property. The first defendant has not filed any written statement and has not contested the suit.

7.As far as the second defendant is concerned, the plaint averments, does not even make it clear as to how the second defendant had encroached into the rest of the suit property. As a matter of fact, in Page No.2 of the plaint in Paragraph No.III, it is simply mentioned that “*The rest of the portion was vacant and was in the possession and enjoyment of the plaintiff. While so, the second defendant has encroached the rest of the portion and has failed to vacate the same...*”. It is the case of the second defendant in the written statement, which is filed in the year 2008 itself, that he has title over the suit property and that he is residing with his family in

the suit property and the house was built some fifteen years prior to the filing of the suit itself.

8.In this background, this plaintiff had filed the present application for appointment of Advocate Commissioner, four years after filing of written statement, in the year 2012. Therefore, considering the facts that (i) the consequential relief of ejection and mandatory injunction is prayed only in respect of the schedule B property; (ii) the bald averments in the plaint that the second defendant had encroached into the rest of the schedule A property; and (iii) the filing of the appointment of Advocate Commissioner application, four years after filing of the written statement; (iv) the alleged boundary dispute, which is pointed out by the learned counsel for the petitioner, is only against the first defendant who is in no way contesting the suit; (v) as far as the second defendant is concerned, it is a question of title coupled with the fact that there is no consequential relief prayed for; I am not inclined to interfere with the order of the Trial Court, dismissing the application to appoint an Advocate Commissioner. It is also seen that the suit is of the year 2008 and therefore, the Trial Court is requested to proceed further in the matter without any further delay, as expeditiously as possible and in any event, to dispose off the suit, not later

than three months from the date of receipt of a copy of this order.

9. With the above observations, the above C.R.P.No.4036 of 2016, shall stand dismissed. There shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.

02.11.2021

Index : yes/no
Internet : yes/no
Speaking/Non-Speaking order

klt

To

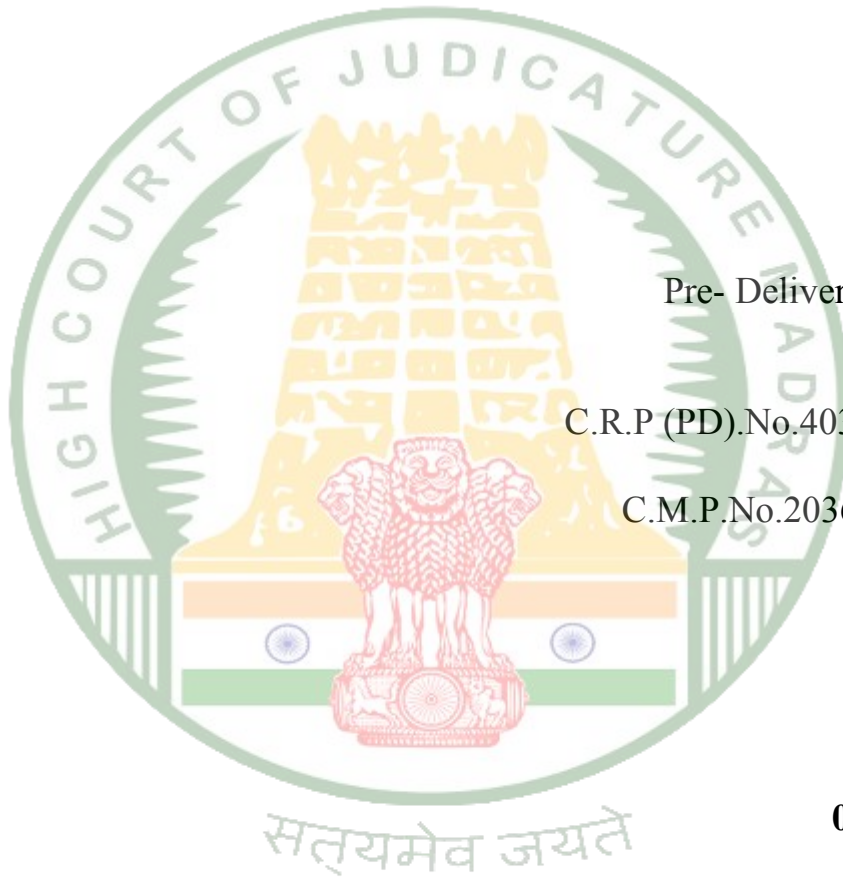
The Additional Sub-Court, Pondicherry.



WEB COPY

D.BHARATHA CHAKRAVARTHY. J.,

klf



Pre- Delivery Order in

C.R.P (PD).No.4036 of 2016
and
C.M.P.No.20363 of 2016

02.11.2021

WEB COPY