

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 06.01.2017

Coram

The Honourable MRS.JUSTICE PUSHPA SATHYANARAYANA

C.R.P.PD.No.198 of 2015

and

M.P.No.1 of 2015

K.Sivakumar

... Petitioner

vs.

1. Marappa Gounder

2. Srinivasan

3. Balasubramanian

... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decreetal order dated 25.11.2014 passed by the learned Principal District Munsif, Bhavani in I.A.No.1693 of 2014 in O.S.No.88 of 2013.

For Petitioner : Mr.K.Sivasubramanian

For Respondents : Mr.N.Manokaran

**ORDER**

The defendant is the revision petitioner. Being aggrieved by the order passed by the Court below in dismissing the application filed by

him under Order 26 Rule 9 r/w Section 151 of the Code of Civil Procedure for appointment of Advocate Commissioner for the second time, the present revision is preferred.

2. Heard both sides.

3. It is the case of the revision petitioner that earlier an Advocate Commissioner was appointed to note down the physical features of the suit properties in I.A.No.387 of 2013; however in that application he was set exparte. According to him, the said Commissioner without even issuing notice, has inspected the suit property and filed his report and plan. Hence, the present application in I.A.No.1693 of 2014 in O.S.No.88 of 2013 was filed seeking to re-issue of Commission. However, the said application was dismissed vide the impugned order on the ground that when the petitioner has chosen to file a petition to set aside the exparte order along with the written statement, has not filed any objection to the report and plan submitted by the earlier Commissioner.

4. The learned counsel for the petitioner would submit that it is essential to appoint a second Commissioner to inspect the suit property and file a fresh report and plan in the presence of both the

parties in order to render justice. However, the court below without considering the same had dismissed the application filed by him. In support of his contention he cited the judgment of this Court reported in **1999-1-MLJ-60 [Kathiresan and another vs. Shanmugha Sundaram]**. The relevant portion is extracted here under:

"14. Finally, the petitioners being defendants to the suit having been already once set exparte and on an application to set aside the said order allowing the same, they have been allowed to participate in the further proceedings of the suit is in no way connected to the matter in issue, since the point for consideration, so far as the subject matter is concerned, is whether the commission already appointed by the lower court should be re-issued for the purpose sought for by the petitioner or not. Through many judicial pronouncements, the upper forum of law have made it quite clear that it is always desirable, when a commission is sought to be appointed, for courts to be liberal in such appointments and on sufficient reasons either to bring to fore new set of facts or to give enough participation for a party, which had not been adequately represented before the Commissioner during his visit. The re-issue is to be ordered liberally and that there is no such stage of the suit within which either issue of such commission or the re-issue of the same could be restricted but prior to delivering the judgment even in a matter, which is reserved for judgment

reopening the case, such appointment of the commission or re-issue of the same could be ordered by civil courts. In spite of such telling versions available, it is amazing to note that the lower court has refused to re-issue the commission, especially, when it was sought for on ground that the petitioners were not at all issued with the notice of the appointment of the commission nor participated in any manner."

5. The learned counsel for the respondents submitted that the petitioner had filed another application in I.A.No.1693 of 2014 for appointment of a second commissioner with a mala fide intention to drag on the matter, which was correctly dismissed by the court below, warranting no interference in this revision.

6. I have considered the submissions made on either side and perused the records.

7. As rightly held by the court below, the petitioner could have very well filed his objection to the Commissioner's report and plan, which were marked as Exs.C1 and C2, if he is aggrieved over the same, while filing his written statement as well as the petition to set aside the ex parte order. He has also not stated the purpose for

which the commission has to be re-issued. As stated earlier when he has not objected to the report of the Commissioner, it is deemed that he has accepted the same. Where the Court is of the opinion on considering the objections of the parties that the Commissioner has misconceived his duties to render the report valueless, it may wipe out and issue fresh commission or re-issue the same commission. The acceptance of the commissioner report does not, however, mean parties are precluded from challenging the evidence of the Commissioner or assailing the report by cross examination of the commission or adducing any other evidences to countermand the report of the commissioner. The commissioner report is only an evidence in the case. It is in no way binding on the Court. The Court has full power to arrive at its own conclusion even at variance with the report.

8. In such circumstances, at this stage, he cannot raise any hue and cry before this Court by stating that the Commissioner has not issued notice to him before inspecting the suit property and hence re-issue the warrant of same commissioner to note down the physical features. The judgment referred to by him, is not relevant to the case on hand, as the petitioner has taken out such an application only to drag on the proceedings.

8. The petitioner, has also filed another revision in CRP PD.No.199 of 2015 against the dismissal of the application filed in I.A.No.935 of 2014 dated 30.07.2014 for the same relief, however, the said civil revision petition was withdrawn by him on 02.01.2017.

9. In view of the above, I do not find any merit in this Civil Revision Petition and accordingly, the same is dismissed. However, there shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.

06.01.2017

vj2

Index: Yes/No

Internet: yes

To

The Principal District Munsif, Bhavani

PUSHPA SATHYANARAYANA.J

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