



WEB COPY



CRP.No. 726 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 14.11.2024

CORAM:

THE HONOURABLE MR. JUSTICE R. SAKTHIVEL

Civil Revision Petition No. 726 of 2023

and

Civil Miscellaneous Petition No. 5626 of 2023

Subramaniam

...Petitioner

versus

1.Lakshmi

2.Murugesan

3.Kuppusamy

4.Selvam

...Respondents

Prayer: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, praying to set aside the fair and decretal Order dated October 26, 2022 made in IA.No.1 of 2021 in A.S.No. 34 of 2021 on the file of Principal Subordinate Court, Salem.

For Petitioner

: Mr.R. Subramanian

For Respondents

: Mr.N. Vijaya Baskar

For M/s. Law Vision



CRP.No. 726 of 2023

ORDER

WEB COPY

This Civil Revision Petition has been filed against the Order dated October 26, 2022 passed in I.A.No. 1 of 2021 in A.S.No. 34 of 2021, on the file of 'Principal Subordinate Court, Salem', ['First Appellate Court' for convenience]

2. The revision petitioner herein is the appellant and the respondents herein are the respondents before the First Appellate Court. The revision petitioner herein is the plaintiff and the respondents herein are the defendants in O.S.No. 86 of 2015 on the file of I Additional District Munsif, Salem [Trial Court for short]. The parties will be denoted as per their array in the Original Suit.

3. The revision petitioner/plaintiff filed the Suit in O.S.No. 86 of 2015 before the Trial Court for declaration, mandatory injunction and delivery of possession against the defendants. The defendants filed their written



CRP.No. 726 of 2023

statement. After full-fledged trial, the Trial Court dismissed the Suit observing that the real dispute is with regard to boundaries and only on locating the constructions it can be ascertained whether the constructions are in Survey Nos. 57/2 or 57/3 and the plaintiff has not taken any steps to locate the boundary line of S.No.57/2 and 57/3. Accordingly dismissed the Suit.

4. In the appeal by the aggrieved plaintiff filed IA.No. 1 of 2021 in A.S.No. 34 of 2021 under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 (For short 'CPC'), seeking to appoint an Advocate Commissioner to note down the physical features of the Suit Property along with a qualified Surveyor assisted by concerned Village Administrative Officer and to file a report and plan.

5. The First Appellate Court after hearing both sides, dismissed the I.A.No.1 of 2021 by observing that the plaintiff did not take any steps for the appointment of Advocate Commissioner before Trial Court or examine another



CRP.No. 726 of 2023

Surveyor to prove Ex.A7 rough plan and the plaintiff ought to have filed petition seeking appointment of Advocate Commissioner before Trial Court.

The Advocate Commissioner cannot be appointed in the Appeal Suit.

Accordingly, dismissed the Interlocutory Application on October 26, 2022.

6. Feeling aggrieved with the Order passed by the First Appellate Court, the revision petitioner/plaintiff has preferred this Civil Revision Petition.

7. Mr.R. Subramanian, learned Counsel appearing for the revision petitioner/plaintiff has submitted that the plaintiff's property is situated at Survey No.57/2 and the defendants' property is situated at Survey No. 57/3. The case of the plaintiff is that the defendants have encroached into Survey No.57/2. To find out the exact area and location of encroachment, appointment of Advocate Commissioner along with a qualified Surveyor is necessary. He has further submitted that before filing the Suit, the plaintiff had measured the Suit property, but, at the time of adducing evidence the plaintiff could not



CRP.No. 726 of 2023

secure the Surveyor who measured and gave the plan. Hence, there is no

prejudice would be caused, if this revision is allowed. The First Appellate

Court without appreciating the evidence and the facts, dismissed the petition.

The learned Counsel refers to Section 107 of CPC, and submits that the First

Appellate Court has every power to appoint an Advocate Commissioner.

Accordingly, he prayed to allow this Civil Revision Petition.

8. Per contra, Mr.N.Vijaya Baskar, learned Counsel representing M/s.Law Vision, vehemently contends that the Trial Court found that the plaintiff did not prove his title. In these circumstances, the petition filed under Order XXVI, Rule 9 of CPC., is not maintainable before the First Appellate Court. He further submits that the petitioner has filed the petition only with a view to collect evidence. The First Appellate Court after considering the facts and circumstances rightly dismissed the said application under Order XXVI, Rule 9 of CPC, on October 26, 2022. Therefore, there is no warrant of interference in the Order passed by the First Appellate Court. Accordingly, he



CRP.No. 726 of 2023

prays to dismiss the Civil Revision Petition.

WEB COPY

10. This Court has considered both sides' submissions.

11. The dispute is whether the defendants have encroached upon Survey No. 57/2 or Survey No.57/3. This Court is of the considered view that to find out the location of alleged encroachment, appointment of an Advocate-Commissioner is absolutely necessary and no prejudice would be caused defendants if this revision is allowed. The questions as to whether the plaintiff is entitled to property in Survey Nos.57/2 and whether the defendant encroached into Survey No.57/2 as alleged by plaintiff. In the affidavit filed in support of the I.A.No. 1 of 2021, plaintiff assigned reason for non-examining the Surveyor before the Trial Court. The reasons stated in the affidavit are satisfactory and bonafide. Since Appeal is a continuation of Suit, subject to the other provisions of CPC., the application under Order XXVI Rule 9 is maintainable.



CRP.No. 726 of 2023

WEB COPY

12. Accordingly, this Revision Petition is allowed and the Order dated October 26, 2022 passed in IA.No.1 of 2021 in A.S.No. 34 of 2021 by the First Appellate Court, is hereby set aside and I.A.No. 1 of 2021 is allowed. The First Appellate Court shall appoint an Advocate Commissioner to note the physical features in the Suit Property and also measure the same with a qualified Surveyor for the purpose of ascertaining whether the constructions are in Survey No.57/2 or Survey No. 57/3 of Kollapatty Village to file the Report and Plan in this regard. No costs. Consequently, connected Civil Miscellaneous Petition is closed.

14.11.2024

MSM

To

The Principal Subordinate Court, Salem.



WEB COPY



CRP.No. 726 of 2023

R. SAKTHIVEL, J

MSM

CRP.No. 726 of 2023

14.11.2024