

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.02.2017

CORAM

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

C.R.P.(NPD) No.602 2012

and

M.P.No.1 of 2012

1.Ekambaram
2.Rajagopalan
3.Srinivasan
4.Sadasivam
5.Balasubramanian

.. Petitioners

vs

1.Nagapattinam Municipality,
rep. by its Commissioner,
Nagapattinam.
2.Dhanalakshmi
3.Illakkiyam
4.Ilamathi
5.Muthulakshmi
6.Anbudurai

.. Respondents

Revision under Article 227 of the Constitution of India against the order dated 27.6.2011 in I.A.No.31 of 2011 in A.S.No.68 of 2010 on the file of the Subordinate Judge, Nagapattinam.

For Petitioners : Mr.S.Sounthar

For Respondents : Mr.A.Muthukumar
(for R2 to R4 & R6)

No Appearance (for R1)

ORDER

This Civil Revision Petition is directed against the order of the learned Subordinate Judge, Nagapattinam dated 27.6.2011 passed in I.A.No.31 of 2011 in A.S.No.68 of 2010, dismissing the petition filed by the petitioners seeking to appoint an advocate commissioner to measure the suit property with the field map of old survey numbers with the assistance of Inspector of Surveyor and file a report.

2. The petitioners are appellants/plaintiffs and the respondents are respondents/defendants in the appeal. The appellants have filed the suit for permanent injunction restraining the defendants, their men and agents from encroaching and putting up construction in the red marked portion of the suit property. After trial, the suit was dismissed. Aggrieved by the same, the plaintiffs have filed A.S.No.68 of 2010.

3 Pending appeal, the petitioners have filed I.A.No.31 of 2011 seeking to appoint an advocate commissioner to survey the suit property alleging that the first respondent was enjoying S.No.311/2A2 only as a house site, but getting greedy, he attempted to encroach the

red line portion in S.No.316/1, which belong to the petitioners and which is north of the first respondent's property. In order to prevent their encroachment, the petitioners have filed the suit for permanent injunction. While dismissing the suit, the trial Court observed that when the advocate commissioner inspected the suit property, the petitioners were not present. Further, in para 18, the trial Court held that if S.No.316 and S.No.311/2A2 are measured and the exact extent found, the Court would be in a position to be arrived at a correct conclusion, but the petitioners have failed to do so. Therefore, it is necessary to appoint an advocate commissioner along with Inspector of Survey to compare the field map of old S.F.No.159/15 L and 159/15 K along with the field map of S.F.No.316 and file the report. If the same was done, the petitioners case could be established and no prejudice would be caused if advocate commissioner is appointed.

4. Resisting the petition, the respondents filed counter stating that before the trial Court the petitioners have sought appointment of advocate commissioner along with surveyor and the advocate commissioner inspected the suit property and filed the report. Considering the oral and documentary evidence and also the report of the advocate commissioner, the trial Court dismissed the suit. The

petitioners without having merits have preferred appeal to drag on the proceedings and to create confusion in the case and in the appeal, they are once again seeking appointment of advocate commissioner without taking steps to scrap the earlier commissioner's report. In order to gather evidence, the petitioners are seeking appointment of advocate commissioner and the same cannot be entertained and prayed for dismissal of the same.

5. Upon consideration of rival submissions, the first appellate Court dismissed the petition. Aggrieved by the same, the petitioners have preferred this Civil Revision Petition.

6. I heard Mr.S.Sounthar, learned counsel for the petitioner and Mr.A.Muthukumar, learned counsel for the respondents 2 to 4 and 6 and perused the records. No representation on behalf of the 1st respondent.

7. Assailing the impugned order of the first appellate Court, the learned counsel for the petitioners submitted that the first appellate Court failed to see that appointment of Advocate Commissioner with Inspector of Survey to inspect the suit property

and to measure the same with the help of field map of old survey number and the field map of present survey number is absolutely necessary to decide the controversy involved in the appeal.

8. The learned counsel further submitted that the first appellate Court failed to see that the suit was dismissed mainly on the ground that the petitioners had not taken any steps to measure the suit property with the help of the Surveyor on the basis of the field map of old and new survey numbers and thus prayed for setting aside the order of the first appellant Court.

9. Per contra, the learned counsel for the contesting respondents submitted that the petitioners are trying to gather new evidence by way of appointment of advocate commissioner and without scrapping earlier report of the advocate commissioner, the petitioners cannot seek appointment of a new commissioner that too at the appellate stage and that the first appellate Court was right in dismissing the petition.

10. I have considered the submissions made by the learned counsel appearing on either side and also perused the materials

available on record.

11. The main grievance of the petitioners seeking appointment of advocate commissioner at the appellate stage is that when the advocate commissioner inspected the suit property during trial, the petitioners were not present and holding so, the trial Court dismissed the suit. The trial Court also held that the measurement of the suit property was not properly given and the petitioners have not taken steps to seek re-appointment of the advocate commissioner. Hence, in order to find out the measurement of the suit property, it is necessary to appoint an advocate commissioner along with Inspector of Survey to inspect the suit property and measure it with the aid of the field map of old survey numbers and field map of the present survey number.

12. The suit is for permanent injunction restraining the defendants, their men and agents from encroaching and putting up construction in the red marked portion of the suit property. By the judgment dated 20.7.2010, the trial Court dismissing the suit on the ground that the petitioners have failed to prove that the defendants were trying to encroach upon the red marked portion of the suit

property. While dismissing the suit, the trial Court held that when the petitioners pleaded that the measurement of the suit property was not given properly, they have not asked for re-issue of the warrant to the advocate commissioner to once again inspect the suit property and file the report.

13. By relying upon the decision of this Court in *Thangaraj v. Pappathi*, reported in 2014 (2) CTC 68, the learned counsel for the respondents 2 to 4 and 6 submitted that plaintiff cannot indirectly convert suit for bare injunction into one for identifying and fixing boundary of the suit property and therefore, the trial Court was right in dismissing the petition.

14. In *Thangaraj v. Pappathi*, supra, this Court held as under:

"It at all the Revision Petitioner himself is not confident as to where the boundary line between the Suit property and the adjacent Poramboke land lies, he ought to have filed the Suit for demarcation of the boundary and not for bare injunction. When the failure to give the boundaries of the Suit property was made as a ground for holding that the Revisional Petitioner could not have been in possession of the suit property, such a finding could not be sought to be nullified by seeking appointment of a Commissioner to fix the

boundary after measuring the Suit property. If at all there is any defect in the Plaint, the Revisioner Petitioner could have very well sought the permission of the Court to withdraw the suit and file a fresh Suit projecting the absence of proper description of the Suit property as formal and technical defect. Without doing it, the Revision Petitioner has chosen to indirectly convert the bare injunction Suit into one for identifying and fixing the boundary of the Suit property. The learned Lower Appellate Judge has rightly held that the Application could not be maintained in view of the fact that already a Commissioner appointed by the Trial Court had visited the Suit property and submitted a Report and Plan, which were marked as Exs.C1 and C2."

15. It appears that S.No.316 belongs to the petitioners and S.No.311/2A2 belongs to the respondents. On a perusal of the judgment of the trial Court, it had held that if measurements was done in respect of Survey No.316 belongs to the petitioners and S.No.311/2A2 belongs to the respondents, they could able to arrive at a correct decision in the suit. But the petitioners have not taken steps. In para 9 of the judgment, the trial Court observed that the measurement of the suit property was not properly given by the petitioners and moreover, they have not sought re-appointment of the

commissioner and surveyor.

16. The respondents contended that at the appellate stage, the petitioners are not entitled to seek appointment of advocate commissioner and moreover, without scrapping the earlier report of the advocate commissioner, the petitioners cannot seek fresh appointment of advocate commissioner.

17. In K.Viswanathan v.D.Shanmugam Mudaliar and another, reported in 1986 II MLJ 319, the learned Single Judge of this Court held as under:

"2. The mere fact that the Commissioner has failed to note certain features which according to the defendant were important does not mean that the whole report should be scrapped. Adequate provision to safeguard the interest of the parties concerned is made in sub-rule (3) of Order 26, rule 10, C.P.C. which provides that 'where the court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.' In the previous order, specific attention of the trial Court was drawn to this provision. Instead of directing further inquiry by the same Commissioner or even by a Commissioner specially appointed, the District Munsif has directed that the report should be

scrapped which is wholly impermissible by the provisions of Order 26, rule 10, C.P.C. Under sub-rule (3), a further enquiry to be made. This provision itself implies that whatever report has been made must continue to remain part of the record, but if the report is lacking in particulars or is unsatisfactory, a further enquiry can be ordered. The order of the District Munsif scrapping the report is therefore wholly contrary to law."

18. It is seen that when the advocate commissioner inspected the suit property, the petitioners were not present. There was no hard and fast rule that appointment of advocate commissioner cannot be made at the first appellate stage. The trial Court while dismissing the suit held that measurements of the suit property have not been correctly given by the petitioners. Observing so, the trial Court held that the petitioners have failed to seek appointment of advocate commissioner to give the correct measurement to the trial Court.

19. Having regard to the facts and circumstances of the case and the findings of the trial Court in the suit that the petitioners have failed to seek re-appointment of the advocate commissioner and also in order to know the correct measurements of the suit property and its physical features, it would be appropriate to direct the first appellate

Court to appoint an advocate commissioner. This Court finds that no prejudice would be caused to the respondents, if the advocate commissioner inspected the suit property and filed his report. In the interest of justice and in order to arrive at a correct conclusion in the appeal, this Court is ordering appointment of advocate commissioner at the first appellate stage though the suit is one for permanent injunction.

20. For the foregoing discussion, this Court is of the view that the order impugned in this Civil Revision Petition is liable to be set aside.

21. In the result,

- (a) The Civil Revision Petition is allowed by setting aside the order passed in I.A.No.31 of 2011 in A.S.No.68 of 2010, dated 27.6.2011, on the file of the learned Subordinate Judge, Nagapattinam;
- (b) The Subordinate Judge, Nagapattinam is directed to appoint the advocate commissioner along with Inspector of Survey within a period of 15 days from the date of receipt of a copy of this judgment;

(c) On appointing the Advocate Commissioner, the learned Subordinate Judge is directed the Advocate Commissioner along with Inspector of Survey to inspect the suit property and measure it with the aid of field map of old survey numbers and field map of present survey number and file his report within a period of one month from the date of appointment of the advocate commissioner and thereafter, on filing the report of the advocate-commissioner, the first appellate Court is directed to dispose of the appeal within a period of two months.

(d) No costs. Consequently, connected miscellaneous petition is closed.

15.02.2017

vs

Note: Issue order copy on 08.01.2019

Index : Yes

To

The Subordinate Judge,
Nagapattinam.

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M.V.MURALIDARAN, J.

vs



Pre-delivery order made in
C.R.P.(NPD) No.602 of 2012
and
M.P.No.1 of 2012

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