

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.11.2016

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THE HONOURABLE MR.JUSTICE M.DURAIWAMY

C.R.P.(NPD).No.2010 of 2016  
and C.M.P.No.10477 of 2016

A.Elumalai

... Petitioner

Vs.

1.G.Vijayalakshmi

2.G.Sekar

3.The District Collector,  
The Collectorate,  
Chennai - 600 001.

4.The Tahsildar,  
Mylapore - Triplicane Taluk,  
Chemiers Road,  
Chennai - 600 028.

... Respondent

Civil Revision Petition filed under Section 115 of the Civil Procedure Code against the fair and decreetal order passed in C.M.P.No.112 of 2015 in A.S.No.246 of 2015 dated 24.02.2016 on the file of the XVI Additional Judge, City Civil Court, Chennai.

For Petitioner : Mr.V.Balaji

For Respondents : Mr.S.R.R.Raaghavan (R1 & R2)

Mr.T.Jayaramaraj (R3 & R4)

**ORDER**

Challenging the fair and final order passed in C.M.P.No.112 of 2015 in A.S.No.246 of 2015 on the file of the XVI Additional Judge, City Civil Court, Chennai, the 1<sup>st</sup> defendant in O.S.No.912 of 1999 on the file of the I Assistant Judge, City Civil Court, has filed the above Civil Revision Petition.

2.The plaintiff filed the suit in O.S.No.912 of 1999 for declaration, recovery of possession and for permanent injunction.

3.The defendants filed their written statement and contested the suit. The trial Court decreed the suit.

4.Aggrieved over the same, the 1<sup>st</sup> defendant preferred an appeal in A.S.No.230 of 2003 on the file of the III Additional Judge, City Civil Court, Chennai and the 1<sup>st</sup> Appellate Court allowed the appeal and set aside the judgment and decree passed by the trial Court. On the earlier occasion, the plaintiffs preferred a Second Appeal in S.A.No.2020 of 2004 challenging the judgment and decree passed in A.S.No.230 of 2003. This Court, by its judgment dated 02.08.2011, set aside the judgment and decree passed by the Courts below and remitted the matter back to the trial Court for fresh disposal. Further, this Court directed the trial Court to appoint an Advocate

Commissioner *suo motu* to measure the respective properties with the help of the Surveyor and correlate the suit property with reference to the documents and the revenue records and submit a report. After remand, a Commissioner was appointed and the Commissioner also inspected the property and filed his report. The 1<sup>st</sup> defendant filed his objections to the Commissioner's report.

5.Subsequently, the plaintiffs filed an application in I.A.No.4445 of 2013 in O.S.No.912 of 1999 to scrap the Commissioner's report and appoint another Advocate Commissioner to properly measure the suit property with the help of a Surveyor and Chartered Engineer. After contest, the said application was dismissed by the trial Court. However, while dismissing the application, the trial Court gave liberty to the parties to cross examine the Advocate Commissioner with regard to the objections raised by them. Subsequently, after cross examining the Advocate Commissioner and examining the other witnesses, the trial Court decreed the suit in part.

6.Challenging the judgment and decree passed in O.S.No.912 of 1999 dated 16.10.2014, the plaintiffs filed an appeal in A.S.No.246 of 2015 on the file the XVI Additional Judge, City Civil Court, Chennai. In the said appeal, the plaintiffs took out another application in C.M.P.No.112 of 2015

seeking for appointment of a fresh Advocate Commissioner to measure the suit property with the assistance of a Taluk Surveyor and a Civil Engineer. The said application was opposed by the defendants. The Lower Appellate Court, taking into consideration the case of both parties, allowed the application with a direction to re-issue the warrant of commission to the same Commissioner, who was appointed by the trial Court to take measurement of the suit property with the help of the Taluk Surveyor.

7.As already stated, the application filed by the plaintiffs to scrap the report of the Advocate Commissioner before the trial Court was dismissed by the trial Court in I.A.No.4445 of 2013 on 15.04.2013. The plaintiffs have not challenged the said order and the same has become final. Pursuant to the findings of the trial Court for cross examining the Advocate Commissioner, the parties have also cross examined the Advocate Commissioner before the trial Court.

8.The learned counsel appearing for the respondents/plaintiffs submitted that in the cross examination of the Advocate Commissioner, it was elucidated that the Commissioner's report filed before the trial Court are incorrect. In these circumstances, the plaintiffs have filed the present application seeking for fresh appointment of Advocate Commissioner.

9. When the Commissioner's report filed before the trial Court was not scraped by the trial Court and when the Advocate Commissioner was subjected to cross examination by the parties, there is absolutely no necessity for seeking for appointment of 2<sup>nd</sup> Advocate Commissioner or to re-issue the warrant of commission to the same Commissioner. The findings of the trial Court have to be canvassed by the parties only based on the available materials.

10. It is settled position that a party cannot collect evidence through an Advocate Commissioner.

11. In the case on hand, when the parties had let in oral and documentary evidences and also filed their objections before the trial Court to the Commissioner's report, there is absolutely no necessity for re-issuing warrant of commission to the same Commissioner. If the warrant of commission is re-issued, it would only create further complications in the matter and it will not help the Court in deciding the matter in a proper manner.

12. In these circumstances, the fair and decreetal order passed by the Lower Appellate Court are liable to be set aside. Accordingly, the same are set aside. The Civil Revision Petition stands allowed. No costs. Consequently, the connected miscellaneous petition is closed.

Index : No  
Internet : Yes  
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**21.11.2016**

To

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**M.DURAIWAMY,J.**  
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