IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders reserved on 08.09.2021	Orders pronounced on 17.09.2021

Coram

THE HONOURABLE Mr. JUSTICE G.CHANDRASEKHARAN

CRP (PD) No.1740 of 2021
and
C.M.P.No.13504 of 2021

1. Sathyalakshmi @ Lakshmi
2. R.Balamurugan
3. B.Tejas
4. M/s.Karpagam Jewellers rep. By Balamurugan
No.491, Cross Cut Road
Gandhipuram
Coimbatore. ... Petitioners

Vs

1. Kavitha
2. Sri Vidhya ... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order dated 10.08.2021 passed in I.A.No.9 of 2021 in O.S.No.672 of 2020 on the file of I Additional District Judge, Coimbatore.

For Petitioners .. Mr.AR.L.Sundaresan, Senior Counsel

for
M/s.S.Rathina Praveen Kumar

For Respondent-1 .. Mr.R.Bharath Kumar

For Respondent-2 .. Mr.P.R.Ramakrishnan
for
M/s.Sarvabhauman Associates

ORDER

This Civil Revision Petition is directed against the order passed in I.A.No.9 of 2021 in O.S.No.672 of 2020 on the file of I Additional District Judge, Coimbatore on 10.08.2021.

2. I.A.No.9 of 2021 was filed under Section 75 read with Order 26 Rules 9 and 10 CPC for appointing Advocate Commissioner with basic knowledge of computer operating system to visit item Nos. 1 and 4 of the suit properties to verify and check all the records and registers including stock book and repair register book etc., from 01.04.2019, take the print out, CCTV camera back up, which are available and file a printout with a detailed report. This petition was filed by the first respondent/fourth defendant against the petitioners/defendants 1,2,3 and 5. Affidavit filed in support of the

petition states that the first respondent is one of the co-sharers and she is also seeking partition of the suit properties. Second respondent herein, as plaintiff filed I.A.No.4 of 2020 for appointment of Advocate Commissioner to visit the two shops namely item Nos.1 and 4 of the suit properties, to inspect the books of account and to take copies thereof to produce before the court. The contesting respondents filed counter and additional counter and submitted that accounts are maintained digitally and account books are not available. A private auditor's report was also filed with additional counter. Argument was partly heard in I.A.No.4 of 2020, objection was taken by the contesting respondents for appointing a chartered accountant by the Advocate Commissioner. First respondent/fourth defendant's son H.S.Pranav visited item No.1 of the suit properties and he observed that the second petitioner was diverting the business from the first item shop to the fourth item shop. Fake sales are being done without bills, CCTV camera was changed, actual sales are not reflected in the accounts and proper accounts are not maintained. Bar code tags were removed and replaced by the second petitioner with an intention to destroy the evidence. Material evidence is being destroyed and self-serving reports are obtained to cover up the illegal operations.

Computers in item No.4 of the suit property should be inspected and entries would reveal the diversion. Initially. the second petitioner brain washed the first respondent and after knowing his dishonest approach, first respondent came out of his clutches and engaged her own counsel. Their father's last wish was that item No.1 of the suit properties should be entrusted to the daughters, respondents 1 and 2. Second petitioner is preventing the respondents from accessing item No.1. In the said circumstances, Advocate Commissioner has to be appointed to inspect the digital accounts, stocks and bank accounts maintained by M/s.Karpagam Aparana Maligai (item No.1) and M/s.Karpagam Jewellers (item No.4). Commissioner should take assistance of chartered accountant in this task. Therefore, this petition.

3. This petition was contested by the petitioners stating that the application filed for appointment of Advocate Commissioner for collecting evidence is not maintainable in law. This application is filed in collusion with the second respondent, who already filed an application for appointment of Commissioner in I.A.No.4 of 2020. The petitioners filed two copies of balance sheet, physical stock statement dated

20.01.2021 given by chartered accountant concerning item No.1 of the suit properties. The first petitioner appeared in person and contested the claim of the second respondent. Therefore, that petition was not pressed by the second respondent unconditionally. First respondent was also a party to I.A.No.4 of 2020 and she has not raised any objection while that petition was not pressed. Therefore, she cannot not now seek appointment of Advocate Commissioner again. First petitioner is running item No.1 of the suit properties as proprietrix and her son, the second petitioner is helping her. First respondent requested the first petitioner for training her son in the shop. Without doubting her real intention, her request was accepted. It is now used by first respondent for creating false evidence. The theory of diversion of business, change of CCTV camera and claim in this regard is meaningless, false and imaginary. Accounts are properly maintained and it is reflected in the books of accounts maintained in the computer. First respondent has no locus standi to seek inspection of item No.4 of the suit properties. Respondents have nothing to do with item No.4 of the suit properties. Item No.4 of the suit properties is the exclusive business owned in partnership in the name of M/s.Karpagam jewellers. Therefore, the question of appointing Advocate Commissioner to inspect item No.4 of the suit properties will not arise. Apparently, this petition is filed for collection of evidence, that cannot be entertained at any cost.

4. The learned I Additional District Judge, Coimbatore, on considering the rival submissions of the parties, partly allowed the petition appointing M.Gowri as Advocate Commissioner with a direction to visit item No.1 of the suit properties with the qualified chartered accountant for the purpose of taking extract of stock register, account books, repair registers and other records pertaining to bill of accounts from 01.04.2019 to till date. As far as item No.4 is concerned, the Advocate Commissioner was directed to take extract of stock register, repair register book, account book extract from 01.04.2019 till date There are other directions to the Advocate Commissioner in the order. Against the said order, this Civil Revision Petition is preferred.

5. Learned senior counsel for the petitioners submitted that earlier Commission petition filed by the second respondent in I.A.No.4 of 2020 was not pressed. When the first petitioner appeared in person

and opposed the commission petition by producing relevant accounts and auditor's report, first respondent has not opposed the not pressing of I.A.No.4 of 2020. Petition under Order 26 Rule 9 can only be filed for local inspection. Commissioner cannot be appointed for taking accounts, when the suit is pending. Item No.4 of the suit properties is a partnership business. This business has no connection with item No.1 of the suit properties. Item No.4 of the suit properties is an independent business. May be the respondent can seek to inspect item No.1 of the suit properties, but not item No.4 of the suit properties for the reason that they have not produced any single piece of material to show that they have any right in item No.4 of the suit properties. Counter in I.A.No.9 of 2021 was filed by the first petitioner. As a mother of second petitioner and respondents, she knows what is happening in item No.1 and item No.4 of the suit properties. No relief was asked for rendition of accounts for item No.4 of the suit properties. When that relief is not asked, what is the necessity for inspecting item No.4 of the suit properties for taking accounts details. The father of the respondents and second petitioner and husband of the first petitioner died on 14.08.2020. When that be the case, how can the details of accounts from 01.04.2019 can be sought for.

Item No.4 of the suit properties is the absolute property and business of the fourth petitioner. If Commissioner inspects that property, the right of the partners would be violated. The learned I Additional District Judge, Coimbatore has not considered the non-existence of right of the first respondent to pray for inspecting of item Nos.1 and 4 of the properties, in right perspective and wrongly allowed the petition. Therefore, learned counsel for the petitioner prayed for setting aside the order of the Learned I Additional District Judge, Coimbatore and for dismissing the Commission petition filed in I.A.No.9 of 2021.

6. Per contra, learned counsel for respondents 1 and 2 submitted that Commissioner Application was filed under Section 75 read with Order 26 Rules 9 and 10 of Civil Procedure Code. Section 75 gives power of inspection to the commissioner. Order 26 only prescribes rules as to how the inspection should be carried out. Therefore, commissioner can be appointed for the purpose of inspecting and taking accounts. The case of the respondents is that the second petitioner is in direct control and management of item Nos.1 and 4 of the suit properties (businesses). First petitioner is the mother and she is an

aged person. She is under the complete control and clutches of the second petitioner. The suit properties are all joint family properties, either purchased in the name of father of the respondents, second petitioner and husband of first petitioner C.Ramdos, or in the name of other joint family members. Item No.4 of the suit properties namely 'Karpagam Jewellers' was started with the funds derived from joint family income. All the properties are treated as joint family properties and enjoyed by the respondents and petitioners 1 and 2. Therefore, they are entitled for share in the properties. Taking advantage of the dominant position and having control over Item Nos. 1 and 4 of the suit properties, second petitioner is diverting the business from Item No.1 to Item No.4, making false entries in the accounts, changing CCTV footage. Therefore, the account details are absolutely necessary for establishing the rights of respondents to claim their right share in the suit properties. The first commission application in I.A.No.4 of 2020 was not pressed for the reason that the accounts are not maintained manually, but digitally. The account statement filed by the petitioners cannot be accepted. Therefore, a comprehensive application is filed for appointment of Advocate Commissioner. The learned counsel for the 1st respondent relied on the judgment reported in 2002 Supreme 231 for the proposition that the court has suo-motu powers to appoint Advocate Commissioner for elucidating any matter in dispute. He also relied on the order of this Court in CRP. (NPD) No.2686 of 2015 for the proposition that the Advocate Commissioner can be appointed for taking inventories of the business and taking note of of the accounts. He further submitted that taking note of the genuine claim of the first respondent, learned I Additional District Judge, Coimbatore, has appointed Advocate Commissioner giving specific directions to the Advocate Commissioner. Thus, he prayed for sustaining the order of learned I Additional District Judge, Coimbatore and for dismissing this Civil Revision Petition.

7. Considered the rival submissions and perused the records. From the submissions made by the learned counsel for the parties, it appears that the petitioners have no objection for the appointment of Advocate Commissioner for inspecting Item No.1 of the suit properties for the purpose of taking extract of accounts. The main dispute is with regard to the appointment of Advocate Commissioner for inspecting Item No.4 of the suit properties with a qualified chartered accountant. The

reason is that Item No.4 of the suit properties is the exclusive business of fourth petitioner, in which respondents have absolutely no iota of any right or interest. It is an independent property and business of the petitioners 1 and 2. On the other hand, it is the submission of the respondents 1 and 2 that Item No.4 of the suit properties was established with the income from the item No.1 of the suit properties. Though there is a partnership between petitioners 1 and 2 for running Item No.4 of the suit properties, in effect, it is a joint family venture and it was controlled by late Ramdoss till his life. Second petitioner was holding licence in his name. In fact, when the father Ramdoss was alive, he expressed his desire that the respondents should own and run Item No.1 of the suit properties and petitioners 1 and 2 should run Item No.4 of the suit properties. Because of his death, his last wish could not be materialised by written instrument.

8. To appreciate the rival contentions, it is necessary to go through the averments made in the plaint in brief. There is no dispute with regard to the fact that the husband of the first petitioner, father of second petitioner and respondents was Late C.Ramdoss. It is claimed in

the plaint that late Ramdoss was dealing in gold and he started a business namely 'Karpagam Aparana Maligai' , namely the first item of the suit properties. He subsequently purchased properties in his name, his wife and children. It is also alleged that Item No.4 of the suit properties namely 'Karpagam Jewellers' was established with the income from Item No.1 of the suit properties 'Karpagam Aparana Maligai'. According to the respondents, these properties are Hindu Undivided Family properties and treated as such by C.Ramdoss and other members of the joint family. Second petitioner brought about a settlement deed on 28.09.2020 by undue influence and coercion on the 1st petitioner and got item No.2 of the suit properties transferred in the name of third petitioner. Therefore, the suit had to be necessarily filed for the relief of partition and for other reliefs.

9. One of the main allegation is that the second petitioner is trying to transfer the valuable stocks from ItemNo.1 of the suit properties to item No.4 of the suit properties. There was also diversification of orders, customers and accounts. Some of the stocks in item No.1 of the business had already been mingled with item No.4.

These are broad averments made in the plaint for instituting the suit.

10. The averments in the plaint with regard to the claim that all the suit properties are joint family properties is strongly denied by the petitioners. It is petitioners' case that the properties stand in the name of petitioners 1, 2 and 3 and item No.4 of the business are their independent properties. Respondents have no iota of interest or claim over these properties. This is a disputed fact.

11. Whether all the suit properties are joint family properties or some of the suit properties alone are joint family properties or whether some of the properties were purchased from the income derived from joint family properties are the issues arise for the consideration of the court in this case. These issues arose out of the disputed facts with regard to the nature and character of the suit properties. These issues require to be proved by oral and documentary evidence.

12. At this stage, this vexed, complicated and disputed facts cannot be gone into. The specific claim made by the respondents that

item No.4 of the suit properties was established from the income from the item No.1 of the suit properties and claim of the petitioners that item No.4 of the suit properties is an independent business entity run by petitioners 1 and 2 in partnership, is a disputed fact, which require to be proved by oral and documentary evidence. Suffice it is to say that there is a dispute with regard to the nature and character of the suit properties, especially item No.4 of the suit properties as to whether it is an independent property of the petitioners 1 and 2 or the joint family properties consisting of petitioners 1 and 2 and respondents.

13. This Commission application is filed mainly for taking note of accounts from the digital records to know what is the sate of account transaction from 01.04.2019. Learned counsel for the respondents submitted that the financial year started from 01.04.2019, their father died on 13.08.2020. Therefore, it is appropriate that the account details are collected from 01.04.2019 to appreciate the rival claim. It is true that Order 26 Rule 9 deals with local inspection by the Commissioner for the purpose of elucidating any matter in dispute. The term local inspection cannot be restricted only to identifying the physical features of

immovable property. In a suit like this, where two business establishments are involved and the parties right of participation and claim share in these business establishments, is an issue to be decided, investigation of accounts is necessary for helping the court in elucidating the matter in dispute. The matter in dispute in this case is the participation in the business and sharing of profits derived from the businesses of item Nos.1 and 4 of the suit properties. Only by production of accounts, the profit and loss of the businesses can be made known and that will help the court in deciding the dispute. One important and serious allegation against the petitioners is that they are diverting the business and stock from item No.1 of the suit properties to item No.4 of the suit properties. Local inspection of immovable property is made essentially to note down the physical features of the suit property to bring it to the knowledge of the Court what is the features available on ground as on the date of inspection by the Advocate Commissioner. Inspection of accounts is also like noting the physical features (Accounts transactions) of the business of item Nos.1 and 4 of the suit properties. In the facts and circumstances of the case, allegations levelled against the petitioners and the relief claimed. The prayer for appointment of

Commissioner to take accounts from 01.04.2019 cannot be faulted.

14. With regard to the submissions made by the senior learned counsel for the petitioners that when no relief for accounts is claimed in respect of item No.4 of the suit properties, what is the necessity to inspect and take accounts in respect of item No.4 of the suit properties, the learned counsel for the respondents submitted that such a relief can be claimed by the first respondent by way of counter claim. Therefore, it is not necessary to deal any further on this point now.

15. It is seen from the memo filed by the petitioners for deferring the inspection scheduled on 17.08.2021 on the ground that the marriage of second petitioner's daughter was scheduled on 20.08.2021, petitioners submitted that they are ready to cooperate with the Advocate Commissioner's visit on 22.08.2021 for item No.1 of the suit properties. Then they filed this revision petition.

16. The learned I Additional District Judge, Coimbatore has considered all the relevant aspects and found that the appointment of

Advocate Commissioner with the help of qualified chartered accountant is necessary for elucidating the matter in dispute and for helping the court to arrive at a right decision. Learned I Additional District Judge, Coimbatore was also very cautious in ordering appointment of Advocate Commissioner. He issued necessary directions taking note of interest of both the parties. Therefore, this Court finds no reason to interfere with the order of the learned I Additional District Judge, passed in I.A.No.9 of 2021 in O.S.No.672 of 2020 on 10.08.2021 and it is confirmed.

17. Accordingly, this Civil Revision Petition is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

17.09.2021

mra

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

To,
1. The I Additional District Judge, Coimbatore.

G.CHANDRASEKHARAN, J.

mra

Pre-delivery order in
CRP (PD) No.1740 of 2021
and
C.M.P.No.13504 of 2021

17.09.2021