



C.R.P.No.3080 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.09.2023

CORAM :

THE HONOURABLE MR.JUSTICE V. LAKSHMINARAYANAN

C.R.P.No.3080 of 2019
and
C.M.P.No.20010 of 2019

1.Selvi (died)
2.G.Venkatesan
3.V.Boopathy
4.V.Srinivasan

*(P2 to P4 brought on record
as LRs of deceased vide
order dated 12.09.2023
in CMP Nos. 21166 to 21168/23)*

.. Petitioners

VS

Geetha

.. Respondent

Petition filed under Section 115 of CPC to set aside the fair and decretal order dated 04.01.2019 made in I.A.No.93 of 2018 in A.S.No.12 of 2016 on the file of the Subordinate Court, Arrakkonam, Vellore District.

For Petitioner : Mr.K.V.Ananthakrushnan

For Respondent : Mr.B.Hari Babu



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ORDER

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This revision arises against an order passed in I.A.Nos.92 and 93 of 2018 in A.S.No.12 of 2016. A.S.No.12 of 2016 is an appeal pending on the file of the Subordinate Court at Arakkonam. Originally, O.S.No.23 of 2010 was filed by the respondent before me for permanent injunction, to which a written statement was presented and the matter was contested over a period of five years. Thereafter, the learned District Munsif at Arakkonam entered into a judgment on 16.12.2015. The learned District Munsif decreed the suit. Against the said judgment and decree, A.S.No.12 of 2016 was presented.

2. The applications in I.A.Nos. 92 and 93 were filed for the purposes of re-opening the case for arguments on the side of the appellant and for appointment of an Advocate Commissioner to inspect the suit property and Survey No. 229/2B an adjacent property along with the relevant records and to submit a report. The applications were dismissed by the learned trial Judge on 04.01.2019.



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3. I have heard Mr.K.V.Ananthakrushnan, learned counsel appearing for the petitioners and Mr.B.Hari Babu, learned counsel for the respondent.

4. When the revision was taken up for disposal, I enquired Mr.K.V.Ananthakrushnan as to how his client is maintaining an application under Order 26 Rule 9 CPC without an application under Order 41 Rule 27 CPC. I made this query because a report of the Advocate Commissioner together with the evidence that he collects during the course of inspection forms evidence in the suit under Order 26 Rule 10(2) of the CPC. Receipt of evidence in an appellate stage is permissible only under Order 41 Rule 27 of the CPC. Unless and until, the petitioner is able to get through the standards of Order 41 Rule 27 CPC, I feel the application under Order 26 Rule 9 CPC is not automatic. This has a specific reason.

5. Under Order 41 Rule 27 of the Code, the petitioner who seeks for additional evidence will have to convince the Court as to why he was not in a position to let in additional evidence before the trial Court and only then the Court, if satisfied, receives the additional evidence.



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6. Mr.Ananthakrushnan, responded that the Advocate Commissioner's report should be first received and thereafter the Court shall decide whether it is evidence or not.

7. I am unable to accept this contention because as stated above under Order 26 Rule 10 (2) of the Code, the report of the Advocate Commissioner together with the evidence collected by him forms a part of the record. If an Advocate Commissioner is appointed and he submits a report and it becomes part of evidence, the question of dealing with Order 41 Rule 27 CPC subsequently does not arise. Therefore, the application in I.A.No.93 of 2018 for appointment of Advocate Commissioner without an application under Order 41 Rule 27 CPC, in my view, is not maintainable.

8. The correct procedure, according to me, is when a party who seeks for appointment of an Advocate Commissioner in the appellate stage should file an application under Order 41 Rule 27 CPC as well as an application under Order 26 Rule 9 CPC. The Court below should first deal the application filed under Order 41 Rule 27 CPC and thereafter take up the application under Order 26



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Rule 9 CPC. Even if one application is missing, then the petition is not maintainable. I find support for this view in the case of *Penta Urmila v Karukola Kumaraswamy* (2005 (2) ALD 130 = 2005 (1) ALJ 81)

9. In the light of the above, I confirm the order passed in I.A.No.93 of 2018 in A.S.No.12 of 2016 giving liberty to the petitioner to renew his application for appointment of Advocate Commissioner but first taking out an application under Order 41 Rule 27 CPC convincing the Court on the necessity of such an appointment.

10. With the above liberty, this civil revision petition stands dismissed. No costs. Connected miscellaneous petition is closed.

21.09.2023

Index:Yes/No
Neutral Citation:Yes/No
ssm

To

The Subordinate Court, Arrakkonam, Vellore District.



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V. LAKSHMINARAYANAN,J.

ssm

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