



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 20.06.2018

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THE HONOURABLE MR. JUSTICE M.V.MURALIDARAN

C.R.P. (PD) (MD) No.1040 of 2015
and M.P. (MD) No.1 of 2015

Marichamy ... Petitioner/Petitioner/Plaintiff

-vs-

Dhatchinamoorthy ... Respondent/Respondent/Defendant

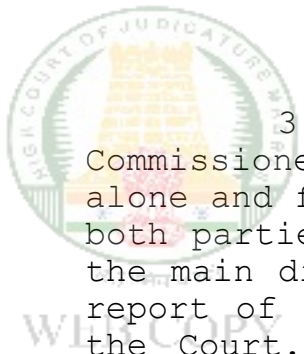
Prayer: Civil Revision Petition filed under Article 227 of Constitution of India praying to set aside the Fair and Decreetal order dated 17.12.2014 passed in I.A.No.552 of 2014 in O.S.No.183 of 2011 on the file of the District Munsif Court, Theni and allow the present Civil Revision petition.

For Petitioner : Mr.R.Subramanian
For Respondent : No Appearance

O R D E R

The revision petitioner is the plaintiff in the suit in O.S.No.183 of 2011 on the file of the District Munsif Court, Theni and the said suit was filed seeking the relief of injunction among other reliefs. During the pendency of the suit, an Advocate Commissioner was appointed and after inspection, a report was also filed. Subsequently, the petitioner/plaintiff filed an application in I.A.No.552 of 2014 for re-issuance of Commissioner Warrant, directing measurement of the petition schedule property and to submit a report and the said application was dismissed on 17.12.2014 on the ground that the application was filed only to drag on the proceedings. Aggrieved over the same, the present Civil Revision petition has been filed.

2. It is the case of the revision petitioner / plaintiff that the Commissioner had failed to furnish the exact measurement of the suit schedule property and pursuant to his ill-health, he was not present at the time of inspection by the Advocate Commissioner and his Counsel also did not inform the exact date of inspection by the Advocate Commissioner. Since he could not be able to appear before the Advocate Commissioner on account of his health condition, the Advocate Commissioner had mentioned in the report that the plaintiff did not wantonly cooperate for the inspection.



3. The revision petitioner states that the Advocate Commissioner proceeded to inspect the property of the respondent alone and filed a report to that effect and unless the properties of both parties are measured, the dispute could not be resolved. Since the main dispute itself is in connection with measurement, a proper report of the Advocate Commissioner alone would reduce the work of the Court. Contending that the Commissioner has not measured the property of both parties and that in such an event, if the suit is proceeded on the basis of the said report, much prejudice would be caused to him, the order of the Trial Court rejecting his application for re-issuance of warrant to the Advocate Commissioner for revisiting the property, is liable to be set aside.

4. The learned counsel for the petitioner relied upon the following decisions of this Court to substantiate his argument that re-issuance of warrant to the very same Advocate Commissioner for the purpose of filing better report is permissible under law:

i) **V.Ganesan vs. Kamal Jain** reported in **2013 (2) MWN (Civil) 619;**

"7. A perusal of the pleading of both the parties will make it clear that there is an issue as to whether the pathway really forms part of the suit property. Of course the Commissioner in his earlier report has submitted that there is a pathway. That is very seriously objected to by the petitioner/plaintiff. But, the Commissioner did not have the benefit of measuring the suit property and give a specific finding as to whether the so called pathway forms part of the suit property or not. Apart from that, at the time the Commissioner visited the property, the petitioner was not present to identify the suit property. In such circumstances, in my considered opinion, it will be appropriate to request the very same Commissioner to measure the suit property with the help of surveyor and to file a Supplemental report.

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 had 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".

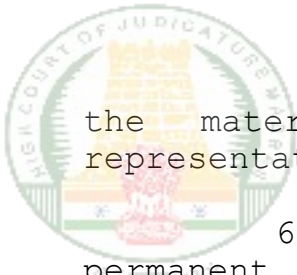
ii) **A.Palaniappan vs. K.Nallasamy**, reported in **2008 (3) CTC**

602;

"7. It is true that at an earlier point of time, an Advocate Commissioner was appointed by the Trial Court at the instance of the respondents. In pursuance of the warrant issued to the Advocate Commissioner he had inspected the property and submitted the report. After a period of about two years the petitioner had come with the present application to remit the report to the Advocate Commissioner and to file a fresh report in the light of the objections filed by the petitioner to the earlier commissioner's report. The learned Trial Judge observed that the details which are sought to be collected by way of remitting the report the Advocate Commissioner could be elicited by examining the Advocate Commissioner and such being the case, the Application to remit the warrant tot he Advocate Commissioner with a prayer to file afresh report is clearly unwarranted in the facts and circumstances of the case. However , the fact remains that the petitioner has preferred objection to the report of the Advocate Commissioner and it was his case before the trial court that the plan drawn by the Advocate Commissioner was not in accordance with the actual measurement of the property and in fact the inspection was conducted in the absence of the petitioner. The prayer in the application is only to remit the warrant to the very same Advocate Commissioner for the purpose of filing a fresh report after measuring the property with the help of a surveyor, but of course, taking into consideration the objection filed by the present petitioner. All the procedures are man made and the ultimate goal goal is to do complete justice. The petitioner being the plaintiff in the suit, the burden is on him to prove the plaint averments and for the purpose of projecting his case , the petitioner has sought the report of an Advocate Commissioner by remitting the warrant to the very same Commissioner and as such I do not find any reason to deny the relief to the petitioner. Therefore, I am inclined to allow this Civil Revision Petition by setting aside the order dated 18.06.2007 in IA No.394 of 2007.

8. The Lower Court is directed to remit the warrant to the very same Advocate Commissioner to inspect the property once again by fixing an outer limit of three months from the date of remitting the warrant to submit the report".

5. Heard the learned counsel for the petitioner and perused



the material documents available on record. There is no representation on behalf of the respondent.

6. Admittedly, the plaintiff had filed the suit for permanent injunction in order to bring out the cat out of the bag, an Advocate Commissioner was appointed by the Trial Court, who, in turn filed his report, which, according to the plaintiff, was not a full-fledged one and was filed without inspecting his property. In such circumstances, I am of the view that one more opportunity may be given to the plaintiff to prove his case by requesting the very same Commissioner to measure the suit property with the help of Surveyor and to file a Supplementary report.

7. Of course, it is true that in the normal course without scraping the earlier report for defects, it is not possible to appoint another Commissioner for the same purpose. But here, the earlier Commissioner's report need not be scrapped because by re-issuing the warrant, the very same Commissioner is directed to submit an Additional report. Thus both reports will be on the file of the Court and by doing so, no prejudice would be caused to the respondent herein also.

8. Thus, following the judgments, referred to supra and on its due application to the present case on hand, no other conclusion than the one that the order dated 17.12.2014 passed in I.A.No.552 of 2014 in O.S.No.183 of 2011 by the learned District Munsif, Theni, is liable to be set aside, can be arrived at.

9. In the result,

a) this Civil Revision Petition is allowed by setting aside the order dated 17.12.2014 passed in I.A.No.552 of 2014 in O.S.No.183 of 2011 by the learned District Munsif, Theni;

(b) the learned District Munsif, Theni is directed to re-issue the warrant to the same Advocate Commissioner, within a period of one week from the date of receipt of a copy of this order, with a direction to measure the suit property with the help of Surveyor, upon notice to either parties and submit an additional report within a period of four weeks from the date of re-issuance of warrant;

(c) on filing the additional report by the Advocate Commissioner based on the re-issuance of warrant, learned counsel on either side are permitted to file their objections before the Trial Court within a period of two weeks thereafter;

(d) on filing the additional report as well as on receipt of objections of both parties within the time limit fixed by this Court, the learned District Munsif, Theni is directed to dispose the suit within a period of two months thereafter without giving any unnecessary adjournment to either parties and the respective parties are directed to cooperate for early disposal of the suit.



No costs. Consequently, connected miscellaneous petition is closed.

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Sd/-
Assistant Registrar (CS-III)

/True Copy/

Sub Assistant Registrar (CS-IV)

To:

1.The District Munsif,
Theni.

2.The Record Keeper,
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

+ 1 CC TO Mr.R.SUBRAMANIAN, ADVOCATE IN SR No. 69125

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TE/SKN/SAR-4 : 20/08/2018 : 5P/5C

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