

IN THE HIGH Court OF JUDICATURE AT MADRAS

Dated: 31.07.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

**CRP(PD)No.1750 of 2013
and
M.P.No.1 of 2013**

A.Selvaraj

.. Petitioner

Vs.

S.R.Lingaraj

.. Respondent

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the Fair and Decretal Order passed in I.A.No.416 of 2011 filed in I.A.No.2055 of 2010 in O.S.No.1824 of 2010, on 20.09.2012, on the file of I Additional District Munsif Court, Coimbatore, dismissing the interlocutory application filed by this petitioner under Section 151 of C.P.C. to reject the Commissioner's Report filed in I.A.No.2055 of 2010 in O.S.No.1824 of 2010.

For Petitioner : Mr.P.Udhayasankar

For Respondent : Mr.G.Karthikeyan

ORDER

The petitioner has filed this Civil Revision Petition to set aside fair and decreetal order passed by the learned I Additional District Munsif Court, Coimbatore on 20.09.2012 in I.A.No.416 of 2011 filed in I.A.No.2055 of 2010 in O.S.No.1824 of 2010 by allowing this Civil Revision Petition and consequently reject the commissioner's report filed in I.A.No.2055 of 2010 in O.S.No.1824 of 2010.

2.The case of the revision petitioner is that the respondent herein has filed a suit for permanent injunction in O.S.No.1824 of 2010 against the revision petitioner. In the said suit the respondent herein filed an application under Order 26 Rule 9 of CPC to appoint an advocate commissioner to make local investigation and to note down the physical features of the suit property. The said interlocutory application was ordered and an Advocate Commissioner was appointed by the trial Court and a warrant of commission was issued to note down the physical features of respondent's property and measure the respondent's property with the help of a surveyor and to file a report

before this Court. However, in spite of the memo of instruction issued to the learned Commissioner by this revision petitioner, instructing to adhere with the directions given in the warrant of commission, the advocate commissioner by violating the direction issued in the warrant has measured the revision petitioner's property. The said act of measuring the revision petitioner's property is unwarranted. Further the measurements reflected in the Advocate Commissioner's report are incorrect. Therefore the revision petitioner has filed an interlocutory application in I.A.No.416 of 2011 in I.A.No.2055 of 2010 by invoking the inherent power of the trial Court under section 151 CPC with a prayer to reject the advocate commissioner's report as inadmissible.

3.However, without proper appreciation of the fact that the Advocate commissioner as well as the surveyor have exceeded the scope of the commission, thereby measured the revision petitioner's property, the learned trial judge has erroneously dismissed the said application. Challenging the said order, this Civil Revision Petition has been filed.

4.I heard Mr.P.Udhayasankar, learned counsel appearing for the petitioner and Mr.G.Karthikeyan, learned counsel appearing for the

respondent.

5.The learned counsel for the revision petitioner would submit that the advocate commissioner has exceeded his jurisdiction in measuring the revision petitioner's property which is not a subject property of the suit. In fact the advocate commissioner has invaded into the petitioner's property in the grad of executing the warrant, which the warrant does not empower him. Further the measurements mentioned by the learned advocate commissioner are erroneous and unacceptable. One another prime contention of the revision petitioner is that in a suit for injunction simpliciter based on possession, the appointment of advocate commissioner itself is an error and the same is unwarranted.

6.Per contra, the learned counsel for the respondent would submit that earlier the suit property and the adjacent properties as a whole stood owned by the respondent's family. During their family partition the property was partitioned into three portions as A, B and C schedule properties and they were allotted to the mother, father and the respondent as their respective shares. The revision petitioner is the purchaser of one such portion comprised in 'C' schedule belonging

to his mother Saraswathiammal. Only if the entire property is measured which is of one unit the real controversy can be elucidated. Only on proper appraisal of the very fact the learned trial judge has appointed an advocate commissioner to note down the physical features of the suit property. Accordingly the advocate commissioner conducted a field inspection and has submitted his report before the trial Court. Hence the petition filed by the revision petitioner to reject the advocate commissioner's report is not justifiable.

7. It is seen from the typed set of papers and the impugned order that after appointment of advocate commissioner, the learned advocate commissioner has caused notice to either parties i.e both to the revision petitioner and the respondent. Accordingly he visited the suit property on 04.11.2010 at 1.30 p.m. and at that time both revision petitioner and the respondent, besides their counsels were also present therein. Only thereafter the survey was conducted by the Advocate Commissioner and the surveyor as per the revenue records and Court records and the corresponding measurements were made. It is noticeable that a survey plan and a Commissioner plan were being submitted along with the Commissioner report. It is noteworthy that neither the revision petitioner nor their counsels has raised their

objection at the time of survey. Further this Court concurs with the opinion of the trial Court that only if the entire property is measured which is of one unit, the real controversy can be elucidated.

8.It is needless to say for this Court that there cannot be any Straight Jacket formula as claimed by the revision petitioner that in a suit for bare Injunction an advocate commissioner cannot be appointed. It is the discretionary power of the Court either to appoint or not to appoint an advocate commissioner based on the facts involved in the case, so as to arrive at a just and right decision. This view was already considered by me in a case of **B.Amutha v. Anandhi Sankara Narayanan** reported in **2016 (3) MWN (Civil) 614** in para-28 has stated as follows:

"28.Therefore, as per the judgment referred by the various Courts, I am of the consider view that absolutely there was no prejudice would be caused in the Respondent/Defendant by appointing an Advocate Commissioner for the purpose of inspecting the property and submit his Report on physical features, measurements, etc. In fact, though the Commissioner cannot decide the dispute, his Inspection and Report would helpful the Court in deciding the dispute. Hence, a local investigation is the best way to find out the position and the party, and coveting the evidence to place before the

Court through local investigation by the Commissioner cannot be shut out of their right. Therefore, the appointment of Advocate Commissioner is maintainable in this case, even in the Suit filed by the Petitioner/Plaintiff for Permanent Injunction and accordingly there is necessity for the interference by this Court and accordingly, I am inclined to set aside the order passed by the learned Principal District Munsif Court, Poonamallee, in I.A.No.1471 of 2012 in O.S.No.121 of 2012 dated 04.07.2013 and a direction is issued to the Trial Court for appointing an Advocate Commissioner."

9.In view of the foregoing reasons, this Court finds no illegality or infirmity in the Order of the trial Court. In the result this CRP is dismissed as devoid of merits. No cost. Consequently, connected miscellaneous petition is closed.

31.07.2017

Internet:Yes

Index:Yes

vs

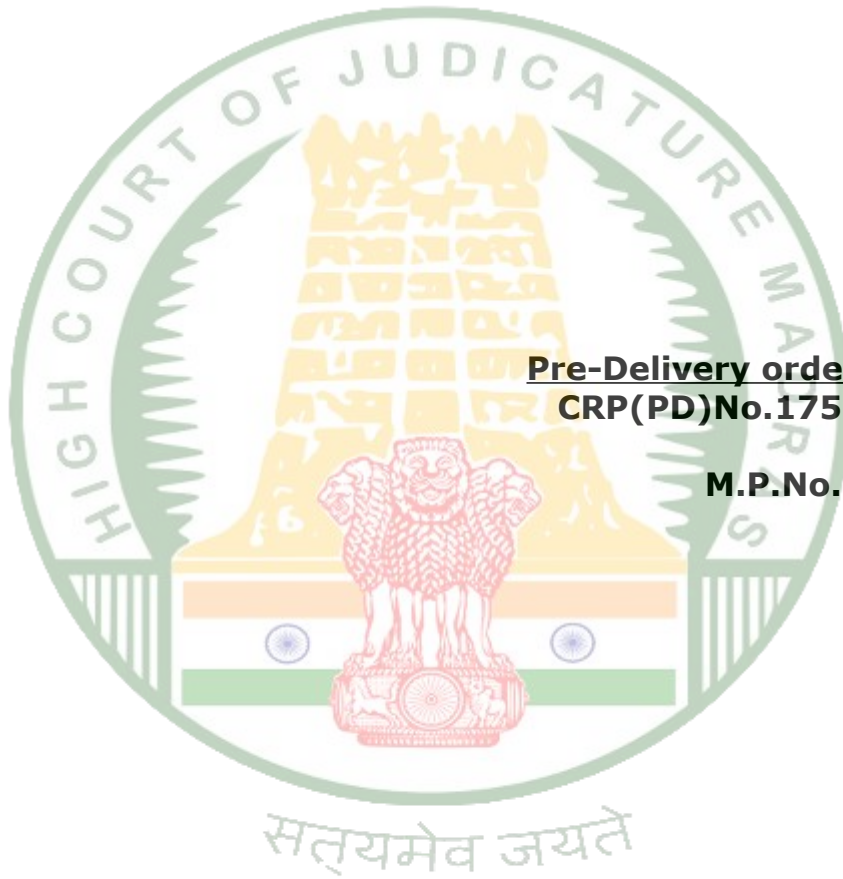
To

The I Additional District Munsif Court,
Coimbatore.

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M.V.MURALIDARAN, J.

VS



**Pre-Delivery order made in
CRP(PD)No.1750 of 2013
and
M.P.No.1 of 2013**

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