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C.R.P.(NPD)No.1931 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.07.2024

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THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

C.R.P.(NPD)No.1931 of 2023

and

C.M.P.No.12253 of 2023

Shanmugam

.. Petitioner

Vs.

Mathiyazhagan

.. Respondent

Prayer : The Civil Revision Petition is filed under Article 227 of Constitution of India, to set aside the fair and decreetal order, dated 06.04.2023, made in I.A.No.1 of 2022 in A.S.No.47 of 2022 passed by the learned Additional District Judge, Dharmapuri, Dharmapuri District.

For Petitioner : Mr.M.R.Jothimanian

For Respondent : Mr.Ganesh Babu

ORDER

The present Civil Revision Petition arises against an order passed by the learned Additional District Judge at Dharmapuri in I.A.No.1 of 2022 in A.S.No.47 of 2022 dated 06.04.2023.



C.R.P.(NPD)No.1931 of 2023

2. For the sake of convenience, the parties will be referred to as per their rank in the suit.

3. The civil revision petitioner before me is the defendant in the suit, and the respondent in the appeal. The plaintiff, who is the appellant in A.S.No.47 of 2022, presented a suit for the relief of declaration of title and permanent injunction with respect to the 'A' schedule mentioned property, and for recovery of possession with respect to the 'B' schedule mentioned property.

4. The suit came to be decreed in part with respect to the 'A' schedule mentioned property, and it was dismissed with respect to the 'B' schedule mentioned property on 04.08.2022. The judgment was delivered in O.S.No.50 of 2018 by the learned Additional Subordinate Judge at Dharmapuri.

5. Feeling aggrieved by the portion of the judgment denying him the relief of recovery of possession, the plaintiff has preferred a regular appeal in A.S.No.47 of 2022.



C.R.P.(NPD)No.1931 of 2023

WEB COPY

6. Insofar as the portion that has been decreed in favour of the plaintiff, the learned counsel for the respondent submits that the civil revision petitioner has preferred an appeal in A.S.No.10 of 2023.

7. Pending the appeal in A.S.No.47 of 2022, the appellant/respondent herein took out an application for appointment of an Advocate Commissioner to note down the physical features of the property, and to submit a report to the Court. This application was resisted by the civil revision petitioner on the ground that on previous occasion before the trial Court, an application had been filed for appointment of an Advocate Commissioner and that application came to be allowed by the trial Court in I.A.No.27 of 2021 dated 16.03.2021.

8. Previously, the civil revision petitioner had preferred a revision to this Court against the appointment of an Advocate Commissioner in C.R.P.(PD)No.1004 of 2021. This Court after hearing both sides allowed the revision and dismissed the commissioner application holding that an Advocate Commissioner cannot be appointed to see as to who is in the



C.R.P.(NPD)No.1931 of 2023

possession of the property, and the Advocate Commissioner is not an authorized person to give a finding to the effect of possession.

9. It was the plea of the civil revision petitioner that since C.R.P.(PD)No.1004 of 2021 had already been allowed, it is not open to the appellant/respondent herein to move a fresh application for appointment of an Advocate Commissioner.

10. The learned Additional District Judge at Dharmapuri considered both these arguments, and came to the conclusion that for the proper adjudication of the case, an Advocate Commissioner must be appointed to note down if there is any encroachment with respect to the suit schedule mentioned property.

11. Feeling aggrieved by this order, the present revision has come up before this Court.

12. Heard Mr.M.R.Jothimanian, appearing on behalf of the petitioner, Mr.Ganesh Babu, appearing on behalf of the respondent.



C.R.P.(NPD)No.1931 of 2023

WEB COPY

13. Mr.M.R.Jothimanian would vehemently contend that by virtue of the order of this Court in C.R.P.(PD)No.1004 of 2021, the issue of appointment of an Advocate Commissioner has effectively been concluded. This Court having allowed the civil revision petition, had rejected the prayer for appointment of an Advocate Commissioner. He would submit that it is not open to the respondent to seek the very same relief by way of a fresh application.

14. He would then submit that even on the merits of the case, it is the duty of the plaintiff/respondent herein to prove his title to the 'B' schedule mentioned property and only on such proof, the question of probing into whether there is an encroachment on the same arises. Therefore, the effect of both these pleas is that the appointment of an Advocate Commissioner is irrelevant especially in the appellate stage and therefore, he seeks the present civil revision petition to be allowed.

15. Per contra, Mr.Ganesh Babu would rely upon the very same paragraph that had been relied upon by Mr.M.R.Jothimanian to point out



C.R.P.(NPD)No.1931 of 2023

that on previous occasion, this Court had construed the petition for the appointment of an Advocate Commissioner as one filed to decide, who is in possession of the property. But the present prayer is to note down the lie of the property. He states that the Advocate Commissioner certainly cannot submit a report if there is an encroachment or not. Without a report of the Advocate Commissioner being on record, the Court cannot come to a conclusion, in case the plaintiff proves his title, as to whether the defendant is in possession of the property which the plaintiff claims to be his.

16. He would state that the scope of the order in C.R.P.(PD)No.1004 of 2021 is fundamentally different from the present application and therefore, he would plead that since the learned appellate Judge has exercised her discretion in the matter, the same may not be interfered with in the present revision.

17. I have carefully considered the arguments on either side and I have carefully gone through the records available.



C.R.P.(NPD)No.1931 of 2023

WEB COPY

18. Where there is a dispute on identity of the property or lie of the property, the Supreme Court in ***Haryana Waqf Board vs. Shanti Sarup and Others [(2008) 8 SCC 671]*** has held that the appointment of an Advocate Commissioner is essential. In fact, the Supreme Court was dealing with an issue where the High Court, in the exercise of the powers of the second appellate Court, had rejected an application for appointment of an Advocate Commissioner, and had deemed it fit that such appointment was not necessary. The Supreme Court, in such circumstances, held that where there is a dispute on identity or lie of the property it is essential that the Advocate Commissioner be appointed.

19. Keeping this principle in mind, I approach the facts of the present case.

20. As rightly contended by Mr.Ganesh Babu, the scope of the present application is fundamentally different from the scope of the previous application in C.R.P.(PD)No.1004 of 2021. This Court had specifically rendered a finding in Paragraph No.9 of the order dated



C.R.P.(NPD)No.1931 of 2023

30.04.2021, that an Advocate Commissioner cannot be appointed to determine as to who is in possession of the property. This reflects the settled position of law and does not require any reiteration. It was in those circumstances that the revision was allowed, and the appointment of an Advocate Commissioner was set aside by this Court.

21. However, in the application taken out in the present case, the learned Judge has come to the conclusion that the identity of the property would have to be noted first with the help of Village and Taluk Surveyors and thereafter, the physical features of the property has to be noted, which would in turn assist the Court in arriving at a conclusion, if there are any encroachments over the property. This essentially requires that the property of the plaintiff/respondent herein as well as the property of the civil revision petitioner/defendant be measured.

22. In matters relating to suit for recovery of possession, in order to obviate the necessity of identification of the property during the course of execution, a report of an Advocate Commissioner is made a part of the decree. This is because, if the Court comes to a conclusion that there is an



C.R.P.(NPD)No.1931 of 2023

encroachment, the duty falls on it to specify as to which extent has been encroached and where the encroachments have been made.

23. The argument of Mr.M.R.Jothimanian that the title has to be proved first and thereafter, the encroachment would have to be found later begs the issue. The only way the Court can come to a conclusion as regards the lie of the property is either by appointing an Advocate Commissioner or by the Court, exercising the power vested in it under the Code of Civil Procedure, visiting the property in-person along with the Surveyors. The latter portion is seldom resorted to by the Court, and the eyes and ears of the Court are the Advocate Commissioners who, after due notice to both sides, visit the property, identify the same, and submit a report to the Court. If the title has to be proved and thereafter, the Commissioner has to be appointed, then the purpose of conducting the appeal itself would become otiose. In case, the Advocate Commissioner visits the property and submits a report after measuring both the plaintiff's property and the defendant's property, then it will certainly help the Court to come to a conclusion whether there is any encroachment or not.



C.R.P.(NPD)No.1931 of 2023

24. As rightly contended by Mr.Ganesh Babu that the learned Additional District Judge, who is a senior Judge having vast experience in civil jurisdiction, in her discretion has decided that the appointment of an Advocate Commissioner is essential. I do not find the said exercise of discretion either capricious or arbitrary.

25. In the light of the above discussion, I do not find any reason to revise the order passed by the learned Additional District Judge at Dharmapuri. Therefore, the order passed by the learned Additional District Judge, Dharmapuri in I.A.No.1 of 2022 in A.S.No.47 of 2022 stands confirmed.

26. The Advocate Commissioner shall take note of the observations made in this order. She shall measure both the plaintiff's property as well as the defendant's property after identifying the same with the help of the Taluk and Village Surveyors, and then submit a report whether there are encroachments.



C.R.P.(NPD)No.1931 of 2023

27. Needless to state, prior to the inspection, she shall issue notice to both the parties concerned. The learned Additional District Judge is also requested to club A.S.No.47 of 2022 along with A.S.No.10 of 2023 and dispose of the same by rendering a common judgment.

28. Accordingly, the Civil Revision Petition stands dismissed. No costs. The connected Civil Miscellaneous Petition is closed.

09.07.2024

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Index:Yes/No

Speaking Order :Yes/No

Neutral Citation:Yes/No



WEB COPY



C.R.P.(NPD)No.1931 of 2023

V. LAKSHMINARAYANAN, J.

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To

The learned Additional District Judge,
Dharmapuri, Dharmapuri District

C.R.P.(NPD)No.1931 of 2023

and

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