

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.11.2015

CORAM

THE HONOURABLE MS.JUSTICE R.MALA

CRP (PD).No.3181 of 2015

N.Saminathan

.. Petitioner

Vs

Balamurugan

.. Respondent

Prayer:Civil Revision Petition filed under Article 227 of the Constitution of India, against the order dated 24.03.2015 passed in I.A.No.880 of 2013 in O.S.No.202 of 2011 on the file of the District Munsif Court, Palladam.

For Petitioner : Mr.L.Chandrakumar

For Respondent : Mr.S.Nagarajan

ORDER

Heard the learned counsel for the petitioner and the learned counsel for the respondent.

2.Challenging the impugned order passed in I.A.No.880 of 2013 for appointing new Advocate Commissioner without scraping the earlier Advocate Commissioner's report, this Civil Revision Petition has been filed.

3.Learned counsel for the petitioner submitted that the petitioner as a plaintiff filed a suit in O.S.No.202 of 2011 on the file of the District Munsif Court, Palladam for bare injunction in respect of the suit property stating that from the date of purchase he made construction in the suit property and enjoying the same. But six months prior to filing of the suit, the respondent/defendant has purchased the property and attempted to interfere with his possession. Hence, he was constrained to file a suit for bare injunction. The respondent/defendant filed the written statement and contested the suit. At the time of filing of the suit, the petitioner/plaintiff filed I.A.No.1086 of 2011 wherein Advocate Commissioner was appointed and he filed a report which was marked as Exs.C1 and C2. During the trial, the respondent/defendant filed an application in I.A.No.880 of 2012 for appointment of new Advocate Commissioner without scraping the earlier Commissioner's report. The Trial Court has not considered the same and allowed the application. Hence, he prayed for setting aside the impugned order passed by the Trial Court. To substantiate his argument, the learned counsel for the petitioner relied upon the decision reported in **2009 (2) CTC 265 (Anna Sudha Devi vs. P.George Samuel)**.

4.Resisting the same, the learned counsel for the respondent would submit that it is true that Advocate Commissioner was appointed on the basis

of the application filed by the petitioner/plaintiff in I.A.No.1086 of 2011 and during the inspection, the respondent/defendant was present. The respondent/defendant has filed objections but however, he has stated in the counter that even though he has purchased 1500 sq.ft., he is in possession of only 1440 sq.ft. and 60 sq.ft. has been encroached upon by the petitioner/plaintiff. So, to measure the property and find out the encroachment, appointment of Advocate Commissioner is necessary. Therefore he filed an application for appointment of new Advocate Commissioner and the Trial Court has rightly allowed the application. Hence, he prayed for dismissal of the revision petition.

5.Considered the rival submissions made on both sides and perused the typed set of papers.

6.The present suit has been filed in simplicitor for injunction stating that the petitioner/plaintiff purchased the property in the year 1988 and from that date onwards, he made constructions and enjoying the property. Six months prior to filing of the suit, i.e. in the year 2010, the respondent purchased the property and interfered with his possession. Hence, the plaintiff's was constrained to file a suit for injunction. The respondent/defendant filed a detailed written statement and he also made a

counter claim for the relief to remove the encroachment made by the plaintiff in B schedule property. But admittedly, Advocate Commissioner was appointed, he inspected the property and filed a report. It is admitted by both sides that Exs.C1 and C2 has been marked through the Advocate Commissioner. It is well settled dictum of the Apex Court that without scrapping the earlier Advocate Commissioner's report, no new Advocate Commissioner can be appointed. If anything to be clarified in the Commissioner's report, the respondent/defendant is entitled to file an application for re-issuing the warrant to the same Advocate Commissioner to work out the remedy by giving memo of instructions to the Advocate Commissioner to measure the property and file his report.

7.As per the ratio decendi in the decision reported in **2009 (2) CTC 2015 (Anna Sudha Devi vs. P.George Samuel)**, without setting aside the earlier Advocate Commissioner's report, new Advocate Commissioner shall not be appointed. The Trial Court without considering the same, has appointed a new Advocate Commissioner and hence, the impugned order is unsustainable. Accordingly, the impugned order passed by the Trial Court is hereby set aside and the Civil Revision Petition is hereby allowed.

8.In the result, the Civil Revision Petition is allowed. Considering the

counter claim made by the respondent/defendant, it is open to the respondent/defendant to file an application to re-issue the warrant to the same Advocate Commissioner to measure the property and find out the encroachment. The Presiding Officer, District Munsif Court, Palladam is also directed to consider the application on merits and in accordance with law. No costs.

26.11.2015

Index: Yes/No
Internet: Yes/No
cse

To

The District Munsif Court, Palladam.

R.MALA. J.,

cse

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