

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 16.04.2021

Pronounced on : 20.04.2021

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

C.R.P.(PD).No.2321 of 2020

and

C.M.P.No.14588 of 2020

C.B.Manokaran

...

Petitioner / Plaintiff

Vs.

1.P.Valli

2.P.Nallendra Kumar

3.S.Hemalatha

4.Hari @ Hariharan

5.Antony Philips

6.Mariam Biji



Respondents / Defendants

Prayer:- This petition filed under Article 227 of the Constitution of India, prayed to set aside the fair and decretal order dated 24.11.2020 passed by the learned District Munsif, Tiruvotiyur, dismissing I.A.No.2 of 2020 in O.S.No.4 of 2017 and allow I.A.No.2 of 2020 in O.S.No.4 of 2017.

For Petitioner : Mr.B.Hari Krishnan

For R5 : Ms.R.Poornima

For R1 to R4 : No Appearance

ORDER

The Revision Petition has been filed by the plaintiff in O.S.No.4 of 2017 now pending on the file of the District Munsif Court, Tiruvotriyur, questioning the order dated 24.11.2020 in I.A.No.2 of 2020.

2.The said application had been filed seeking appointment of an Advocate Commissioner to make local inspection. The said application was dismissed by order dated 24.11.2020.

3.O.S.No.4 of 2017 had been filed by the plaintiff, seeking a judgment and decree against the defendants in the nature of declaration that a Sale Deed dated 10.03.2011 executed by the 1st, 2nd and 3rd defendants conveying the lands measuring 17.5 cents in S.No.73/48 in Ernavur Village, Tiruvotriyur Taluk, Tiruvallur District, to and in favour of the 4th defendant is non-est, illegal, null and void and not binding on the plaintiff and on the other legal heirs of deceased Chellammal and for permanent injunction restraining the 4th and 5th defendants from interfering with the peaceful possession of the plaintiff with the said lands and for costs of the suit.

4.It had been stated in the plaint, that the lands in S.No.73/48 measuring 17.5 cents is the ancestral property of the plaintiff. The revenue records stands in the name of paternal grandmother Chellammal. The property had devolved on to her and she was in uninterrupted possession and enjoyment till her death. During her lifetime, Chellammal also purchased lands measuring 16,000 sq.ft., in S.No.73/50 also situated in Ernavur Village by a registered Sale Deed dated 11.04.1966 registered as Doc.No.467 of 1966 in the Sub-Registrar Office, Tiruvotriyur. She later sold the said lands in S.No.73/50 to one T.D.Purushothaman, under Sale Deed dated 06.12.1967 registered as Doc.No.1917 of 1967 in the Office of the Sub-Registrar, Tiruvotriyur.

5.Chellammal died on 17.03.1983 leaving behind three sons, one daughter and three grand children including the plaintiff herein born through a pre-deceased son. It is claimed that the legal heirs are entitled to succeed to her estate namely her ancestral property in S.No.73/48 measuring 17.5 cents. The plaintiff and his two sisters are jointly entitled to an undivided 1/5th share in the said ancestral property in S.No.73/48. The other four shares would devolve to the other three sons and daughter of Chellammal.

6.It is claimed in the plaint that the purchaser of S.No.73/50 measuring 16,000 sq.ft., from Chellammal under registered Sale Deed dated 06.12.1967, T.D.Purushothaman died on 24.09.1992. His legal representatives namely, his wife, son and daughter who had been impleaded as 1st, 2nd and 3rd defendants had sold the lands in S.No.73 / 48, Ernavur Village along with other lands in S.Nos.73/1P, 73/49, O.S.No.73, 48, Block No.4, Ward B, Ernavur Village, to the 4th defendant under Sale Deed dated 10.03.2011 registered as Doc.No.1828 of 2011 in the Office of the Sub-Registrar, Tiruvotriyur. This Sale Deed by which the ancestral property of Chellammal had been sold by the legal representatives of T.D.Purushothaman has been sought to be declared as null and void by the plaintiff in the suit.

7.The plaintiff had also lodged a complaint with the Central Crime Branch, Office of the Commissioner of Police on 29.09.2011 and a representation was also given on 25.10.2012 to the Inspector General of Registration to cancel the Sale Deed. It is stated that there has been no progress with respect to either criminal complaint or with respect to the representation to cancel the Sale Deed. A representation was also given on 07.06.2013 to the Revenue Divisional Officer, Madhavaram to survey the suit property. However, survey has not been conducted. It is claimed

that the 5th defendant who is not involved with the dispute but claims to be an Advocate and a politically influential person, along with the 4th defendant had attempted into encroach the said property. It is under these circumstances that the suit had been filed seeking the reliefs as prayed for.

8. Along with the plaint, the Sale Deed dated 11.04.1996 registered as Doc.No.467 of 1966, whereby Chellammal purchased the lands in S.No.73/50 and the Sale Deed dated 06.12.1967 registered as Doc.No.1917 of 1967 whereby Chellammal sold the said lands to T.D.Purushothaman had been filed as documents. The Sale Deed dated 10.03.2011 registered as Doc.No.1828 of 2011 whereby the legal heirs of T.D.Purushothaman had however sold the lands in S.No.73/48 which the plaintiff claims to be ancestral property of Chellammal had also been filed as a document along with the plaint. Other relevant documents had also been filed.

WEB COPY

9. Written statement had also been filed. Issues had been framed and parties had been invited to adduce evidence. Plaintiff had adduced evidence. The defendants had also adduced evidence. The matter is now posted for delivering of judgment. It is however, claimed by the learned

counsel for the petitioner / plaintiff that he had not advanced arguments before the Trial Court. This is countered by the learned counsel for the respondents / defendants stating that sufficient opportunity had been granted for advancing arguments.

10. At this juncture, the petitioner herein who was the plaintiff in the suit had filed I.A.No.2 of 2020 seeking permission to appoint an Advocate Commissioner to inspect and survey the suit property along with the help of Taluk Surveyor and to file a report in respect of the suit property. It had been claimed that this is required because the ancestral property of Chellammal was S.No.73/48 measuring 17.5 cents. She had also purchased the land measuring 16,000 sq.ft., in S.No.73/50. She had conveyed that land namely S.No.73/50 to T.D.Purushothaman. After his death the legal representatives of T.D.Purushothaman, had however, conveyed the ancestral property of Chellammal in S.No.73/48 measuring 17.5 cents along with other lands to the 4th defendants in the suit. In order to establish that the suit property is S.No.73/48 and not other survey numbers as claimed by the defendants, appointment of an Advocate Commissioner was sought.

11.A counter had been filed on behalf of the 4th to 7th defendants. The purchaser of the land was the 4th defendant and on his death his legal representatives had been impleaded as 6th to 7th defendants. It is claimed that the 5th defendant is an Advocate. They claimed that the plaintiff is not a legal representative of Chellammal. They also claimed that the suit property is not the ancestral property of Chellammal. They claimed that the 4th defendant had entered into an unregistered Agreement of Sale on 25.04.1991 with T.D.Purushothaman. After the death of T.D.Purushothaman, the property was registered by a Sale Deed in the year 2011 by his legal representatives. It is claimed that the 1st, 2nd and 3rd defendants were in absolute possession of the vacant property measuring 17.5 cents in T.S.Nos.79 & 90, R.S.No.73/48, 73/1P, 73/49, O.S.No.73, Block No.4, Ward B, Ernavur Village. It is claimed that they are in possession of the property. It had been claimed that this purchase had been suppressed in the plaint. It had also been stated that the plaintiff had not provided the measurement of the suit property and also not mentioned the boundaries. It had also been stated that there are no title deeds in favour of the plaintiff with respect to the suit property. It had been stated that the application should be dismissed.

12.By order dated 24.11.2020 , the said application came to be dismissed by the learned District Munsif, Tiruvotriyur. The learned Judge found that the application had been filed at the time when the suit is posted for defendants' side further evidence. The learned Judge also opined that an Advocate Commissioner cannot be appointed to collect evidence. The learned Judge also stated that the revenue records would speak with respect to the identity of the suit property. Even though rulings were forwarded by the learned counsel, the learned Judge straight away stated that they are not applicable to the case and therefore, dismissed the Interlocutory Application. This order has been called into question by the revision petitioner.

13.Heard arguments advanced by Mr.B.Hari Krishnan, learned counsel appearing for the petitioner and Ms.R.Poornima, learned counsel appearing for the 5th respondent. There has been no appearance for the other respondents.

14.I have carefully considered the materials on record and the arguments advanced.

15.The suit in O.S.No.4 of 2017 now pending on the file of the learned District Munsif, Tiruvotriyur, had been filed seeking a judgment and decree against the defendants in the nature of a declaration that the Sale Deed dated 10.03.2011 executed by the 1st, 2nd and 3rd defendants conveying the lands measuring 17.5 cents in S.No.73/48 in Ernavur Village, Tiruvotriyur Taluk, Tiruvallur District, to and in favour of the 4th defendant is non-est, illegal, null and void and not binding on the plaintiff and on the other legal heirs of deceased Chellammal and for permanent injunction restraining the 4th and 5th defendants from interfering with the peaceful possession of the plaintiff with the said lands and for costs of the suit.

16.The plaintiff's paternal grandmother Chellammal is said to have been possessed of an ancestral property in S.No.73/48 measuring 17.5 cents in Ernavur Village, Tiruvotriyur. It is claimed that she also purchased lands measuring 16,000 sq.ft., in S.No.73/50 also in Ernavur Village, Tiruvotriyur, by a registered Sale Deed dated 11.04.1996 registered as Doc.No.467 of 1996 in the Office of the Sub-Registrar, Tiruvotriyur. She sold the said lands in S.No.73/50 measuring 16,000 sq.ft., by registered Sale deed dated 06.12.1967 registered as

Doc.No.1917 of 1967 in the Office of the Sub-Registrar, Tiruvotriyur, to T.D.Purushothaman. Chellammal died on 17.03.1983. It is claimed that she was survived by three sons and one daughter and by the grand children of a pre-deceased son. The plaintiff is one of the said grand children. He claimed an undivided 1/5th share in S.No.73/48 measuring 17.5 cents along with his two sisters. The other undivided four shares would devolve on the surviving three sons and daughter of Chellammal. It is claimed that T.D.Purushothaman died on 24.09.1992. After his death his legal representatives namely, 1st, 2nd and 3rd defendants had sold the lands in S.No.73/48 which the plaintiff claims to be the ancestral property of Chellammal instead of lands in S.No.73/50 which Chellammal had purchased and later conveyed to T.D.Purushothaman, to the 4th defendant along with other lands. This Sale Deed is questioned in the suit. Evidence has been let in. Documents have been marked. The witnesses have been examined and cross-examined and the documents have been tested during cross-examination. At that stage, the plaintiff had filed an application for appointment of an Advocate Commissioner to survey the suit property and file a report with respect to the physical features and to undertake this task of inspection and survey of the suit property with the help of a Taluk Surveyor. The learned Judge had

rejected the said application. Three judgments were relied by the petitioner. The judgments were not referred to by the learned Judge. The learned Judge should have had the courtesy to indicate what the three judgments relied on by the petitioner herein stated and in what manner they were not relevant to the facts of the case. The learned District Munsif, Tiruvotriyur, had no authority to simply reject the said judgments even without probably opening them and reading them.

17. In *Sarawathy & Another Vs. Viswanathan S/o Muthusamy* reported in **2002 (2) CTC 199**, one of the judgments, referred, a learned Single Judge of this Court had, no doubt in a suit relating to easementary right, an occasion to set aside the order of a learned Subordinate Judge who dismissed an application seeking appointment of an Advocate Commissioner and in the course of the reasoning, had held as follows:

“9. In my view, the reasoning of the learned Judge cannot be accepted. Merely because there is no dispute with regard to the identity of the property, it does not mean that no case is made out for the appointment of an Advocate Commissioner. The question is whether the defendant is putting up the construction in his property as per the plan sanctioned by the Municipality. Equally, the

further question would be as to whether the plaintiffs themselves have put up construction as per any sanctioned plan in their property, for which purpose a visit by the Advocate Commissioner to note down the physical features and take measurements on the basis of the rival documents would be necessary and it would eliminate any detailed oral evidence.

10. In Pillaiyar v. Ganesan and another, 1999 MLJ (Supp.) 432 I had occasion to consider the grounds for invoking Order 26 Rule 9 of the Code of Civil Procedure for the appointment of an Advocate Commissioner. No doubt, there can be no appointment of Commissioner for collecting evidence or gathering materials. However, the object of a Commission under Order 26 Rule 9 of the Code of Civil Procedure is not to collect evidence, which has to be done only by the Court, but for elucidating matters which are local in character, which can be done only by local investigation at the spot.

11. In my view, a local investigation is requisite and proper and the lower Court was in error in declining to appoint an Advocate Commissioner. Absolutely no prejudice would be caused by the appointment of an Advocate Commissioner.

12. In Ponnusamy v. Salem Vaiyappamalai Jangamar Sangam, 1985 (1) MLJ 380: AIR 1986 Mad. 33, the appointment of an Advocate commissioner was sought for by the defendant in a suit for injunction to restrain him from digging foundation in the plaintiff's land. The defendant contended that the land belonged to him. The Court refused to issue Commission. Nainar Sundaram, J. (as the learned Judge then was) interfered with in revision and granted the prayer on the following reasoning:

“A controversy, as we would see from the pleadings, has arisen as to whether the constructions put up by the third defendant are within his land or whether they have encroached into the lands of the plaintiff. A local investigation is the best way to find out the position and the party, viz., the third defendant coveting the evidence to place before the Court through local investigation by the Commissioner cannot be shut out of their right.”

13. In Appu v. A. Fatima Zohra and another, 1983 (96) LW 369: 1982 TLNJ 482 it has been held by this Court that,

“there may be very many circumstances in which only a Commissioner inspecting the property promptly and recording timely assessment of what obtains relating to the building, could alone assist Courts to decide correctly. If such prompt actions are not taken, it may destroy the

valuable right of the parties. It may so happen, when a landlord highhandedly starts pulling down a portion of the main building, the tenant would be greatly interested in securing a Commissioner appointed forthwith. If the right of the tenant to have access to stair-case is constructed, he is most interested in seeking appointment of the Commissioner and secure immediate relief for restoring amenities, which is assured to him under the Act.”

14. As already pointed out, absolutely no prejudice would be caused by the appointment of an Advocate Commissioner for the purpose of inspecting the property and submitting his report on the physical features, measurements etc. Though the Commissioner cannot decide the dispute, his inspection and report would help the Court in deciding the dispute.

18. In **Sivagurunathan Vs. Ramalingam and Others** reported in (2005) 3 MLJ 525, it had been held as follows:

12. When the controversy between the parties is about the area of the land or the identification or the location of the land, local investigation by a commissioner is necessary. It would clarify the location and extent in which the plaintiff is in possession and would explain any doubtful points on the evidence on

record. When there is a dispute over the extent, measuring of the suit property with the help of surveyor and the plan thereon would considerably reduce the oral evidence. The object of local investigation is to obtain evidence which could be based on only from the spot and the inspection. Report of the advocate Commissioner would enable the Court to properly and correctly understand and assess the evidence on record in resolving the contentious points.”

19. It is seen that even in the instant case, a real dispute had arisen, in view of the fact that the plaintiff claims that Chellammal sold 16,000 sq.ft., in S.No.73/50 to T.D.Purushothaman. However, after his death, the legal representative of T.D.Purushothaman had conveyed to the 4th defendant the lands in S.No.73/48 measuring 17.5 cents which the plaintiff claims to the ancestral property of Chellammal. Therefore, there is an issue which had arisen which requires elucidation and this is local in character and can only be done by local investigation at the spot. The assistance of a Taluk Surveyor would certainly clear the doubt whether the property conveyed to the 4th defendant was S.No.73/48 or 73/50. It can be easily verify by looking to the boundaries found in the documents of sale namely, the Documents registered as Doc.No.467 of 1996 dated

11.04.1966, Doc.No.1917 of 1967 dated 06.12.1967 and Doc.No.1828 of 2011 dated 10.03.2011. Identification of the property can only be done by a Taluk Surveyor and the presence of an Advocate Commissioner would only give further authenticity. This would certainly help the learned District Munsif to give a fair judgment with respect to the issues raised in the suit. It is no doubt true the application had been filed at a late stage. However, the report of the Advocate Commissioner would certainly not affect the existing evidence already recorded and let in by the parties. The Advocate Commissioner is only an officer of the Court. He is an extended arm of the Court. The Advocate Commissioner is certainly not appointed to collect the evidence but only for elucidating matters in dispute. The local investigation is the best way to find out the possession and to fix the identity of the property which had actually been sold. Though Commissioner cannot decide the dispute, his inspection and report would help the Court in deciding the dispute.

WEB COPY

20.I also hold that no prejudice would be caused by appointment of an Advocate Commissioner for the purpose of inspecting the property and submitting a report. The lands are fixed in nature. Survey numbers have been allotted. It is now an issue of determining the lands in

particular survey number namely, S.No.73/48 and 73/50 and determining which one of the lands in the said survey numbers had actually been conveyed by the 1st, 2nd and 3rd defendants to the 4th defendant. This would require, as stated above, local investigation and for that purpose to assist the Court to decide the dispute, appointment of an Advocate Commissioner would certainly be of much assistance to resolve the issue raised by both parties.

21. In view of these reasons, the order of the learned District Munsif, Tiruvotriyur, is set aside and the matter is remitted back to the learned District Munsif, Tiruvotriyur, for appointment of an Advocate Commissioner to inspect the property along with the Taluk Surveyor and file necessary report in accordance with the reliefs sought in I.A.No.2 of 2020.

22. The Advocate Commissioner should follow the procedure set out by issuing notice to the parties to the suit and to the learned counsels. The expenses of the Advocate Commissioner should be borne by the present Revision Petitioner / Plaintiff and I leave it to the discretion of the learned District Munsif, Tiruvotriyur to nominate the Advocate Commissioner and to decide the remuneration.

23.The learned District Munsif, Tiruvotriyur, may, after taking up the report of the Advocate Commissioner also grant necessary opportunity to all the parties to file their objection and if necessary summon the Advocate Commissioner for examination. However, this would not give any right to either the plaintiff or the defendants to reopen the evidence which had already been recorded. That evidence still stands and would continue to stand. It cannot be added. It should be analysed and such analysis should be done keeping in mind the report of the Advocate Commissioner.

24.The learned District Munsif, Tiruvotriyur, should give necessary opportunity to the plaintiff and the defendants to advance arguments and thereafter deliver judgment. The directions stated above may be strictly followed by the learned District Munsif, Tiruvotriyur.

25.With the above observations, the Civil Revision Petition is allowed. No order as to costs. Consequently, the connected Civil Miscellaneous Petition is also closed.

20.04.2021

smv

Index : Yes / No

Internet : Yes / No

Speaking order : Yes / No

C.V.KARTHIKEYAN, J.,

smv



Pre-Delivery Order made in
C.R.P.(PD).No.2321 of 2020

WEB COPY

20.04.2021