

Subbiah Vs. Periyamayagi and Another

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Court : Chennai Madurai

Decided On : Sep-16-2016

Judge : D. Krishnakumar

Appeal No. : C.R.P.(PD)(MD)No. 1696 of 2016 & C.M.P.(MD) No. 8280 of 2016

Appellant : Subbiah

Respondent : Periyamayagi and Another

Judgement :

(Prayer: Civil Revision Petition is filed under Article 227 of the Constitution of India, to call for the records relating to fair and decreetal order dated 12.02.2016 made in I.A.No.778 of 2015 in O.S.No.19 of 2014 on the file of District Munsic, Devakottai and set aside the same.)

1. The civil revision petition arises against the order dated 12.02.2016 made in I.A.No.778 of 2015 in O.S.No.19 of 2014 on the file of District Munsif, Devakottai.
2. According to the learned counsel for the petitioner, the revision petitioner/plaintiff has filed the suit in O.S.No.19 of 2014, praying for permanent injunction against the respondents herein. The petitioner herein/plaintiff has also filed an interlocutory application in I.A.No.778 of 2015 before the learned District Munsif, Devakottai, for appointment of an advocate commissioner to inspect and measure the suit property along with the surveyor and to submit a report and plan before the trial Court.

3. Counter affidavit has been filed by the respondent/plaintiff, objecting the appointment of advocate commissioner stating that the said interlocutory application has been filed by the petitioner only to drag on the proceedings and also contended that the advocate commissioner cannot be appointed to collect the evidence for the possession of the suit property. The said application was dismissed by the Court below. Aggrieved by the said order, the above civil revision petition has been filed by the revision petitioner before this Court.

4. According to the learned counsel for the petitioner, the trial Court has not appreciated the submission made by the petitioner and erroneously dismissed the application. It is further submitted that the trial Court has not given any reason for not accepting the plea of the petitioner necessitating the filing of the present application and hence, the impugned order passed by the trial Court is liable to be set aside.

5. Heard the learned counsel for the petitioner and perused the materials available on records.

6. The petitioner filed a suit in O.S.No.19 of 2015 before the learned District Munsif, Devakottai against the respondent for the relief of permanent injunction. The respondent filed written statement in the said suit. Thereafter, the petitioner has filed the instant interlocutory application to appoint an advocate commissioner to inspect and measure the suit property along with the surveyor and to submit a report and plan before the trial Court.

7. Perusal of the impugned order of the trial Court, in para No.4, the trial Court had observed as follows:

(Tamil)

8. At this juncture, it is appropriate to consider the decision relied on by the learned counsel for the petitioner in Anwar Batcha Vs. S.Mahuedoom reported in 2014(5) CTC 85, wherein this Court has held that in the suit filed by the respondents/plaintiffs seeking permanent injunction restraining the respondent from interfering with his peaceful possession and enjoyment of the suit property,

the contention of the defendant clearly demonstrated that object of appointment of advocate commissioner is to elucidate matter in dispute.

9. At this stage, it is appropriate to extract para 16 of the said decision, which reads as follows:

16. On the other hand, learned counsel appearing for the respondent/plaintiff has vehemently argued that the order passed by the learned trial Judge did not suffer with any infirmity and therefore the interference of this Court did not require. Further, he has submitted that it is settled principles of law that for procuring evidence Advocate Commissioner need not be appointed. This proposition will not be made applicable to the instant case on hand as the contention of the revision petitioners/defendants clearly demonstrates their object for elucidating the matter in dispute by local investigation of the Commissioner at the spot. Therefore, as contemplated under Rule 9 to Order 26, C.P.C., this Court deems that a local investigation by the Advocate Commissioner is proper for the purpose of throwing more light on enlighten the Court to take a fair decision.

10. Perusal of the said judgment would show that the petitioner therein has filed the application for appointment of advocate commissioner to note down the physical features of the suit property and also to file a report along with plan. The said citation is not applicable to the facts of the present case. Because, in the instant case, the petitioner/plaintiff has filed the application only for the purpose of proving his possession of the suit property. It is settled law that advocate commissioner cannot collect the evidence to prove the possession of the suit property and hence, the reasons stated by the petitioner for appointment of advocate commissioner cannot be accepted.

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

12. In another decision in Chandrasekaran Vs. V.Doss Naidu reported in (2005) 3 M.L.J. 473, wherein, this Court in para 10,21 and 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.

21. The power under Art.227 of the constitution is to be exercised by the Court in its discretion and cannot be claimed as of right by any party. Under Art.227 of the Constitution of India, the well settled position is:-

(1) The High Court's power to revision under Art.227 of the Constitution would be restricted to interference in cases of grave dereliction of duty or flagrant violation of law, and would be exercised mist sparingly, in cases where grave injustice would be done unless the Higher Court interferes. It cannot be used as appellate or revisional power.

(2) The Power would not be exercised to correct an error of fact or of law, not being an error of law apparent on the face of the record , of an irregularity or illegality of procedure unless such error affects the jurisdiction, or involves a breach of the principles of natural justice; or to reappraise the evidence.

(3) Nor will the High Court, in exercise of this power, substitute its own judgment for that of the inferior court, whether on a question of fact, or of law or interfere with the intra vires exercise of a discretionary power, unless it is arbitrary or

capricious or unless there was no evidence at all on which the inferior Court could have come to the conclusion it did, or there was error of finding on a jurisdictional fact . Whether the High Court found fault with the appellate court in declining to take into consideration certain documents and took them on record, instead of substituting its opinion on the merits of the case, it should have remanded the matter back for the opinion of the appellate Court, it being the final Court of fact.

(4) Nor can the High Court, nor being an appellate Court, pass an order of remand. In short, as regards findings of fact of the inferior Courts, the jurisdiction under Art.227 is limited to only examining whether the subordinate Court kept itself within the bounds of its authority in reaching the findings of fact. Consequently, the High Court cannot quash the judgment of the subordinate Court merely on the ground that its findings of fact were erroneous, but could do so only if the subordinate Court came to its conclusion without any evidence or upon a misreading of the evidence, or if its conclusions were perverse.

There is nothing to suggest that the impugned order is perverse or in violation of law warranting interference under Art.227 of the Constitution of India.

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 decision, I find no reason to interfere with the order of the trial Court and the same does not warrant any interference of this Court.

14. In view of the above reasons, the civil revision petition is dismissed. It is open to the petitioners to file appropriate applications, if so advised and if it is permissible under law. No costs. Consequently, connected miscellaneous petition is also dismissed.