

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.04.2021

CORAM

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

C.R.P(PD).No.1481 of 2017

and

C.M.P.No.6862 of 2017

K.R.Palanivel
S/o.Ramasamy Gounder

... Petitioner

Vs

1.Arunachalam
S/o.Kanthasamy Nadar

2.Perumayee
W/o.Late Ramasamy

3.Jothimani
S/o.Late Ramasamy

... Respondents

Prayer: Petition filed under Article 227 of the Constitution of India, seeking to set aside the fair and decreetal order dated 03.01.2017 in I.A.No.353 of 2016 in O.S.No.48 of 2016 on the file of the District Munsiff court, Rasipuram.

For Petitioner : Mr.S.Kalyanaraman

For Respondents : Mr.N.Suresh

ORDER

(The case has been heard through video conference)

Civil Revision Petition has been filed seeking to set aside the fair and decreetal order dated 03.01.2017 in I.A.No.353 of 2016 in O.S.No.48 of 2016 passed by the District Munsiff court, Rasipuram.

2.The brief facts of the case is that the petitioner is the plaintiff in suit which has been filed for declaration and permanent injunction. The case of the revision petitioner is that the suit properties belong to him by inheritance and by virtue of sale deed. Since there was some inconvenience in enjoying the suit properties, the petitioner and the 1st respondent had jointly executed an exchange deed dated 08.05.2012 and pursuant to the exchange deed, the revision petitioner was in possession and enjoyment of the suit properties. The further averment of the petitioner is that the property of the petitioner was in elevated position and that the property of the 1st respondent was lying 4 feet below his property, thereby, the petitioner attempted to put a stone revetment in the property and the same was objected and prevented by

the respondents, thereby the revision petitioner had filed a suit for declaration of his title over the suit properties and for consequential injunction. During the pendency of the suit, the revision petitioner / plaintiff had filed the petition in I.A.No.353 of 2016 in O.S.No.48 of 2016 to appoint an Advocate Commissioner to note down the physical features of the suit properties and also to measure the properties with the help of a qualified surveyor and to file a plan in order to establish the truth for arriving at a right decision.

3.The 1st respondent had filed a counter stating that the alleged exchange deed stated by the petitioner / plaintiff dated 08.05.2012 was obtained by fraud and that the respondents / defendants have also filed a suit in O.S.No.96 of 2016 to cancel the exchange deed dated 08.05.2012 and the same is pending for disposal. Further, the 1st respondent had stated that the revision petitioner / plaintiff was not in possession and enjoyment of the suit property as per the exchange deed dated 08.05.2012 and thereby he would not be entitled to seek relief based on the exchange deed dated 08.05.2012. Further it was contended by him that the petitioner / plaintiff who wanted to

establish the possession should have done the same through independent witnesses and he should not seek to prove his case by appointment of an Advocate Commissioner to establish the same and that the petitioner had filed a petition only to stall the suit.

4.The trial Court, after hearing the revision petitioner / plaintiff and the respondents/ defendants had dismissed the petition filed in I.A.No.353 of 2016 vide order dated 03.01.2017, against which, the present revision has been filed.

5.Learned counsel appearing for the revision petitioner would submit that the petitioner is the plaintiff in the suit. He had filed a suit for declaration and permanent injunction in respect of the suit scheduled properties. Earlier, since the petitioner was facing some inconvenience with regard to the enjoyment of the suit properties, he had entered into a deed of exchange dated 08.05.2012 and thereafter he had also mortgaged the property with Canara Bank and obtained loan and he had also obtained patta in his favour and that since the property of the petitioner was in an elevated

position and the property of the respondents was lying 4 feet below the land of the petitioner, the petitioner intended to put up a stone revetment in the property, whereas, the respondents prevented him from putting up the stone revetment in the property, thereby, the petitioner had filed a petition for appointment of Advocate Commissioner to get the filed report with regard to the physical features with the help of the qualified surveyor. Whereas, the trial Court without taking into consideration the issue in question had dismissed the petition filed in I.A.No.353 of 2016 in O.S.No.48 of 2016. The learned Judge has failed to see that the appointment of advocate commissioner and a report filed by him would assist the Court in arriving at a right decision and thereby, he would seek to allow the revision and set aside the impugned order.

6.Per contra, learned counsel appearing for the respondents would submit that as per the Order 26 Rule 9, a commissioner can be appointed whenever the Court deems that local inspection is required for the purpose of elucidating any matter in dispute. He would further submit that there is absolutely no dispute with regard to the physical features or the location of

the properties. The reasons adduced by the petitioner did not make out a case for appointment of Advocate commissioner. The suit was filed for declaration and permanent injunction and it is a case of the petitioner / plaintiff that he is claiming the property by way of exchange deed, whereas the exchange deed itself is disputed herein. The respondents have also filed a suit praying to declare that the alleged exchange deed is null and void since it has been obtained by fraud. Admittedly, there is no dispute with regard to the possession, location, description or physical features of the properties by the petitioner and the respondents and the issue to be decided is whether the petitioner is in possession of the suit property pursuant to the exchange deed dated 08.05.2012 or not and the reasons for appointment of Advocate Commissioner is beyond the scope of the suit. The trial Court finding that the petitioner has not stated any specific reasons for appointment of commissioner in the petition and finding that the petitioner has simply stated that in order to establish the truth there was a need for appointment of advocate commissioner and also finding that the petitioner / plaintiff had filed the petition with an intention to gather evidence had rightly dismissed the petition. The trial Court also finding that the petition

has been filed in order to gather evidence in his support had rightly dismissed the petition and there is no error in the order passed by the trial Court and it warrants no interference of this Court.

7.Heard the counsels and perused the materials.

8.The trial Court after perusing the pleadings had come to a conclusion that the dispute between the parties is in respect of the possession over the suit properties and that the issue to be decided in the suit is whether the petitioner is in possession of the suit properties or not and whether the exchange deed dated 08.05.2012 is true and valid. The trial Court had further held that the petitioner has not stated any specific reason for appointment of an advocate commissioner and that he had simply stated that the petition had been filed for appointment of advocate commissioner to establish the truth and had further held that the parties should establish their case through letting in oral and documentary evidence and that the petitioner is not entitled for appointment of an advocate commissioner. Since it is a settled law that an advocate commissioner cannot be appointed for the

purpose of gathering evidence in support of one party and finding that the purpose of the petitioner seeking for appointment of the advocate commissioner is to lend a support to his plea that he is in possession, has dismissed the petition. The trial Court had further held that the material issue of determining the possession cannot be left to an advocate commissioner.

9.In this case, the suit has been filed seeking for declaration and permanent injunction against the respondents from interfering with the peaceful possession and enjoyment of the suit properties. It is the case of the respondents that they are in possession of the suit scheduled properties. The alleged exchange deed dated 08.05.2012 is also disputed by the respondents.

10.When the suit is pending, the petitioner has filed a petition in I.A.No.353 of 2016, seeking for appointment of an advocate commissioner and the reasons stated in the petition is that the petitioner had attempted to put up stone revetment in the properties and that it was prevented by the

respondents and that in order to establish the truth, it is necessary to appoint an advocate commissioner for arriving at a just decision. The trial Court finding that the petition had been filed to lend support to his plea that the suit properties were in his possession, has dismissed the petition.

11.As rightly stated by the trial Court, the petitioner has to prove his case through independent evidence and that an advocate commissioner cannot be appointed for ascertaining the boundaries and possession in support of his case. As stated by the trial Court, there is no dispute with regard to the boundaries or physical features, this Court finds no infirmity or illegality in the order passed by the trial Court.

12.In view of the above, the revision stands dismissed. It is made clear that the observations made in the revision petition are only for deciding this revision and the trial Court shall get along with the trial based on the evidence adduced in trial.

A.D.JAGADISH CHANDIRA, J.

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13.With the above observations, this Civil Revision Petition stands dismissed. Consequently, the connected miscellaneous petition is also dismissed. No costs.

20.04.2021

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Index : yes / no

Internet : yes / no

To.

1.The District Munsif Court
Rasipuram



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