

Kandan and Another Vs. Govindasamy and Another

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Court : Chennai

Decided On : Nov-23-2016

Judge : M. Duraiswamy

Appeal No. : C.R.P.(NPD)No. 663 of 2016 & C.M.P.No. 3416 of 2016

Appellant : Kandan and Another

Respondent : Govindasamy and Another

Judgement :

(Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and decreetal order dated 16.02.2015 made in E.A.No.180 of 2014 in E.P.No.237 of 2011 in O.S.No.498 of 2003 on the file of the Principal District Munsif Court, Thiruvannamalai.)

1. Challenging the fair and final order passed in E.A.No.180 of 2014 in E.P.No.237 of 2011 in O.S.No.498 of 2003 on the file of Principal District Munsif Court, Thiruvannamalai, the judgment debtors-defendants have filed the above Civil Revision Petition.

2. The respondents-plaintiffs filed the suit in O.S.No.498 of 2003 for the following reliefs:-

(i) declaration, recovery of possession and mandatory injunction in respect of 1st item of the suit property ; and

(ii) declaration and permanent injunction in respect of 2nd item of the suit property.

3. After contest, the Trial Court decreed the suit by declaring the title of the plaintiffs to an extent of 2.23 cents in 1st item of the suit property and 2 cents in respect of 2nd item of the suit property. The defendants were also directed to pay the market value in respect of 2.23 plus 2 cents to the plaintiffs.

4. Aggrieved over the judgment and decree passed in O.S.No.498 of 2003, the defendants have filed an appeal in A.S.No.49 of 2008 and the plaintiffs have filed a Cross Objection in Cross Objection No.65 of 2009, before the Principal Sub Court, Thiruvannamalai.

5. The Lower Appellate Court, dismissed the appeal and allowed the Cross Objection filed by the plaintiffs, thereby decreed the suit in O.S.No.498 of 2003 in toto.

6. Against the judgment and decree passed in A.S.No.49 of 2008, the defendants filed a Second Appeal in S.A.No.76 of 2014 and this court also confirmed the judgment and decree passed by the Lower Appellate Court and dismissed the Second Appeal.

7. Thereafter, the plaintiffs filed an Execution Petition in R.E.P.No.227 of 2011 to execute the decree granted in O.S.No.498 of 2003. In the said Execution Petition, the defendants filed an application in R.E.A.No.180 of 2014 seeking for appointment of an Advocate Commissioner. In the affidavit filed in support of the said application, the defendants have stated that the plaintiffs have wrongly mentioned the extent of the property as 0.01 are. Further, they have stated that the 1st petitioner/1st defendant purchased an extent of 5 1/2 cents on 15.07.1983. the defendants have also stated that, in I.A.No.1559 of 2005, filed by the plaintiffs before the Trial Court, the Advocate Commissioner has found that there is an encroachment in respect of the terraced house. Further, they have stated that if the property is measured, it could be found that the plaintiffs are entitled to only half of the land in the suit property.

8. The plaintiffs filed their counter, before the Executing Court disputing the averments stated in the affidavit filed in support of the application, wherein they have stated that the judgment and decree passed by the Lower Appellate Court in A.S.No.49 of 2008 was confirmed by this court in the Second Appeal in S.A.No.76 of 2012 by the judgment dated 08.09.2014.

9. Since the judgment and decree passed in S.A.No.76 of 2012 has not been challenged by the defendants, the same has become final.

10. That apart, even before the Trial Court, an Advocate Commissioner was appointed and the Advocate Commissioner also inspected the suit property and filed his report and plans, which were marked as Exs.C1 to C4. The courts below also took into consideration the Advocate Commissioner's report and plans and decreed the suit.

11. When the Commissioner's report was considered by the courts below and when a decree was passed against the defendants, they cannot seek for an appointment of Advocate Commissioner for the second time in the proceedings. If a Commissioner is appointed at the execution stage, it would only create confusion in deciding the issue involved in the Execution Petition. If the defendants are aggrieved over the Commissioner's report, they could have filed an application to scrap the report, which was not done by the defendants. The defendants cannot wait till the filing of the Execution Petition and file the application seeking for appointment of an Advocate Commissioner. It is settled position that the Executing Court is bound by the decree passed in the suit.

12. The learned counsel appearing for the second respondent, in support of his contentions, relied upon the following judgments:-

(i) 2003 (8) SCC 289 [Ravinder Kaur v. Ashok Kumar and Anr.] wherein, the Hon'ble Supreme Court held as follows:-

"8. As per the terms of the affidavit filed by the respondents pursuant to the direction issued by this Court, the tenants ought to have vacated the premises by 30.4.2002 which the respondents did not do compelling the appellant herein to

take steps to execute the order of eviction which was done by the appellant by moving the executing court. In the said execution the respondents took the contention that the decree obtained by the appellant did not pertain to the premises sought to be taken possession of. They also disputed the correctness of the boundaries of the shop in question. The executing court rejected the said objection of the respondents against which a Civil Revision Petition No.5175/2002 was filed on 3.10.2002 by the respondents. The said revision petition came to be dismissed by the High Court by a reasoned order holding that there was no error in the order of the executing court rejecting the objections raised by the respondents. The High Court in the course of the said order also observed:

"The view taken by the Executing Court does not suffer from any infirmity .The tenants who after having given up the plea taken by them in the written statement, seek to revive the same only with a view to delay their ejection, cannot complain of refusal of the executing court to appoint a local commissioner, specially when they have not led any other evidence in support of their objections."

(ii) AIR 2004 SIK 39 [Tulamaya Chettri and Anr. v. Yonarayan Pradhan and Ors.] wherein, the Division Bench of Sikkim High Court held that Order 26, Rule 9 CPC authorises the court to appoint a Commissioner, if it considers a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute or for other reasons mentioned therein.

(iii) An unreported judgment of this court dated 18.06.2013 made in C.R.P.(NPD).No.1019 of 2012 [A.Mohamaed Usane v. K.Thillaivinayagam] wherein, this court held as follows:-

"6. First of all, the petitioner has to establish as to how such application is maintainable before the court below when admittedly he has lost before all the forums upto this Court in the eviction proceedings. It is a fact that the description of the property given in the R.C.O.P. and the description of the property given in the E.P. are one and the same. Therefore, based on the decree passed in the R.C.O.P. proceedings, the execution proceedings came to be filed seeking for execution of the order of eviction passed against the petitioner. It is not the case of the petitioner that he had made any attempt to raise such objection during the

pendency of R.C.O.P. or R.C.A or C.R.P with regard to the alleged description of the boundaries. When it is clearly found by the court below that there was no discrepancy in the boundaries of the property, the court below is justified in rejecting the application by holding that the proceedings which are initiated by the petitioner herein before the Execution Court is nothing but to drag on the process of eviction one way or other. I find no irregularity or infirmity in the order passed by the court below."

13. The ratios laid down in the judgments relied upon by the learned counsel for the second respondent squarely applies to the facts and circumstances of the present case.

14. It is settled position that a party cannot collect evidence through the Advocate Commissioner.

15. In the case on hand, the parties have let in oral and documentary evidences before the Trial Court, the Lower Appellate Court had decreed the suit in toto, which was also confirmed by this court in the Second Appeal.

16. In these circumstances, the Executing Court has rightly dismissed the application seeking for appointment of Advocate Commissioner. I do not find any error or irregularity in the order passed by the Execution Court. The Civil Revision Petition is devoid of merits and is liable to be dismissed. Accordingly, the Civil Revision Petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

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