



C.R.P.(MD)No.2609 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 23/02/2024

CORAM

The Hon'ble Mr.Justice **G.ILANGOVAN**

C.R.P (MD) No.2609 of 2022

and

CMP (MD) No.12736 of 2022

V.R.Karthik Thondaiman : Petitioner/1st Respondent/
1st Defendant

Vs.

1.M/s.Kalati Agencies Pvt. Ltd.,
a Registered Company under the Companies Act,
Represented by its Director and Authority Signatory,
S.Prakash : 1st Respondent/Petitioner/
Plaintiff

2.Rajagopal Thondaiman
3.M/s.Shanthi Guru Infra
A Partnership Firm Rep.
by its Partner Shripal Sanghvi
: Respondents 2 & 3/
Respondents 2 and 3/
Defendants 2 & 3

PRAYER:-Civil Revision Petition has been filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order, passed in IA No.4 of 2022 in OS No.142 of 2015, dated 01/11/2022 on the file of the 3rd Additional District Court, Tiruchirappalli.

For Petitioner : Mr.H.Arumugam

For 1st Respondent : Mr.R.Sundhar

For 2nd Respondent : Mr.K.Govindarajan

For 3rd Respondent : Mr.S.Vinod Sathya Lazar



C.R.P.(MD)No.2609 of 2022

O R D E R

WEB COPY

This civil revision petition is filed seeking to set aside the fair and decreetal order, dated 01/11/2022 passed in IA No.4 of 2022 in OS No.142 of 2015 by the 3rd Additional District Court, Tiruchirappalli.

2.The facts in brief:-

A suit in OS No.142 of 2015 was filed by the plaintiff seeking the relief of specific performance; and the alternative relief of refund of the money and for costs. Pending the suit a petition was taken out by the respondent herein in IA No.4 of 2022 seeking appointment of commissioner. That was allowed.

3.Against which, this civil revision petition is preferred.

4.In the petition, it has been stated by the plaintiff that as per the condition No.12 in the sale agreement, the defendants have agreed to demarcate the suit property and put up the boundary wall well within a period of one month from the date of agreement. But till now, they have not acted upon the agreement. So they have breached the contractual obligation. But in the written statement, it has been stated by them that they have



WEB COPY



C.R.P.(MD)No.2609 of 2022

performed their part of contract. So unless the physical features available and demarcation of the property with the assistance of the Surveyor is made, the issue cannot be resolved. Pending the suit, the first defendant sold the property in favour of the third defendant, who is also impleaded as a party.

5.That was resisted by the petitioner herein by filing a counter stating that the earlier similar application was taken out by the plaintiff namely the 1st respondent herein. That was withdrawn. It was not averred in the plaint. In the written statement, they have stated that they have sold the property, on 27/11/2015 in favour of the third defendant. The property was also demarcated. Compound wall also raised. Even before the date of agreement, there was a compound wall. Apart from that, it is also stated that only the 1st respondent did not comply the terms of the agreement. Apart from that, other grounds also stated.

6.That petition was allowed by the trial court observing that the physical feature is necessary to decide the performance of the contract.



C.R.P.(MD)No.2609 of 2022

7. Against which, this civil revision petition is preferred.

WEB COPY

8. The learned counsel appearing for the petitioner would straightaway draw the attention of this court to the procedural mistake committed by the respondents as well as the trial court. By relying upon the judgment of this court in **A.Sengoda Gounder Vs. P.Malliga [2019(5)CTC 541]**, he would submit that even though the principles of *Res judicata* will not stand attracted for the present factual circumstances, but Order 23 Rule 1 CPC prohibits filing of the subsequent petition, when no proper permission was obtained, while not pressing the earlier suit. So according to the learned counsel appearing for the petitioner, since the earlier petitions filed by the petitioner in IA Nos.251 of 2016 and 38 of 2017 were withdrawn without seeking leave or permission for filing fresh application, second application namely the impugned petition herein is also barred.

9. No doubt that the earlier applications were withdrawn by the petitioner and no liberty was granted to file a fresh application in future. But here, the earlier two applications were not pressed.



WEB COPY

10. When the specific endorsement that the third defendant is going to be impleaded, he is not pressing the same. So the specific reason was assigned by the 1st respondent herein at the time of withdrawing the earlier applications.

11. Now the third defendant has also been brought on record. So the contention on the part of the petitioner, that procedural mistake was committed by the 1st respondent in presenting the second application is not attracted to the present facts and circumstances of the case. Had not any reason has been assigned by the 1st respondent, while withdrawing the earlier applications, the contention that has been raised by the petitioner will hold good. But here, the position is not like that.

12. The learned counsel appearing for the petitioner would also rely upon the judgment of this court reported in ***Ambrose and another Vs. Neelamegam [(2009) 2 MLJ 769]*** for the purpose of argument that in a suit for specific performance, no Commissioner need be appointed. But in that judgment, the purpose of appointment of the Commissioner was to assess the value of the property. But here, it is not so.



C.R.P.(MD)No.2609 of 2022

WEB COPY

13.As stated by the respondents, there are specific contents in the agreement that the petitioner must demarcate and put up the boundary wall. Whether that condition was complied or not is a factual issue, which got to be decided by the trial court. Now it has been stated that already a compound wall was in existence. Whether the compound wall was already in existence or any new compound wall put up by the petitioner as part performance of the contract are all the matters for consideration by the trial court. Unless the physical features, which are available on ground is brought on record, a binding adjudication cannot be made. Appointment of Commissioner is only to help the Court to arrive at a factual finding with regard to the physical features. So, I am of the considered view that the discretion has been rightly exercised by the trial court, which requires no interference.

14.In the result, this civil revision petition is **dismissed.** No costs. Consequently, connected Miscellaneous Petition is closed.

23/02/2024

Index:Yes/No
Internet:Yes/No
er



C.R.P.(MD)No.2609 of 2022

To,

The III Additional District Court,
Trichy.



WEB COPY



C.R.P.(MD)No.2609 of 2022

G.ILANGOVAN, J

er

C.R.P (MD) No.2609 of 2022

23/02/2024