



C.R.P.No.3261 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.08.2024

CORAM

THE HONOURABLE Mrs. JUSTICE R.KALAIMATHI

C.R.P.No.3261 of 2022

and C.M.P.No.17299 of 2022

Malliga

...Petitioner

vs.

1. Mageshwari

2. Arumugam

... Respondents

PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India to set aside the Fair and Decreeal order dated 04.08.2022 passed by the learned Principal Subordinate Court, Tindivanam in I.A.No.233 of 2022 in O.S.No.165 of 2022.

For Petitioner : Ms.R.A.Thejashwini
for Mr.P.Dinesh Kumar

For Respondents : Mr.S.Ezhilraj

ORDER

This Civil Revision Petition is filed by the sole plaintiff, aggrieved by



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the order passed in I.A.No.233 of 2022 in O.S.No.165 of 2022 dated 04.08.2022 on the file of the Principal Subordinate Court, Tindivanam. A suit was filed by the revision petitioner/plaintiff against the respondents for the relieves of declaration of title, mandatory injunction to remove the encroached portion, for recovery and for permanent injunction not to proceed with the construction. The suit property is a vacant plot measuring about 1090 sq.ft. (0.002 1/2 cent) situated at Tindivanam Taluk, Avaraipakkam S.R.D, Salavathi Village as per the Natham Land Tax Scheme 140/3B in New Survey No.140/3, Old Survey No.90/3.

2. An application was filed by the plaintiff under Order XXVI Rule 9 of Civil Procedure Code, 1908 for appointment of an Advocate Commissioner to measure the suit property with the help of Surveyor and Village Administrative Officer, and to file a report along with sketch.

3. The respondents resisted the said application by filing counter stating that, as the respondents refused to sell their property to the petitioner and the 1st respondent has purchased the adjacent property by a sale deed dated 19.09.2002 from one Jeyakrishnan, son of Kannappa Gounder and it has been further contended that, in order to protract the



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proceedings, the application was filed based on false documents in order to gain unlawfully.

4. The trial Court has observed that, considering the nature of the relieves sought in the plaint, the application filed under Order XXVI Rule 9 of CPC is unnecessary and chosen to dismiss the application. Aggrieved, the plaintiff has preferred this revision petition.

5. Ms.R.A.Thejashwini, learned representing counsel for the petitioner would vehemently contend that, as one of the relieves sought for in the plaint is for recovery of possession, in order to prove the same, the plaintiff at the initial stage itself filed the application under Order XXVI Rule 9 of CPC. To buttress her arguments, the following judgments have been referred to:

1.Haryana Waqf Board Vs. Shanti Sarup and others reported in 2008 (8) SCC 671 and

2.Vaithinattar and another Vs. Sakkubai Ammal reported in AIR 2004 Madras 419.

6. The Hon'ble Supreme Court in *Haryana Waqf Board Vs. Shanti Sarup and others reported in 2008 (8) SCC 671* has held that:



“...Admittedly, in this case, an application was filed under Order 26 Rule 9 of the Code of Civil Procedure which was rejected by the trial court but in view of the fact that it was a case of demarcation of the disputed land, it was appropriate for the court to direct the investigation by appointing a Local Commissioner under Order 26 Rule 9 CPC.”

7. It is relevant to note that in *Vaithinattar and another vs. Sakkubai Ammal* reported in AIR 2004 MADRAS 419, this Court had an occasion to deal with the matters which relates to an application under Order XXVI Rule 9 of CPC, wherein this Court has observed as follows:

17. None, particularly, the plaintiff who claims that the suit property is lawfully belonging to her has been encroached upon by the defendants and annexed to their lands has filed an application for the appointment of Commissioner to measure the property and submit a report with sketch, and this Court wonders as to why the plaintiff has not resorted to file an application nor even the defendants thought of in this line, as a result of which the Courts have to arrive at their own conclusions based on the paltry evidence placed on record and, therefore, since the best of evidence in cases of such nature could have been obtained only by appointment of a Commission and ascertainment of the extent of lands in possession and enjoyment of each party to the contest, and since this legal necessity has not been complied with, the



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lower Courts have not been in a position to act with the conclusive proof which could be relied upon and, therefore, it is only desirable to do this requirement which is absolutely necessary in the case in hand and, therefore, needless to mention that it is a case which has to be remanded back to the trial Court for observing this requirement in the circumstances of the case and to give a decision based on such report obtained and hence, both the judgments rendered by the trial Court and the first appellate Court have to be set aside and the case remanded for re-consideration and hence, the sole substantial question of law has to be decided in the manner and with the following result.”

8. Admittedly, one of the relieves sought for in the plaint, is for removal of encroachment and for recovery of possession. Dispute pertains to a portion of suit property, which was allegedly encroached by the defendants. In such view of the matter, best evidence can be obtained by appointment of an Advocate Commissioner. This is a legal necessity for the plaintiff, considering nature of suit which is filed. The plaint reads that the plaintiff is in possession and enjoyment of the suit property based on sale deed dated 23.01.1997 and he is residing not in the suit property. The plaint also reads that the defendants have encroached into the suit property and raising construction, therefore, the said details have to be measured by



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the Advocate Commissioner with the help of Surveyor and Village Administrative Officer. So, as the dispute pertains to the encroachment of part of the suit property, the appointment of the Advocate Commissioner is necessary for effective adjudication. In such a view of the matter, this Civil Revision Petition stands allowed. There is no order as to costs. Consequently, connected Civil Miscellaneous Petition stands closed.

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Index : Yes/No
Internet : Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation Case : Yes/No
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R.KALAIMATHI, J.
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