

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

DATED: **24.04.2015**

CORAM:

THE HONOURABLE MR.JUSTICE **T.MATHIVANAN**

**C.R.P.No. 3951 of 2011 (PD)**

**And**

**M.P.No. 1 of 2011**

R.Malligeswari : Respondent/Plaintiff/Petitioner

**Vs.**

V.Munuswamy : Petitioner/Defendant/Respondent

**PRAYER:** Civil Revision Petition is filed under Article 227 of Constitution of India against the order and decreetal order passed by the learned District Munsif, Chengalpattu in I.A.No. 924 of 2010 in O.S.No. 398 of 2004, dated 14.12.2010.

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For Petitioner : Mr.C.Jagadish

For Respondent : Mr.R.Thiyagarajan  
for Mr.S.Selvanandam

**O R D E R**

Challenge is made in this memorandum of Civil Revision to the fair and decreetal order dated 14.12.2010 and made in I.A.No. 924 of 2010 in O.S.No. 398 of 2004 on the file of the learned District Munsif, Chengalpattu.

2. The revision petitioner is the plaintiff in the suit in O.S.No. 398 of 2004; whereas the respondent herein is the defendant.

3. It is manifested from the records that originally the revision petitioner herein being the plaintiff has filed a suit in O.S.No. 32 of 1999 as against the respondent/defendant on the file of the learned Subordinate Judge, Chengalpattu, seeking the relief of declaration of his title over the suit property and for consequential relief of recovery of vacant possession after removing the superstructure put up by the respondent. The said suit was transferred to the file of the learned District Munsif Court, Chengalpattu on the ground of jurisdiction and re-numbered as O.S.No. 398 of 2004. The said suit was resisted by the respondent by filing his written statement.

4. When the suit was pending before the learned Subordinate Judge, Chengalpattu, the revision petitioner/plaintiff has filed an application in I.A.No. 12 of 1999 to appoint an advocate Commissioner to make local inspection and to file a report along with the rough sketch after due inspection. Accordingly, an Advocate Commissioner

was appointed and he had also filed a report after inspecting the suit property. The report and plan were marked as Exs. C-1 and C-2 respectively.

5. Then it is revealed from the records that at the instance of the revision petitioner / plaintiff, another Commissioner was appointed on his application in I.A.No. 117 of 2000 to inspect the suit properties with the help of surveyor. Accordingly, the learned Additional Subordinate Judge, Chengalpattu had appointed a Commissioner and the Commissioner had also inspected the property after measuring the same with the help of surveyor. In this connection, he has also filed a report.

6. After the suit was transferred to the file of the learned District Munsif, Chengalpattu, the respondent being the defendant has taken out an application in I.A.No. 924 of 2010 under Order 26 Rule 9 of the Code of Civil Procedure to scrap the Commissioner's report filed in I.A.No. 117 of 2000 and to appoint a new Advocate Commissioner to measure the property with the help of surveyor in accordance with the layout measurement and revenue records and to file a report with plan. Despite strenuous contest, made by the revision

petitioner/plaintiff, the learned District Munsif, Chengalpattu has proceeded to allow that application in I.A.No. 924 of 2010 on 14.12.2010 scrapping the Commissioner's report filed in I.A.No. 117 of 2000 and he has also gone one step further to appoint an Advocate Commissioner.

7. Having been aggrieved by this order, the plaintiff has preferred the present Civil Revision.

8. Heard Mr.C.Jagadish, learned counsel appearing for the revision petitioner and Mr.R.Thiyagarajan, learned counsel appearing for Mr.S.Selvanandam, learned counsel who is on record for the respondent.

9. It is obvious to note here that so far as the suit in O.S.No. 398 of 2004 is concerned, trial was already commenced and was in parted heard stage. Only at that time, the Advocate Commissioner was appointed in I.A.No. 117 of 2000 and he had also filed his report on 15.07.2002 along with the plan under Exs. C-1 and C-2 respectively.

10. On perusal of the impugned order, this Court is able to find that the learned District Munsif has proceeded to dispose that application on the following three grounds:-

(1) No notice was issued to the respondent/defendant by the Advocate Commissioner at the time of his inspection;

(2) Despite a memo of instructions was given by the learned counsel for the respondent/defendant for revisiting the suit property, the Commissioner did not respond to the memorandum.

(3) The Commissioner's report does not exhibit the true spirit of the Commissioner warrant.

11. Mr.C.Jagadish, learned counsel appearing for the revision petitioner/plaintiff has drawn the attention of this Court to the affidavit and petition relating to I.A.No. 924 of 2010 and in this connection, he would submit that the said application was filed by the respondent/defendant on 21.06.2010. Whereas the suit was filed on 24.02.1999. He has also argued that the application in I.A.No. 924 of 2010 was filed after a lapse of 11 years for the purpose of scrapping the earlier Commissioner's report filed in I.A.No. 117 of 2000

dated 15.07.2002. He has also maintained that earlier application for the appointment of Advocate Commissioner in I.A.No. 12 of 1999 was filed on 06.04.1999. In that application, a Commissioner was appointed and he had also filed his report along with a plan, which were marked as Exs. C-1 and C-2. Then another Commissioner's application in I.A.No. 117 of 2000 was filed in the year 2000 and a Commissioner was appointed and he had also filed his report. Subsequently, the said Commissioner warrant was remitted to the same Commissioner to measure and localised the suit property along with surveyor. Accordingly, the Commissioner had measured and localise the suit property along with the help of the surveyor and filed his report along with plan furnished by the surveyor, for which, the respondent/defendant had also filed his objection. He has also added that subsequently the respondent/defendant had filed an application in I.A.No. 1165 of 2002 for appointing an Advocate Commissioner and that application was dismissed on 02.08.2005. He has added further that having failed in his attempt with dismissal of the application in I.A.No. 1165 of 2002, the respondent/defendant has come forward with another application in I.A.No. 924 of 2010 to scrap the Commissioner's report dated 15.07.2002 filed in I.A.No. 117 of 2000.

12. Mr.C.Jagadish has also made stress upon the point that despite the Commissioner, who was appointed in I.A.No. 117 of 2000 had filed his report on 15.07.2002 along with plan, the respondent/defendant had filed the said application in I.A.No. 924 of 2010 to scrap the Commissioner's report dated 15.07.2002 after passing of 8 years which would go a long way to show that the petition itself ought to have been dismissed in-limine as it appears that the respondent/defendant had acted in a vindictive manner to take revenge upon the respondent/defendant and also for the purpose of procrastinating the proceedings.

13. In support of his contention, Mr.C.Jagadish has placed reliance upon the following two decisions:-

"(1). **Chockalingapuram Thevangar Vardhaga Sangam V. Chokkanathaswami Temple, Chokkalingapuram** reported in **AIR 1996 Madras 148;**

(2). **Padmanabhan Vs. Krishnamurthy** reported in **2005(2) TLNJ 386."**

14. On the other hand, Mr.R.Thiyagarajan, learned counsel appearing for on behalf of Mr.S.Selvanandam, who is on record for the respondent/defendant has submitted that the Commissioner who was appointed in I.A.No. 117 of 2000 had not given notice either to the respondent/defendant or to his counsel and even inspite of memo of instructions was given, the Advocate Commissioner did not respond to the memo of instructions and he also did not re-visit the suit property and only for this reason, the learned trial Judge has proceeded to scrap the earlier report. He has also pointed out that in paragraph 10 of the impugned order, the learned trial Judge has given reasoning for the scraping of the Commissioner's report.

15. In support of his contention, Mr.R.Thiyagarajan has placed reliance upon the following decisions:-

"1. **Anwar Batcha and another V. S.Mahuedoom** reported in **2014 (5) CTC 85;**

2. **Ponnusamy Pandaram V. The Salam Jilla Vaiyappamalai Jangamar Sangam, represented by its President, Palanivel** reported in **1984 TNLJ 384;**

3. **A.Nagarajan V. A.Madhanakumar** reported in **1996-1-L.W. 278**; and

4. **Ponnusamy V. Subramanian** reported in **AIR 2015 (NOC) 114 (MAD.)**"

16. Sub rule (3) to Rule 10 of Order 26 of the Code of Civil Procedure contemplates that "*where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further enquiry to be made as it shall think fit.*"

17. Under Order XXVI Rule 10(3), the trial Court has got a discretion to order a fresh commission or not. However, the Court is not bound to do so in every case where the result of the local investigation is found to be unsatisfactory. Trial Court can decide the case on the evidence. But where the trial Court is dissatisfied with the whole proceedings of the Commissioner that it thinks it better to discard the whole record and start afresh, it may do so. Where the Court is of opinion, on considering the objection of the parties, if any, that the Commissioner has so misconceived his duties as to

render his report valueless, it may wipe out and supersedes the first report by a specific order to that effect, and may issue a fresh commission.

18. When the Court forms an opinion that it is not satisfied with the Report, it is entitled to call for another report after setting aside the same or get a supplementary report from the same Commissioner. (see ***Irulayee and others Vs. Sri.Krishna Vilas Baliya*** reported in ***2000 A I H C 3462***)

19. From the languages of Sub rule 3, this Court infer that the powers of the Court have to be exercised reasonably with circumspection in accordance with the provisions of Order 26 Rule 10(3) of the Code of Civil Procedure. As per this rule, it is necessary on the part of this Court to give reason to direct such further inquiry when it is dissatisfied with the proceedings of the Commissioner.

20. In ***Chockalingapuram Thevangar Vardhaga Sangam V. Chokkanathaswami Temple, Chokkalingapuram*** reported in ***AIR 1996 Madras 148***; referred to by Mr.C.Jagadish, learned counsel for the revision petitioner, the learned Single Judge of this Court (Raju, J.) in paragraph 7 has observed as under:-

"In my view as held by the learned Chief Justice M.M.Chandurkar, in the decision reported in K.Viswanathan v. D.Shanmugham Mudaliar, (1986) 2 Mad LJ 319, it is not as though that the Court concerned is powerless, but its powers have to be exercised reasonably in accordance with the stipulation contained under O. 26 Rule 10(3), C.P.C. The Court below on the facts of this case, was not satisfied with the request made by the petitioner for the appointment of a fresh Commissioner. The learned counsel for the petitioner contended that such a request was made on account of the fact that on an earlier occasion relevant document could not be made available to the Commissioner and that the earlier Commissioner is not available as he had already left practice. But in my view, as noticed in the Judgment placed before me, it is not that a mere lapse in any report which necessitates the

*automatic/appointment of a further Commissioner. That is on account of the fact that per se a Commissioner's report is not an evidence and this is a well accepted proposition of law. The Court which is concerned, with the adjudication of an issue before it, is the best Judge to decide the need or necessity to appoint a Commissioner, and that too, when it is asked for a second time. If the Court is satisfied with the request, in the interest of justice to both parties, it can always proceed to set in a given case at the given stage, within the frame work of its powers as envisaged in the code and particularly under sub-rule (3) of Rule 10 of O.26, C.P.C is noticed above, it will always depend upon the facts and circumstances of the case before it."*

21. With the above said observation, the learned Single Judge has expressed his view that he is unable to interfere

with the order of the learned trial Judge. In an another decision in ***Padmanabhan Vs. Krishnamurthy*** reported in **2005(2) TLNJ 386** cited supra (referred to by Mr.C.Jagadish), another learned Judge of this Court has explained under what circumstance the report of the Commissioner can be scrapped. In the above said decision, paragraph 18 is very relevant; wherein it is stated as under:-

*"..... If the Court is dissatisfied with the Commissioner's report, if considered necessary, it can issue another Commission for collecting more details, without setting aside the Report of the first Commission. If the report is not satisfactory, the Court may appoint another Commissioner, but not without recording any finding as to its dissatisfaction about the Report of the first Commissioner..... The report of the earlier Commissioner cannot be scrapped, unless there are allegations that the Commissioner has acted in a partial or vindictive manner ...."*

22. In **Anwar Batcha and another V. S.Mahuedoom** reported in **2014 (5) CTC 85**, this Court in paragraph Nos. 10 and 11 has observed that:-

"10. From the texture of the languages coined in Rule 9 to Order 26, C.P.C it is explicit that it does not make any distinction between the plaintiff and the defendant or it does not have any reference to show that a particular party viz., either the plaintiff or the defendant alone shall file an application under Order 9 to Rule 26, C.P.C with a prayer to appoint an Advocate Commissioner. What it transpires is, where the Court deems a local investigation to be requisite or proper in any suit for the purpose of elucidating any matter, 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.

11. The expression 'elucidate' means to make lucid or clear, throw light upon, explain, enlighten. Where the Court is satisfied on the materials available on the record that a party is not able to produce the desired evidence for reasonable circumstances, it may assist the party to appoint a 'Commissioner' to get the evidence. However, such evidence is not binding on the Court, which is to appreciate the same along with other evidence. The party can 'countermand' the evidence of Commissioner's report by giving any other evidence. This dictum is laid down in *Anukura & Ankura Charan Sahu v. Arjuna Charan Palei*, 1998 AIHC 1702 (Ori-DB). Besides this, in *Debendranath Nandi v. Natha Bhuiyan*, AIR 1973 Ori 240, it is held that the object of local investigation under Rule is to obtain evidence which from its peculiar nature can best be had from the spot."

23. In **Ponnusamy Pandaram V. The Salam Jilla Vaiyappamalai Jangamar Sangam, represented by its President, Palanivel** reported in **1984 TNLJ 384**, the learned Single Judge of this Court has observed as follows:-

"The object of local investigation under Order XXVI, rule 9 of the Code cannot be belittled. Its object is to collect evidence at the instance of the party who relies on the same and which evidence cannot be taken in Court but could be taken only, from its peculiar nature, on the spot. This evidence will elucidate a point which may otherwise be left in doubt or ambiguity on record. The Commissioner, in effect, is a projection of the Court, appointed for a particular purpose. In this regard, the implication of Order XXVI, Rule 10 cannot be lost sight of when it says that the report of the Commissioner and the evidence taken by him shall be evidence in the suit and shall form part of the record."

24. Mr.R.Thiyagarajan has also placed reliance upon an another decision in **A.Nagarajan V. A.Madhanakumar** reported in **1996-1-L.W. 278**, wherein this Court has observed as under:-

*"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 judgment 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. Hence, there is neither abdication nor delegation*

*of the powers of functions of the Court to decide the issue. Only on examination of the Commissioner, the Report forms part of the record and evidence. The opposite party has opportunity to cross-examine the Commissioner. Ofcourse, after failure to do so and to elicit such information as is required, he cannot at later stage object to the Report being accepted on the ground that the Commissioner was not examined or cross examined."*

25. On coming to the instance case on hand, it is the case of the respondent/defendant who is the petitioner in I.A.No. 924 of 2010 that he had purchahsed plot No. 185 and that there is no such plot bearing No. 186 in the layout. It is also his case that even prior to the filing of the suit, he had finished the construction and has been living in the suit property. After his plot, a small vacant place is available and after that a poromboke land is available.

26. According to the respondent/defendant, the layout promoters have shown the poromboke property and the small vacant area as Plot No. 186. But according to the revision

petitioner/plaintiff, he had purchased the Plot No. 186 and required the entire cite specified in the layout. He says that the layout property survey number was not properly measured and therefore, his counsel had requested the Commissioner and surveyor to measure the entire property afresh. However, their request was turned down by the Commissioner as well as by the surveyor and in fact the Commissioner had specified in his report that the property could not be tallied with the lay out measurement and revenue record measurement.

27. The learned trial Judge has also assigned the reasons for scrapping out the Commissioner's report dated 15.07.2002 and made in I.A.No. 117 of 2000 as under:-

(1) The Commissioner has not given notice to the respondent/defendant at the time of visit;

(2) Despite a memo of instructions was given by the learned counsel for the respondent/defendant, the Commissioner did not re-visit the suit property.

Besides this, the learned trial Judge has also observed that the Commissioner's report does not exhibit true spirit of the Commissioner warrant and according to him, this is a valid ground for scrapping the Commissioner's report filed by the Advocate Commissioner in I.A.No. 117 of 2000.

T.MATHIVANAN, J.

**vsg**

28. This Court, after striking balance between the submissions of both the learned counsels and on considering the grounds of revision, finds that no interference is required to the order of the learned trial Judge and therefore, the revision is dismissed as devoid of any merits. Consequently, connected Miscellaneous Petition is closed. No costs.

24.04.2015

Index: Yes/No  
Internet: Yes/No  
vsg

To

The District Munsif,  
Chengalpattu.

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**And**  
**M.P.No. 1 of 2011**