
(2012) 08 MAD CK 0035

In the Madras High Court

Case No : C.R.P. (PD) . No. 2692 of 2012 and M.P. No. 1 of 2012

M. Malakondiah and M. Ramadevi

APPELLANT

Vs

K. Palani and M. Kalaiarasi

RESPONDENT

Date of Decision : 01-08-2012

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (2012) 08 MAD CK 0035

Hon'ble Judges : V. Dhanapalan, J

Bench : Single Bench

Advocate : P. Raja, for the Appellant; Francis Ashok, for the Respondent

Judgement

Honourable Mr. Justice, V. Dhanapalan

1. This Civil Revision Petition is filed challenging the order dated 17.4.2012 in I.A.No3054 of 2012 in O.S.No.2078 of 2006 on the file of XVII

Assistant Judge, City Civil Court, Chennai. The revision petitioners are defendants 1 and 2 in the suit. The respondents/plaintiffs 1 and 2 and

another filed the suit for a mandatory injunction to direct defendants 1 to 3 to demolish the unauthorised construction made by defendants 1 and 2

in the first floor on the Eastern side running to a length of 17 feet and to a breadth of 1 feet on the plaintiffs" property and marked as I & J and

coloured red in the sketch attached with the plaint including a direction to defendants 1 and 2 to close the openings made by them on the Northern

side wall of the second floor facing the plaintiffs" property and also for a permanent injunction restraining defendants 1 and 2, their men, agents,

servants or any other person or persons claiming through or under defendants 1 and 2 from in any manner proceeding further with the unauthorised

construction in the property, more fully described in B schedule there under. The defendants filed the written statement and contested the suit.

2. By the time, by order dated 2.3.2006, there was an appointment of Advocate Commissioner in I.A.No.4169 of 2006 to inspect the suit

schedule properties, to note down the physical features, to measure the same and also its present position and to file a report along with a sketch.

Accordingly, the Advocate Commissioner appointed by the Court inspected the properties on 25.3.2006 at 11 a.m. in the presence of the first

petitioner/first defendant and the first respondent/first plaintiff and their counsel and thereafter, the Advocate Commissioner filed a report.

3. While so, the petitioners have filed the present I.A. to direct the Advocate Commissioner to measure the physical features of the suit schedule

properties by taking proper measurements with the help of Government Surveyor by re-issuing the warrant to the same Commissioner or to

appoint an Advocate Commissioner on the ground that the respondents/plaintiffs 1 and 2 have encroached upon the properties and the defendants

had sought for a counter-claim and the encroachment was done by the plaintiffs pending suit and after inspection of the Advocate Commissioner

appointed by the trial Court. The said I.A. was contested by the respondents/plaintiffs by filing counter affidavit.

4. The trial Court, on hearing the learned counsel appearing for the parties, and considering the case of the petitioners, came to the conclusion that

in the present suit, as nearly six years after the filing of the Commissioner's report, the defendants have come forward with the present I.A. to re-

issue the Commissioner's warrant and taking note of the earlier decision of this Court in the ratio laid down in AIR 1996 Madras 148

(Chockalingapuram The vangar Vardhaga Sangam Vs. Chokkanathaswami Temple, Chockalingampuram), dismissed the petitioners' application

and therefore, the revision petitioners are before this Court in this C.R.P.

5. Mr. P.Raja, learned counsel appearing for the petitioners consistently pleaded that after the filing of the report by the Advocate Commissioner,

the plaintiffs have trespassed into the suit properties and encroached upon a portion of the same and therefore, there is a need for re-inspection of

the properties and hence, the petitioners have made the application for re-issuance of the warrant or for appointment of an Advocate

Commissioner.

6. Resisting the above contentions, Mr. Francis Ashok, learned counsel for the respondents/caveators contended that after the filing of report by

the Advocate Commissioner, the petitioners have contested the suit by letting in evidence and keeping quiet for a considerable period of time and

thereafter, they have made an attempt to file the present application for re-issuance of the warrant of Advocate Commissioner, and it is only

dilatory tactics, and therefore, it cannot be permitted at the belated stage of six years.

7. Admittedly, the revision petitioners are defendants 1 and 2 in the suit which was filed by the respondents/plaintiffs 1 and 2 and another for

mandatory and permanent injunction as stated above. The petitioners contested the suit by filing written statement. The trial Court proceeded with

the appointment of Advocate Commissioner on 2.3.2006 and thereafter, the Commissioner inspected the properties on 25.3.2006 at 11 a.m. and

commenced the inspection at 12.15 p.m. in the presence of the respective parties and their counsel and submitted a report on 31.3.2006.

Thereafter, the trial Court proceeded with the examination of witnesses and took evidence. The matter had been in the stage of conclusion of

evidence. At that stage, the petitioners/defendants 1 and 2 made an attempt after a period of six years of filing of the report of the Advocate

Commissioner, to re-issue the warrant or to appoint an Advocate Commissioner to inspect and measure the suit properties in view of the allegation

that there was an encroachment by the respondents/plaintiffs.

8. Such an attempt by the petitioners had been contested by the respondents/plaintiffs 1 and 2 by filing counter affidavit in the said I.A., stating that

they oppose the application on the ground that it is not maintainable for the simple reason that the petitioners have not filed any objection to the

Commissioner's report and having failed to do so soon after the Commissioner's report, now, the petitioners cannot seek permission of the Court

to re-issue the warrant or appoint an Advocate Commissioner. Non-filing of the objections by the petitioners would amount to acceptance of the

Advocate Commissioner's report and it has become final. It is also contended by the respondents/plaintiffs 1 and 2 that the petitioners herein are

somehow trying to wriggle out from their illegal act of encroachment upon their

properties and that is why they are filing application after application before the trial Court to prolong the trial.

9. On examining every issue, the trial Court has come to the conclusion that the Commissioner's report and plan had already been marked as

Exs.C-1 and C-2 and the Commissioner has specifically stated that she inspected the suit properties after giving notice and measured the

properties and on the application filed by the petitioners/D1 and D2, the Commissioner was examined as C.W.1 and she was fully cross-examined

by the defendants 1 and 2 and in C.W.1's evidence, the Commissioner deposed that she inspected the suit properties and measured the same and

after perusal of Exs.C-1 and C-2 and C.W.1's evidence, the trial Court held that there is no ambiguity in the same. The suit prayer is in respect of

the first floor and second floor of the building, and so there is no necessity to measure the land in question and it was purchased by the defendants

1 and 2 from the plaintiffs. As far as the building is concerned, the Commissioner already measured the building and therefore there is no necessity

to re-issue the warrant to the same Commissioner or appoint a new Commissioner to inspect the suit properties. The trial Court further concluded

that in the present suit, nearly six years after the filing of the report by the Advocate Commissioner, the defendants 1 and 2 have come forward

with the application to re-issue the Commissioner's warrant and the trial Court has taken note of the ratio laid down by this Court in the decision

reported in AIR 1996 Madras 148 (cited supra), in which, it was held that if objections were raised after eight years to the Commissioner's

report, when the case was posted for trial, it cannot be entertained.

10. Such a conclusion arrived at by the trial Court in dismissing the application of the petitioners, in my considered opinion, is in no way legally

informed. There is no manifest error committed by the trial Court, and therefore, there is no warranting circumstance to exercise jurisdiction under

Article 227 of the Constitution of India to interfere with such clear findings of the trial Court. The Civil Revision Petition deserves no merit

consideration and it is accordingly dismissed. No costs. The Miscellaneous Petition is closed.