

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 17.10.2016

Delivered on: 21.10.2016

CORAM

THE HONOURABLE THIRU JUSTICE **V. PARTHIBAN**

C.R.P.(PD)No.1915 of 2013 &
M.P.No.1 of 2013

1. Semitta Kounder
2. Santhi

.... Petitioners

vs

Murugesan

.... Respondent

Civil Revision Petition filed under Article 227 of the Constitution of India against the order of the Subordinate Judge, Kallakurichi, dated 22.01.2013 made in I.A.No.61 of 2012 in O.S.No.45 of 2009.

For petitioner : Mr.P.Valliappan

For respondents : Mr.P.Kumaravel

ORDER

This Civil Revision Petition is directed against the order passed by the learned Subordinate Judge, Kallakurichi, dated 22.01.2013 made in I.A.No.61 of 2012 in O.S.No.45 of 2009, dismissing the interlocutory application filed by the petitioner herein, seeking re-issuance of the Commissioner's warrant to the very same Advocate-

Commissioner, for properly identifying and measuring the suit property with the help of the Surveyor and file a report along with plan.

2. The revision petitioners herein are the defendants in the suit in O.S.No.45 of 2009 filed by the respondent herein, for permanent injunction. Earlier to present I.A.No.61 of 2012, the petitioners/defendants had taken out an interlocutory application in I.A.No.497 of 2009, seeking appointment of Advocate-Commissioner for identifying and measuring the suit property for effective adjudication of the *lis* between the parties. The said interlocutory application having been allowed on 4.3.2010. The respondent/plaintiff approached this Court by way of filing a petition in CRP (PD) 2921 of 2010. This Court disposed of the said Civil Revision Petition vide order dated 21.10.2010, confirming the order passed by the trial Judge for appointment of the Advocate-Commissioner and ordered that the inspection by the Commissioner should be confined only to the suit property and he should not go to inspect other property as claimed by the respondent/plaintiff. Thereafter, it appears that the suit property was inspected by the Advocate-Commissioner appointed by the trial Court and a report was also filed by him.

3. According to the revision petitioners, the report of the Advocate-Commissioner was sketchy and not containing proper details regarding the identity and boundaries of the suit property and with such incomplete report, the dispute between the parties can hardly be resolved in the suit. Therefore, the petitioners/defendants filed the subject I.A.61 of 2012 seeking re-issue of the Commissioner's warrant to the very same Advocate-Commissioner, to enable him to properly identify and measure the suit property with the help of the Surveyor.

4. The said I.A. was resisted by the respondent/plaintiff, stating that the 1st petitioner/defendant himself being employed in Revenue Department, would exercise influence on any Surveyor to be appointed for the said purpose and therefore, any report prepared would only mislead the trial Court. It is further stated that the application in question was only to protract the proceedings.

5. The learned trial Judge, after hearing the rival submissions, dismissed the subject Interlocutory Application vide order, dated 22.1.2013, which is impugned in this Revision Petition, on the ground that the petitioners/defendants have already filed objections to the report of the Advocate-Commissioner and the suit having been filed

for bare permanent injunction and the Commissioner's report saying that the suit survey could not be located for want of survey stone, no purpose would be served by re-issuing of Commissioner's warrant. Further, the trial Judge held that the physical features that were sought to be noted down by the learned Advocate-Commissioner would not play a vital role in deciding the issue in controversy between the parties.

6. Heard the learned counsel appearing for both sides and perused the entire materials available on record.

7. The learned counsel appearing for the petitioners would contend that re-issue of Commissioner's warrant is necessitated to inspect the suit property along with the Surveyor in view of the fact that in his earlier report, the Advocate-Commissioner has not given proper identity and measurements of the suit property since according to him, the extent of suit survey could not be measured since he could not find the survey stones. He would also contend that no prejudice would be caused to the respondent if re-issuance of warrant is ordered. In support of his contentions, the learned counsel relied upon the decisions reported in 2013(2) MWN (Civil) 619 (***V.Ganesan versus Kamal Jain and another***); 2009(4) CTC 271

(V.K.Ramanathan (deceased D3) and 3 others versus Jayalakshmi and 5 others); 2012(3) MWN (Civil) 823 (**Rangasamy Gounder and others versus Valliammal and others**) and 2012(2) MWN (Civil) 255 (**Andal versus Ajjai Alva and others**)

8. On the other hand, learned counsel appearing for the respondent would contend that pursuant to the direction of this Court vide order dated 21.10.2010 in CRP (PD) No. 2921 of 2010 directing to measure the suit property alone, the Advocate-Commissioner has complied with the same and there is no need to order re-issuance of the Commissioner's warrant and only in order to drag on the proceedings, the petitioners have filed the subject IA, which was rightly dismissed by the trial Judge and as such no interference is required. In support of his contentions, the learned counsel for the respondent relied upon a decision reported in 1996(1) CTC 472 (**S.Anthonidoss and another versus Sabesthiyan and another**).

9. No doubt, as a matter of routine, there cannot be any order for re-issue of Commissioner's warrant in filling up any lacuna since it is always open to the aggrieved party to file objections and cross-examine the Advocate-Commissioner concerned on his report. However, in the instant case on hand, the claim of the petitioners for

re-issue of Commissioner's warrant appears to be bona fide since it is only in regard to the proper identification and measurement of the suit property as both the petitioners and respondent happened to be the neighbours and claiming rights over a portion of the property. In the absence of proper measurement and identification of the suit property, the trial Court may not be able to resolve the issue and give a quietus to the dispute between the parties. Mere opportunity to raise objections and cross-examine the Advocate-Commissioner on his report, in the circumstances of the case, will be of no assistance to the trial Judge for resolving the issue. Further, no prejudice would be caused to either side if the same Advocate-Commissioner is directed to properly measure and identify the physical features of the property with the active assistance of the Surveyor and if proper report is submitted on such re-issue of the warrant and the trial Court would be in a better position to adjudicate the claim and resolve the issues in favour of either parties. Therefore, this Court is of the view that the dismissal of the subject I.A. by the Judge, is not in order and the same is required interference of this Court.

10. As regards the decision relied upon the learned counsel for the respondent in "S.Anthonidoss's case (cited supra), it is to be noted that there should be sufficient basis and justification for re-

appointment of the Advocate Commissioner and such appointment cannot be sought for as a matter of course and that too to achieve ulterior object or motive. This Court is of the view that in the facts and circumstances of the case, there is need to order re-issue of the Commissioner's warrant for effective adjudication of the matter and such a prayer by the petitioners/defendants cannot be construed to be one with an ulterior object or motive. As regards the decisions relied upon by the learned counsel for the petitioners, this Court is inclined to accept the ratio decided therein, when applied the same to the facts of the present case.

11. For the foregoing reasons, the impugned order dated 22.1.2013 made in I.A.No.61 of 2012 in O.S.No.45 of 2009 by the learned Sub Judge, Kallakurichi, is hereby set aside. It is made clear that on re-issuance of the warrant to the very same Advocate-Commissioner, the report shall be prepared along with with the assistance of the Surveyor only in respect of the suit property as originally ordered by this Court vide order dated 21.10.2010 in CRP No.2921 of 2010. Taking note of the fact that the suit is of the year 2009 and the issues hanging fire as between the parties, the trial Court is directed to expedite the trial and dispose of the suit, within a period of six months from the date of receipt of a copy of this order.

In the result, the Civil Revision Petition is allowed on the above terms. No costs. Consequently, connected MP is closed.

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21-10-2016

To

The Subordinate Judge, Kallakurichi

V. PARTHIBAN,J.,
suk

Pre delivery order in
CRP(PD)No.1915 of 2013

21-10-2016