

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.04.2017

CORAM:

THE HONOURABLE Ms.JUSTICE V.M.VELUMANI

C.R.P.(PD)No.3334 of 2015

B.Ramesh

.. Petitioner

Vs.

Vatsala

.. Respondent

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the order dated 08.08.2014 passed in I.A.No.481 of 2014 in O.S.No.546 of 2000 on the file of the District Munsif Court, Alandur.

For Petitioner : Mr.R.S.Shankar Narayanan
Senior Advocate for Mr.B.Vijay
For Respondent : Mr.T.V.Krishnakumar

ORDER

This Civil Revision Petition has been filed to set aside the order dated 08.08.2014 passed in I.A.No.481 of 2014 in O.S.No.546 of 2000, on the file of the District Munsif Court, Alandur.

2. The petitioner is the defendant and the respondent is the plaintiff in O.S.No.546 of 2000 on the file of the District Munsif Court, Alandur. The respondent/plaintiff filed the suit for mandatory injunction, for a direction to the petitioner/defendant to

demolish the unauthorised wall constructed by the petitioner/defendant in the plaintiff's plot by encroaching 10 feet on the Southern side of the plaintiff's plot, failing which plaintiff may be directed to demolish the same. The petitioner/defendant filed written statement 29.09.2004, and he is contesting the suit. After completion of respondent/plaintiff's side evidence, during the cross-examination of petitioner/defendant as DW1, the petitioner/defendant deposed that only if the property is measured with Surveyor, it can be decided whether the petitioner/defendant had encroached the respondent's/plaintiff's property or not. The respondent/plaintiff filed an application in I.A.No.745 of 2012, for appointment of an Advocate Commissioner. The said application was allowed and an Advocate Commissioner was appointed and he measured the property with the help of the Surveyor and filed a report dated 29.08.2013.

3. The petitioner/defendant, then filed an application in I.A.No.481 of 2014, under Order 26 rule 9, r/w Section 151 of CPC to direct the learned Advocate Commissioner to re-inspect the suit property along with Taluk Head Surveyor by remitting back the warrant of commission issued in I.A.No.745 of 2012. It is contented by the petitioner/defendant in the affidavit filed in support of I.A.No.481 of 2014 that pursuant to the order passed by the trial Court, an Advocate Commissioner was appointed, and he measured

the property with the help of a Surveyor, but the Surveyor did not submit his report and the Advocate Commissioner returned the warrant. Therefore, the petitioner/defendant had filed the present application in I.A.No.481 of 2014 for appointment of Advocate Commissioner to measure the property with the help of the Surveyor, on the ground that the earlier application filed in I.A.No.745 of 2012 was to measure the property only from Northern and Southern side of the property and accordingly, the learned Advocate Commissioner and Surveyor measured the property only from Southern and Northern side of the property and filed a report. But, they did not measure the property on all the four sides.

4. The respondent/plaintiff filed a counter and opposed the said application in I.A.No.481 of 2014. It is submitted that the petitioner/defendant had filed I.A.No.481 of 2014 only to drag on the proceedings. He further submitted that earlier the petitioner/defendant took several adjournments to file his written statement in the suit, and set the petitioner/defendant as ex-parte, and the trial Court passed an ex-parte decree on 09.11.2003. The petitioner/defendant filed execution proceedings in E.P.No.70 of 2004. The petitioner/defendant also filed an application to condone the delay of 265 days in setting aside the ex-parte decree passed by the trial Court. The said petition was allowed and ex-parte decree

was set aside. Thereafter, the petitioner filed the written statement and contested the suit. It is contended that the earlier Surveyor in his report has categorically stated that the plot owners on the Southern side of the petitioner's/defendant's side had encroached ten feet of the petitioner's/defendant's plot and therefore, the petitioner/defendant had encroached the said ten feet on the Southern side of the respondent's/plaintiff's land. It is also contended that the petitioner/defendant, instead of taking steps to retrieve his extent of ten feet of land from the said plot owners, now filed the application disputing the Commissioner's Report and Survey report.

5. The learned Judge, after considering the averments in the affidavit, counter affidavit, the materials placed on record, and on the arguments advanced by the counsel for the parties, dismissed the application in I.A.No.481 of 2014, holding that the report of the Advocate Commissioner is not a conclusive proof of evidence, but it is only a corroborative evidence, and the parties must let in evidence to prove their case, and the applications filed repeatedly by the petitioner/defendant is a frivolous one, and thus the Court cannot mechanically appoint an Advocate Commissioner on the said request. Against the said order of dismissal dated 08.8.2014 made in I.A.No.481 of 2014 in O.S.No.546 of 2000, the Civil Revision Petition is filed.

6. The learned Senior Counsel for the petitioner contented

that when there is a dispute with regard to the property, the appointment of Advocate Commissioner is necessary. In the present case, an Advocate Commissioner was appointed and he measured the property with the help of Surveyor. But he did not measure the property on all the four sides. Warrant was re-issued to the Advocate Commissioner. The Advocate Commissioner measured the property with the help of Surveyor. The Surveyor did not give his report. The Advocate Commissioner alone filed his report. The learned Judge failed to consider this aspect and erred in dismissing the application holding that the petitioner is filing application after application for the very same relief. In view of the fact that after re-issue of warrant, the Surveyor did not file his report, the learned Judge ought to have allowed the application. In support of his submissions, the learned counsel appearing for the petitioner relied upon the following judgments :

(i) *Debendranath Nandi Vs. Natha Bhuiyan in [AIR 1973 ORISSA 240]*

6. A Commissioner for local investigation is deputed under Order 26, Rule 9, Civil Procedure Code, when the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute or for ascertaining any other matter mentioned in the said rule. The object of local investigation under the above provision is to obtain evidence which from its peculiar nature can best be had from the spot itself. Such evidence enables the

Court to properly and correctly understand and assess the evidence on record already recorded. It clarifies or explains any point which is left doubtful on the evidence on record.

(ii) Payani Achuthan Vs. Chamballikundu Harijan Fisheries Development Co-operative Society and others [AIR 1996 KERALA 276]

5. In a suit for injunction to restrain the defendants from interfering with the possession due to alleged encroachment into the land of the plaintiff, one of the methods to find out as to whether or not there is encroachment is to have the local investigation done by a competent Commissioner.

(iii) Sivagurunathan Vs. Ramalingam and Others [(2005) 3 MLJ 525]

11. When the location of the plaintiff's property and the extent is denied, Commissioner ought to have been appointed for effectively adjudicating the dispute. Report of the advocate Commissioner and the plan drawn to scale would considerably reduce the oral evidence which aspect was not taken into consideration by the lower Court.

12. When the controversy between the parties is about the area of the land or the identification or the location of the land, local investigation by a Commissioner is necessary. It would clarify the location and extent in which the plaintiff is in possession and would explain any doubtful points on the evidence on record. When there is a dispute over the extent, measuring of the

suit property with the help of surveyor and the plan thereon would considerably reduce the oral evidence. The object of local investigation is to obtain evidence which could be based on only from the spot and the inspection. Report of the advocate Commissioner would enable the Court to properly and correctly understand and assess the evidence on record in resolving the contentious points.

(iv) Saraswathy Vs. Viswanathan [2002 (2) CTC 199]

9. In my view, the reasoning of the learned Judge cannot be accepted. Merely because there is no dispute with regard to the identity of the property, it does not mean that no case is made out for the appointment of an Advocate Commissioner. The question is whether the defendant is putting up the construction in his property as per the plan sanctioned by the Municipality. Equally, the further question would be as to whether the plaintiffs themselves have put up construction as per any sanctioned plan in their property, for which purpose a visit by the Advocate Commissioner to note down physical features and take measurements on the basis of the rival documents would be necessary and it would eliminate any detailed oral evidence.

7. On the contrary, the learned counsel appearing for the respondent/plaintiff submitted that on two occasions Advocate Commissioner has inspected the suit property and measured the same with the help of Surveyor and filed his report. The petitioner has not filed any objection to the Commissioner's report, but only to drag on the proceedings has filed the present application. The

learned Judge has considered all the materials on record and dismissed the application by giving cogent and valid reasons. The learned counsel for the respondent relied on the following judgments of this Court in support of his contention:

(i) D.Kuttiyappan & Others Vs.Meenakshiammal Polytechnic Unit of M/s. Meenakshiammal Trust, rep. by its Managing Trustee reported in [(2005) 4 MLJ 592]

13. It is well settled that a Commissioner cannot be appointed to note down the factum of possession or the enjoyment. The defendants are not entitled to seek for the appointment of Commissioner to note their possession.

14. Earlier, atleast two times, the Commissioners have been appointed. Unless the Court is dissatisfied with the earlier reports, another Commissioner cannot be issued. It is stated that the earlier reports are comprehensive covering all the aspects. When that being so, it would not be appropriate to issue another Commission. There cannot be indiscriminate appointment of more than one Commissioner merely for the sake of asking and that the petitioner would bear remuneration. If the Commissioner is so appointed repeatedly, it would lead to the unhealthy practice of making the application seeking for appointment of Commission till the party gets a favourable

report. Such a course cannot be allowed.

(ii) Vemba Gounder Vs.Pooncholai Gounder reported in [CDJ 1996 MHC 439]

31. It may also be noted that if the Court is satisfied that the Report is not satisfactory, it need not insist on the petitioner to file an application for the issue of a second Commission. It is the duty of the Court to appoint a second Commissioner or remit the matter to the same Commissioner, for the application is already there. Only a direction is to be given to the Commissioner, how to implement the warrant of appointment and how the work has to be done.

32. Learned counsel for the petitioner submitted that the Court below has observed that the remedy of the petitioner is to seek remittance of the Commission Warrant to the same Commissioner. Therefore, according to the learned counsel, even if a second Commissioner is not appointed, at least the Court below should have remitted the Warrant to the same Commissioner, for rectifying the defects mentioned in the objections. It is true that such objections are there in the order. But, according to me, those observations also not warranted so long as there is no finding by the Court below that the Report already filed by the Commissioner is defective or that it cannot be accepted.

Learned counsel for the petitioner cannot take refuge merely on those observations.

and submitted that an Advocate Commissioner may not be appointed to note down the factum of possession of the suit property and therefore, the petitioner/defendant is not entitled to seek appointment of Advocate Commissioner to note down the alleged possession.

8. Heard the learned counsel appearing for the petitioner and the learned counsel for the respondent and perused the materials placed on record.

9. From the materials available on record, it is seen that earlier, an Advocate Commissioner was appointed on the application filed by the respondent/plaintiff vide I.A.No.745 of 2012, and he measured the suit property with the help of a Surveyor only on Northern and Southern side of the property and filed his report. Thereafter, the petitioner/defendant filed an application to measure the suit property from all sides with the help of a Surveyor and the same was allowed and the Advocate Commissioner measured the property with the help of the Surveyor. It appears that the Surveyor did not submit his report and the Advocate Commissioner returned the warrant. Again, the petitioner/defendant filed an application in

I.A.No.481 of 2014, for appointment of Advocate Commissioner to measure the property with the help of a Head Surveyor. A perusal of the records would show that the petitioner has not filed any objection to the report of the earlier Advocate Commissioner and now filing application for appointment of Advocate Commissioner would only reveal the intention of the petitioner/defendant to drag on the proceedings. The suit is of the year 2000 and it is at the stage of cross-examination of DW1, and the Advocate Commissioner was appointed to measure the suit property and report was filed. Now, the petitioner/defendant has filed an application in I.A.No.481 of 2014 to direct the Advocate Commissioner to re-inspect the suit property along with Taluk Head Surveyor. The trial Court while dismissing the said application, has rightly held that the report of the Advocate Commissioner is only a corroborative evidence and not a conclusive proof. The learned Judge has also stated that the parties must prove and substantiate their case and hence, the petitioner/defendant cannot be permitted to use the Court to collect the evidence for his case. The finding of the learned Judge is that repeated applications seeking same relief is vexatious. In the said circumstances, the judgments relied on by the learned counsel for the petitioner/defendant are not applicable to the facts of the case. There is no infirmity or illegality in the order dated 08.08.2014 passed by the learned Additional District Munsif Judge, Alandur,

warranting interference by this Court.

10. Accordingly, the Civil Revision Petition is dismissed. No costs. Since the suit is of the year 2000, the learned Additional District Munsif Judge, Alandur, is directed to dispose of the suit, on merits and in accordance with law, as expeditiously as possible, in any event, not later than August 31, 2017.

20.04.2017

Speaking order / Non-speaking order
Index : Yes

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To:

The Additional District Munsif Court,
Alandur.

V.M.VELUMANI, J.

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