

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.02.2018

CORAM :

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)No.816 of 2015
and M.P.No.1 of 2015

1.A.Moorthy

2.Venkatesan

...

Petitioners

Vs.

1.Shanmugam

2.D.Pachaiappan

...

Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decretal order respectively dated 07.03.2014 and 03.03.2014 made in I.A.No.168 of 2012 in O.S.No.2 of 2010 on the file of the Principal District Munsif Court at Vandavasi.

For Petitioners : Mr.S.Rajendiran

For Respondents : Mr.R.Krishnaswamy

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ORDER

This Civil Revision Petition is filed against the fair and decreetal orders dated 07.03.2014 and 03.03.2014 made in I.A.No.168 of 2012 in O.S.No.2 of 2010 on the file of the Principal District Munsif Court at Vandavasi.

2. The petitioners are defendants and the respondents are plaintiffs in the suit in O.S.No.2 of 2010 on the file of Principal District Munsif Court at Vandavasi. The respondents filed the above suit for permanent injunction restraining the petitioners from interfering with their possession, not to put up any further construction and for mandatory injunction to remove the construction put up by the petitioners in the 'A', 'B', 'C' and 'D' plan of the schedule property. The petitioners filed written statement and are contesting the suit. Alongwith the suit, the respondents filed I.A.No.4 of 2010 for appointment of Advocate Commissioner. The said application was allowed by appointing an Advocate Commissioner to inspect and measure the suit property.

2(b) The Advocate Commissioner inspected and measured the suit property on 30.01.2010 with the help of surveyor and filed his

report on 01.02.2011. The petitioners filed the present application under Order XXVI Rule 9 CPC for re-issue of warrant of commissioner to the same Advocate Commissioner to measure the property with the help of Taluk Surveyor. According to the petitioners, the Advocate Commissioner did not send any notice to the petitioners. The notice sent to their Advocate by the Advocate Commissioner was received by their Advocate only on 02.02.2010, i.e. after the date of inspection. The petitioners were not present and in their absence, the Advocate Commissioner inspected the property and filed the report, without measuring the property properly. The Advocate Commissioner has not given correct particulars with regard to the suit property. In the said circumstances, it is necessary to re-issue the warrant of commission to the same Advocate Commissioner to re-visit the suit property and measure the same alongwith the Taluk Surveyor.

2(c) The respondents filed counter and denied all the averments and contended that the petitioners were served notice of inspection by the Advocate Commissioner and petitioners were present. The Advocate Commissioner, with the help of surveyor measured the property only in the presence of the petitioners and

the Advocate Commissioner filed his report. There is no lacuna or ambiguity in the said report of the Advocate Commissioner and prayed for dismissal of the application.

3. The learned Judge, considering the fact that notice of inspection was sent by the Advocate Commissioner by courier on 25.01.2010 and considering the decision reported in **2013 (5) MLJ 310 [Kasthurirangan v. Commisisoner, Arcot Municipality]** dismissed the application.

4. Against the said fair and decreetal order dated 07.03.2014 and 03.03.2014 made in I.A.No.168 of 2012 in O.S.No.2 of 2010, the present Civil Revision Petition is filed by the petitioners.

5. Heard the learned counsel appearing for the petitioners as well as respondents and perused the materials available on record.

6. The grievance of the petitioners is that no notice was served on the petitioners by the Advocate Commissioner regarding inspection of the property. The notice issued to their counsel by the Advocate Commissioner for inspection of the suit property was

received by their counsel only on 02.02.2010, after the date of inspection, i.e. on 30.01.2010. According to the learned counsel for the petitioners, the Advocate Commissioner did not properly measure the suit property and has not given correct details with regard to the suit property. From the impugned order, it is seen that the learned Judge has held that notice was sent to the learned counsel for the petitioners by courier on 25.01.2010 but there is no record to show that notice was served on the learned counsel for the petitioners before the date of inspection.

7. Considering the above facts as well as the nature of relief sought for by the respondents, I hold that an opportunity must be given to the petitioners to be present when the Advocate Commissioner inspected the property. For the above reason, the impugned order of the learned Judge is liable to be set aside and it is hereby set aside. The learned Judge is directed to issue warrant of commission to the same Advocate Commissioner with instruction to measure the suit property with the help of surveyor, after issuing notice to both the petitioners as well as respondents and their respective counsel. If the same Advocate Commissioner is not available, the learned Judge is at liberty to appoint any other

competent Advocate Commissioner and issue warrant of commission with above instructions.

8. In the result, this Civil Revision Petition is allowed setting aside the fair and decreetal order dated 07.03.2014 and 03.03.2014 made in I.A.No.168 of 2012 in O.S.No.2 of 2010. No costs. Consequently, connected Miscellaneous Petition is closed.

22.02.2018

Index: Yes/No
Internet: Yes/No
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To

The Principal District Munsif,
Vandavasi.



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V.M.VELUMANI, J.

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Order in
C.R.P.(PD)No.816 of 2015

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