

(2005) 08 MAD CK 0011

In the Madras High Court

Case No : C.R.P. No. 961 of 2003 and C.M.P. No. 6349 of 2003

P. Kaliappa Gounder

APPELLANT

Vs

M. Loganathan Gounder, T.K. Ramani Gounder and
Vijayalakshmi

RESPONDENT

Date of Decision : 08-08-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 2, Order 26 Rule 3, Order 26 Rule 4A, 115, 151

Citation : (2005) 08 MAD CK 0011

Hon'ble Judges : R. Banumathi, J

Bench : Single Bench

Advocate : K. Kalyanasundaram, for the Appellant;

Judgement

R. Banumathi, J.—This Civil Revision Petition is directed against the order dated 11.04.2003 passed by the Additional District Judge (Fast

Track Court No. 1), Coimbatore in I.A. No. 152 of 2003 in O.S. No. 187 of 2002, dismissing the Petition filed under Order XXVI Rules 2, 3

and 4-A read with Section 151 C.P.C. to appoint Advocate Commissioner for examination of the First Defendant. The First Defendant is the

Revision Petitioner. O.S. No. 869 of 2000 (Sub-Court, Coimbatore) O.S. No. 187 of 2002 (Fast Track Court 1, Coimbatore):

The Plaintiff has filed the Suit for Cancellation of Sale Deeds dated 15.07.1997 executed by the First Defendant purporting to be on behalf of the

Plaintiff in favour of Defendants 2 and 3. Case of the Plaintiff is that he is entitled to the Suit Property Property measuring 0.57 Acres in Thudiyalur

Village, Coimbatore North Taluk. He has purchased the Suit Property by the sale Deed dated 30.05.1994. The First Defendant is very closely

related to the Plaintiff. The Plaintiff entrusted the work to the First Defendant for forming the lay out in the lands, for which purpose, the Plaintiff

had executed a General Power of Attorney on 15.07.1994 in respect of the Suit Property, empowering the First Defendant to divide the land into

House Sites and also to get an approval from the Town Planning Authorities. For a long time, the First Defendant did not do any development

work nor cause any sale of the Sites. When the Plaintiff contacted the First Defendant, only then the First Defendant informed the Plaintiff that he

had caused sale of Site No. 23 and the First Defendant assured that he would do the further work soon. Since the First Defendant failed to carry

out the further work and also stopped informing or communicating with the Plaintiff, the Plaintiff has cancelled the Power of Attorney by the

Cancellation Deed dated 09.07.1997. Infuriated over the same, the First Defendant has created two Sale Deeds in favour of his Son the Second

Defendant and the other in favour of his Daughter-in-law the Third Defendant. Both the Sale Deeds are fraudulent, collusive creation and not

binding upon the Plaintiff. Hence, the Plaintiff has filed the Suit for cancellation of the Two Sale Deeds by the First Defendant in favour of Second

and Third Defendants.

2. The First Defendant has filed elaborate Written Statement running several pages about 35 paragraphs. In the Written Statement, the First

Defendant has elaborately narrated as to how he has formed the lay out and travelled to Chennai for four times for getting approval for the lay out.

According to the First Defendant, he has made tireless efforts physically as well as mentally for forming the lay outs. In the Written Statement, it is

alleged that the Plaintiff is liable to reimburse Rs. 2,76,951/- to the First Defendant apart from the service charges of Rs. 50,000/-.

3. The Trial commenced. On behalf of the Plaintiff, Plaintiffs Witnesses were examined and also cross-examined. When the case was posted for

the defence side evidence, I.A. No. 152 of 2003 was filed by the First Defendant to appoint an Advocate Commissioner for examining him.

According to the First Defendant, he is aged 87 years and is having Heart and breathing ailments and that he had been taking treatment for almost

four years. Due to sudden Heart ailment and chronic asthma, he was admitted in V.G. Hospital and that he is undergoing treatment. Under such

circumstances, a Commissioner is to be appointed for examining him. The Application was filed under Order 26 Rules 2, 3 and 4-A read with

Section 151 C.P.C seeking for Appointment of an Advocate Commissioner for examination of the First Defendant.

4. The Application was resisted by the Plaintiff by alleging that the First Defendant is not actually interested in conducting the case, but only the

Second Defendant, who is the son of the First Defendant is conducting on his part. The Plaintiff has further alleged that in consideration of the

nature of the Suit and the elaborate Written Statement put forth by the parties, the First Defendant ought to have been examined only in the Court.

The Plaintiff is the adopted son of the First Defendant and is fully aware of the health condition of the First Defendant. The First Defendant is hale

and healthy and in sound condition to give evidence before the Court. The Medical Certificate is only an eye wash and the alleged admission of the

First Defendant in V.G. Hospital is an arranged one in order to avoid giving evidence before the Court. It is further alleged that the circumstances

are not conducive to record the evidence of the First Defendant by appointing the Advocate Commissioner.

5. Upon consideration of the contentions of both parties, learned Additional District Judge has dismissed the Application finding that in view of the

contentious points urged by the parties demeanour of the First Defendant is to be noted while recording his evidence. It was pointed out that during

the cross-examination of the Plaintiffs Witnesses, no suggestion was put forth that the First Defendant is aged and suffering from ailments. Learned

District Judge has also pointed out that the Plaintiffs Witnesses were cross-examined only on the instruction of the First Defendant. The Application

was dismissed mainly on the ground that if the First Defendant is not examined in the Court, his demeanour cannot be noted.

6. Aggrieved over the order of dismissal of the Application, the Revision Petitioner has filed this Civil Revision Petition. Assailing the Impugned

Order, Learned Counsel for the Revision Petitioner/First Defendant has submitted that the Court below has not considered that the Appointment

of Advocate Commissioner is sought for only because of his age ailment and inability to appear before the Court. It is contended that when the

First Defendant has categorically stated about his Heart ailment, the same ought to have been accepted by the Trial Court and the Commissioner

ought to have been appointed in view of the age and the ailment. Contending that the presence of the First Defendant is neither necessary nor is

able to be present in the Court, Learned Counsel for the Revision Petitioner has prayed to set aside the Impugned Order and to appoint the

Advocate Commissioner for examination of the First Defendant.

7. Despite opportunities, there was no representation for the Respondents. The contentious points urged by the Respondents before the Court

below have been taken into consideration for disposal of this Civil Revision Petition.

8. The main point arising for consideration is whether in the light of the elaborate Written Statement filed by the First Defendant and other

circumstances of the case, can the evidence of First Defendant be recorded by the Advocate Commissioner and whether Impugned Order

declining to appoint the Advocate Commissioner for recording the evidence of the First Defendant suffers from any jurisdictional error warranting

interference.

9. In the Affidavit, the First Defendant is said to be aged 87 years and suffering from Heart ailment and Asthma and is unable to attend the Court

to give evidence. Even at the outset, it is to be pointed out that the age of the First Defendant stated in the Affidavit is highly doubtful. In the long

cause title of the Plaint, the age of the First Defendant is stated as ""68 years. Nowhere in the Written Statement, the age of the First Defendant is

denied. No evidence has been shown that he is aged 87 years. The Medical Evidence produced before the lower Court stating that he is suffering

from ailment cannot be accepted. The Suit is of the year 2000. The Suit had been filed for declaration that the Sale Deeds executed by the First

Defendant in favour of his Son and Daughter-in-law Defendants 2 and 3 as null and void and not binding upon the Plaintiff. The Defendant has filed

the elaborate Written Statement contending that the Suit site had been handed over to him for developing and to form lay out. In the Written

Statement, it is alleged that for getting approval of the lay out he had gone to Chennai for four times and spent Rs. 64,700/- towards the same. In

Paragraph 22 of the Written Statement, it is further alleged that the First Defendant had put up fence and Compound Wall. It is also alleged that in

view of the encroachment by the third party, the First Defendant had put up

barbed wire fencing around the lay out by spending amount and

Advertisement Boards at several places for the publicity of lay outs. The First Defendant in Paragraph 23 of the Written Statement has alleged that

he had spent much for the lay out works apart from his tireless efforts physically as well as mentally.

10. By consideration of the averments in the Written Statement, it is seen that the First Defendant is alleged to have formed the lay out by

contributing much of his physical efforts showing that he is hale and health. The First Defendant was able to travel to Chennai at least four times. At

the time of filing the Application in 2003, the First Defendant is stated to be aged 87 years. At the time while he travel to Chennai, he must have

been 80 years. When he was able to travel to Chennai at least four times at that stage, there may not be any difficulty for him to come to-the court

for giving evidence. It is relevant to note that the First Defendant is shown to be living in Mettupalayam Road in Thudiyalur, which is within the

Corporation limits of Coimbatore. The contention of the First Defendant that he is not physically fit to come to the Court to give evidence does not

merit acceptance.

11. The stage in which the Application was tiled is also to be noted. The examination of the Plaintiff's witnesses was completed. When the case

was posted for the Defendants evidence, the Application was filed seeking for appointment of an Advocate Commissioner to record the evidence

of First Defendant. Learned District Judge has stated that during the cross-examination of Plaintiffs Witnesses, they were not cross-examined on

the ailment of the First Defendant. Learned District Judge has expressed the view that the Plaintiffs witnesses must have been cross-examined only

on the instruction of the First Defendant. While so, the First Defendant was not justified in filing the Application to appoint the Advocate

Commissioner to record his evidence.

12. In view of the serious dispute and contentious points raised by the parties, this court finds no error in the Impugned Order, wherein the learned

District Judge has expressed the view that noting the demeanour is necessary. If the evidence of the First Defendant is recorded by appointment of

Advocate Commissioner, the Court would not have the advantage of noting the demeanour of the Witnesses. To know the demeanour of the First

Defendant assumes impossible in view of the serious allegations levelled by the Plaintiff that the Second Defendant is only conducting the Suit on behalf of his Father the First Defendant.

13. Power to issue commission for recording the evidence is discretionary. The recording of the evidence by the Court has to be normal

rule/practice. Examination of Witnesses on commission has to be an exception. This is all the more so to examine the party the First Defendant by

appointing the Advocate Commissioner. If the parties consent for the Appointment of Advocate Commissioner, liberal approach could be

adopted; but where the parties do not consent for the appointment of Advocate Commissioner and raise serious dispute for examining the party by

appointing Advocate Commissioner, the discretion must be exercised judicially. The mere fact that the First Defendant is aged or suffering by

ailment would not by itself be a ground justifying the recording of the evidence by appointing Advocate Commissioner.

14. The mere fact that the First Defendant is suffering from Heart ailment or asthma by itself is not a sufficient ground justifying recording of the

evidence by appointing Advocate Commissioner. When sickness is alleged, the gravity of the sickness has to be assessed. At the same time, the

importance of having the Witness/party before the Court and the advantages that would follow from examination in the Court should not be

altogether lost sight of. Before ordering issuing of the Commission to examine the Witnesses on the ground that he is sick, the Court has to record

the satisfaction as to the existence of the sickness and the inability of the party to come to the Court to depose. The gravity of the Heart ailment

and Asthma is not so grave incapacitating the First Defendant to attend the Court. The Written Statement was filed only in the year 2002. The First

Defendant is residing in Mettupalayam Main Road, Thudiyalur and it would be so difficult for him to attend the Court.

15. Bonafide doubts arise that the Application was tiled (after the Plaintiffs evidence was closed) to delay the Trial Proceedings. Challenging the

order dated 11.04.2003, the Civil Revision Petition has been filed u/s 115 C.P.C. After the C.P.C. Amendment Act 2002, the Revisional

Jurisdiction of the High Court is very much curtailed. It is also not made known as to how the Revision against the order passed in Interlocutory

Application is maintainable. Be that as it may, the lower Court has rightly declined to appoint Advocate Commissioner to record the evidence of the First Defendant. This Civil Revision Petition has no merits and is bound to fail. For the foregoing reasons stated, the order dated 11.04.2003 of the Additional District Judge (Fast Track Court No. 1), Coimbatore in I.A. No. 152 of 2003 in O.S. No. 187 of 2002 is confirmed and this Civil Revision Petition is dismissed. In the circumstances of the case, there is no order as to costs. Consequently, the connected C.M.P. No. 6349 of 2003 is closed.