Sadaiyan Vs Ravi and Raja

C.R.P. (NPD) No. 1571 of 2013 and M.P. No. 1 of 2013

Court: Madras High Court (Madurai Bench)

Date of Decision: Dec. 2, 2013

Citation: (2014) 1 LW 364

Hon'ble Judges: P.R. Shivakumar, J

Bench: Single Bench

Advocate: P. Mani, for the Appellant; N. Beulah John Selvaraj, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

P.R. Shivakumar, J.
Invoking the supervisory jurisdiction of this court under Article 227 of the Constitution of India, this Civil Revision

Petition has been filed by the respondent in A.S. No. 17/2011, which is pending on the file of the first appellate court, namely the court of learned

District Judge, Tiruvannamalai. The Revision is directed against order of the said court dated 13.02.2013 made in I.A. No. 8/2012 filed in the

above said appeal praying for the appointment of the very same Advocate-Commissioner, who was appointed by the trial court or any other

advocate as Commissioner to inspect the petition mentioned property and submit a report in the appellate court.

2. The said petition was resisted by the revision petitioner herein contending that the filing of such an application was nothing but an attempt to

prolong the litigation and pointing out the fact that the respondents did not file any petition for the report filed by the Advocate-Commissioner

appointed by the trial court and that after the judgment of the trial court, which is under challenge in the above said appeal before the appellate

court was pronounced, they have chosen to file I.A. No. 8/2012 for inspection of the suit "A" schedule property and submission of a report.

3. The learned District Judge, after hearing both the parties, allowed the said application by the order dated 13.02.2013 impugned in this civil

revision petition and appointed Mr. T. Anbalagan (the very same Advocate appointed as Advocate-Commissioner by the trial court) with a

direction to measure the suit "A" schedule property with reference to a document dated 10.07.1971 with the assistance of the District Surveyor

after serving notice on the advocates appearing on both sides and to file a report and plan. The learned appellate judge chose to refer to Second

Appeal No. 2136/1986 as the earlier round of litigation, in which the above said document dated 10.07.1971 came to be marked as Ex. A2.

Admittedly not only the said document, but also another document dated 16.07.1917 have been marked as Ex. A2 and A1 respectively in the suit

concerned in the present civil revision petition.

4. Contending that since the property was already measured by the Advocate-Commissioner appointed by the trial court and his report and plan

were marked as Exs. C1 and C2 as the respondents herein (defendants) did not file any objection to the Advocate-Commissioner"s report and

plan, the respondents herein chose to file I.A. No. 8/2012 on the file of the appellate forum for appointment of an Advocate-Commissioner as a

result of an after thought with a view to prolong the litigation as long as possible and that the learned appellate judge, without considering the

appeal on merits and without properly considering the nature of the prayer made in the petition, erroneously allowed the interlocutory application

and appointed the very same advocate as Advocate-Commissioner to measure the suit "A" schedule property with the help of the District

Surveyor, the revision petitioner has challenged the order of the District Judge by preferring the Civil Revision Petition. According to the revision

petitioner, the said procedure adopted by the appellate court is not only improper, but also a wrong exercise of the power to appoint

commissioner in the appellate stage.

5. The arguments advanced by Mr. P. Mani, learned counsel for the Revision Petitioner and by Ms. N. Beulah John Selvaraj, learned counsel for

the respondents are heard. The materials relied on by both the parties, copies of which have been filed in the form of typed sets of papers, are also

taken into consideration.

6. The Original Suit O.S. No. 13/2009 came to be filed on the file of the learned Subordinate Judge, Tiruvannamalai initially for a declaration and

for permanent injunction. Since during the pendency of the suit, according to the plaintiff (revision petitioner), the defendants (respondents herein)

encroached upon a portion of the suit property and put up a pucca construction, the plaint was amended by including a prayer for mandatory

injunction for the removal of the superstructure put up by them during the pendency of the suit. Admittedly, on an application filed by the plaintiff,

an Advocate-Commissioner came to be appointed by the trial court to show the encroachment and the erection of the superstructure in a portion

of the suit property. After the Advocate-Commissioner filed a report, the plaintiff (revision petitioner) filed an application to amend the plaint

incorporating the prayer for mandatory injunction and the same was allowed. The respondents herein (defendants) did not file any objection to the

Commissioner''s report and plan, which were marked as Exs. C1 and C2. Though the defendants (respondents herein) fully participated in the trial,

ultimately the plaintiff succeeded in getting a decree for all the three reliefs, namely declaration, permanent injunction. The said decree is challenged

before the appellate forum (District Court, Tiruvannamalai) in A.S. No. 17/2011.

7. In the appellate court, the respondents herein/defendants, who figured as the appellants in the said appeal, chose to file I.A. No. 8/2012 for the

appointment of an Advocate-Commissioner, contending that the Commissioner appointed by the trial court and the Surveyor who assisted him,

failed to measure the properties in accordance with the title deeds and patta came to be issued in favour of the plaintiff (the revision petitioner

herein) as per the wrong measurements and praying that the very same Advocate-Commissioner or a new Advocate-Commissioner be appointed

to measure the properties with the assistance of the District Surveyor with reference to the documents dated 16.07.1917 and 10.07.1971 marked

as Exs. A1 and A2 before the trial court. The reason for seeking such an appointment of Commissioner in the appellate stage, as stated in the

affidavit of the respondents herein/appellants before the lower appellate court, are two fold. They are:

1) the counsel for the defendants in the trial court, by inadvertence, thinking that the case was not with him, did not file any objection to the report

and plan of the commissioner; and

2) the Commissioner appointed by the trial court and the surveyor who assisted him did not measure the suit property in accordance with the

particulars found in the documents which were marked as Exs. A1 and A2 before the trial court.

8. All these aspects ought to have been raised before the trial court by filing an objection to the Commissioner''s Report. Or else, at least at the

time of leading evidence, the respondents herein/defendants could have raised an objection for marking those documents stating that they could not

be relied on as they were not prepared in accordance with the documents. Having chosen to keep mum and proceed with the trial on the

assumption that the report was correct, the respondents seem to have filed a petition in the appellate forum for appointment of the very same

Advocate Commissioner appointed by the trial court or a new Advocate Commissioner to measure the property with reference to Exs. A1 and

A2, with the help of the District surveyor. The learned appellate judge also, without considering the question ""whether the evidence available on

record will be sufficient to render a finding?"" - simply chose to pass an order allowing the said application granting the relief as prayed for. The said

order has been demonstrated to be an erroneous exercise of jurisdiction conferred on the appellate forum. For all the reasons stated above, this

court comes to the conclusion that the revision shall succeed and the order of the learned appellate judge dated 13.02.2013 made in I.A. No.

8/2012 in A.S. No. 17/2011 on the file of District Judge, Tiruvannamalai is bound to be set aside.

In the result, the civil revision petition is allowed. The order of the learned appellate judge dated 13.02.2013 made in I.A. No. 8/2012 in A.S. No.

17/2011 on the file of the District Judge, Tiruvannamalai is set aside. The appellate court shall take up the appeal and decide the matter based on

the evidence available on merits and only in case the court comes to the conclusion that the evidence available is not enough to render an effective

finding, then the appellate court can exercise the option of appointing a commissioner, which power can be exercised even suo motu. The appeal

shall be disposed of within three months from the date of receipt of a copy of this order. The connected M.P. No. 1 of 2013 is closed. However,

there shall be no order as to cost.