

(2017) 01 MAD CK 0058

MADRAS HIGH COURT

Case No: 1308 of 2013

M.Ammasayappan &
ors.

APPELLANT

Vs

Muthusamy (died) &
ors.

RESPONDENT

Date of Decision: Jan. 25, 2017

Acts Referred:

- Code of Civil Procedure, 1908, Section 151, Order 26Rule 9, Order 26Rule 13, Order 26Rule 14, <a href=

Hon'ble Judges: M.V.Muralidaran

Bench: SINGLE BENCH

Advocate: M.V.Muralidaran

Judgement

1. The case of the revision petitioners is that they have purchased some stretch of properties viz the properties mentioned as item Nos.5 and 6 in

Schedule of properties in suit in O.S.No.170 of 2006. The said properties were purchased from their vendors for a valid sale consideration and

registered the sale deed dated 11.12.1991 and 14.03.2007. Thereafter the purchase of the aforementioned properties, the revision petitioners

carried out several developments over the said properties viz

1. Fencing expenses of entire item 5 and 6 incurred by the Revision Petitioners
2. Two wells were depended by digging 40 feet further.
3. Erected 10 bore wells.
4. Constructed cattle shed measuring 1,200 sq.ft.
5. A new tiled house about 1.200 sq.ft.

6. Planted 350 coconut saplings

7. Expenses incurred for leveling the land fit for cultivation.

2. Being so, an Advocate Commissioner claimed to be appointed in the above said O.S.No.170 of 2006 visited the suit property. Thereupon the

revision petitioners got knowledge of a suit for partition in O.S.No.170 of 2006, that was pending between the revision petitioners" vendor and his

family members. Furthermore the revision petitioner came to know that the Advocate Commissioner was appointed in furtherance of a preliminary

decree came to be passed in respect of the above said properties as well as including some other properties also. The said Advocate

Commissioner namely Mr.K.C.Dhanasekaran executed the warrant and thereby inspected the suit properties on 17.11.2007. In pursuance of his

inspection he filed his report before the Trial Court on 03.01.2008. At this juncture the revision petitioners made all their effects canvassing the

Advocate Commissioner about the enormous improvement made by the revision petitioners viz stated supra as 1 to 7. However since these

revision petitioners were not a party to the partition suit in O.S.No.170 of 2006, the Advocate Commissioner remind heedless to the contentions

of the revision petitioners. That apart the Advocate Commissioner has also failed to note down some necessary features in this regard.

3. Therefore immediately the revision petitioners filed an interlocutory application in I.A.No.47 of 2008 praying for impleading the revision

petitioners in the above said final decree proceedings in I.A.No.698 of 2006, so as to put forth their claim and workout their equities as being a

bonafide purchaser of the afore mentioned properties. However, the said I.A.No.47 of 2008 filed by the revision petitioners was dismissed by the

Trial Court vide order dated 04.07.2008. Against which the revision petitioners filed a revision in C.R.P.No.3438 of 2008, wherein the Trial

Court"s order was set aside and the revision petitioner were impleaded as parties in the above said suit as respondents 7 to 9 in the final decree

proceedings. Thereby this Court vide order dated 27.01.2009 directed the Trial Court to reopen the proceedings, thereby enabling this revision

petitioners to work out their equities before the Trial Court.

4. The said order of this Court impleading the revision petitioners and the reopening of the case, came to be challenged before the Apex Court in

S.L.P.No.8453 and 8454 of 2009. The said S.L.P. was dismissed on 30.09.2011 by holding that the order of this Court not warranted any

interference. Thus the order of this Court allowing the impleading petition of the revision petitioners and reopening of the case has become final.

Whereupon the revision petitioners herein immediately filed a interlocutory application in I.A.No.184 of 2013 in the final decree proceedings in

I.A.No.698 of 2006, under Order 26 Rule 13, 14 r/w Section 151 of CPC praying for a re-issuance of warrant of Advocate Commissioner to

revisit the items 5 and 6 of the suit properties viz bonafidely purchased by the revision petitioners, so as to render his suggestions for working out

the equities. However the said I.A. of revision petitioners for reissuance of warrant to the very same Advocate Commissioner was dismissed by

the Trial Court vide order dated 28.02.2013. The said order is impugned herein.

5. I heard Mr.R.Bharath Kumar, learned counsel appearing for the revision petitioners and Mr.K.Sathish Kumar, learned counsel appearing for

the respondents 1 to 3.

6. The learned counsel appearing for the revision petitioners submitted that they being bonafide purchasers of the above said properties from some

of the co-sharers on equity is entitled to pray for allotment of some other lands to the plaintiffs/ respondents, since the 5th and 6th items of

properties was considerably improved by the revision petitioners. Therefore the reissuance of the warrant to the very same Advocate

Commissioner to note down the above stated improvements made by the revision petitioners. Moreover on legal aspect also, since the revision

petitioners were not parties at the time of submission of the Commissioner report and the corresponding came to be filed without noticing the

revision petitioners and was made ready without reference to the contention of the revision petitioners, the earlier report of the Advocate

Commissioner dated 03.01.2008 becomes in admissible.

7. Therefore in the interest of justice and equity the reissuance of warrant to the Advocate Commissioner is indispensable. In the light of

subsequent impleadment of the revision petitioners in I.A.No.47 of 2008, an inspection is to be conducted in the presence of the revision

petitioners and taking into account of all the relevant documents put for the by this revision petitioners. The Learned Counsel for the respondent

filed counter submitted that the revision petitioners do not have any right over the above properties, since the transaction is hit by lis pendens.

Further the Trial Court in compliance with the order of this Court to dispose of the final decree proceedings within a period of two months has

rightly dismissed the revision petitioners application. Without challenging the earlier report of the Advocate Commissioner dated 03.01.2008, the

2nd application for re inspection is not at all maintainable. The petitioners right are very limited and it will be operative only as against their vendors,

but it will not have any impact over the shares of the respondents herein. Only on proper appreciation of the said facts the Trial Court as rightly

dismissed the revision petitioners" application.

8. Order 26 Rule 9 of C.P.C. for the appointment of Advocate Commissioner as follows:

9.Commissions to make local investigations.-In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of

elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net

profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provide that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by

such rules.

9. Pursuant to the appointment of Advocate Commissioner under Order 26 Rule 18 says that for the compliance of the Order 26 Rule 9, the

Order 26 Rule 18 has specifically states as follows:

18.Parties to appear before Commissioner.-(1) Where a commission is issued under this Order, the Court shall direct that the parties to the suit

shall appear before the Commissioner in person or by their agents or pleaders.

(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence.

10. It is clearly held that this Court and the Hon"ble Apex Court has very categorically held that if the Courts below has considered the re-appointment of Advocate Commissioner or re-issuance of warrant, first report has been filed by the Advocate Commissioner should be scrapped.

In a case where notice was not served by the Advocate Commissioner to either parties, without giving opportunity to both the parties, if the Advocate Commissioner inspected and filed the report that report should not be considered and cannot accepted as evidence.

11. This Court considered several judgments of this Court and the Hon"ble Apex Court, in a case of

(i) Chaitan Das v. Smt.Purnabasi Pattnayak and others reported in AIR 1988 Ori. 52, held as follows:

if no notice is served on any of the parties to the suit to appear before the survey knowing commissioner at the time of local investigation, the result of such local investigation, namely, the report and the map, cannot be accepted as evidence.

(ii) Jamil Ahmed Taban and others v. Must. Khair-UI-Nisa and others reported in AIR 1970 Del. 205, also considered the very same point.

(iii) In yet another judgment in Mander Mukherjee v. Sachindra Chandra reported in AIR 1962 Pat. 211, wherein it has been held as follows:

Court appointing commissioner without notice to parties is without jurisdiction"" and would further contend that "the court shall direct that the

parties to the suit shall appear before the commissioner in person or by their agents or pleaders ""and"" under Rule 10(2) of O.26 of the Code of

Civil Procedure, the report of a commissioner is evidence and any evidence recorded by a Pleader Commissioner, without notice to the parties to

the suit, cannot be used as evidence at all.

(iv) The other decision in Sivaraman v. V.C.Narayanan reported in AIR 1987 Ker. 156, wherein it is held as follows:

It is not correct to say that under no circumstances without setting aside an earlier report, the court can issue a second commission or the same

commission to note details which have been omitted by him, when he made the first report. ""Further inquiry to be made"" contemplated by O.26,

Rule 10(3) pre-supposes that an enquiry by the same commissioner also is possible if the court feels so. If the report of the first commissioner is found to be deficient on any point, the proper course would be to direct same commissioner to remedy the defects.

(v) In yet another judgment, this Court in the case of K.Viswanathan v. Shanmugham Mudaliar and another reported in 99 L.W. 293, wherein it

has been held as follows:-

even the court could direct further enquiry - scrapping of the report which is not proper and examining the Commissioner.

12. Therefore, all these judgments were clearly held that if no notice is served on any of the parties to the suit to appear before the survey knowing

commissioner at the time of local investigation, the result of such local investigation, namely, the report and the map, cannot be accepted as

evidence.

13. Admittedly, in this case, these civil revision petitioners, who were the subsequent purchasers of the property and after purchasing the property,

they meet the further developments as follows:

1. Fencing expenses of entire item 5 and 6 incurred by the Revision Petitioners

2. Two wells were depended by digging 40 feet further.

3. Erected 10 bore wells.

4. Constructed cattle shed measuring 1,200 sq.ft.

5. A new tiled house about 1.200 sq.ft.

6. Planted 350 coconut saplings

7. Expenses incurred for leveling the land fit for cultivation.

14. When this Court while considering the case of these civil revision petitioners in a case for impleading the said parties as defendants in the suit in

C.R.P.No.3438 of 2008, this Court has very categorically held that to work out their equities before the trial Court, these civil revision petitioners

are the necessary parties in the said suit. Therefore, they were ordered to implead as the defendants in the suit and the said order of this Court was

confirmed by the Hon"ble Supreme Court in S.L.P.No.8453 and 8454 of 2009 by order dated 30.09.2011.

15. Thus being the case, it amounts to non hearing of these impleading defendants, who are the civil revision petitioners, when the Advocate

Commissioner were inspected the properties and the improvement made in Item Nos.5 and 6, which was purchased by these petitioners was not

properly considered by the Advocate Commissioner. Therefore, the re-issuance of warrant without scrapping the earlier report would not any way

affect these respondents/plaintiffs. Since, it is not the case of these civil revision petitioners, who are the impleading defendants in the suit and the

entire Advocate Commissioner's report has not proper or illegal, but they want only to verify the item Nos.5 and 6 of the suit schedule of

properties in the persons of newly added defendants, who are the civil revision petitioners before this Court.

16. Per contra, the respondents have produced a recent judgment rendered by this Court in K.Sivakumar v. Marappa Gounder and others

reported in 2017 (1) CTC 319, on the ground that at the time of inspection of the Advocate Commissioner, no notice was given to him. Therefore,

he sought for appointment of Advocate Commissioner on 2nd time. But, this Court has considered that though notice was given to the said civil

revision petition in the above said case in CRP(PD)No.198 of 2015. But, the said petition was not meet any objection raised in the report of the

Advocate Commissioner in the written statement filed by him. Therefore, it would be presumed that he accepted the report of Advocate

Commissioner. Therefore, in such circumstances, the fresh appointment of Advocate Commissioner or re-commission to be made only Advocate

Commissioner has not rendered his duties properly. This Court has considered in the above said case held as follows:

Code of Civil Procedure, 1908 (5 of 1908), Order 26, Rule 9 & Section 151 - Application for appointment of Advocate Commissioner for

second time - Dismissal of - Whether valid - Advocate Commissioner appointed in Suit when Defendant was set ex parte - Application by

Defendant to appoint another Advocate Commissioner as earlier inspection was conducted without Notice to him - Held, when no objection was

raised by Defendant to Report to Advocate Commissioner in Written Statement filed by him, it would be presumed that he accepted Report of

Advocate Commissioner - Fresh appointment of Advocate Commissioner or re-commission to be made only when Advocate Commissioner had not rendered his duties properly - Application filed by Defendant only to drag proceedings, rightly dismissed by Trial Court - Civil Revision

Petition dismissed.

17. At this juncture it would be relevant to extract para 6 of the order of this Court dated 27.01.2009 made in C.R.P.No.3438 of 2008 while

allowing the impleading petitions of the revision petitioners, wherein this Court has held as follows:

I would like to recollect and call up, the common or cardinal Principle of law that in partition suits, even third parties could be allowed to be

impleaded as parties so that whatever shares the third parties acquired in the suit property from the co-sharers, they would be able to work out

their equities. Such third parties cannot put forth any new plea, but only pray for equities and nothing more"".

18. The above order made by this Court envisages that justice and equity are paramount. Only on taking into the said fact this Court has earlier

allowed the revision petitioners impleading application and thereby the revision petitioners were impleaded in the year 2009, whereas the records

disclose that the earlier report has been submitted on 03.01.2008 itself. i.e., prior to the impleadment of the revision petitioners. In this context the

contention of the revision petitioners that since the revision petitioners were not parties to the original partition suit, whereas they were only

impleaded at final decree proceedings and hence all their efforts and their case put forth before the Advocate Commissioner was not considered,

deserves to be considered. Therefore this Court in the interest of justice is of the view that only a proper report submitted after due consideration

of all relevant documents and noting down of the physical features of the suit properties in the presence of all the parties to the suit, either was a

party or was impleaded subsequently, will enable the Trial Court to arrive at a correct and just decision. It is to be noted that in the case on hand

since the reissuance of warrant is prayed in respect of the very same Advocate Commissioner, to inspect the suit property, this Court do not have

any hesitation to allow the revision petitioners" application.

19. In the result:

(a) this civil revision petition is allowed by setting aside the order passed in I.A.No.184 of 2013 in I.A.No.698 of 2006 in O.S.No.170 of 2006,

dated 28.02.2013, on the file of the I Additional District Judge, Erode.

(b) the trial Court is hereby directed to pass orders by re-issuing the warrant for revised by the very same Advocate Commissioner within a period

of one week from the date of receipt of a copy of this order and further directed the Advocate Commissioner to inspect the property in item Nos.5

and 6, by giving notice to all the parties, including the Civil Revision Petitioners and file report within a period of one month thereafter;

(c) on filing the report, the trial Court is directed to take up the suit on day to day basis, without giving adjournment to either parties and to dispose

of the same within a period of four months thereafter. Both the parties are hereby directed to co-operate for early disposal of the suit. No costs.

Consequently, connected miscellaneous petition is closed.