

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

DATED : 05.06.2017

CORAM :

WEB COPY

THE HONOURABLE DR.JUSTICE **G.JAYACHANDRAN****C.R.P. (PD) (MD) No.2588 of 2016**

T.S.Surulivel ... Petitioner/Respondent/Plaintiff

vs.

1.Rajendran,
2.Chellammal ... Respondents/Petitioners/Defendants

Prayer: The Civil Revision Petition is filed under Article 227 of the Constitution of India, against the Order and Decreetal Order made in I.A.No.243 of 2014 in O.S.No.19 of 2014, on the file of the learned District Munsif Cum Judicial Magistrate, Bodinayakanur, Theni District dated 01.11.2016.

For Petitioner : Mr.S.T.Sasidharan Tamilkani

For Respondents : Mr.T.Pon Ramkumar

O R D E R

This Civil Revision Petition is directed against the order passed by the Trial Court in I.A.No.243 of 2014 filed under Order 26 Rule 9 of CPC.

2.The grievance of the revision petitioner is that the Trial Court has allowed the application for appointment of Advocate Commissioner without considering the fact that the Court has already appointed Advocate Commissioner in the earlier application and the report has also been submitted to the Court. Therefore, without scrapping the earlier advocate commissioner report re-issuance of Commissioner warrant appointing a new advocate commissioner is not permissible in law. The earlier commissioner report has not mentioned any existing pathway in the suit property. While so, to fish out evidence, the application to appoint fresh advocate commissioner has been filed and the Trial Court, without considering the matter on merit, has entertained the application, which may lead to fill up lacuna. It is also contented by the revision petitioner that the appointment of advocate commissioner is sought for to note down the factum of possession, which is contrary to the settled principle of law and

judgments of the Court.

3. The learned counsel appearing for the respondents submits that the commissioner's report submitted in the earlier interlocutory application is silent about the existence of the pathway, which is contrary to the physical feature found in the disputed site joined in photograph containing in the CD. Therefore there is no error in the order passed by the Trial Court appointing advocate commissioner to note down physical feature and to find out whether there is pathway in the suit property.

4. In support of the petitioner, the learned counsel for the revision petitioner referred to Judgment of the Hon'ble High Court reported in **2013(2) MWN (Civil) 619 in the matter of V. Ganesan Vs. Kamal Jain and another**. In the said Judgment, the learned Judge has held as under:

"8. Of course, it is true that in the normal course, without scraping the earlier Report for defects, it is not possible to appoint a Commissioner for the same purpose. But here, the earlier Commissioner's Report need not be scrapped because by re-issuing the warrant, the Commissioner is directed only to submit an Additional Report. Thus, both Reports will be on the file of the Court. Above all, a perusal of the impugned order of the Lower Court would go to show that the Lower Court has dismissed the Interlocutory Application on the ground that the present Application was filed when the Interlocutory Application for Temporary Injunction was under consideration and also because the earlier Commissioner Report was available.

9. In my considered opinion, this reasoning cannot be accepted at all for the reason that the Commissioner's Report is mainly for the purpose of resolving the issues in the Suit. May be not that the Commissioner's Report can be used at the interlocutory stage. But, simply because, the Interlocutory Application for injunction is in progress, the request for re-issuance of commissioner's warrant should not have been rejected. Thus, the reason stated by the learned Additional District Munsif, Alandur, for the dismissal of the Interlocutory Application is not at all acceptable. For the foregoing reasons, I am inclined to interfere with the order of the Lower Court."

5. Though the learned counsel for the revision petitioner contends that the application is filed to make a rowing enquiry and to fill up the lacuna, the Trial Court has specifically, ordered the advocate commissioner to inspect and



note down physical feature alone and there is no direction to the advocate commissioner to find out, who is in possession of the property as contended by the revision petitioner. Therefore, this Court find no error in the order passed by the Lower Court appointing an advocate commissioner to note down the physical feature more particularly to report whether there is any pathway in the suit property or not except to the fact that instead of appointing the same Advocate Commissioner, the Trial Court has appointed a new Advocate Commissioner. Therefore, it is suffice to modify the order of the Trial Court to the effect that warrant may be issued to the former advocate commissioner to file an Additional Report after inspecting the suit property and note down the physical feature of the suit property in respect of existence or non-existence of the alleged pathway in the suit property.

6. Accordingly, this Civil Revision Petition is disposed of. No costs.

Sd/-
Assistant Registrar (CS-III)

/True Copy/

Sub Assistant Registrar

To

The Principal District Munsif,
Madurai.

+1cc to Mr. S.T.SASIDHARAN TAMILKANI Advocate in SR. No.58446

+1cc to Mr. T.PON RAMKUMAR Advocate in SR. No.58438

MYR/IS

JS/KP/SAR.3/14.6.2017/3P-4C

C.R.P. (PD) (MD) No.2588 of 2016
05.06.2017