



C.R.P(MD)No.2575 of 2014

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 21.04.2023

CORAM:

THE HONOURABLE MRS.JUSTICE L.VICTORIA GOWRI

C.R.P(MD)No.2575 of 2014

and

M.P(MD)No.2 of 2014

Packiam @ Subramania Chettiar (Died)

1.Shanthi

2.Mathi

3.Ramalingam

... Petitioners

Vs.

Chellaiah,

Represented by his Power Agent,

Paulsamy @ Madasamy Thevar.

... Respondent

PRAYER : Civil Revision Petition is filed under Article 227 of the Constitution of India, to call for the records relating to the petition and order dated 07.02.2014 passed in I.A.No.169 of 2012 in A.S.No.31 of 2012 on the file of the Sub-Court, Kovilpatti and set aside the same.

For Petitioner : Mr.V.Sasikumar

For Respondent : No appearance



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ORDER

This Civil Revision Petition came to be filed assailing the order passed by the learned Sub-Judge, Kovilpatti in I.A.No.169 of 2012 in A.S.No.31 of 2012 on 07.02.2014. The Appeal Suit bearing A.S.No.31 of 2012 on the file of the learned Sub-Judge, Kovilpatti was preferred as against O.S.No.49 of 2004 on the file of the District Munsif Court, Vilathikulam. O.S.No.49 of 2004 was a suit for declaration and permanent injunction. The said suit was dismissed on merits. As against the same, the plaintiff had filed A.S.No.31 of 2012 before the Sub-Judge, Kovilpatti. Along with the same, the Appellant / Plaintiff had filed I.A.No.169 of 2012 under Order XXVI, Rule 9 of the Code of Civil Procedure, 1908, seeking to appoint an Advocate Commissioner to survey the plaint schedule property with the aid of a surveyor on the basis of revenue documents with respect to the plaint schedule property.

2. A counter was filed by the fourth respondent, who was the fourth defendant in the original suit. The learned first Appellate Court allowed the said petition on 07.02.2014. As against the same this Civil Revision Petition



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is filed. For the sake of convenience, the parties herein are arrayed as in the I.A.No.169 of 2012.

3. This case was taken up for hearing on 07.03.2023, on which date the learned Counsel for the revision petitioner submitted his arguments. Thereafter, the case was posted for respondent side arguments on 10.03.2023 and 30.03.2023, both dates on which, there was no representation for the respondent. Recording the same, the revision petitioner was allowed to submit his arguments further and the case was posted under the caption 'For Orders' on 21.04.2023.

4. Heard the learned Counsel for the revision petitioner anxiously and perused the materials available on record. The learned Counsel for the revision petitioner took me through the various grounds of the Civil Revision Petition, the contents of the documents and the various orders passed by the Appellate Court as well as the Trial Court, in A.S.No.31 of 2012 and O.S.No.49 of 2004 respectively.



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5. I.A.No.169 of 2012 was filed by the Petitioner / Appellant / Plaintiff seeking to appoint an Advocate Commissioner in the first Appeal suit. The gist of the Petitioner / Appellant / Plaintiff's case is precisely as follows:

“The Petitioner / Appellant acquired title over the plaint schedule property consisting an area of 3 Acres and 9 Cents comprised in Survey No. 215/3 of M.Kumarachakkanapuram Village, corresponding to Zameen old Adangal 26-A, by the strength of Sale Deed dated 25.03.1996 executed in his favour together by Kanagasabapathi and Guruswamy. The necessity for the appointment of Advocate Commissioner, arose when D.W.1 / 4th respondent, namely, Ramalingam in his evidence disagreed with the four boundaries of the plaint schedule property in his evidence before the Trial Court. Simultaneously denying the Petitioner / Appellant's claim that the said property is in the possession and enjoyment of the Petitioner / Appellant / Plaintiff, the 4th respondent also in his evidence stated that the boundaries with respect to the plaint schedule property in the title documents as well as the parent documents of the Petitioner / Appellant and the survey numbers do not tally with each other. At the same time, the



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Zameen Old survey number of the petitioner and that of the respondent are also different. According to the Petitioner / Appellant, there was no change in the nature of the plaint schedule property. However, the change of boundaries with respect to the plaint schedule property is nothing but which was due to the change in hands of ownership with respect to the properties abutting the four boundaries from time to time. These facts could be ascertained if the plaint schedule property is surveyed on the basis of revenue records by an Advocate Commissioner with the assistance of a surveyor.”

6. Per contra all the contentions of the Petitioner / Appellant / Plaintiff were denied by the 4th respondent / 4th respondent / 4th defendant in his counter statement to the said I.A.No.169 of 2012. It is the case of the 4th respondent / 4th respondent / 4th defendant that the power of attorney of the plaintiff is not entitled to file such an application, since he may not know the facts and circumstances of the case fully.

7. The Trial Court has diligently and cogently conducted the trial of the original suit by permitting the Power of Attorney holder of the plaintiff



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to examine himself as P.W.1, marking Exhibits A1 to A15 through him.

Similarly, on the side of the defendants, three witnesses were examined as D.Ws, marking Exhibits B1 to B18 through them. Further it is stated in the counter that the Petitioner / Appellant / Plaintiff himself has accepted all the Exhibits marked on the side of the defendants as admissible at the time of trial, without any objection. In fact, all the 18 Exhibits marked on the side of the defendants were submitted before the Trial Court only by the 4th respondent / 4th respondent / 4th defendant. Likewise, Exhibits A11 and A12 are the documents created after the suit. It is completely incorrect as to the Petitioner / Appellant's claim that he was entitled to the plaint schedule property by the strength of a sale deed in favour of Thayamma.

8. It is not true that the plaint schedule property is in the enjoyment and possession of the Petitioner / Appellant. It is not justifiable on the part of the Petitioner / Appellant to have submitted that the change in survey number and four boundaries of the plaint schedule property is nothing but, due to the change in ownership of the various abutting properties over the passage of time. It is unjust on the part of the Petitioner / Appellant to have submitted that the plaint schedule property could be ascertained, if



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measured and surveyed on the basis of revenue records. There is no relevance between Exhibit A2 and Exhibit A1. The properties mentioned in both of those documents are not connected with each other. Without specifically mentioning the documents to be relied for measuring the plaint schedule property, the Petitioner / Appellant / Plaintiff is not justified in filing an application under Order XXVI, Rule 9 of the Code of Civil Procedure, 1908. This application has been filed only with a *mala fide* intention to defeat the ends of justice and to delay the proper adjudication of the appeal suit and the same is filed with the sole intention of preventing the respondent / respondent / defendants from enjoying the fruits of the judgment and decree passed by the learned Trial Court in the original suit.

9. However, the learned first Appellate Court allowed the said application stating that, despite the objections of the 4th respondent / 4th respondent / 4th defendant, it is reasonable to appoint an Advocate Commissioner to inspect the plaint schedule property with the assistance of a surveyor. Now the sole question to be decided is as to the maintainability of the order passed by the first Appellate Court in appointing an Advocate



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Commissioner to measure the plaint schedule property with the assistance of a surveyor in the Appeal suit.

10. The original suit was one for declaration and permanent injunction with respect to the Petitioner / Appellant / Plaintiff's title and enjoyment over the plaint schedule property. For the proper adjudication of this revision petition, it is pertinent to consider the judgment of the Trial Court in the original suit. The learned Trial Court in its judgment has observed that the perusal of the evidence and the documents marked by both parties would reveal that the Petitioner / Appellant has purchased the plaint schedule property consisting an area of 3 Acres and 9 Cents land comprised in Survey No.215/3 from one Kanagasabapathi and Guruswamy and the said sale deed was marked as Exhibit A1. However, the parent document through which Gurusamy and Kanagasabapathi purchased the said property which is marked in the said case as Exhibit A2 would reveal that the property mentioned therein was comprised in Survey No.216.

11. The submissions of the Petitioner / Appellant / Plaintiff that the survey number correlating to the old Zameen Adangal 26-A is Survey No.



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215 and the same is not Survey No.216, but inadvertently the survey number was wrongly stated in Exhibit A2 and this submission was vehemently opposed by the respondents / respondents / defendants. The Trial Court further discussed that the various revenue records especially Exhibit B16 revealed that both the first defendant and his sister Swarna Gandhi are the joint patta holders of the property comprised in Survey No. 215/3 (plaint schedule property). Hence, the learned Trial Court held that the original suit was bad for non-joinder of necessary parties, that is, for non-joinder of Swarna Gandhi in whose name the patta with respect to the plaint schedule property stands along with the first defendant. Dismissing the suit for declaration and permanent injunction filed by the Petitioner / Appellant / Plaintiff, the learned Trial Court has specifically mentioned that the Power of Attorney holder of the plaintiff, who deposed evidence as the only plaintiff's side witness, in his evidence has accepted that the plaintiff has not filed appropriate documents necessary to prove his case. At the same time, the said witness fully agreed with the submissions and the various documents submitted on the side of the defendants. Clearly mentioning that the plaintiff has failed to prove his case, the learned Trial Court dismissed the original suit.



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12. When the learned Trial Court has categorically decided the original suit as against the Petitioner / Appellant / Plaintiff on the basis of the various title / parent documents filed by both the parties along with all the relevant revenue records, I am of the view that, the first Appellate Court ought not to have appointed an Advocate Commissioner in the Appeal Suit to measure the plaint schedule property with the assistance of a surveyor. Because the reason stated by the Petitioner / Appellant seeking the appointment of an Advocate Commissioner was mainly the evidence deposited by the 4th respondent / 4th respondent before the Trial Court with respect to the indiscrepancies in the survey number as well as the four boundaries of the plaint schedule property as described in Exhibits A1 and A2. Had that been the point for the Petitioner / Appellant to seek appointment of an Advocate Commissioner, the Petitioner / Appellant / Plaintiff ought to have made an application for the same, immediately after the evidence of D.W.1 before the Trial Court. Having not done that, now the Petitioner / Appellant / Plaintiff is not entitled to file an application under Order XXVI, Rule 9 of the Code of Civil Procedure in the Appeal Suit. Appointment of an Advocate Commissioner in the appellate stage by the

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Appellate Court and receipt of Commissioner's report as an additional evidence cannot be done mechanically by the Appellate Court without proper reasons. In this case, while allowing the interim application filed by the Petitioner / Appellant under Order XXVI, Rule 9 of the Code of Civil Procedure, the learned Appellate Court without elaborating the reasons for allowing the said application did the said exercise mechanically. Having purchased an area of 3 Acres and 9 Cents land comprised in Survey No.216 from one Thayamma, the vendors of the Petitioner / Appellant / Plaintiff have no right to execute the sale deed in favour of the Petitioner / Appellant with respect to an area of 3 Acres and 9 Cents land comprised in Survey No. 215 in favour of the plaintiff. Moreover, the indiscrepancies with respect to the survey number and the four boundaries between the title document and parent document (Exhibits A1 and A2) relied by the Petitioner / Appellant / Plaintiff to prove his title and possession over the plaint schedule property could be substantiated clearly from the title documents and revenue records produced at the time of trial by both the parties before the Trial Court even without any Commissioner's report.



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13. The Trial Court was able to conclude without any iota of doubt as to the title and possession of the respective parties in the original suit. So after the judgment and decree in the original suit, the Petitioner / Appellant / Plaintiff cannot fill up the lacunas in his case in the Appellate stage by seeking appointment of an Advocate Commissioner. The judgment of this Court in the case of ***R.Nandakumar Vs. The Dindigul Co-operative Housing Building Society Ltd. reported in [MANU/TN/2167/2008]*** dated **12.03.2008** in paragraph Nos.7 and 9 has held as follows:

“7. Appointment of Advocate-Commissioner in the Appellate stage in the Appellate court and receiving the Commissioner's report as additional evidence is not automatic. Under Or.41, Rule 27 CPC production of additional evidence whether oral or documentary is permitted only under three circumstances (i) the trial court had refused to admit the evidence though it ought to have been admitted; (ii) the evidence was not available to the party despite exercise of due diligence and (iii) the appellate court required the additional evidence so as to enable it to pronounce better judgment or for any other substantial cause of like nature. The basic principle requisite for admission of additional evidence is the existence of one or other of the above said conditions.



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9. The discretion for allowing additional evidence at Appellate stage cannot be exercised to patch up the weak points of his case and fill up lacuna in the Appellate court by production of additional evidence.”

14. This Court in the said decision has categorically stated that the appointment of an Advocate Commissioner in the appellate stage by the Appellate Court and receiving the Commissioner's Report as additional evidence is not automatic. Moreover, none of the circumstances described in the above order exist in the facts and circumstances of the instant case. The provisions relating to the appointment of Commissioner are Section 75 and Order XXVI, Rules 1 to 22 of the Code of Civil Procedure, 1908. Of which, Order XXVI, Rule 9 specifically deals with commissions to make local investigation. The scope of appointment of an Advocate Commissioner is neither to assist any party to collect evidence to prove the case of parties nor to make any enquiry with regard to the factum of possession of the suit property. Before allowing an interim application under Order XXVI, Rule 9 of the Code of Civil Procedure, 1908, the Court concerned should approach the said application with a holistic mind. Only after considering, the total pleadings of both parties, relief claimed in the suit and the necessity to



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appoint an Advocate Commissioner to decide the real controversy between the various parties to the suit, the learned first Appellate Court ought to have worked out the relief to be granted in the impugned order.

15. Here in this case, the Appellate Court without going into the merits of the case decided by the learned Trial Court, the various documents marked by both the parties, the relevant evidence deposed on the side of the plaintiff and the defendants proceeded to allow the application filed under Order XXVI, Rule 9 of the Code of Civil Procedure without recording any reason for the same. Such an unmindful exercise of judicial power by the first Appellate Court is not sustainable. The true test therefore, is whether the Appellate Court could pronounce judgment with the materials before it, without appointment of an Advocate Commissioner. No doubt, in this case, the application was filed by the Petitioner / Appellant / Plaintiff to fill up the lacunas in his case which cropped up after the pronouncement of the judgment and decree by the learned Trial Court and such an application came to be allowed by the Appellate Court in the Appellate stage without putting forth appropriate reasons for allowing the same. Therefore, it is not possible to sustain the order, allowing the petition seeking the appointment



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of an Advocate Commissioner before the Appellate Court in the appellate stage. Though it is well settled that the report of the Court Commissioner and the evidence collected by him becomes part of the record as provided under Order XXVI, Rule 10 (2) of the Code of Civil Procedure, 1908, in the facts and circumstances of this case, if the order passed by the learned Appellate Court is allowed, both the parties would be entitled to file their objections to the Commissioner's Report and examine / cross-examine him. Further, the respondents / respondents / defendants would also be entitled to impeach the documents which are permitted by the Appellate Court to aid the Advocate Commissioner in surveying the plaint schedule property, complicating the proper adjudication of the Appeal, rather throwing light to the ends of justice. To be specific, when the Petitioner / Appellant / Plaintiff himself is not certain as to which document / record should be in aid to the Advocate Commissioner to conduct the survey of the plaint schedule property and when he had not explained the reasons for not seeking appointment of an Advocate Commissioner before the Trial Court, the appointment of the Advocate Commissioner by the Appellate Court in the appellate stage is unwarranted.



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16. To conclude, I am of the considered view that the order passed by the learned Sub-Judge, Kovilpatti in I.A.No.169 of 2012 in A.S.No.31 of 2012 is not sustainable and hence the same is dismissed. The First Appellate Court is directed to conclude the appeal as expeditiously as possible within a period of two (2) months from the date of receipt of a copy of this order. In furtherance to the same, this Civil Revision Petition stands allowed. Consequently, connected Miscellaneous Petition stands closed. There shall be no order as to costs.

21.04.2023

NCC : Yes
Index : Yes
Internet : Yes
BTR

To

- 1.The Sub-Court,
Kovilpatti.
- 2.The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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L.VICTORIA GOWRI, J.

BTR

Order made in
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