

(2004) 02 MAD CK 0021

In the Madras High Court

Case No : CRP.PD. No. 2852 of 2003 and CMP. No's. 21488 and 21489 of 2003

Pushparaj, Selvaraj, Soundararaj, Chella Nadar, Steephen
and Thankaraj

APPELLANT

Vs

Chellan

RESPONDENT

Date of Decision : 27-02-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

Citation : (2004) 4 LW 701

Hon'ble Judges : K. Gnanaprakasam, J

Bench : Single Bench

Advocate : J. Anandhavalli, for the Appellant; Sreekumaran Nair, for the Respondent

Final Decision : Allowed

Judgement

K. Gnanaprakasam, J.—The respondent/plaintiff filed an application for appointment of an Advocate Commissioner and the same was

allowed by the trial court. Aggrieved by the same, the defendants have preferred this civil revision petition. Heard the learned Advocate for the

revision petitioners and the respondents.

2. The respondent/plaintiff, in the affidavit filed in support of the petition for appointment of an Advocate Commissioner, has stated that there are

19 alphisia trees (soft wood trees), in the disputed area, which are in his possession i.e. (after excluding "GHI" portion). Now, the existence of

alphisia trees in the suit property, is disputed by the defendants in this suit. So, a Commissioner may be appointed in this suit, to report whether

alphisia trees are available in the suit property and to locate them. Since the defendants objected to the very existence of the alphisia trees, a

commissioner has to be appointed in this suit to ascertain the said fact and also to cut and remove the said trees in the presence of the commissioner.

3. The petitioners/defendants resisted the application by filing a counter, wherein, they have stated that the commissioner already appointed in this case has not located the property, as per the plan in the earlier partition deed, dated 30.11.1124-M.E due to the defendants in the suit property.

The commissioner has also not shown the area due to the defendants 2 to 6 in the plan filed by him. The defendants have strong objection to the

report and the plan filed by the Advocate Commissioner and there is absolutely no necessity for appointment of an Advocate Commissioner. It is

also stated that the alphisia trees will stand at least for 50 years and only to prolong the suit, this application has been filed. The trial court has not

adverted to any of the averments made in the affidavit or in the counter and it has simply passed an order, ""Both side heard. Petition allowed.

4. The learned Advocate for the revision petitioners would contend that the trial court has not even chosen to discuss the merits of the averments in

the affidavit and also in the counter and it did not at all take into consideration the relative merits of the case and has not passed any speaking order

and hence, it is liable to be set aside.

5. The learned Advocate for the revision petitioners would also point out that the plaintiffs' suit itself is one for damages and for recovery of a sum

of Rs.5,000/- and for injunction, restraining the defendants 1 to 6 from committing further damages in the suit property or in the compound wall of

the plaintiff. In such a suit, appointment of an Advocate Commissioner is highly unwarranted. The revision petitioners have also pointed out that the

plaintiff himself has admitted that the alleged trees are in the disputed area, which is claimed to be in possession of the plaintiff. Though it has been

stated that the disputed area in the suit is only in respect of "GHI" portion, it has got to be decided in the main suit, which is pending adjudication.

The request of the plaintiff is for appointment of an Advocate Commissioner to find out whether there are alphisia trees in the suit property and also

to locate them and thereby they are trying to create evidence for some other purpose and the same is not permissible. It is incumbent upon the

plaintiff to prove his case and the suit is only for recovery of damages and also

for permanent injunction, and not to cause further damages to the suit property. The relief sought for in the suit did not at all warrant the appointment of an Advocate Commissioner of this nature to find out the existence of the alleged trees and also to locate them. Under the guise of appointment of an Advocate Commissioner, the plaintiff is trying to fish out some other information, which is not permissible under law. It is therefore, submitted that the order passed by the trial court is not sustainable.

6. On the contrary, the learned Advocate for the respondent/plaintiff would contend that the defendants dispute the very existence of the trees and only in the said circumstances, it has become necessary for the plaintiff to file an application for appointment of an Advocate Commissioner to inspect the suit property and also to find out the existence of the trees and also to locate them. It is also submitted that the order of appointment of an Advocate Commissioner passed by the trial court is not a decision taken by the trial court and hence, that would not fall within the revisional power of this court.

7. Normally, an Advocate Commissioner would be appointed for the purpose of noting down the physical features of the suit property, as certain physical features are subjected to be obliterated and also for noting down all other important features of the suit property, which are necessary and also connected or related to the prayer in the suit. The relief sought for in the suit is for recovery of damages and for permanent injunction. It is not the case of the plaintiff that the defendants are making arrangements to obliterate the physical features of the suit property, if they do so, the plaintiff will not be able to prove his case. But, in the suit for recovery of damages and for permanent injunction, the plaintiff has come forward with this application to find out whether there are trees in the suit property and also their location. If the plaintiff succeeds in the suit, the prayer in the petition would be totally alien to the prayer in the suit. It is not known, how this would help the plaintiff to prove his case also. This is nothing, but an attempt made by the plaintiff to create an evidence and the same is not permissible under the garb of appointing an Advocate Commissioner. As such, I am of the view that the application filed by the plaintiff for appointment of an Advocate Commissioner is not maintainable.

8. The learned Advocate for the respondent/plaintiff relied upon the following

cases to sustain his argument that the order passed would not come under the category of cases decided and therefore, the same is not susceptible for revision.

9. The case in *L. Srinivasan Chettiar v. L. Santhanam Chettiar* 1997 3 LW 714, arose out of a suit for partition and after passing of the preliminary decree, an Advocate Commissioner was appointed to measure the properties and recommend allotment. That appointment came to be challenged before this court and only in the said context, this court held that revision u/s 115 CPC is not maintainable against the said order, as it is not a case, which would come under the category of "cases decided". It has been well said that the commissioner prepared and signed the report and submitted to the court. The court after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

10. In *A. Nagarajan v. A. Madhanakumar* 1996 1 LW 278, it was observed, "The power conferred on the court to appoint a Commissioner for local inspection is for better appreciation of the evidence already on record. The trial court has jurisdiction to decide under what circumstances it can appoint a commissioner. The commissioner so appointed is not performing a judicial act and it is a ministerial act. Nothing is left to discretion and there is no occasion to use judgement or adjudicate the issue involved, but only noting the details and reporting the actual state of affairs. Such report does not automatically form part of evidence in the proceeding and the court has power to confirm, vary or set aside the report or issue a new commission." In that case, appointment of commissioner was sought after the closure of his side evidence, by a party for the purpose of clarification, examination and proof of the matter in issue or a fact, which requires elucidation and the same was allowed and same came to be questioned under the revisional jurisdiction and only in that context, it was held that, "There was no reason to quash the impugned order and sustain the order of appointment of the Advocate Commissioner. The facts and circumstances in the above said cases are totally different from the case on hand.

11. The respondent also relied upon the case of *C.L. Ramaiah Thevar Vs. P.C. Balarama Raja*, . That case arose out of a suit for specific

performance of an agreement of sale of property, wherein the defendant denied its execution and filed an application to send the suit document for

expert opinion and the admitted signature along with the disputed signatures were sent for getting expert opinion to Forensic Sciences Department,

Government of Tamilnadu and all the papers were returned to the court with a covering letter. That thereafter, the defendant also filed a memo,

requesting the court to send for expert opinion and the learned judge rejected the said memo and the same was challenged by way of filing a

revision. In that context, this court has held that the order passed by the trial court in a memo filed by the defendant is not a case decided and

therefore, the revision petition is not maintainable. The facts of this case are also totally different and alien to the issue in this case.

12. As it has already been seen that the trial court has failed to take into consideration the averments in the affidavit and also the objections made

by the defendant in their counter and has simply passed an order, ""Both sides heard. Petition allowed."" , which order suffers from all infirmities. A

trial judge is expected to consider the relative merits of the claim and objections therein and pass a considered order. The trial judge is hereby

directed not to pass orders of this nature, at least in future. If the trial judge has taken into consideration all the aspects of the case, he would not

have passed such an order and therefore, the order so passed by the trial court is not maintainable.

13. In the result, the civil revision petition is allowed. No costs. Consequently, connected CMPs are closed.