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C.R.P.No.3432 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29..08..2024

Coram

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

Civil Revision Petition No.3432 of 2024

and

C.M.P.No.18655 of 2024

Dayalan

..... Petitioner

-Versus-

1.Ravi

2.Gopi

3.Narayanan

..... Respondents

Petition filed under Article 227 of the Constitution of India, praying to set aside the fair and decretal order dated 12.02.2024 passed by the learned Subordinate Judge, Alandur, in I.A.No.1 of 2023 in O.S.No.917 of 2021.

For Petitioner : Mr.C.Dilipkumar

*For Respondents : Ms.Raji for
Mr.M.P.John Peter for R3*



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ORDER

This civil revision petition arises out of an order dated 12.02.2024 passed by the learned Subordinate Judge, Alandur, in I.A.No.1 of 2023 in O.S.No.917 of 2021.

2. O.S.No.917 of 2021 was originally presented before the learned Subordinate Judge at Tambaram as O.S.No.70 of 2011. Subsequent to the formation of the Subordinate Court at Alandur, the said suit was transferred to that court and renumbered as O.S.No.917 of 2021. The suit originally was presented seeking the relief of declaration and for injunction.

3. The case of the plaintiff is that one Krishnappa Naicker was the owner of the property who sold it to his daughter Kuppammal. Thereafter, Kuppammal had settled the property in favour of the plaintiff by way of a settlement deed dated 19.04.2004. He would plead that he was utilizing the vacant land for the purpose of tethering the cattle and had also put up a compound wall around the property. The defendant in order to grab the property tried to dispossess the plaintiff from the same. Pending the litigation, the plaintiff did amend the plaint seeking for recovery of possession on account of the fact that the defendant had entered into the property and put up a thatched hut. It is the specific case of the plaintiff that the property is situated in Paimash No.499, S.No.260, T.S.No.31/3 of Adambakkam Madura Village.



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The property said to bear Door No.16, New Door No.8-F of Odaikarai Street of the said village.

4. A perusal of the written statement filed by the defendant would show that the plaintiff would plead that the property bearing Door No.8-F is not situated in S.No.260 but, it is situated in S.Nos.272 (pt) and 275 (pt). They would plead that this is as per the patta No.260 and the Town Survey Number for the property is not T.S.No.31/3 but is T.S.N0.31. There being a dispute in the identity of the property, the plaintiff took out an application for appointment of Advocate Commissioner to note down the lie of the suit property and to submit a report. The said application was opposed by the defendant on the ground of delay and to the effect that it amounts to collection of evidence through the Advocate Commissioner. The learned Subordinate Judge accepting the plea of the defendant dismissed the application. Hence, the revision.

5. Heard Mr.A.Prabhakaran for the civil revision petitioner and Ms.Raji for the respondent.

6. The counsel appearing on either side reiterated their arguments that were made in court below on behalf of the respective parties.



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7. Mr.A.Prabhakaran would in addition submit that by appointing an Advocate Commissioner, the court can find out the position where the suit property is situated since the identity of the property is in dispute.

8. Ms.Raji would vehemently contend that it amounts to filling up of lacuna in the evidence that has been tendered by the plaintiff and that an Advocate Commissioner cannot be utilized for the purpose of collection of evidence.

9. The Supreme court in **Haryana Wakf Board v. Shanti Sarup and others** [2008 (8) SCC 671] has held that where there is a dispute regarding identity of the property, the court should appoint an Advocate Commissioner in order to find out the nature and lie of the property.

10. A perusal of the suit schedule mentioned property given in the plaint and the averments made in Paragraph 2 of the written statement would show that there is a dispute in the identity of the property. The plaintiff asserts that the property is situated in S.No.260. Whereas the defendant would assert that the schedule mentioned property is situated in S.Nos.272 (part) and 275 (part). Consequently, following the judgement of the Supreme Court in **Haryana Wakf Board v. Shanti Sarup and others** (cited supra) I feel that if the Advocate Commissioner goes and surveys and submit a report, it will help the



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court to render a just verdict at the time of final disposal.

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11. Now turning to the argument of Ms.Raji that the Advocate Commissioner is not supposed to collect evidence, the provision of Order XXVI, Rule 10 (2) CPC seems to have escaped her notice. Under Order XXVI, Rule 10(2) of CPC, a report of the Advocate Commissioner is deemed to be evidence in the suit. If such is the situation as per the CPC, then, there is no question of Advocate Commissioner making out evidence either for the plaintiff or defendant.

12. With respect to the plea of Ms.Raji that the plaintiff is trying to fill up the lacuna, I am not in agreement with her argument for the simple reason that the parties are still before the trial court and the trial is still open. The question of filling up lacuna arises when the parties have completed their evidence and a judgement has been rendered in favour of one of the parties and the other is on appeal. It is in those circumstances the doctrine of filling up lacuna was brought into the concept of civil jurisprudence. The same cannot be made applicable when the suit is still at large.

13. Both the objections of Ms.Raji fail and I am inclined to allow the civil revision petition.



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In the result, the civil revision petition is allowed. The order dated 12.02.2024 made in I.A.No.1 of 2023 in O.S.No.917 of 2021 by the learned Subordinate Judge, Alandur, is set aside. The application in I.A.No.1 of 2023 filed for appointment of Advocate Commissioner stands allowed. The learned Subordinate Judge, Alandur, is requested to appoint a person who is practising predominantly on the civil side as Advocate Commissioner to submit a report. No costs. Consequently, connected CMP is closed.

Index : yes / no
Neutral Citation : yes / no
Speaking / Non Speaking Order
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To
1.The Subordinate Judge, Alandur, Kancheepuram District.



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V.LAKSHMINARAYANAN.J.,

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