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CRP No. 2158 of 2018



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07-07-2025

CORAM

THE HONOURABLE MR JUSTICE N. SATHISH KUMAR

CRP No. 2158 of 2018

1. A.Kirupakaran

Petitioner(s)

Vs

1. Chennai Metropolitan Development Authority,
Rep By Its Member Secretary,
No.1, Gandhi Irwin Road,
Egmore, Chennai-600008

2. Corporation Of Chennai
Rep by Its Commissioner,
Ripon Buildings, Chennai-600 003

3. Sakthi Towers Owners' Association,
Rep By Its Secretary,
M.Rajendran, No.107-109,
Gandhi Road, Velachery, Chennai-600042

4. M/s Sakthi Builders
Rep By Its Managing Partner,
Mr.P.Rajendran, No.107-109,
Gandhi Road, Velachery, Chennai-600 042

Respondent(s)



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This Civil Revision Petition has been filed under Section 115 of CPC to set aside the fair and decreetal order dated 13/07/2018 passed in C.M.P.No.1222/2017 in A.S.No.175/2017 on the file of the learned VII Addl.Judge, City Civil Court, Madras by allowing this CRP.

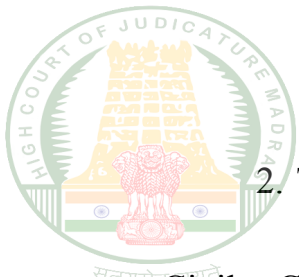
For Petitioner(s): M/s.S.Sadasharam

For Respondent(s): Mrs..K.Aswini Devi,
Standing Counsel For R3

Mr.M.Venkatakrishnan,
For R4

ORDER

Challenge has been made to the order passed by the VII Additional Judge, City Civil Court, Chennai in C.M.P. No.1222 of 2017 dismissing the application filed under Order 26 Rule 9 of CPC to appoint an Advocate Commissioner to inspect the suit property to identify the illegal structure said to have been put up by the 4th respondent over the passage of 40 feet width leading from Gandhi Road to residential complex, by name, Sakthi Towers.



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2. The suit in O.S.No.2740 of 2011, on the file of the IV Assistant City Civil Court, Chennai, has originally been filed by the revision petitioner/plaintiff for mandatory injunction for removal of an extent of 1216 sq.ft land in passage of 40 feet width leading to Sakthi Towers Residential Complex from main road at No.107 to 109, Gandhi Road, Velacherry.

3. According to the revision petitioner/plaintiff, he has purchased an extent of 530 sq.ft. of undivided share of land out of a total extent of 32,274 sq.ft, for which, the 4th defendant had already obtained a plan on 02.06.1990 for constructing a residential complex of flats consisting of ground floor, first floor, second floor and third floor. The revision petitioner/plaintiff has entered into an agreement with the 4th defendant for constructing a residential flat. According to the revision petitioner/plaintiff, in collusion with the office bearers of the 3rd defendant, the 4th defendant has illegally put up construction to an extent of 1216 sq.ft, on the place which is earmarked as passage. Therefore, he sought to demolish that area said to have been constructed by the 4th defendant.



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4. The suit was contested by the defendants 3 and 4 and was dismissed by the Trial Court on 10.03.2017, after contest, holding that the original owners, who purchased the property have not been included as parties to the suit, and the 4th defendant is merely a builder, who has constructed the building as per the plan obtained by the earlier owner. Against which, the appeal has been preferred by the revision petitioner/plaintiff in A.S.No.175 of 2017, on the file of the VII Additional City Civil Court, Chennai. In the said appeal, a petition in CMP No.1222 of 2017 has been taken out to appoint an Advocate Commissioner to identify the illegal construction put up by the 4th respondent. Whereas, the First Appellate Court has rejected the claim of the petitioner and dismissed the petition vide order dated 13.07.2018 . Challenging the same, the present revision has been filed.

5. It is the contention of the learned counsel for the petitioner that the petition for appointment of Advocate Commissioner has been filed in order to ascertain the illegal construction put up on the passage of the entire premises.



6. According to the learned counsel, an extent of 1216 sq.ft has been illegally encroached upon, and construction has been put up on the passage.

Therefore, the petitioner, being the purchaser of the flat, is entitled to question such unauthorized activities. Unless a Advocate Commissioner is appointed, the said illegal construction would not be brought to the notice of the Court.

7. The learned counsel for the 4th respondent would submit that the revision petitioner has purchased the property only in the year 2002, whereas, the construction was happened in the year 1998. The further contention of the learned counsel is that the subject property has been already sold to third parties, namely, Mrs.Rajeswari and Mr.Rajagopal, but they have not been made as a party. Hence, he vehemently opposed the petition.

8. Heard both sides and perused the materials available on records carefully.



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9. It is a well settled law that an Advocate Commissioner cannot be appointed to gather evidence. The contention of the revision petitioner that there was encroachment and illegal construction for an extent of 1216 sq.ft. is concerned, this Court is of the view that without any details, such allegations have been made. In fact, the construction has been completed in the year 1998 itself. The revision petitioner has come into picture only after his purchase, i.e., in the year 2002 and no other flat owners or buyers have raised such a question. Therefore, since the construction took place in the year 1998 after obtaining the necessary approved plan, it is hard to believe that any violation or illegal construction was carried out.

10. Be that as it may, the suit property has already been transferred to third party, namely, Rajeshwari and Rajagopal, who were not impleaded as parties in the suit. When the third parties have already acquired the title over the property, without making them as parties, such right cannot be disturbed. That apart, the suit has been filed only in the year 2011. Further, if any party intends to adduce additional evidence by way of a commissioner's report, the



proper procedure is to file an application under Order 41 Rule 27 of the CPC

before the Appellate Court. This Court in the case of ***Selvi and others /vs/***

Geetha in ***CRP No.3080 of 2019 dated 21.09.2023*** in paragraph no.7 & 8 held

as follows:-

“7. I am unable to accept this contention because as stated above under Order 26 Rule 10(2) of the Code, the report of the Advocate Commissioner together with the evidence collected by him forms a part of the record. IF an Advocate Commissioner is appointed and he submits a report and it becomes part of evidence, the question of dealing with Order 41 Rule 27 CPC subsequently does not arise. Therefore, the application in I.a.No.93 of 2018 for appointment of Advocate Commissioner without an application under Order 41 Rule 27 CPC, in my view, is not maintainable.

8. The correct procedure, according to me, is when a party who seeks for appointment of an Advocate Commissioner in the appellate stage should file an application under Order 41 Rule 27 CPC as well as an application under Order 26 Rule 9 CPC. The Court below should first deal the application filed under Order



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41 Rule 27 CPC and thereafter, taken up the application under Order 26 Rule 9 CPC. Even if one applicaltion is missing, then the petition is not maintainable. I find support for this view in the case of Penta Urmila V. Karukola Kumaraswamy 2005 (2) ALD 130 =2005(1) ALJ 81)”

11. In such view of the matter, I find no infirmity in the order passed by the First Appellate Court and there is no merit in this revision and is liable to be dismissed.

12. Accordingly, the Civil Revision Petition is dismissed. No costs.

07-07-2025

mrp

Index: Yes/No

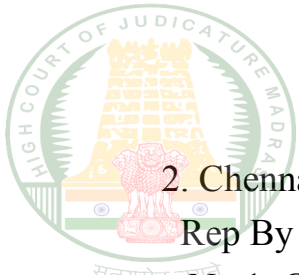
Speaking/Non-speaking order

Internet: Yes

Neutral Citation: Yes/No

To

The VII Additional City Civil Court,
Chennai.



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N.SATHISH KUMAR J.

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