

Banumathi Vs. Muniammal

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Court : Chennai

Decided On : Aug-30-2013

Judge : The Honourable Ms. Justice K. Suguna

Appellant : Banumathi

Respondent : Muniammal

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED :

30. 08.2013 CORAM THE HONOURABLE MS. JUSTICE K. SUGUNA AND THE HONOURABLE MR. JUSTICE M.DURAI SWAMY C.R.P.(PD) No.2813 of 2007 and M.P.No.1 of 2007 1.Banu @ Banumathi 2.Elumalai 3.Mani ... Petitioners v. Muniammal ... Respondent Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India against the order dated 14.6.2007 passed in I.A.No.25 of 2007 in O.S.No.472 of 2005 on the file of the Additional District Munsif Court, Tiruvannamalai. For Petitioners : Mr.G.Rajan For Respondent : Mr.J.Ramakrishnan

ORDER

M.DURAI SWAMY, J A learned Judge of this Court has referred the above Civil Revision Petition to a Division Bench for considering the following question:-
".Whether an Advocate Commissioner can be appointed to ascertain the age of a building?".

2. Before the learned single Judge, the learned counsel appearing for the petitioners relied upon a judgment reported in 2002 (2) CTC199(Saraswathy and another vs. Viswanathan) wherein this Court held as follows:- ".15. In view of the discussion above, the civil revision petition is allowed. The lower Court shall appoint an Advocate Commissioner for the purpose set out in the petition in support of the application for appointment of an Advocate Commissioner. The Advocate Commissioner shall measure the properties of both the parties and also note down whether there are projections of the sunshades over the plaintiff's School Buildings on the defendant's property. The Commissioner shall also note down the age of the buildings of the plaintiffs and submit his report. The parties shall file copies of their respective title deeds and also the plans from the Municipality to enable the Commissioner to inspect and file a proper report."

3. The learned counsel appearing on behalf of the respondent in support of his contention relied upon the judgment reported in 2006-2-L.W.159 (Chandrasekaran & 6 others v. V.Doss Naidu) wherein this Court confirmed the fair and final order passed by the trial Court refusing to appoint an Advocate Commissioner which found that (i) the Advocate Commissioner cannot be appointed to prove the long possession of the defendants, (ii) the Commissioner cannot note the age of the building and trees and (iii) the petition has been filed with a view to delay the trial proceedings. This Court, while dismissing the Civil Revision Petition, held that an Advocate Commissioner cannot be appointed to file a report relating to the nature of possession.

4. According to the learned single Judge, since this Court has taken different views in the above referred judgments as to the appointment of Advocate Commissioner to ascertain the age of the building, the learned Judge referred the matter to a Division Bench.

5. In the case on hand, the respondent who is the plaintiff in O.S.No.472 of 2005 on the file of the Additional District Munsif Court, Tiruvannamalai, filed the said suit for declaration, mandatory injunction, delivery of possession and for other reliefs. The said suit is being contested by the revision petitioners who are the defendants in the said suit.

6. The revision petitioners/defendants filed an application in I.A.No.25 of 2007 in O.S.No.472 of 2005 under Order XXVI, Rule 9 of the Civil Procedure Code for appointment of Commissioner to inspect the suit properties, note down the physical features and approximate age of the thatched shed in the suit properties. In the affidavit filed in support of the application, the defendants have stated that the plaintiff alleged in the plaint that the defendants had trespassed and constructed the thatched house in the said property on 9.8.2005. They have also stated that the thatched house was constructed by them in the year 1995 and the same is old one. Further, the defendants have stated that the plaintiff deposed that the defendants constructed the thatched house recently.

7. The respondent filed her counter stating that a commissioner cannot be appointed to ascertain the age of the building.

8. The trial Court after taking into consideration the case of both parties dismissed the application finding that an Advocate Commissioner cannot be appointed to ascertain the age of the building since Advocate Commissioner is not an expert to give a finding with regard to the age of the building. Further, the trial Court held that the age of the building can be proved only by oral and documentary evidences. Aggrieved over the order passed by the trial Court, the defendants have filed the above Civil Revision Petition.

9. Heard the learned counsel appearing for the petitioners and the respondent.

10. The learned counsel appearing for the petitioners relied upon the following judgment:- (i) 2000 (1) CTC279(Pillaiyar Vs. Ganesan and another) (ii) 1985 1 - MLJ380(Ponnuswamy Pandaram vs. Salem Vaiyappamalai Jangamar Sangam rep. by its President Palanivel) 11. On a reading of both these judgments, it could be seen that both the Civil Revision Petitions were filed as against the order passed in the applications for appointment of Advocate Commissioner but the appointment of Advocate Commissioner sought was not to ascertain the age of building. Since the issue involved in the present Civil Revision Petition is whether a Commissioner can ascertain the age of the building, the judgments relied upon by the learned counsel for the petitioners are not applicable to the present case.

12. The learned counsel appearing on behalf of the respondent in support of his contention relied upon the judgment reported in 2006-4-L.W.970 (R.Sankarappan vs. R.Jayachandran) wherein this Court held that an Advocate Commissioner cannot be appointed to find out the facts and gather evidences to prove the case of the parties.

13. The learned counsel appearing for the petitioners submitted that the defendants filed the application in I.A.No.25 of 2007 under Order XXVI Rule 9 of the Civil Procedure Code for appointment of Commissioner and not for Advocate Commissioner. The learned counsel also fairly submitted that only an expert can be appointed to ascertain the age of the building.

14. Countering the submissions made by the learned counsel appearing for the petitioners, the learned counsel appearing on behalf of the respondent submitted that an Advocate Commissioner cannot be appointed to give a finding with regard to the age of the building.

15. It cannot be disputed that the Advocate Commissioner is not an expert to give a finding with regard to the age of the building. The said exercise can be done either by a qualified engineer or by an expert in the said field.

16. Even in the judgment reported in 2002 (2) CTC199supra, in Paragraph No.14, this Court held that though Advocate Commissioner cannot decide the dispute, his inspection and report would help the Court in deciding the dispute. In Paragraph No.15, while allowing the Civil Revision Petition, this Court directed the trial Court to appoint an Advocate Commissioner for the purpose set out in the petition in support of the application for appointment of an Advocate Commissioner. Further, this Court also directed that the Commissioner shall note down the age of the building of the plaintiffs and submit his report.

17. In the judgment reported in 2006-2-LW159supra, this Court while confirming the order passed by the trial Court which dismissed the application for appointment of Commissioner finding that (i) Advocate Commissioner cannot be appointed to prove the long possession of the defendants, (ii) the Commissioner cannot note down the age of the building and the trees and (iii) the petition has

been filed with a view to delay the trial proceedings. Thus, the order of the trial Court was confirmed by this Court in the judgment reported in 2006-2-LW159 18. As already stated, since the Advocate Commissioner is not an expert to give a finding with regard to the age of building, seeking for appointment of Advocate Commissioner for the said purpose cannot be done. The age of the building can be ascertained only by an expert in the said field. If the party seeks to get a report with regard to the age of the building, the same can be done only with the assistance of a qualified expert. Therefore, for ascertaining the age of the building, the parties can seek for appointment of an Advocate Commissioner to file a report with regard to the age of the building only with the assistance of a qualified expert or engineer. An Advocate Commissioner cannot be appointed independently to ascertain the age of the building. In such circumstances, the Court can direct the Advocate Commissioner to file a report with regard to the age of the building with the assistance of a qualified expert or engineer.

19. Therefore, we are of the considered view that the Advocate Commissioner cannot be appointed to ascertain the age of the building. Hence, we agree with the proposition laid down by this Court in the judgment reported in 2006-2-LW159 and, with respect, are not agreeing with the view taken in the judgment reported in 2002 (2) CTC199 20. To summarise our answer to the question referred to the Division Bench is as follows: An Advocate Commissioner cannot be appointed to ascertain the age of the building. The age of the building can be ascertained only by a qualified expert in the said field.

21. As we have answered the reference as above, the Registry is directed to place the matter before the learned single Judge next week for hearing on merits. (K.S.A.,J.) (M.D.,J.) 30.08.2013 Index : yes Internet: yes asvm K.SUGUNA, J and M.DURAISWAMY, J (asvm) Order in C.R.P.(PD) No.2813 of 2007 and M.P.No.1 of 2007 30.08.2013

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