



C.R.P.Nos.1554 and 1557 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 15.06.2023

Delivered On : 01.12.2023

CORAM :

THE HON'BLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

C.R.P.Nos.1554 and 1557 of 2021

and

C.M.P.Nos.12175 and 12177 of 2021

St. George's Home Society,
Represented by its Secretary,
Mrs.Dierdre Issar,
Registered Office at
The Laidlaw Memorial School and Junior College,
Ketti, Nilgiris – 643215. : Revision Petitioner in both petitions

-VS-

1.Joan Gardner
2.W.R.Gardner : Respondents in both petitions

COMMON PRAYER: Civil Revision Petitions had been filed under Section 115 of the Civil Procedure Code, praying to set aside the fair and decretal common order passed in I.A.Nos.97 & 98 of 2020 in O.S.No.126 of 2017, dated 27.04.2021 on the file of the learned Subordinate Judge, Coonoor.

For Petitioner : Mr.E.K.Kumaresan
in both cases

For Respondents : Ms.S.Nandhini Devi
in both cases for Mr.R.Subramanian



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COMMON ORDER

WEB COPY Both the Civil Revision Petitions had been filed against the order of dismissal passed in I.A.Nos.97 and 98 of 2020 in O.S.No.126 of 2017, dated 27.04.2021, on the file of the learned Subordinate Judge, Coonoor.

2. The learned Counsel for the Revision Petitioner submitted that both I.A.Nos.97 & 98 of 2020 in O.S.No.126 of 2017 were filed to reopen the case for evidence and for the appointment of an Advocate Commissioner to measure the suit schedule properties.

3. I.A.Nos.97 & 98 of 2020 in O.S.No.126 of 2017 were dismissed on the ground that the suit was pending along with the delay in filing Petition for appointment of an Advocate Commissioner.

4. The learned Counsel for the Revision Petitioner further submitted that during the COVID lockdown period, the learned Counsel for the Plaintiff died. Therefore, the delay is caused. It is the case of the Plaintiff that he served as a headmaster at the school for 26 years. In the meanwhile, the Defendants in the suit had encroached the portion of the suit properties.



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Only when the Advocate Commissioner is appointed, the encroachment of the Defendants be recorded before the Court through the Advocate Commissioner. The learned Subordinate Judge, Coonoor, misinterpreted it as though the Petitioner was seeking the appointment of an Advocate Commissioner to collect evidence.

5. It is the specific case of the Plaintiff that the Defendants had encroached the portion of the school premises. Therefore, an Advocate Commissioner was required with the assistance of the surveyor, along with the Plaintiff as well as the Defendants. The learned Subordinate Judge, Coonoor, has misinterpreted that the Plaintiff is attempting to collect evidence, which is not the case. The Plaintiff has clearly stated in his plaint that there is an encroachment on the school premises. Therefore, the order passed by the learned Subordinate Judge, Coonoor, in dismissing I.A.Nos.97 & 98 of 2020 as per order dated 27.04.2021, is to be set aside.

6. In support of his contention, the learned Counsel for the Revision Petitioner relied on the following rulings:-



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(a) In the case of *Shanmugathai Vs. Kamalammal* reported in (2017) 2

WEB COPY *CTC 353*.

(b) In the case of *Aathichandran @ Chandran Vs. Selladurai & Ors.* in

C.R.P.No(MD)(PD)No.1796 of 2017.

7. The learned Counsel appearing for the Respondents submitted that the Revision Petitioner as Plaintiff in the suit in O.S.No.126 of 2017 had filed Interlocutory Application Nos.97 and 98 of 2020 to reopen the case for evidence and for the appointment of an Advocate Commissioner to note down the physical features of the suit property and also to find out who is in possession. It is unacceptable as per the provisions of the Order XXVI, Rule 10 CPC for appointment of Advocate Commissioner. It is settled proposition of law, as laid down by the Hon'ble Supreme Court and reiterated by our High Court, that Advocate Commissioner cannot be appointed to fill up the lacunae or for creating evidence. It is the further submission of the learned Counsel for the Respondents that Revision Petitioner, who is the Plaintiff before the trial Court, has filed the suit for declaration of title and for mandatory injunction. It is for him to prove



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through oral and documentary evidence regarding the claim for suit property. After closing of evidence of both the Plaintiff and the Defendants, when the suit was posted for argument, at that stage only, the Revision Petitioner herein as Plaintiff had filed I.A.No.98 of 2020 seeking appointment of an Advocate Commissioner. Also, in the affidavit of the Revision Petitioner, the Petitioner in I.A.No.98 of 2020 stated that no prejudice will be caused to the Defendants in the suit. The Defendants have already filed written submission and when the case is posted for arguments, the Plaintiff had filed the petition to fill up the lacunae. Therefore, on the vehement objection of the learned Counsel for the Respondents/Defendants before the trial Court, the learned trial Judge had dismissed the Petitions. Only to protract the proceedings and delay the trial Court from disposing of the suit and to cause harassment to the Defendants, the Plaintiff has come up with this Civil Revision Petition. Also, at the time of admission of the Civil Revision Petition, no stay was granted. Therefore, this Civil Revision Petition has no merit and the same is to be dismissed.

8. Point for consideration:

Whether the order passed by the learned Subordinate



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Judge, Coonoor, in I.A.Nos.97 & 98 of 2020 in O.S.No.126

of 2017, dated 27.04.2021 is to be set?

9. On consideration of the rival submissions and on perusal of the typed set wherein the copies of the plaint, written statement, affidavit of the Revision Petitioner as Plaintiff/Petitioner in I.A.Nos.97 and 98 of 2020, the counter of the Respondents, the orders passed by the learned trial Judge in I.A.Nos.97 and 98 of 2020 in O.S.No.126 of 2017, dated 27.04.2021 and also considering that the suit had reached the stage of arguments after closing of the evidence, the submission of the learned Counsel for the Revision Petitioner is found unacceptable. As rightly pointed out by the learned Counsel for the Respondents/Defendants, the objection is only to fill up the lacuna when the case is at the stage of arguments. When the Plaintiff had filed the suit for declaration of title to the suit property and mandatory injunction, it is for the Plaintiff to prove it through oral as well as documentary evidence. For the same, he cannot appoint an Advocate Commissioner to collect evidence which is unacceptable as per the law laid down by the Hon'ble Supreme Court and this High Court. Therefore, order passed in I.A.Nos.97 and 98 of 2020 in O.S.No.126 of 2017, dated 6/10



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27.04.2021 is found to be a well reasoned order and it does not warrant any interference by this Court.

10. The ruling cited by the learned Counsel for the Revision Petitioner in the case of *Shanmugathai Vs. Kamalammal* reported in *(2017) 2 CTC 353* and in the case of *Aathichandran @ Chandran Vs. Selladurai & Ors.* in *C.R.P.No(MD)(PD)No.1796 of 2017, dated 14.09.2018* will not be helpful to the case of the Petitioner. The fact of the reported ruling that the Advocate Commissioner petition was filed for the purpose stated in that suit which was objected by the Defendant claiming that the Plaintiff is attempting to collect evidence. In those cases, the dispute is with regard to the property enjoyed by the Plaintiff for which the Defendant disputes the same. The suit was filed for the relief of declaration and permanent injunction. In this case, before the trial Court both sides had completed evidence and the case is reached the stage of argument. If the Plaintiff in the trial court in this case had filed petition for appointment of Advocate Commissioner at the earliest stage the order passed by the learned Judge dismissing the application could have been set aside. This is not the



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case before the trial Court. Here is a case where both sides had adduced evidence and the suit had reached the stage of argument. At that stage, the suit is re-numbered and Advocate Commission is sought for collecting evidence which cannot be permitted. Therefore, in the light of the above, the order passed by the learned trial Judge dismissing the petitions in I.A.Nos.97 and 98 of 2020 in O.S.No.126 of 2017, is well reasoned order and it does not warrant any interference by this Court. The rulings cited by the learned Counsel for the Petitioner are not applicable to the facts of this case.

11. In the light of the above discussion, the point for consideration is answered in favour of the Respondents and against the Revision Petitioner.

In the result, **both the Civil Revision Petitions are dismissed.** The common order passed in I.A.Nos.97 and 98 of 2020 in O.S.No.126 of 2017, dated 27.04.2021 is confirmed. The learned trial Judge is directed to dispose of the suit in O.S.No.126 of 2017 within a reasonable period of two months from the date of receipt of copy of this order. No costs. Consequently, the connected miscellaneous petitions are closed.



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01.12.2023

WEB CO SRM

Index : Yes / No

Internet : Yes / No

Speaking Order / Non-Speaking Order

To

1.The Subordinate Judge,
Coonoor.

2.The Section Officer,
V.R. Section,
High Court, Madras.

SATHI KUMAR SUKUMARA KURUP., J.

SRM



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**Order made in
C.R.P.Nos.1554 and 1557 of 2021**

01.12.2023