

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.07.2015

CORAM:

THE HONOURABLE **MS. JUSTICE R. MALA**

C.R.P.(PD).No.2296 of 2015

and

M.P.No.1 of 2015

1.Adhimoolam

2.Panneerselvam

3.Sankar .. Respondents/Defendants/Petitioners

Vs.

1.Kumaravel

2.Vadivel .. Petitioners/Plaintiffs/Respondents

Prayer:

Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the fair and final order dated 10.04.2015 made in I.A.No.1446 of 2014 in O.S.No.9 of 2008 on the file of the District Munsif Court, Attur.

For Petitioners : Mr.T.Murugamanickam

For Respondents : Mr.P.Jagadeesan

ORDER

The petitioner has come up with the present Civil Revision Petition seeking to set aside the fair and final order dated 10.04.2015 made in I.A.No.1446 of 2014 in O.S.No.9 of 2008 on the file of the District Munsif Court, Attur, wherein an Advocate Commissioner was appointed to inspect the suit property with the help of a qualified surveyor and note down the physical features and file a report along with plan.

2. The learned counsel appearing for the petitioner would submit that the respondents herein as plaintiffs have filed a suit for declaration, permanent injunction and mandatory injunction. In the said suit, the revision petitioners who are the defendants had filed an application in I.A.No.72 of 2008 for appointment of an Advocate Commissioner to inspect the suit property. In the said application, an Advocate Commissioner was appointed and he inspected the suit property on 10.01.2008 and filed a report along with plan on 21.01.2008. It is pertinent to note that no one had filed any objection to the said report filed by the Advocate Commissioner. However, the plaintiffs have now come forward with an application in I.A.No.1446 of

2014 to appoint a commissioner with qualified surveyor to measure the description of properties and to fix the boundaries and specifically mention the encroached portion of the suit cart track and to note down the physical features of the suit property and submit a report. The Trial Court after hearing the arguments advanced by both sides allowed the application, against which the present civil revision petition has been preferred. The learned counsel would mainly contend that without setting aside the earlier report filed by the Advocate Commissioner, the present application to appoint a commissioner should not have been filed. The Trial Court without considering the said aspect had allowed the application and hence, the learned counsel for the petitioner prayed for allowing the revision.

3. Resisting the same, the learned counsel for the respondent would submit that in the report filed by the Advocate Commissioner in I.A.No.72 of 2008, it has been specifically stated in paragraphs 2, 3 and 4 that there is a cart track in the suit property and some new plantations were found to be made in the suit property. Further, after the filing of the said report by the Advocate Commissioner, the respondents/plaintiffs had filed a petition for amendment and prayed for the relief of mandatory injunction. Hence, to prove the actual area

of encroachment, the appointment of Advocate Commissioner is necessary. That factum was rightly considered by the Trial Court and a Commissioner was appointed to inspect the suit property. Thus, the learned counsel for the respondent prayed for dismissal of the revision.

4. Considered the rival submissions made by both sides and perused the typed set of papers.

5. The respondents herein as plaintiffs had filed the suit seeking for the following reliefs:

"(a) declaring the rights of the plaintiffs to use the suit cart track for taking their men, cattle, carts, agricultural implements and produce and for their ingress and egress as per the muchalika dated 25.07.1973.

(b) restraining the defendants and their men by means of a permanent injunction from in any way interfering with the right and enjoyment of the plaintiffs and their men from using the suit cart track for taking their men, cattle, carts, agricultural implements, agricultural produces and for their ingress and egress.

(c) restraining the defendants and their men by means of permanent injunction from disturbing the rights and enjoyment of the plaintiffs and their men from taking water from the suit common well to the suit property through the channel in any manner.

(d) directing the defendants by means of a mandatory injunction to correct the damages caused by them and restore the suit cart track including the channel to its original position in S.No.264/7, as detailed in item 3 of the suit properties.

(e) directing the defendants to pay the costs of the suit to plaintiffs and awarding such other relief or reliefs which are necessary under the circumstances of the case and render justice."

6. At the time of filing the suit, the plaintiffs had also filed an application for injunction in I.A.No.18 of 2008. The revision petitioners/defendants entered appearance and they filed an application in I.A.No.72 of 2008 for appointment of Advocate Commissioner. In the said application, a commissioner was appointed and he inspected the suit property on 10.01.2008 and filed a report

along with plan on 21.01.2008. According to the learned counsel for the revision petitioners/defendants, the plaintiffs had not filed any objection to the report of the Advocate Commissioner. However, the learned counsel for the respondents/plaintiffs is unable to specify whether they had filed the objection or not. Further, the report of the Advocate Commissioner filed in I.A.No.72 of 2008 is still in subsistence and the same is not set aside. It is a well settled principle that an Advocate Commissioner cannot be appointed for collecting evidence. Furthermore, when a Commissioner was appointed to inspect the property and he files a report after inspecting the property, without setting aside the said report, even the same commissioner cannot be directed to revisit the property and file a report. However, the Commissioner warrant has to be re-issued to the same commissioner to clarify the defects in the commissioner report. In the instant case, the respondents/plaintiffs had neither filed an application to re-issue the warrant nor filed an application to scrap the earlier report of the Advocate commissioner. But, the respondents/plaintiffs had filed an application to appoint a new Advocate Commissioner and measure the suit property with the help of a qualified surveyor.

7. Further, when it has been specifically stated in paragraphs 2, 3 and 4 of the Advocate Commissioner's report that some new plantations were found to be made in the suit property, it is the duty of the respondents/plaintiffs to immediately file an application to direct the same Commissioner to revisit the property and file a report. However, without doing so, the respondents/plaintiffs had kept quiet all along and now when the matter was posted for trial, they have come forward with an application for appointment of Advocate Commissioner. Furthermore, even if the Court accepts that the cart track has been destroyed by the revision petitioner, there would be no evidence left out for the past 6 years. In such circumstances, I am of the view that no purpose will be served by the appointment of an Advocate Commissioner in I.A.No.1446 of 2014. The Trial Court without considering all those aspects had allowed the application which is unsustainable. Hence, the fair and final order dated 10.04.2015 made in I.A.No.1446 of 2014 in O.S.No.9 of 2008 is liable to be set aside and it is hereby set aside.

8. The Civil Revision Petition is allowed. The fair and final order dated 10.04.2015 made in I.A.No.1446 of 2014 in O.S.No.9 of 2008 is

hereby set aside. Both the parties are entitled to let in oral and documentary evidence to prove their respective case. Consequently, connected miscellaneous petition is closed. No costs.

06.07.2015

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To

The District Munsif Court, Attur.

R.MALA, J.

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