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Court : Chennai Madurai

Decided On : Dec-02-2016

Judge : D. Krishnakumar

Appeal No. : CRP (MD) (PD) No. 1998 of 2016 & CMP (MD) No. 9378 of 2016

Appellant : Saaswathi

Respondent : Dhaamani

Judgement :

(Prayer: Civil Revision Petition is filed under Article 227 of the Constituion of India, to set aside the fair and decretal order dated 24.02.2016 made in I.A.No.117 of 2015 in A.S.No.9 of 2014 on the file of the Sub court, Siilliputhur.)

1. These civil revision petition arises against the fair and decretal order dated 24.02.2016 made in I.A.No.117 of 2015 in A.S.No.9 of 2014 on the file of the Sub court, Srivilliputhur.

2. According to the learned counsel for the petitioner, the respondent filed a suit in O.S.No.17 of 2006 on the file of the learned District Munsif, Srivilliputhur. The said suit is filed for permanent injunction. The revision petitioner filed a counter claim for declaration that the suit property belongs to the petitioner. The trial Court decreed the suit and dismissed the counter claim. Aggrieved against the said judgment and decree, the petitioner preferred A.S.No.8 and 9 of 2014 and 8 of 2014 before the learned Subordinate Judge, Srivilliputhur. In A.S.No.9 of 2014, the

petitioner filed I.A.No.117 of 2015 for appointment of an advocate commissioner to make local inspection of the suit property with the help of the surveyor and file a report and a plan. The Appellate Court has dismissed the said application. Aggrieved against the said order, the present civil revision petition has been filed.

3. Heard the learned counsel for the petitioner as well as the leaned counsel for the petitioner and perused the materials available on record.

4. According to the leaned counsel for the petitioner, there is a dispute regarding the measurement of the property and only boundary will prevail over the measurement. The lower Court has passed the judgment without properly analysing the documents as well as the measurement and the four boundaries. As per the document under Ex.B2, the measurement of the north-south and the further south has been specifically mentioned. The said aspect was not properly considered by the trial Court. Therefore, the four boundaries of the suit property have to be measured by the Advocate commissioner and then only, the real dispute can be determined in the said appeal suit.

5. Per contra, the learned counsel for the respondent would submit that the earlier litigation arose between the parties in respect of the same subject matter in O.S.No.239 of 2002 and the same was disposed of and the judgment and decree in the aforesaid suit was also marked in the present suit. In the earlier suit, a commissioner was appointed and he has also filed his report. In the present suit, there is no dispute with regard to the identity of the property and hence, no need to appointment an advocate commissioner and he prayed for the dismissal of the civil revision petition.

6. At this juncture, it is appropriate to consider the decision of this Court, relied upon by the petitioner in Dinamalar V. Tiruchirappalli Municipality reported in (1984) 2 MLJ 306. There is no quarrel over the proposition. But, the said decision will not help to the case of the petitioner herein. In the above said decision, the boundaries prevail over extent. Therefore, the said judgment is not applicable to the facts of the present case, since the instant application was filed for appointment of advocate commissioner. Therefore, the said decision is not applicable to the facts of the present case.

7. At this juncture, it is appropriate to consider the decision relied on by the respondent in Meenakshi V. Vennila reported in 2008(5) CTC 181, wherein, this Court has held in para 9, as follows:

9. It is true that Order XXVI Rule 9 of C.P.C. empowers the court to appoint commissioner to make local investigation as it finds fit and proper based on the facts and circumstances of the case. At this stage, it is pertinent to point out that it is not the aim of Order XXVI Rule 9 of C.P.C. to assist a litigant to collect evidence, where the litigant can get evidence himself. In the instant case, the suit has been filed only for permanent injunction and as such in regard to the factum of possession, this Court opines that the lower court alone can gather evidence through the parties to the litigation and therefore, the same cannot be entrusted to the Advocate Commissioner to gather evidence and in that view of the matter, the Civil Revision Petition fails and the same is hereby dismissed in the interest of Justice.

8. In the decision in T.K.Krishnamurthy V. Tamil Nadu Water and Drainage Board reported in 2006(5) CTC 178, this Court has held in para 9 as follows:

9. The report of the advocate commissioner alone can never be the basis for deciding the suit as Commissioner should not be appointed to gather evidence to prove the case of the parties. Parties should prove their case by themselves by letting in legally acceptable evidence and the report of the Commissioner can only aid the court in evaluating the evidence to come to a just conclusion. But in this case Advocate Commissioner was sought for and appointed to gather the evidence to disprove the case of the revision petitioner in respect of a property which is not subject matter of the suit.

9. In the decision in Subhaga V. Shobha reported in (2006)5 Supreme Court Cases 466, the Hon'ble Apex Court, in para 5, has held as follows:

5. We find that a commission was issued for demarcating the suit plot No. 1301/1 Ba and the Commissioner showed the disputed area in the map prepared by him. The lower appellate court while considering the question of identification had referred to the description of the boundaries in the plaint, the admissions of one of

the defendants as DW1 and the report and plan submitted by the Commissioner. That Court also noticed that the plaintiff had given specific boundaries of the suit land and it was clear from the sketch prepared by the Commissioner that the disputed constructions lay in the suit land and that it belonged to the plaintiff. This was the basis of the affirmance of the decree in favour of the plaintiff by the lower appellate court. In Second Appeal, the learned Judge of the High Court, after referring to the description of the boundaries in the plaint, simply discarded the sketch prepared by the Commissioner in the presence of the parties after ascertaining the plots lying as boundaries of the suit property. It also appears to have taken the view that without a survey of the adjoining plots, it cannot definitely be said that the disputed structure lies in the plot belonging to the plaintiff, namely, plot No. 1301/1 Ba. We think that the High Court was not justified in interfering with the finding of the lower appellate court and in discarding the identification made by the Commissioner. It must be noticed that the suit had been remanded twice for the purpose of identifying the suit property and such identification had been done by the Commissioner and such identification had been accepted by the trial court and the first appellate court in the light of the admissions of DW1. The vague and general reasons given by the High Court for interfering with the decision of the first appellate court are clearly insufficient to upset the finding on identification. There was nothing to show that the Commissioner had not properly identified the suit property.

6. The High Court has also upheld the title claimed by the plaintiff over the plot, Plot No. 1301/1 Ba. Once we accept the identification made by the Commissioner as was done by the first appellate court, it is clear that the plaintiff has the right to have the disputed construction removed and the well filled up. That a property can be identified either by boundary or by any other specific description is well established. Here the attempt had been to identify the suit property with reference to the boundaries and the Commissioner has identified that property with reference to such boundaries. Even if there was any discrepancy, normally, the boundaries should prevail. There was no occasion to spin a theory that it was necessary in this suit to survey all the adjacent lands to find out whether an encroachment was made in the land belonging to the plaintiff. In this situation, we are satisfied that the judgment and decree of the High Court calls for interference.

We are also satisfied that the lower appellate court was justified in affirming the decree granted in favour of the plaintiff on the pleadings and the evidence in the case.

10. At this juncture, it is appropriate to consider the decision of this Court in Ganapathy V. Mani reported in (2003)3 M.L.J. 16, wherein, this Court has held that the discretion of the Court for the purpose of local investigation is to elucidate any point, which is left doubtful in evidence taken before Court. However, in the present case is concerned, the suit is filed for permanent injunction. The real issue in the present suit is to decide the possession of the property. It is for the parties to establish their case by way of filing oral and documentary evidence. Therefore, the above said decision is not applicable to the facts of the present case.

11. In the case in C.Panneerselvam V. Padmaja reported in 2014(1) MWN (Civil) 268, this Court has held as follows in para12 of the judgment:

12.The Interlocutory Application could have been filed under Order 26, Rule 9 of the Code. Even as per Order 26, Rule 9 of the Code, the petitioner/Defendant is not entitled to seek appointment of Commissioner for the purpose of collecting evidence in a suit. The relief sought for is to measure A Schedule properties, which is admittedly belongs to the Respondent/Plaintiff and therefore, the Petitioner/Defendant has no legal pleas, seeking an Order to measure the property belongs to the Respondent/Plaintiff and raise a legal grievance against the impugned order passed by the Court below, dismissing the application.

12. In another decision in Chandrasekaran Vs. V.Doss Naidu reported in (2005) 3 M.L.J. 473, wherein, this Court in para 10, 22, has held as follows: 10.Countering the arguments, learned counsel for the respondent has drawn the attention of the Court to the number of documents filed along with the plaint and has submitted that in the light of the documents filed by the plaintiff and the earlier litigation, the appointment of Advocate Commissioner is not warranted. It is further submitted that the factum of possession and age of the trees are the main issues to be determined by the Court in the suit and the same cannot be delegated to the Advocate Commissioner. He has further submitted that the factum of possession is to be proved by adducing evidence.

22. Upon consideration of the facts and circumstances of the case, learned District Munsif has rightly declined to appoint Advocate Commissioner to note down the physical features and thereby elucidating the factum of possession. The impugned order does not suffer from any material irregularity. This revision petition has no merits and is bound to fail.

13. Applying the dictum laid down in the above said decision, I am of the view that the appellate Court has rightly dismissed the application in I.A.No.117 of 2015 in A.S.No.9 of 2014 on the file of the Subordinate Judge, Srivilliputhur and the impugned order does not warrant any interference of this Court and the civil revision petition is liable to be dismissed.

14. Accordingly, the civil revision petition is dismissed. No costs. Consequently, connected miscellaneous petition is also dismissed.

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