



C.R.P.(MD) No.725 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on	08.09.2023
Delivered on	27.09.2023

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THE HON'BLE **MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI**

C.R.P.(MD) No.725 of 2023

and

C.M.P.(MD) No.3388 of 2023

Kothandaraman

... Petitioner

Vs.

1.State represented by its
District Collector,
Virudhunagar District.

2.Revenue Divisional Officer,
Vembakottai Taluk,
Virudhunagar District.

3.Kadarkarai

... Respondents

Prayer:- This Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the order dated 06.02.2023 made in I.A.No.6 of 2022 in O.S.No.119 of 2016 on the file of the District Munsif Court, Sivakasi.

For Petitioner : Mr.Y.Prakash

For R1 & R2 : Mr.G.Suriyananth
Additional Government Pleader



C.R.P.(MD) No.725 of 2023

For R3 : Mr.K.P.Sankarakumarakuruban

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ORDER

This Civil Revision Petition has been filed by the petitioner to set aside impugned the order dated 06.02.2023 passed in I.A.No.6 of 2022 in O.S.No. 119 of 2016 on the file of the District Munsif Court, Sivakasi.

2. The above suit in O.S.No.119 of 2016 was filed by the petitioner for declaration and for injunction in respect of the suit schedule property. During the pendency of the suit, the petitioner/plaintiff filed an application in I.A.No.6 of 2022 under Order 26 Rule 9 of the Code of Civil Procedure, 1908 for appointment of an Advocate Commissioner to note down the physical features of the suit property as per the measurements in the Sale Deed dated 22.03.1938, Will dated 03.08.2000 and the Decree passed in the suit in O.S.No. 210 of 1995 filed by the third respondent's father.

3. The said application was resisted on the side of the third respondent/third defendant. The Trial Court after perusing the averments made in the petition affidavit and the counter affidavit filed by the third respondent/third defendant has dismissed the application in I.A.No.6 of 2022



C.R.P.(MD) No.725 of 2023

vide impugned order dated 06.02.2023 by stating that it is not feasible to measure the property as per the boundaries in the Sale Deed dated 22.03.1938 and for the reason that the Will is subsequent to the suit. Therefore, the Report of the Advocate Commissioner would not be helpful to the Court to decide the dispute between the parties. Aggrieved by this, the present Civil Revision Petition has been filed.

4. The learned counsel appearing for the petitioner/plaintiff would submit that the Trial Court has erred in coming to the conclusion that the three documents, i.e. Sale Deed dated 22.03.1938, Will dated 03.08.2000 and the Decree in the suit in O.S.No.210 of 1995, pertains to different period of time and the property cannot be measured as per these documents.

5. He would further submit that the Trial Court has erred in holding that the Will dated 03.05.2000 came to be executed after the earlier suit between the parties was instituted and that the Sale Deed in 1938 has one schedule and the Will has two schedules and that the decree in O.S.No.210 of 1995 came be passed on the basis of the documents filed by the third respondent/third defendant's father.



C.R.P.(MD) No.725 of 2023

6. The learned counsel for the petitioner/plaintiff would further submit that the endeavour of the petitioner/plaintiff is to establish that S.No.737/1 is only a patta land belonging to the petitioner inherited through his aunt Lakshmiammal and not a public pathway as wrongly noted during the Natham Nilavari Re-survey proceedings and therefore, it is necessary for appointment of an Advocate Commissioner for the said purpose. Therefore, the impugned order passed by the Trial Court is liable to be set aside.

7. The learned counsel for the petitioner/plaintiff relied upon a decision of the Hon'ble Supreme Court in **Gurunath Manohar Pavaskar and others Vs. Nagesh Siddappa Navalgund and others**, AIR 2008 SC 901, in which, it was held that the Trial Court may appoint an Advocate Commissioner for the purpose of taking measurement and demarcation of the disputed suit land.

8. The same is resisted on the side of the third respondent/third defendant. The learned counsel for the third respondent/third defendant would submit that in the year 1990, at the time of re-survey, a common pathway was formed for the residents residing near the suit property situated in the Lakshmiapuram Village. At that time, a proper notice was issued to the vendors of the petitioner/plaintiff and others.



C.R.P.(MD) No.725 of 2023

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9. He would further submit that the property of Lakshmiammal is situated in S.No.737/31 and patta was issued in her favour, in which, southern boundary in S.No.737/1 has been shown as pathway. At that time, the said Lakshmiammal did not raise any objections in this regard. The said Lakshmiammal who was examined as D.W.1 also accepted the existence of the said pathway.

10. It is submitted that the petitioner/plaintiff had constructed toilet, bathroom and staircase in the pathway by encroaching the same and when the third respondent/third defendant took steps to remove the same, the petitioner/plaintiff after lapse of 6 years from the date of filing the suit, filed the above application to appoint an Advocate Commissioner to measure the suit property.

11. The learned counsel for the third respondent/third defendant would submit that the suit in O.S.No.216 of 2013 was filed for the same cause of action which was dismissed on 01.10.2021 and therefore, there is no merit in the application filed by the petitioner/plaintiff and the Trial Court has rightly dismissed the same which calls for no interference.



C.R.P.(MD) No.725 of 2023

12. Heard on both sides. Records perused.

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13. The petitioner/plaintiff filed the above application for appointment of an Advocate Commissioner to measure the suit property in accordance with the documents mentioned in the petition. The first document is the Sale Deed pertaining to the year 1938. The second document is the Will executed in the year 2000. The third document is the Decree passed in O.S.No.210 of 1995.

14. The Sale Deed is of the year 1938 which is more than 84 years and therefore, it is not feasible to survey and note down the physical features on the basis of the boundary mentioned in the Sale Deed. Apart from that, the Trial Court has observed that the Will dated 03.05.2000 came to be executed after the earlier suit was instituted between the parties and the Will has two boundaries and the Decree in O.S.No.210 of 1995 came to be passed on the basis of documents filed by the third respondent/third defendant's father. Therefore, the above three documents pertain to the different point of time and therefore, it is not feasible to measure the land as per these documents.

15. Moreover, the Advocate Commissioner cannot be appointed for demarcation of the suit property which would lead to pre-trial decree. The



C.R.P.(MD) No.725 of 2023

Advocate Commissioner cannot be appointed for collecting evidence. The petitioner/plaintiff must establish his title to the suit property through oral and documentary evidence. Therefore, the Trial Court has rightly dismissed the I.A. filed by the petitioner for appointment of the Advocate Commissioner. Therefore, the impugned order dated 06.02.2023 passed by the Trial Court in I.A.No.6 of 2022 in O.S.No.119 of 2016 is confirmed.

16. Accordingly, this Civil Revision Petition is dismissed. No cost. Consequently, connected Miscellaneous Petition is closed.

27.09.2023

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
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To

1.The District Munsif,
Sivakasi.

2.The District Collector,\
Virudhunagar District.

3.The Revenue Divisional Officer,
Vembakottai Taluk,
Virudhunagar District.



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C.R.P.(MD) No.725 of 2023

K.GOVINDARAJAN THILAKAVADI, J.

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Pre-Delivery Order made in

C.R.P.(MD) No.725 of 2023
and C.M.P.(MD) No.3388 of 2023

27.09.2023