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C.R.P. No. 2904 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.07.2024

CORAM

THE HONOURABLE MR. JUSTICE P.DHANABAL

C.R.P. No. 2904 of 2022

and

C.M.P. No. 15771 of 2022

Selvanayagi

... Petitioner / Plaintiff / Petitioner

Vs.

1. Malliga

2. A.Munivel

... Respondents/Defendants/Respondents

PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India, 1950, to set aside the fair and decreetal order dated 13.07.2022 passed in I.A. No. 1 of 2021 in O.S. No. 865 of 2010 on the file of the Principal Sub Court, Chengalpattu.

For Petitioner : Mr. K.Govi Ganesan

For Respondents : M/s. V.Srimathi

ORDER



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This Civil Revision Petition has been preferred as against the order dated 13.07.2022 passed in I.A. No. 1 of 2021 in O.S. No. 865 of 2010 on the file of the Principal Sub Court, Chengalpattu, wherein, the petitioner herein has filed a petition for appointment of Commissioner to measure the property with the help of Surveyor and report with plan and note down the physical features and construction by the 2nd defendant in the suit property and the same was dismissed.

2. The case of the petitioner is that he is the plaintiff in the main suit and the suit was filed for the relief of declaration and permanent injunction, mandatory injunction, recovery of possession and for damages. The 2nd defendant trespassed into the suit property and constructed a building on the south side of the suit property. The 2nd defendant also admitted the construction, but according to him, he constructed a house in his property. Even during the cross examination also, he stated that he constructed the house in his property not in the suit property. Therefore, by appointment of Commissioner to measure the suit property with the help of Surveyor and to locate the extent of trespass, extent of encroachment has to be ascertained. Therefore, he filed petition for appointment of commissioner and the same was dismissed by the Trial Court. By allowing this petition, no prejudice would be caused to the other side.



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3. The case of the respondent is that the petition for appointment of Commissioner to measure the suit property with the help of Surveyor is not at all maintainable. The petitioner is claiming the property through Will dated 30.12.1996 and the said Will was created on the same is sham and fabricated one. The petitioner is no way connected with the suit property and she is not in possession at any point of time. The 1st respondent and her husband were in possession and enjoyment of the suit property. The 1st respondent sold the suit property through sale deed dated 16.06.2008 in favour of 2nd respondent and the 2nd defendant is a *bona fide* purchaser. From the date of purchase, the 2nd respondent is in lawful possession and enjoyment of the suit property. Already, the plaintiff's side witnesses were examined and now the case is posted for examination of defendant's side further witnesses. At this stage, the petitioner filed a petition to measure the property with the help of Surveyor and the same is unsustainable in law. Therefore, the petition is liable to be dismissed.

4. Before the Trial Court, no oral or documentary evidences adduced on either side. The Trial Court, after hearing both sides, dismissed the petition.



Aggrieved by the said order, the present Civil Revision Petition is filed.

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5. The learned counsel appearing for the petitioner would contend that the petitioner is the plaintiff in the main suit and she filed suit for the relief of declaration, permanent injunction, mandatory injunction and for recovery of possession. In fact, a part of suit property was encroached by the defendants and they constructed a building. In order to prove the exact extent of encroachment, the Advocate Commissioner has to be appointed to measure the property with the help of the Surveyor. By appointing the Commissioner, no prejudice would be caused to the other side. But the Trial Court failed to consider the genuine claim of the petitioner and dismissed the petition since it was filed at the fag end of trial and there is a dispute in respect of the identification of the property. In fact, the defendant admitted the construction of the building in the property, but according to him, it was constructed in his property but the construction was made in the petitioner's property. Therefore, the appointment of Commissioner is very essential.

6. The learned counsel appearing for the respondents would contend that the suit was filed in the year 2010 and already the plaintiff's side witnesses were examined and some of the witnesses were examined on the



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side of the defendants and the case was posted for examination of defendants side further witnesses. At this stage, the petitioner has filed this petition without any valid reasons. The 2nd respondent had constructed the building only in his property and thereby, the appointment of Commissioner is not necessary to decide the case. The Trial Court also, after hearing both sides, correctly dismissed the petition. Therefore, the present Civil Revision Petition is liable to be dismissed.

7. This Court heard both sides and perused the materials available on record.

8. In this case, the petitioner has filed suit for the relief of declaration and permanent injunction, mandatory injunction, recovery of possession and for damages. According to the petitioner/plaintiff, the respondents/defendants encroached the property of the petitioner and thereby she sought for the prayer on declaration, recovery of possession and for mandatory injunction. According to the respondents/defendants, they admitted that the construction was made in the property but according to them, the construction was made only in their property. Therefore, there is a dispute in respect of the identification of the property. Since the suit is filed for declaration, recovery of possession and for mandatory injunction, to establish the case of the



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plaintiff about the encroachment, it is appropriate to appoint an Advocate Commissioner with the help of the Surveyor to measure the property and to note down the physical features. The Trial Court dismissed the petition by holding that there is no dispute in respect of the identification of the property and at the fag end of trial, the petition was filed. In fact, the Trial Court failed to consider that there is a dispute in respect of the identification of the property and the plaintiff is claiming that there was an encroachment in his property. The respondents/defendants also admitted the construction of building, but according to them, the said construction was made only in their property. Therefore, the appointment of Commissioner is necessary to measure the property with the help of Surveyor. So that, the Trial Court can come to fair conclusion whether any encroachment was made in the suit property or not.

9. At this juncture, the learned counsel appearing for the petitioner has relied on the judgment of this Court in *Shanmugathai -vs- Kamalammal* reported in (2017) 2 MWN (Civil) 315 and *Ponnusamy Pandaram -vs- The Salem Vaiyappamalai Jangamar Sangam* in order dated 18.09.1984 in *C.R.P. No. 3295 of 1984*. On a careful perusal of the judgments, it is clear that the object of local investigation under Order XXVI Rule 9 of the Code cannot



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belittled. Its object is to collect evidence at the instance of the party who relies on the same and which evidence cannot be taken in court but could be taken only from its peculiar nature, on the spot. This evidence will elucidate a point which may otherwise be left in doubt or ambiguity on record and also it is clear that the Commissioner's report and plan would enable the Court for the purpose of throwing more light or enlighten to arrive at a fair decision.

10. The learned counsel appearing for the respondents has relied on the judgment of this Court in *A.Meganathan -vs- S.Ramalingam* in *C.R.P.(PD). No. 59 of 2014* in order dated 24.02.2017 and the judgment of Hon'ble High Court of Bombay in *Nalubai Narayan Shinde and others -vs- Gopinath Dagdu Shinde* reported in *2010 SCC OnLine Bom 1875*. On a careful perusal of the judgments, it is clear that for collection of evidence and to find out the possession of the party, the Advocate Commissioner cannot be appointed. In the case on hand, there is a dispute in respect of the identification of the property and thereby, the case Laws submitted by the respondents are not applicable to the present facts of the case. It is true that the petitioner has not taken any steps immediately after the filing of the suit and at the time of further examination of witnesses on the side of the defendants, after 12 years from the date of filing of the suit, the petition was filed. Though, there is a delay considering the nature of the suit and the prayer sought for in the plaint,



it is appropriate to appoint an Advocate Commissioner and for the delay caused by the petitioner, the respondents can be compensated by way of cost.

Therefore, this Court is of the view that the petition can be allowed on payment of cost of Rs. 5,000/- to be paid by the petitioner to the respondents.

11. In view of the aforesaid discussions, this Court is of the opinion that the order passed by the Trial Court is liable to be set aside. Accordingly, this Civil Revision Petition is allowed by setting aside the order of the Trial Court in I.A. No. 1 of 2021 in O.S. No. 865 of 2010 on condition that the petitioner has to deposit a sum of Rs. 5,000/- before the Trial Court within a period of 15 days from the date of receipt of a copy of this order and after depositing of the above said amount, the Trial Court can appoint an Advocate Commissioner to note down the physical features and to measure the properties with the help of the qualified Surveyor and the Commissioner has to file his report within a month from the date of appointment. The respondent is at liberty to withdraw the payment of cost of Rs. 5,000/- after deposit is made by the petitioner.

12. With the above said observations and directions, this Civil Revision Petition is allowed. No costs. Consequently, the connected Miscellaneous Petition is closed.



C.R.P. No. 2904 of 2024

24.07.2024

Index : Yes/No

Speaking order : Yes/No

NCC : Yes/No

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To

The Principal Sub Court, Chengalpattu.



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P.DHANABAL, J.,

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