



C.R.P.No.1315 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.10.2024

CORAM

THE HON'BLE MR.JUSTICE **V.LAKSHMINARAYANAN**

C.R.P.No.1315 of 2024 &
CMP.No.6961 of 2024

1.P.Palanisamy
2.S.Palanisamy : Petitioners

versus

Mallikasundaram : Respondent

Prayer: Petition filed under Article 227 of the Constitution of India seeking to set aside the Judgement and decree passed by the District Munsif Court, Rasipuram in IA No.7 of 2023 in OS No.62 of 2022 dated 06.11.2023.

For Petitioners : Mr.Nithesh Nataraj

For Respondent : Mr.B.Gopalakrishnan

ORDER

This civil revision petition is at the instance of the fifth and sixth defendants in the suit O.S.No.62 of 2022.



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2. O.S No.62 of 2022 was presented before the District Munsif Court at Rasipuram seeking for partition and separate possession. The claim of the plaintiff is that the suit schedule mentioned the property was purchased by one Periyakkal on 10.11.1954. During her lifetime, she had executed a registered settlement deed in favour of the defendants 1 and 2 to an extent of 30 cents out of total extent of 89 cents with specified boundaries. The said Periyakkal enjoyed the remaining extent till her death on 23.10.1971. She left behind her husband Kaveri Nadar, daughters Alamelu, Pavayee, Mallikasundaram, daughter-in-law Muthayee and the granddaughter Indrani as her legal heirs.

3. The plaint proceeds that all the properties were jointly enjoyed by the legal heirs. Periyakkal's husband Kaveri Nadar passed away on 25.02.2002. The plaintiff attempted for reasonable settlement amongst the legal heirs, but unfortunately did not bear fruit. Hence, she presented a suit for partition seeking $1/4^{\text{th}}$ share. The remaining $3/4^{\text{th}}$ was to be divided



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equally among the third defendant, fourth defendant and the defendants one and two in common. She alleged that the fifth and sixth defendants are strangers to the family and want to knock off the property from her. She lodged a police complaint which did not bear fruit as the police came to a conclusion that the matter is civil in nature. Hence, the suit.

4. On service of summons, the third defendant entered appearance and filed a written statement admitting to the relationship between the parties. The third defendant also stated that the civil revision petitioner/defendants 5 and 6 are no way connected to the property. The written statement taken out by the third defendant was adopted by the fourth defendant.

5. The fifth defendant filed a separate written statement, which was adopted by the sixth defendant. According to the fifth defendant, Periyakkal had two properties namely the properties situated at survey No.230/ 5C to an extent of 32 cents and the suit schedule mentioned property. By an oral partition between the plaintiff and the defendants, the property situated in survey No.230/5C was allotted to the plaintiff, which she alienated in favour



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of a third party on 21.05.1996. They pleaded they constructed a temple dedicated to Sri Kangeyathamman, pursuant to the agreement that they had entered into with the third defendant on 21.11.1998. They further alleged that for the temple, which had been constructed, the deceased Kaveri Nadar had acted as a Poosari till his death. On these pleas, they sought for dismissal of the suit.

6. Once the pleadings were completed, the fifth and sixth defendants took out an application for appointment of an advocate commissioner to note down the physical features of the suit property and to submit a rough plan together with a report. The plaintiff resisted this application pleading that the application for appointment of an advocate commissioner is not maintainable and that, it is an attempt by the fifth and sixth defendants to collect evidence in the suit. The submissions of the plaintiff was accepted by the learned District Munsif, who dismissed the application for appointment of Advocate Commissioner. Hence, this revision.

7. I have heard Mr.Nithesh Nataraj for Mr.Anirudh A Sriram and



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Mr.B.Gopalakrishnan for the contesting respondent.

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8. Mr.Nithesh Nataraj submits that whether the temple is in existence or not is a matter in dispute in the suit and for the said purpose, an Advocate Commissioner ought to be appointed. He relied upon a judgment of this court in *Panjavarnam v. Visuvasam Jeyaseeli, 2013 SCC Online Mad 52*. In particular, he invites my attention to paragraph No.6 of the said judgment to press home the point that locating the temple will not be an act of collecting evidence.

9. Per contra, Mr.B.Gopalakrishnan invites my attention to the affidavit filed in support of an application for appointment of an Advocate Commissioner, in particular, paragraph Nos.3, 5 and 6 pointing out that the petitioners themselves wanted a report of the Advocate Commissioner in order to prove their case. Further he argues that the Advocate Commissioner cannot be appointed in order to find out who is in possession of the property. Hence, he pleads for the confirmation of the impugned order.



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10. I have carefully considered the arguments on both sides.

11. In a suit for partition, the issue that the Court would have to answer, at the stage of preliminary decree, is whether the plaintiff is entitled to a share in the property. There is no dispute, in this case, that the property belonged to one Periyakkal. There is also no dispute about the relationship between the plaintiff and the defendants 1 to 4. The ground, on which the plaintiff claimed to her mother's property, is said to be defeated, on the plea taken by the fifth and sixth defendants that there had been an oral partition in the family and the plaintiff had been allotted survey No.230/5C only.

12. The plea of the plaintiff and the defence taken by the fifth and sixth defendants is the matter in dispute. For the said purpose, an Advocate Commissioner cannot be appointed. Whether there was an oral partition in the family or not is a matter, which has to be proved by way of evidence. An Advocate Commissioner by visiting the suit property cannot speak about the said issue.

13. Even if I were to assume that the third defendant had entered into



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an agreement and put the defendants 5 and 6 in possession of the property, it will not in any way affect the right of the plaintiff, if at all that she has one.

This because one co-sharer cannot alienate the entire extent in favour of a stranger, unless and until the said co-sharer is able to prove that she or he had obtained the property by way of partition. As pointed out above, the issue of oral partition is a matter in dispute because there is no dispute that Periyakkal was the owner, and she had died intestate and that the parties had succeeded to the estate.

14. Turning to the authority cited by Mr.Nithesh Nataraj, it has to be pointed out that the said judgment arose out of a suit for declaration and permanent injunction claiming that the property is a vacant site. The defendant in the said suit had pleaded that they are in possession of the property by constructing a house. Therefore, the point in issue in that suit was whether the property is a vacant land or is having a residential hut situated therein. It was in those circumstances, the learned judge came to a conclusion that an appointment of Advocate Commissioner to note down the superstructure would be helpful to the Court to answer the matter in dispute. Such a situation does not prevail in the present case.



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15. Furthermore, if an Advocate Commissioner were to visit the suit property and submit a report as regards the superstructure situated therein, it would be indirectly point out the possession and enjoyment of the same. It is trite that an Advocate Commissioner cannot be appointed to find out as to who is in possession of the property. In any event, the order appointing the Advocate Commissioner is a discretionary order. Unless and until, the discretion has been wrongly exercised, this Court should not interfere with the same in revision. I do not think that vice exists in the impugned order.

16. In the light of the above discussion, this civil revision petition is dismissed. No costs. Consequently, the connected miscellaneous petition is closed.

17. Mr.Nithesh Nataraj fears that any finding that might have been given by this Court in this order may affect the merits of the case. It is made clear that this revision dealt with only the scope of the application filed under Order XXVI Rule 9 of the Code of Civil Procedure and none of the finding rendered herein will affect the right of the parties to prove their respective cases at the time of trial.



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Index : Yes/No

Speaking Order/Non speaking order

Neutral Citation : Yes/No

To

1.The District Munsif Court, Rasipuram



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V. LAKSHMINARAYANAN, J.
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