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C.R.P. (PD) .No.1651 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.02.2022

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.R.P.(PD).No.1651 of 2021

and

C.M.P.No.12796 of 2021

S.Balaji

.. Petitioner

Vs.

1.G.Arumugam

2.Josef Prem Raj

3.T.Govindammal

4.K.Devi

5.S.Elumalai

6.N.Siddeshwaran

7.K.Ramasamy'8.K.Thirupathy

9.J.Malarvizhi

10.A.Saroja

11.J.Sivakumar

12.T.Valliamai

13.Sekar

.. Respondents

Page No.1/10



C.R.P. (PD) .No.1651 of 2021

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, praying to set aside the fair and decreetal order of the learned Principal District Judge, Villupuram dated 26.04.2021 in I.A.No.88 of 2021 in O.S.No.59 of 2017 and consequently dismiss the I.A.No.88 of 2021 in O.S.No.59 of 2017 on the file of the Principal District Judge, Villupuram.

For Petitioner : Mr. T.Sai Krishnan

For Respondents : Mr.K.Chandrasekar
for Mr.T.Dhanasekaran

ORDER

Challenge in this Revision is to the order appointing Commissioner to find out as to whether the constructions put up by the defendants are within the 80 cents belonging to the defendants or in the landed property of 1 acre belonging to the plaintiff.

2. The prayer in the application for appointment of Commissioner reads as follows:-

“For the reasons stated in the accompanying affidavit it is prayed that this Hon'ble Court may be pleased to appoint an advocate Commissioner along with Taluk head surveyor, to inspect the suit property



WEB COPY



C.R.P. (PD) .No.1651 of 2021

and to measure the same and to demarcate and fix the boundaries of the suit schedule property of the plaintiff and to note down as to whether the respondents constructions are all within the respondents landed property of 0.80 cents or plaintiff's landed property of 1 acre of the suit schedule property and other physical features that may be pointed out at the time of local inspection and investigation and to submit a report and plan drawn to scale and thus render Justice.”

3. The plaintiff sued for declaration of his title, mandatory injunction for removal of the superstructure in a portion of the suit schedule property, for recovery of possession and for permanent injunction restraining the defendants from trespassing over the suit property.

4. According to the plaintiff, the suit property belonged to his grandfather Ariputhiri Gounder. Ariputhiri Gounder died leaving behind one Govindasamy Gounder as his only son and on the death of Govindasamy Gounder in 1962, the plaintiff inherited the property. According to the



C.R.P. (PD) .No.1651 of 2021

plaintiff, the 1st defendant's father kothandapani has purchased 80 cents in S.No.152/1 on South side of the suit property under the registered sale deed on 30.03.1968. The said Kothandapani has laid out and sold out the land to the defendants 2 to 13.

5. Claiming that the defendants had trespassed into the property of the plaintiff in the guise of making construction in the property purchased by them, the plaintiff has come up with the above suit. The plaintiff sought for declaration of title in respect of the entire 1 acre of the property and sought for recovery of possession of sub-items 1 and 2 of the A schedule property which measure about 7020 sq.ft and 2400 sq.ft respectively.

6. The suit is resisted by the defendants contending that the plaintiff is not the grand son of Ariputhiri Gounder and title traced to 1 acre of property in S.No.152/1 by the plaintiff was seriously disputed by the defendants. The defendants would further claim that the plaintiff's grandfather parted away with the property even in the year 1940. In paragraph 6 of the written statement, the 4th defendant specifically claimed that he has purchased the

Page No.4/10



C.R.P. (PD) .No.1651 of 2021

Plot Nos.8 and 9 under the sale deed dated 10.09.2012 from one Ganapathy S/o. Perumal and he purchased the Plot No.7 under the sale deed dated 16.09.2016. Therefore, according to the 4th defendant he is entitled to Plot Nos.7, 8, 9 and 17. He would also contend that he has put up construction only in the property purchased by him.

7. After the evidence was complete, the plaintiff came up with an application in I.A.No.88 of 2021 seeking appointment of Commissioner. In the affidavit filed in support of the application, the plaintiff claimed that the dispute is only as to whether the construction put up by the defendants is in 80 cents of land that was sold by Kothandapani or in 1 acre of land that belonged to Ariputhiri Gounder. In view of the contention that the construction has not been put up in plaintiff's property, according to the plaintiff, a need had arisen for seeking appointment of Commissioner to identify the property over which the construction has been put up. This application was resisted on the ground that it is belated and on the ground that a Commissioner cannot be appointed to gather evidence. The trial Judge however relying upon the judgment of this Court in *AIR 1986*



C.R.P. (PD) .No.1651 of 2021

Madras 33 concluded that the appointment of Commissioner is necessary.

WEB COPY

8. Mr.T.Sai Krishnan, learned counsel appearing for the petitioner would submit that the claim in the affidavit that the dispute is only with reference to location of construction is incorrect. Taking me through the written statement filed, Mr.T.Sai Krishnan would submit that the defendant has denied the title of the plaintiff to the 1 acre of land. In the course of pleading he had stated that, construction was put up in the property purchased by the defendant from Kothandapani. The counsel would add that the defendant had not admitted the title of the plaintiff to any portion of the suit property. He would also point out that the very application was filed after completion of evidence, only to fill up the lacuna in the evidence and to gather evidence in support of the claim of the plaintiff.

9. Contending contra, Mr.K.Chandrasekar, learned counsel appearing for the 1st respondent/ plaintiff would submit that appointment of Commissioner is absolutely essential in view of the fact that there is dispute regarding location of the construction. Arguing further the counsel would

Page No.6/10



C.R.P. (PD) .No.1651 of 2021

submit that if the plaintiff succeeds proving his title, there is a possibility of the suit for mandatory injunction being dismissed on the ground that he had not proved the existence of the construction in the suit property. He would also add that wherever the dispute relates to location of very construction, the Courts can appoint Commissioner to find out as to whether the construction has been put up in the suit property or outside the suit property.

10. I have considered the submissions of the counsel on either side. The assumption under which the plaintiff had filed the application for appointment of Commissioner itself seems to be incorrect. The affidavit filed in support of the application proceeds on the footing that the plaintiff admitted to the title of 1 acre of land which is described as suit property. The defendant had denied the status of the plaintiff as the grandson of Ariputhiri Gounder the original owner. The defendant had claimed that Ariputhiri Gounder had sold the property even in 1940 and therefore the plaintiff has no right and the defendant would set up title in himself to certain extent of property that he had purchased from Kothandapani's successors in interest.

Page No.7/10



C.R.P. (PD) .No.1651 of 2021

11. Therefore, it is for the plaintiff to prove his title. If the plaintiff succeeds in proving title to the suit property as claimed by him. He would automatically be entitled to a decree for possession after removal of the superstructures. Whatever superstructure exists in the suit property will have to be removed. Therefore, there is no question of appointment of Commissioner to find out as to whether there is a construction in the suit property or not. If the construction is not in the suit property the decree for mandatory injunction need not be executed. A decree for possession even without the prayer for mandatory injunction carries with it a direction for removal of the superstructure. Therefore, I do not think the appointment of Commissioner in a case of this nature can be for any other purpose than gathering evidence for title.

12. The fact that the application has been filed after the evidence has been recorded militates against the claim of the plaintiff. If the commissioner's report is available before the evidence is recorded, then it will be open to the party to let in evidence by examining Commissioner and prove that the report is incorrect. Such liberty would be lost in view of the



C.R.P. (PD) .No.1651 of 2021

stage at which the Commissioner has been appointed.

WEB COPY

13. I am therefore of the opinion that the order of the trial Court needs to be set aside and it is accordingly set aside and the Revision stands **allowed**. No costs. Consequently, the connected miscellaneous petition is closed. It is made clear that if the plaintiff succeeds in proving his title, he would automatically be entitled to a decree for possession after removal of superstructure.

01.02.2022

dsa
Index : No
Speaking order

Page No.9/10



WEB COPY



C.R.P. (PD) .No.1651 of 2021

R.SUBRAMANIAN, J.

dsa

To

The Principal District Judge, Villupuram.

C.R.P.(PD).No.1651 of 2021

01.02.2022

Page No.10/10