

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.03.2021

CORAM

THE HON'BLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

CRP.PD.No.1566 of 2017

and

CMP.No.7323 of 2017

S.Shanthi

... Petitioner

Vs.

1.T.S.Mahalingam
Rep by Power Agent
K.Mohanraj

2.The Deputy Commissioner
Arulmigu Kapaaleshwar Thirukoil
Mylapore,
Chennai – 600 004.

... Respondents

PRAYER: The Civil Revision Petition is filed under Article 227 of the Constitution of India, praying to set aside the order and Decretal order dated 16.12.2016, passed by the XIII Assistant Judge, City Civil Court, Chennai in I.A. No.12838 of 2015 in O.S.No.6932 of 2014 thereby allowing this Civil Revision Petition.

For Petitioner

: Mr.M.K.Kabir
Senior Counsel for
M/s.M.K.Padma

For Respondents

: Not ready in notice (for R1)
M/s.Usha (for R2)

ORDER

This Civil Revision Petition is directed as against the order and decretal order passed in I.A. No.12838 of 2015 in O.S.No.6932 of 2014 dated 16.12.2016 on the file of the XIII Assistant Judge, City Civil Court, Chennai, thereby, dismissing the petition seeking for appointment of an Advocate Commissioner to record the evidence of the plaintiff/T.S.Mahalingam.

2. The petitioner is the first defendant in the said suit filed by the first respondent herein and the second respondent is the second defendant in the suit. The said suit is filed for mandatory injunction directing the petitioner to vacate and hand over the possession of the suit property and also seeking injunction restraining the second respondent herein from transferring the suit property in favour of the petitioner herein. The suit filed by the Power of Attorney of one T.S.Mahalingam. The second defendant filed a written statement stating that the plaintiff viz., T.S.Mahalingam is no more and hence, the Power of Attorney given by him does not survive and the suit filed by the Power of Attorney is not maintainable. Further, it was averred that the Power of Attorney has not disclosed the address of T.S.Mahalingam

and as such, the Power of Attorney filed by him is suspicious. As such, the petitioner filed a petition to appoint the Advocate Commissioner to record the evidence of the plaintiff/T.S.Mahalingam and the same was dismissed by the trial Court on the ground that the petitioner did not take any claim for the suit and he did not pay any Court fee to require whether the plaintiff is alive and no prayer for declaration to declare that the plaintiff is alive was asked for by the petitioner herein.

3. Mr.M.K.Kabir, learned Senior Counsel for the petitioner submitted that the second defendant filed a written statement, in which it was specifically averred that the plaintiff is no more and as such, the Power of Attorney given by the plaintiff does not exist and the suit itself abated. On the strength of the said statement, the first defendant/petitioner filed a petition for appointment of Advocate Commissioner to record the evidence of the plaintiff. In fact, the Power of Attorney filed a counter and specifically averred that the principal viz., the said T.S.Mahalingam is very much alive and he is ready to appear before the trial Court, if necessary inspite of his illness. When the trial Court specifically directed the plaintiff to appear before the trial Court, he did not appear and no medical records

were produced before the trial Court for his non appearance. Even then, the trial Court dismissed the application with irrelevant reason that the petitioner did not ask for any counter claim in the suit as against the plaintiff.

4. Though notice was served on the first respondent and the name is also printed in the cause list, no one appeared on behalf of the first respondent. Heard the learned Senior Counsel for the petitioner as well as the learned counsel for the second respondent.

5. The first respondent is the plaintiff. He filed the suit through his Power of Attorney for mandatory injunction directing the petitioner to vacate and hand over the possession of the suit property and also seeking injunction restraining the second respondent herein from transferring the suit property in favour of the petitioner herein.

6. On a perusal of the plaint, it reveals that that the plaintiff became old and sick. Therefore, he executed Power of Attorney in favour of one Mohanraj and filed the suit. The second respondent filed a written statement and specifically averred as follows:-

“7. This defendant also learns that the plaintiff T.S.Mahalingam is no more and hence the Power of Attorney given by him does not survive and the suit filed by the Power of Attorney is not maintainable. This defendant also submits that even in the plaint the Power of Attorney has not disclosed the address of T.S.Mahalingam, the plaintiff in the suit and hence the Power of Attorney filed by him is suspicious. The Power of Attorney is bound to prove that T.S.Mahalingam gave him the Power to look after the property and he was alive on the date of filing of the suit.”

7. Therefore, the petitioner filed a petition to appoint an Advocate Commissioner to record the evidence of the plaintiff. On the said petition, the first respondent filed a counter stating that the said T.S.Mahalingam/plaintiff is very much alive and if necessary in spite of his ill health, he is ready to appear before the trial Court for his evidence. When the trial Court is specifically directed the said T.S.Mahalingam to appear before the trial Court, he failed to appear and also failed to produce any medical records showing that he fell ill.

8. On a perusal of the records, further it reveals that the trial Court also failed to render a finding on the issue whether the Power of Attorney

dated 10.02.2012 executed by the plaintiff in favour of T.S.Mahalingam is valid and is in force. When that being so, under Order III Rule 1 of Civil Procedure Code, the Power Agent can only adduce evidence on facts known to him and he cannot adduce evidence pertaining to facts relating to the personal knowledge of the principal/plaintiff. The principal has to prove the factual position and he has to subject himself for cross examination to substantiate his contention. Therefore, it is essential to prove that the said T.S.Mahalingam is alive or not as on date.

9. In view of the above discussion, this Civil Revision Petition is allowed and the order passed in I.A. No.12838 of 2015 in O.S.No.6932 of 2014 dated 16.12.2016 is set aside. The trial Court is directed to appoint an Advocate Commissioner to record the evidence of the plaintiff/T.S.Mahalingam, after verifying his identity in the manner known to law. Consequently, the connected Miscellaneous Petition is closed. No costs.

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03.03.2021

Speaking/Non-speaking order

Index : Yes/No

kv

G.K.ILANTHIRAIYAN,J.

Kv

To

1. The XIII Assistant Judge,
City Civil Court, Chennai.
2. The Deputy Commissioner
Arulmigu Kapaaleshwar Thirukoil
Mylapore,
Chennai – 600 004.



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