



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 21.12.2016

CORAM:

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THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P(MD)No.1693 of 2014 (PD)

and

M.P(MD)No.1 of 2014

1.Karuppusamy

2.Kalisamy

3.Samidurai

4.Karuppanna Goundar

.. Petitioners/petitioners/
Respondents/Defendants

Vs.

Ramasamy

..Respondent/Respondent/
Petitioner/Plaintiff

PRAYER: Civil Revision Petition is filed, under Article 227 of the Constitution of India, against the fair and decreetal order passed in I.A.No.464 of 2009 in I.A.No.195 of 2009 in O.S.No.94 of 2009, on the file of the Sub Court, Palani, dated 28.01.2010.

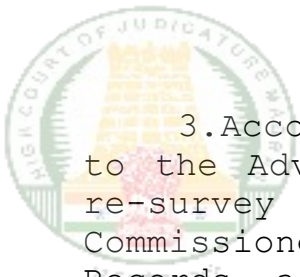
For Petitioners : Mr.D.Venkatesh

For Respondent : Mr.A.R.Kannappan

ORDER

The petitioners have filed this Civil Revision Petition to set aside the order passed in I.A.No.464 of 2009 in I.A.No.195 of 2009 in O.S.No.94 of 2009 by the Sub Court, Palani, dated 28.01.2010.

2.The petitioners are the defendants in the suit. The respondent is the plaintiff. The respondent filed a suit in O.S.No.94 of 2009, before the file of Sub Court, Palani, for declaration and injunction. The respondent filed I.A.No.195 of 2009 for appointment of Advocate Commissioner. An Advocate Commissioner was appointed and she inspected the suit property on 18.09.2009 and filed her report on 09.11.2009 along with sketch. The petitioners filed I.A.No.464 of 2009 for re-issue of warrant of commission to Advocate Commissioner to inspect and measure the property as per Revenue Records with the help of Taluk Deputy Land Surveyor.



3. According to the petitioners, they gave memo of instructions to the Advocate Commissioner to measure the property as per the re-survey number and registered documents. The Advocate Commissioner measured the property only based on the Revenue Records, as per the instruction of warrant of Commission.

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4. The respondent filed counter and submitted that Advocate Commissioner has inspected the property with the help of Village Administrative Officer, Surveyor and filed his report stating that there is a stone building to a height of 3 feet which clearly shows that petitioners have put the said construction after interim order granted in I.A.No.194 of 2009. The petitioners have not given any valid reason and for re-issue of warrant to Advocate Commissioner measuring the suit property with re-survey number and documents has nothing to do with the suit property and prayed for dismissal of I.A.,

5. The learned Judge considering the materials on record and averments made in the affidavit and counter affidavit, dismissed the application with costs holding that the Advocate Commissioner has inspected the property and filed her report. If there is objection to the Advocate Commissioner's Report, the petitioners can file the same into Court and there is a possibility of accepting the said objection by the Court. The onus is on the respondent to prove that he is absolute owner of the suit property.

6. Against the said order of dismissal, the petitioners have filed the present Civil Revision Petition.

7. The learned counsel for the petitioners contended that the learned Judge failed to see that specific case of the petitioners is that Advocate Commissioner refused to receive memo of instructions given by the petitioners to survey the property correlating to the present re-survey number. The learned Judge erred in dismissing the application for re-issue of warrant on the ground that the petitioners can file objection to the Advocate Commissioner's Report. The learned Judge has not considered the scope of Order 26 Rule 9 of Civil Procedure Code.

8. In support of his case, the learned counsel for the petitioners relied on the following judgments.

(i) 2016(6) CTC 66 Semitta Kounder v. Murugesan

"9..... 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 should 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....."

ii) 2013(2) MWN (Civil) 619 V. Ganesan V. Kamal Jain

"7. A perusal of the Pleadings of both parties will make it clear that there is an issue as to whether the pathway really forms part of the Suit property. Of course, the Commissioner in his earlier report has submitted that there is a pathway. That is very seriously objected to by the Petitioner/Plaintiff. But, the Commissioner did not have the benefit of measuring the Suit Property and give a Specific finding as to whether the so called pathway forms part of the Suit property or not. Apart from that, at the time the Commissioner visited the property, the Petitioner was not present to identify the Suit property. In such circumstances, in my considered opinion, it will be appropriate to request the very same Commissioner to measure the Suit property with the help of Surveyor and to file a Supplemental Report.

8. Of Course, it is true that in the normal course, without scraping the earlier Report for defects, it is not possible to appoint a Commissioner for the same purpose. But here, the earlier Commissioner's Report need not be scrapped because by re-issuing the warrant, the Commissioner is directed only to submit an Additional Report. Thus, both Reports will be on the file of the Court. Above all, a perusal of the impugned order of the Lower Court would go to show that the Lower Court has dismissed the Interlocutory Application on the ground that the present Application was filed when the Interlocutory Application for Temporary Injunction was under consideration and also because the earlier Commissioner Report was available."

9.. The learned counsel for the respondent submitted that the Advocate Commissioner already inspected the property along with Village Administrative Officer and surveyor and filed her report. The petitioners have not filed their objections to the Advocate Commissioner's Report and therefore, the learned Judge has rightly dismissed the application. In support of his contention, he relied on the following judgments:-

(i) 2013(1) MWN (Civil) 878 M.S. Saravanan and others vs. Kannan and others

"6. In a suit for declaration and injunction of this nature, the Defendants need not seek for the appointment of Commissioner to disprove the case of the Plaintiffs. The Trial Court had considered all these facts and



circumstances and also found that the Plaintiffs are bound to prove their case based on their pleadings, for which the Defendants are not entitled to make out any Application for appointment of Commissioner. I find no irregularity or illegality in the order passed by the Court below. Accordingly, the Civil Revision Petition is dismissed. No costs. Consequently, the connected Miscellaneous Petition is closed."

(ii) 2012(1) TLNJ 71 (Civil) M/s. Vestas RRB (India) Ltd., Virugambakkam Ch-92 Vs. Anulatha

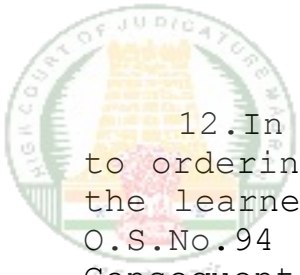
"15. When the Advocate Commissioner has filed his report on 10.04.2006 in I.A.No.261 of 2006, then, this Court opines that the subsequent prayer for appointment of the very same Advocate Commissioner to investigate as to whether the compound wall has been raised in the property etc., cannot be asked for, since in the considered opinion of this Court, it is open to the Revision petitioner to examine the Commissioner as per Order 26 Rule 10 of Civil Procedure Code and at the time, the Commissioner is being examined, then, it is open to the opposite party to cross examine him touching upon the contents of his report. There is also possibility of re-examination of the Advocate Commissioner, when the suit is taken up for trial."

(iii) 2014(3) MWN Civil 53 Mathew Mathan Cross vs. S.S.Kannan and others

"... It is to be noted that Court below appointed Advocate Commissioner only to inspect property to note down physical features of property and not to enquire neighbours or verify Title Deeds...."

10. I have heard the learned counsel appearing for the petitioners and the respondent and considered the arguments of counsel for parties, judgment relied on by them and also perused the entire materials on record.

11. According to the petitioners, the Advocate Commissioner has not received memo of instructions and did not measure the property correlating the present re-survey number with Jamin Bypass numbers. The petitioner has not filed any objection to the Report and also not filed any application to scrap the report of the Advocate Commissioner. The learned Judge has properly exercised his jurisdiction and has rightly held that if any objection is filed by the petitioner to Advocate Commissioner's Report, the same would be considered on merits by the Court. In the circumstances, the Judgment relied on by the learned counsel for petitioner are not applicable to the facts of the present case and judgments relied on by the learned counsel for the respondent are squarely applicable to the facts of the present case.



12. In the result, the order of the learned Judge with regard to ordering of cost is set aside. The suit is of the year 2009, the learned Sub Judge, Palani is directed to dispose the suit in O.S.No.94 of 2009 on or before April 30th, 2017. No costs. Consequently, connected miscellaneous petition is also closed.

Sd/-

Assistant Registrar (CS-I)

/True Copy/

Sub Assistant Registrar

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To

The Subordinate Judge, Palani,

Copy To : The Section Officer, V.R.Section,
Madurai Bench of Madras High Court, Madurai.

+1CC to mr.A.R.Kannappan, Advocate Sr.No.82476

Gjm/MR/VB/3.2.17-5p-4C

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