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C.R.P (PD) No.4449 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.11.2024

CORAM :

THE HONOURABLE MR.JUSTICE V. LAKSHMINARAYANAN

C.R.P (PD) No.4449 of 2024
& C.M.P.No.24781 of 2024

1. Matheswaran
S/o.Chinnathambi Naicker

2. Ganesan
S/o.Chinnathambi Naicker

.. Petitioners

VS.

1. Gunasekaran
S/o.Kaliyaperumal

2. Lavanya
W/o.Balaji

3. Elango
S/o.Gunasekaran

4. Shanthi
W/o.Sivakumar

5. Suganya
W/o.Prakashraj

6. Loganathan
S/o.Late Sivakumar

7. Lakshmi
W/o.Ganapathi



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8. Mayeeli

W/o.Natarajan

9. Prabhavathi

W/o.Prabhu

10. Punniyamoorthi

S/o.Arumugam

11. Uma Maheswari @ Keerthi

W/o.Balaji

12. Logeshwaran

S/o.Punniyamoorthi

13. Raja

S/o.Subramani

..Respondent

Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the fair and final orders dated 21.08.2024 passed in I.A.No.5 of 2024 in O.S.No.170 of 2024 on the file of the Additional District Munsif Court at Attur.

For Petitioners : Mr.R.Nalliyappan

For Respondents : Mr.A.Sriram

ORDER

This Civil Revision Petition arises against the order passed by the learned Additional District Munsif Court at Attur in I.A.No.5 of 2024 in O.S.No.170 of 2024 dated 21.08.2024.



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2. Heard Mr.R.Nalliyappan for the petitioners and Mr.A.Sriram for the respondents.

3. The defendants 1 and 2 are the civil revision petitioners. O.S.No.170 of 2024 is a suit filed for prohibitory and mandatory injunctions. The case of the plaintiffs is that the property belongs to two brothers, namely Kaliyaperumal Naicker and Chinnathambi Naicker. The plaintiffs and defendants 6 to 8 represent Kaliyaperumal Naicker branch. Defendants 1 to 5 & 9 represent the Chinnathambi Naicker branch. The plaint alleges on Chinnathambi Naicker passing away, Kaliyaperumal Naicker and the wife of Chinnathambi Naicker, namely one Chinnaponnu and defendants 1 and 2 entered into a partition deed on 12.12.1983. The plaintiff pleads that the defendants 1 to 5 and 9 have a right only over properties allotted to them and do not have any right over the property allotted to Kaliyaperumal Naicker. According to them, on the death of Kaliyaperumal Naicker, the plaintiffs and defendants 6 to 8 had succeeded to his estate and subsequently to the suit properties.

4. Alleging that the defendants 1 to 5 and 9 had started encroaching upon their property, the plaintiffs came forward with the



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present suit. Pleading that defendants 1 and 2 had presented O.S.No.79 of 2004 for declaration of their title on the basis of the partition deed dated 12.12.1983, the plaintiffs allege that defendants 1 and 2 took a false plea that Kaliyaperumal Naicker by an oral settlement settled to an extent of 0.15 acres, had presented the aforesaid suit. Since there is a dispute in identity of the property, the plaintiffs pleaded that they called upon the defendants to survey the property and to mark their boundaries. As the defendants were not agreeable to the said course of action, the plaintiffs impleaded the Collector as the 10th defendant in the suit and presented the plaint for the aforesaid reliefs.

5. Along with the suit, the plaintiffs filed an application in I.A.No.5 of 2024 seeking for an appointment of Advocate Commissioner to measure all the three items of the suit schedule mentioned property on the basis of the partition deed dated 12.12.1983 and also to note down the physical features of the same. The learned Additional District Munsif at Attur felt that this was a case where an Advocate Commissioner should be appointed *ex parte* and allowed the application. Aggrieved by the same, the present Civil Revision Petition is at the instance of the defendants 1 and 2.



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6. Mr.R.Nalliyappan argued that if the report of the Advocate Commissioner is filed and accepted, then it will become a part of the evidence in the suit and hence, it will amount to the plaintiffs collecting evidence through the Office of the Advocate Commissioner.

7. Per contra, Mr.A.Sriram pleads that since there is a dispute in identity of the property as seen from the plaint and the affidavit filed in support of the application for appointment of Advocate Commissioner, the report of the Commissioner will assist the Court in deciding the issues between the parties.

8. I have carefully considered the plea of the civil revision petitioner and the respondents.

9. Both the parties claim title to the properties by virtue of a partition deed dated 12.12.1983. By virtue of this partition deed, the family of Kaliyaperumal Naicker were vested with a particular extent and the 'C' schedule mentioned property went to the family of Chinnaponnu, wife of Chinnathambi Naicker and defendants 1 and 2. Defendants 1 and 2 are the sons of Chinnathambi Naicker. According to



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the defendants, Kaliyaperumal Naicker had orally settled the property to an extent of 0.15 acres in their favour. It is on the strength of that settlement, they have demarcated the property and have put up a fence. This factum is seriously disputed by the plaintiffs. When the issue of identity, lie, extent are in dispute, the best method by which the Court can ferret out the essential aspects on this issue is through the Office of the Advocate Commissioner.

10. Mr.R.Nalliyappan is right that the Court normally should give an opportunity to the defendants to file a counter in the said application. However, as the plaint itself reveals that there is dispute in identity, the learned Additional District Munsif felt that by appointment of Advocate Commissioner *ex parte*, no prejudice would be caused to the defendants. The power of the Court to appoint an Advocate Commissioner *ex parte* is settled by a judgment of this Court in the case of ***P.Moosa Kutty, in re. (1953) 66 LW 418 ≡ 1952 SCC OnLine Mad 347***. The condition that has been laid down by this Court is that before the Advocate Commissioner visits the suit property, he should give due notice to the parties. The learned Additional District Munsif has taken that precaution also. She has directed the Advocate Commissioner to serve notice on the



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defendants before the Commissioner proceeds to execute his warrant.

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11. Now turning to the objection of Mr.Nalliyappan that if the Commissioner submits a report, it will go against the interest of his client and he will not have an opportunity to contest the same, I have to state that this issue has also been addressed by this Court in ***Vemba Gounder Vs. Pooncholia Gounder*** reported in ***1996 SCC OnLine Mad 54***. In the light of the above discussion, I dispose of the revision with the following directions:

i) The order passed by the learned Additional District Munsif in I.A.No.5 of 2024 in O.S.No.170 of 2024 dated 21.08.2024 is sustained;

ii) The Advocate Commissioner shall issue notice to the plaintiffs and the defendants and thereafter, carry out the inspection of the property with the assistance of a surveyor;

iii) The Advocate Commissioner shall submit a report to the Court after serving the same on the counsel for the plaintiffs and the defendants;

iv) On filing of the report, the learned trial Judge shall grant sufficient time of at least two weeks for the parties to file their objections. Once the objections, if any are filed, the



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Court should consider the Advocate Commissioner's report and the objections and thereafter, decide whether the Advocate Commissioner's report should be received as an evidence in the suit in terms of Order XXVI Rule 10(2) of CPC;

v)At that stage, it shall follow the directions in ***Vemba Gounder's*** case cited supra;

vi) In case the Court comes to a conclusion that the Commissioner has not executed the Commission in terms of the warrant or if there are any defects in the report, it shall not wait for the parties to file an application for re-issuance of warrant but shall *suo motu* do so.

There shall be no order as to costs. Consequently, the connected miscellaneous petitions is closed.

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Index:Yes/No
Neutral Citation:Yes/No
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To
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1. The Additional District Munsif Court
Attur
2. The Section Officer
VR Section
Madras High Court



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V. LAKSHMINARAYANAN, J.

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