



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED :16.08.2021

CORAM:

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

C.R.P. (PD) (MD) No.1621 of 2014

and

M.P(MD) No.1 of 2014, CMP(MD) No.11245 of 2018

WEB COPY

1. P.Backiyanathan
2. P.Pitchi
3. P.Padmanabhan ... Respondents/Defendants/Petitioners

-vs-

1. K.Vijayakumaran ... Petitioner/Plaintiff/Respondent
2. Kunjan Nadar ... Respondent/Defendant/Respondent

PRAYER: Civil Revision Petition is filed under Article 227 of Constitution of India, to set aside the fair and decreetal order dated 22.03.2014 made in I.A.No.322 of 2013 in O.S.No.42 of 2012 on the file of the Subordinate Judge, Kuzhithurai and allow the above Civil Revision Petition.

For Petitioner : Mr.P.Thigarajan

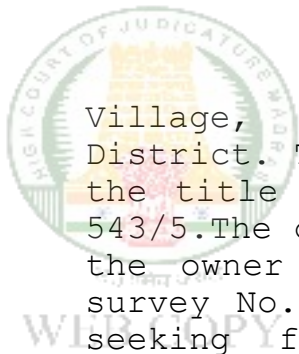
For Respondents : Mr.C.K.M.Appaji for R1
No appearance for R2.

O R D E R

This Civil Revision Petition has been filed to set aside the fair and decreetal order dated 22.03.2014 made in I.A.No.322 of 2013 in O.S.No.42 of 2012 on the file of the Subordinate Judge, Kuzhithurai and allow the above Civil Revision Petition.

2. The brief facts of the case is as follows:

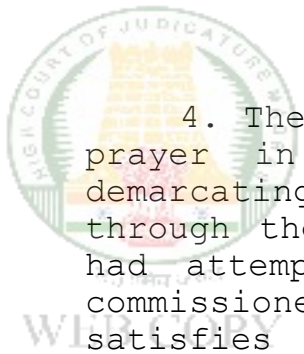
The plaintiff has filed O.S No.42 of 2012 on the file of the Sub Court, Kuzhithurai seeking relief to grant decree for demarcation and put up boundary on the western boundary of the plaint scheduled property through the Honourable Court in execution and the plaintiff to be given decree of permanent injunction and restraining the defendants and their men from trespassing into the plaint scheduled property and committing any act of waste in the plaint scheduled property. The suit scheduled properties were referred as 543/5A, 534/11 and 534/12 measuring 70 cents in Pacode



Village, Vilvankode Taluk, Marthandam Joint II, Kanyakumari District. The first defendant has filed a written statement denying the title of the plaintiff with regard to the property in R.S.No. 543/5. The defendants in the written statement has stated that he is the owner of the property in RS No. 543/5 which pertains to old survey No. 1498. Whiles, the plaintiff filed IA No. 332 of 2013 seeking for appointment of commissioner for the purpose of demarcating the western boundary of the suit scheduled property and note and assess various damages caused by the respondent/defendants in the suit property. Further in the petition the following points were directed to be noted and ascertained by the advocate commissioner.

- 1) To measure the schedule property with the help of the resurvey plan and locate it on a plan.
- 2) To fix the boundary stone on the north west and south west corners of the scheduled property and demarcate the western boundary of the schedule property.
- 3) to note the rubber trees standing on the schedule property
- 4) to note the bars of the rubber tree cut and removed recently and to note its age and numbers
- 5) To note the bark cut removed earlier and to note its age and number
- 6) To note the damage caused to the rubber trees by cutting the barks
- 7) Such other points that will be asked at the spot during the visit of the commissioner.

3. The defendants filed a counter stating that the suit property is the subject matter of O.S.No. 425 of 1966 filed by the defendant's mother Palammal for redemption of mortgage and the suit was decreed in her favour and the same is binding on the plaintiff since his predecessor are the parties to the suit and pursuant to the decree the defendant's mother had taken delivery of the properties through Court. So the executants of the sale deed dated 14.12.1977 relied on by the plaintiff have no title and possession in respect of the suit scheduled property and that the plaintiffs had not mentioned the old survey number of the property which is mentioned in the earlier document and further the prayer in the main suit and in the petition for appointment of commissioner were one and the same, whereas the trial Court by order dated 22.03.2014 had allowed the petition and appointed commissioner. Aggrieved against the order of appointment of Commissioner, the revision has been filed by the petitioner.



4. The learned counsel for the petitioner would submit that the prayer in the plaint itself was seeking for the decree of demarcating and putting up boundary of the plaint scheduled property through the Honourable Court in execution, whereas the plaintiff had attempted to achieve the same by way of appointment of commissioner which would amount to a pre-trial decree as it satisfies part of the relief claimed in the suit. The petitioner/defendant had made a specific claim denying the title of the respondent/plaintiff before the trial Court, whereas the trial court without taking into consideration the specific reference has allowed the petition rendering a wrong finding as if the petitioner/defendant has not denied the title. Further the case is in the pre-trial stage and no evidence has been let in by the respondent/plaintiff to prove that he is the owner of the property and that too when the petitioner has denied the title, the appointment of commissioner amounts to the pre-trial decree and thereby seek to set aside the order.

5. The learned counsel appearing for the respondent/plaintiff would submit that though the larger prayer has been asked for in the petition the Court has only directed the advocate commissioner to visit the suit property and to survey the suit scheduled property with the help of the qualified surveyor and to file a report, with regard to the physical features and the order will not in any way affect the right of the defendants.

6. In reply the learned counsel for the appellant would submit that no document have been produced by the petitioner to show that he is the owner of the property in S.No.543/5A. More over the prayer in the main suit and the prayer in the interim application are one and the same, and he would submit that in the case of **Sarala Jai .vs. Sangu Gangadhar and others** reported in **2016(2) CurCC 483** the Hon'ble Apex Court has held that in a suit for perpetual injunction and demarcation of scheduled property, the appointment of advocate commissioner by the trial Court for the purpose of demarcating scheduled property and fixing boundary stones to the property of the respondents would amount to granting of pre trial decree since it satisfies the part of the relief claimed in the suit, thereby he seeks to set aside the order.

7. Heard the counsels on either side and gone through the materials available on record.

8. The prayer in the main suit is for demarcating and putting up boundary in the western side of the boundary in the suit scheduled property. The very same prayer has been sought for by the respondent/plaintiff in IA No. 332 of 2013. This Court is of the opinion that the impugned order is nothing but an order granting pre trial decree without there being any evidence being let on the side of the plaintiff.



9. At this juncture the learned counsel for the respondent would submit that now the trial has commenced and whenever appropriate evidence has been let in and if necessary the respondent/plaintiff may be granted liberty to take up an application for appointment of advocate commissioner.

10. In the result the Civil Revision petition is allowed and the order dated 22.03.2014 made in I.A.No.322 of 2013 in O.S.No.42 of 2012 on the file of the Subordinate Judge, Kuzhithurai is set aside. However, in the event of appointment of advocate commissioner is necessary the parties are at liberty to file necessary application and the trial Court can decide it in accordance with law taking into consideration the facts and circumstances of the case. No costs. Consequently connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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To:

The Subordinate Judge, Kuzhithurai

+1 CC to M/s.P.THAGARAJAN, Advocate (SR-26594[F] dated 17/0/2021)

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