



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 19.12.2016

CORAM:

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THE HONOURABLE MS.JUSTICE V.M. VELUMANI

**CRP(MD) .No.2559 of 2016 and
CMP(MD) .No.12054 of 2016**

Durai

: Petitioner

Vs.

1. Sureshkumar

2. Satheeshkumar

: Respondents

Prayer: The Civil Revision Petition is filed under Article 227 of the Constitution of India to set aside the fair and decreetal order passed in I.A.No. 5 of 2016 in A.S.No.42 of 2014 dated 24.09.2016 on the file of the Sub Court, Kuzhithurai.

For Petitioner

: Mr. R. Nandakumar

O R D E R

This Civil Revision Petition is filed to set aside the fair and decreetal order passed in I.A.No. 5 of 2016 in A.S.No.42 of 2014 dated 24.09.2016 on the file of the Sub Court, Kuzhithurai.

2. The petitioner is the appellant in A.S.No. 42 of 2014, defendant in O.S.No.403 of 2009. The respondents are plaintiffs in O.S.No.403 of 2009.

3. The respondents filed suit in O.S.No.403 of 2009 against the petitioner claiming right of pathway in the suit property. According to the petitioner there is no pathway in the property purchased by the petitioner as claimed by the respondents. In the said suit, Advocate Commissioner was appointed and he filed his report along with sketch on 02.11.2010. The petitioner filed his objections in the month of February 2011 to the Advocate Commissioner's report stating that the Advocate Commissioner did not act as per the memo of instructions given by the petitioner and has given a false report favouring the respondents. The Advocate Commissioner was examined as witness. The petitioner filed O.S.No.1 of 2009 for injunction restraining the defendants from interfering with the peaceful possession of suit schedule property. The trial of both suits were conducted together and the



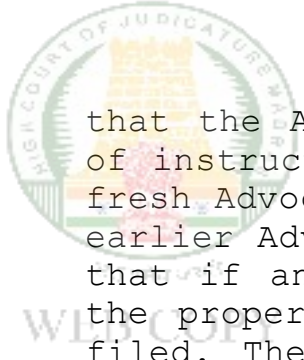
trial Court dismissed the suit filed by the petitioner and decreed the suit filed by the respondents. Against the said judgment and decree passed in O.S.No. 403 of 2009 the petitioner filed A.S.No.42 of 2014 on the file of Sub Court, Kuzithurai. In the said first appeal the petitioner filed I.A.No.5 of 2016 for appointment of Advocate Commissioner to inspect the suit property and file his report. According to the petitioner, the suit filed by the respondents was decreed based on the wrong report filed by the Advocate Commissioner. Therefore, it is necessary to appoint another Advocate Commissioner to inspect the suit property to find out the real facts and compare the same along with report and sketch filed by the earlier Advocate Commissioner, then only first appeal can be decided properly.

4. The respondents filed counter opposing the said application. The respondents submitted that trial Court appointed an Advocate Commissioner and he filed his report along with sketch and they were accepted by the trial Court. The appeal is filed against the Judgment and decree passed in O.S.No.403 of 2009. The appeal is yet to be heard on merits. The first appellate Court considering the materials on record accepted the report of the Advocate Commissioner and it is not necessary to appoint another Advocate Commissioner in the first appeal. The sale deed Ex.B1 executed in favour of the petitioner and the pathway claimed by the respondents has been mentioned. Only in Ex.B4 marked in O.S.No.1 of 2009 it is denied that there is no pathway as claimed by the respondents. The trial Court considered Ex.B1 and evidence of PW.2 decided that there is a pathway in the suit property. Therefore, prayed for dismissal of Interlocutory application.

5. The learned Judge considering the averments in the affidavit and counter affidavit dismissed the application holding that without seeking cancellation of report of the earlier Advocate Commissioner cannot seek appointment of another Advocate Commissioner. The Advocate Commissioner cannot be appointed to verify as to whether the report of the earlier Advocate Commissioner is correct or not.

6. Against the said order passed in I.A.No.5 of 2016 in A.S.No.42 of 2014, the present Civil Revision Petition has been filed.

7. The learned counsel appearing for the petitioner submitted that the learned Judge failed to see that the report filed by the Advocate Commissioner appointed in O.S.No. 403 of 2009 is on the one side and the memo of instructions given by the petitioner has not been noted and considered by the earlier Advocate Commissioner. The learned Judge failed to see whether the Advocate Commissioner carried out the instruction given by the petitioner there would not be any necessity for appointment of another Advocate Commissioner. The learned Judge having held



that the Advocate Commissioner has not clearly answered the memo of instructions given by the petitioner, ought to have appointed fresh Advocate Commissioner to rectify the defect committed by the earlier Advocate Commissioner. The learned Judge erred in holding that if another Advocate Commissioner is appointed and inspected the property same would vary from the report and sketch already filed. The reasons given by the learned Judge in Para 6 of its order is erroneous and unsustainable.

8. I have heard the learned counsel appearing for the petitioner and perused the materials available on record.

9. From the records it is seen that the petitioner filed O.S.No.1 of 2009 for injunction restraining the respondents from interfering with his peaceful possession and enjoyment of the suit property. The respondents filed O.S.No.403 of 2009 claiming right of pathway in the suit property in O.S.No.403 of 2009. The Advocate Commissioner was appointed and he inspected the suit property and filed his report along with sketch. The respondents filed their objection and the Commissioner was also examined in the trial Court and the Advocate Commissioner's report and sketch were accepted by the trial Court. After considering all the materials on record, the trial Court dismissed the suit filed by the petitioner and decreed the suit in O.S.No.403 of 2009 filed by the respondents. The petitioner filed A.S.No.42 of 2014 along with I.A.No.5 of 2016 for appointment of fresh Advocate Commissioner to inspect the suit property and file his report on the ground that an earlier Advocate Commissioner appointed did not consider the memo of instructions given by the petitioner and he has given wrong report.

10. From the materials it is seen that the petitioner has not filed any application to scrap the report of the Advocate Commissioner. The learned Judge considered the report of the Advocate Commissioner and stated that there is no pathway as claimed by the respondents as there are only coconut trees. The Advocate Commissioner also stated that there is alternative pathway as claimed by the petitioner. Further, the learned Judge has held that if Advocate Commissioner is appointed to inspect the property and his report will be based on the present condition of the suit property.

11. In the circumstances, the learned Judge considered all the materials on record in proper perspective and has given valid and cogent reasons for dismissing the Interlocutory Application in I.A.No.5 of 2016 in A.S.No.42 of 2014 dated 24.09.2016 on the file of the Sub Court, Kuzhithurai. Further the learned Judge has exercised his power conferred on him properly and there is no



12. In the result, the Civil Revision Petition is dismissed.
No costs. Consequently, connected Miscellaneous Petition is
closed.

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Sd/-
Assistant Registrar(CO)
/True copy/

Sub Assistant Registrar

To
The Sub Judge, Kuzhithurai.

Copy To:
The Section Officer,
V.R Section,
Madurai Bench of Madras High Court,
Madurai.
+1 CC to Mr.R.NANDAKUMAR, Advocate, SR No. 81647

TRP
PSM/JM/06.02.2017/4P/4C

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