IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **25.04.2023**

CORAM

THE HONOURABLE Mr.JUSTICE SATHIKUMAR SUKUMARA KURUP

C.R.P.No.2097 of 2021
and
CMP.No.15964 of 2021

1.Ramakrishnan

2.Thangappa ... Petitioners

Vs.

Aachi ... Respondent

PRAYER: Civil Revision Petition filed under Article 227 of Constitution of India, to set aside the fair and final order dated 06.08.2021 made in I.A.No.1/2021 in OS.No.60/2011, on the file of the District Munsif, Seerkazhi and allow the said IA by allowing above Revision.

For Petitioners : Mr.B.Jawahar

For Respondent : Mr. A.Mohamed Ismail

ORDER

The Civil Revision Petition has been filed challenging the fair and final order dated 06.08.2021 made in I.A.No.1/2021 in OS.No.60/2011, on the file of the learned District Munsif, Seerkazhi and allow the said IA by allowing above

Revision.

2.The Revision Petitioners herein are the Defendants 1 and 2 in O.S.No.60/2011 on the file of the learned District Munsif, Seerkazhi. It is the case of the Revision Petitioners, the Respondent in this petition is the Plaintiff in OS.No.60/2011. The Plaintiff had filed the Suit for recovery of possession of 67 sq. meters in Survey Number 198/1E. It is the contention of the Respondent that Plaintiff that both the Plaintiff and the Defendants are the tenants in the 'Thirunaghari Arulmighu Kalyana Renganathar Swami Temple'. After filing the suit, the Plaintiff had filed a petition for appointing an Advocate Commissioner to measure and note down the physical features of the property of the Plaintiff and the Defendants along with the assistance of the Surveyor. Accordingly the Advocate Commissioner visited the suit property and filed his report with plan along with Surveyor report and plan.

2.1. It is further submitted by the learned counsel for the Revision Petitioners that during the trial the Plaintiff was examined as PW.1. In the course of the Plaintiff's evidence, the Advocate Commissioner's report along with Surveyor's report and the plan were marked as Ex.C-1 to Ex.C-4. Subsequent to the evidence of the Plaintiff when the case was posted for Defendant's evidence, the Defendant filed a petition in I.A.No.1/2021 in O.S.No.60/2011 seeking to examine the Surveyor who had measured these properties and filed the report along with the Advocate Commissioner's report. The petition filed by the Defendant in

I.A.No.1/2021 in O.S.No.60/2011 was opposed by the Plaintiff. After due enquiry based on the objections of the learned counsel for the Plaintiff the learned District Munsif, Seerkazhi had dismissed the petition in I.A.No.1/2021 in O.S.No.60/2011 as per order dated 16.08.2021. Aggrieved by the same, the Defendants in O.S.No.60/2011, the Petitioners in I.A.No.1/2021 in O.S.No.60/2011 had approached this Court by filing this Revision Petition.

3. It is the contention of the learned counsel for the Revision Petitioners that the objection of the Plaintiff as Respondents of I.A.No.1/2021 is that the Defendant had not filed objection against the Advocate Commissioner's report. Further the Defendant cannot be permitted to examine the Surveyor as Defendant evidence.

3.1. It is the further contention of the learned counsel for the Revision Petitioners that juts because the Advocate Commissioner had not filed objection, it does not mean that either the Advocate Commissioner or the Surveyor who had measured the property cannot be summoned and examined on the side of the Defendant. Otherwise it will cause miscarriage of justice by preventing the Defendant from examining the witnesses in support of the Defendant's case.

4. The order passed by the learned District Munsif, Seerkazhi is based on the objections of the Plaintiff stating that the Surveyor had retried from Government service and therefore, he cannot have the access of the Revenue Records.

5. The learned counsel for the Revision Petitioners further pointed out that as per the Surveyor report it states that the Plaintiff is in enjoyment of the 30 cents whereas in the subsequent part of the report he states that there is an encroachment of 67 sq.meters which according to the Revision Petitioners is contradictory.

6.As per the submission of the learned counsel for the Revision Petitioners both the Plaintiff and the Defendant are the tenants in the property belonging to the temple. They are in enjoyment of the 18 sq.meters is difference between the area enjoyed by the Plaintiff and the Defendants if at all. Therefore the report of the Surveyor is contradictory. It is the further submission of the learned counsel for the Revision Petitioners is that the Surveyor have retired from service is not a ground to dismiss the petition and also the Defendant's counsel having not filed the objection to the report, which cannot be a reason to dismiss the petition filed by the Defendant seeking to examine the Surveyor. In order to enlighten the Court that on what basis the Surveyor had arrived at a conclusion that there is 67 sq. meters of encroachment by the Defendant in the property of the Plaintiff.

7.The learned counsel for the Respondent by way of reply submitted that in the suit instituted by the Plaintiff 3rd Defendant is the temple authorities. Also he invited the attention of this Court to the Advocate Commissioner's report being marked in the evidence of the Plaintiff during the trial as Ex-C1 to Ex-C4 which connotes there is no objection to the Advocate Commissioner's report by the Defendant, it was treated as Court documents. Further he would submit that the Commissioner visited the property in the presence of both side counsels and in the presence of both parties. The property was measured by the Surveyor with the help of Field Measurement Book [FMB] and other Revenue Records and the same was also furnished by the Advocate Commissioner while filing his report. After filing of the Advocate Commissioner's report in spite of grant of time the Defendant and his counsel had not filed any objections against the Advocate Commissioner's report. After 3 years after filing of the report the trial commenced. Further the learned District Munsif had observed had after three years after filing of the report since there was no objection to the Advocate Commissioner's report and the same was marked as Court documents as Ex-C1 to Ex-C4. Now the Surveyor had retired from the government service, he cannot access the Revenue Records. Therefore the petition was dismissed.

8. Further the learned counsel for the Respondent submitted that the order of the learned District Munsif, Seerkazhi dismissing the petition filed by the Defendant is well reasoned order and does not warrant any interference by this Court. He also pointed out that in the Sketch prepared by the Surveyor which form part of the Advocate Commissioner's report the Sketch it has been clearly marked by the Surveyor's report, as 198/1E is the portion in enjoyment as shown by the Surveyor and the encroachment is clearly demarcated in the plan.

9. Therefore, 3 years after filing of the report, since the Defendant had not objected within the time granted and even during the trial he cannot be permitted to turn around and seek to summon the Surveyor who retired from service and examining him as a Defendant's witness. Therefore the petition lacks merits and it should be dismissed.

10. On consideration of the rival submissions, it is found that the petition to summon the Surveyor who had measured the property is unwarranted. On perusal of the order passed by the learned District Munsif, Seerkazhi, it is found to be well reasoned order. As pointed out by the learned counsel for the Respondent the Advocate Commissioner along with the Surveyor and the Revenue Records visited the disputed property in the presence of both side counsels the Advocate Commissioner had measured the properties with assistance of the Surveyor in the presence of both sides the Plaintiff and the Defendants. If at all there had been any objection by the Defendant he could have raised it then and there at the time of the measurement and inspection by the Advocate Commissioner. Neither the Defendant nor his counsel had raised any objections at the time of the local inspection by the Advocate Commissioner along with the Surveyor along with FMB and along with Revenue Records. Even after local inspection when the Advocate Commissioner had filed report along with the Surveyor's Sketch and report. The learned District Munsif, Seerkazhi had granted time to file objections. Even then neither the Defendant nor his counsel raised objections.

11. The next stage the plaintiff had deposed evidence as PW.1. During his evidence, the Plaintiff had marked his documents. It is the usual practice in the Trial Court while marking Advocate Commissioner's report, it is treated as Court

Documents. If there are objections based on objections the learned Trial Judge reissues warrant if there are any acceptable objections by one of the parties to the dispute. During trial if objections are raised then the Advocate Commissioner's report cannot be marked as Ex.C-denotes. It is marked as Court documents. It is neither Plaintiff's document nor Defendant's document. It is Court document as there is no objection.

12. Here in this case, the Defendant had not objected marking of the Advocate Commissioner's report as Ex.C-1 to Ex.C-4. Therefore the observation by the learned District Munsif that after three years after filing of the Advocate Commissioner's report and in spite of grant of time objections having not been raised by the Defendant. The defendant cannot be permitted to summon the Surveyor who assisted the Advocate Commissioner in measuring the properties and examining him as Defendant's side witness cannot be accepted is found to reasonable and acceptable in the light of the circumstances stated by the learned District Munsif, Seerkazhi in his order and as rightly raised before this Court by the learned Counsel for the Respondent herein.

13. The observations of the learned District Munsif, Seerkazhi that the Surveyor concerned had retired from the Government service. Therefore he does not have access to Revenue Records and on that ground the petition seeking to summon the Surveyor concerned and to examine him by the Defendant cannot be permitted is found unacceptable. Even if the Surveyor in Government service had retired from Government Service when he is summoned by the Civil Court, the Civil Court has the power and authority directing the Revenue Authorities to furnish those documents to assist the Court while examining the retired Surveyor who is expected to depose evidence in the light of the Revenue Records. Therefore that part of the objections raised by the learned counsel for the Plaintiff before the Trial Court having been accepted by the learned District Munsif cannot at all be accepted by this Court. That part of the order is found unacceptable. The observations of the learned District Munsif, Seerkazhi that after three years of the Advocate Commissioner's report no objections having been filed by the Defendant. The defendant cannot be permitted to summon the Surveyor to examine him as Defendant's side witness is found acceptable in the absence of any objections.

14.The submission of the learned counsel for the Revision Petitioner is that even though he did not raise objections he has to be permitted to summon the Surveyor concerned to enlighten the Court regarding the observations of the Surveyor in his report that there was encroachment by the Defendant in Survey Number 198/1E which is in enjoyment of the Plaintiff. The encroachment of the Defendant is 67 sq.meters that part of the Surveyor's Report is to be enlightened to the Court by the Defendant. Therefore he is to be permitted to summon the Surveyor that on what basis he had given such a report. The said submission made by the learned counsel for the Revision Petitioners is also found unacceptable. It is an admitted fact that both the Plaintiff and the Defendant are the tenants of the

'Arulmighu Kalyana Renganathar Swami Temple, Thirunaghari'. If that being so the relevant documents will be available with the Temple authorities the 3rd defendant in the Suit. Therefore to enlighten the Court the relevant documents including Lease Deed in favour of both the Plaintiff and the Defendant can be summoned by the Defendant. In support of his contention that he is strictly in possession of the properties identified by the Defendant as his possession. As per the report of the Surveyor the Plaintiff is in enjoyment of the Survey Number 198 / 1E only. He is in possession of the 0.30 Cents only and not for 40 Cents as claimed by the Plaintiff in the warrant.

15. The Surveyor's report is clear regarding the enjoyment of the Defendant. The defendant is in enjoyment of the Survey Number 198/1G, Survey Number 198/1H. The Plaintiff is in enjoyment of the Survey Number 198/1E alone. Therefore it is for the Defendant to summon the relevant documents from the 3rd Defendant's Temple authorities and put forth his case that he is in enjoyment of the property leased out to him as per the Lease Agreement. For which the Surveyor need not be summoned to clarify under what basis he had stated in his report that the Defendant had encroached 67 Sq.meters in enjoyment of the Plaintiffs Property.

16.As rightly pointed out by the learned counsel for the Respondent that

(i) at the time of measurement in the presence of both the parties and their learned Counsels

(ii) at the time of filing of the report by the Advocate

Commissioner and

(iii) at the time of marking of the documents as Ex.C-1 to Ex.C-4

The Defendant having not raised objections. He cannot be permitted to summon the Surveyor and examine him as a Defendant's side witness. The Surveyor's report forms part of the Ex.C-1 to Ex.C-4. Only if there is no objection it will be treated as Court documents. If the Defendant had raised objections in any of the three stages as mentioned above the Court would not have marked the Advocate Commissioner's Report and the Surveyor report as Ex.C-1 to Ex.C-4.

17. The next objection that the Surveyor is retired from the service therefore he does not access to the Revenue Records. If the Surveyor had retired from service the Defendant will be able to influence the Surveyor to depose evidence in his favour. Considering the fact he did not raise any objection earlier. In that case there is every likelihood of the Surveyor remaining as hostile witness resiling from his report. It is to be treated as winning over the witnesses by influence. That cannot be accepted by the Court when the Defendant had not raised objections in the three stages pointed out by the learned District Munsif, Seerkazhi. If the Surveyor had been in service he cannot resile from his report in which case the Court objects to the official witness acting against his report which are to be treated as hostile witness for which departmental action can be initiated against the Government servant concerned. That also is to be considered as facts and circumstances arising in this case. When the Defendant had not raised objections in the three stages he has some ulterior motive in summoning the witness, Surveyor who retired from service. A person retired from Government service is free to speak against the report filed by him. He cannot be proceeded departmentally for his deposing evidence as a hostile witness. Those things also has to be considered. Therefore the intention of the Defendant is true negative the report of the Surveyor by summoning the retired Surveyor as a Defendant witness to adduce evidence favouring the Defendant.

18. In the light of the said circumstances the order of the dismissing the petition seeking to permit the Defendant to summon the Surveyor, to enlighten the Court regarding under what circumstances the Surveyor came to the conclusion that there was encroachment by the Defendant to the extent of 67 sq.meters in the Plaintiff's property is found unacceptable in the above stated circumstances. Therefore the learned District Munsif, Seerkazhi had rightly dismissed the petition. Already the temple authorities are impleaded as 3rd Defendant in the Suit. If both the Plaintiff and the Defendants are tenants of the same temple, the document of the lease which was executed by the Plaintiff and Defendant individually to the temple authorities can be summoned by the Defendant. Therefore, the order passed by the learned District Munsif, Seerkazhi does not warrant any interference. Hence the submissions made by the learned counsel for the Revision Petition is rejected.

In the result this Civil Revision Petition is **dismissed.** No costs.

Consequently connected Civil Miscellaneous Petition is closed.

25.04.2023

Index : Yes/No
Speaking Order : Yes / No
Index : Yes/No
Neutral : Yes/No

jrs

SATHIKUMAR SUKUMARA KURUP.,J.

jrs

To

1. District Munsif, Seerkazhi.

C.R.P.No.2097 of 2021
and
CMP.No.12658 of 2022

25.04.2023