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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 13.07.2018

DELIVERED ON : 22.10.2018

CORAM

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

C.R.P. (MD) (PD) No.2117 of 2017
AND CMP (MD) .10534 of 2017

1.Nagarethinam
2.P.Mohammed
3.M.Alavudeen

.. Petitioners

VS

1.Mangalam
2.Mary Valsala

.. Respondents

Revision filed under Article 227 of Constitution of India against the order dated 18.8.2017 passed in I.A.No.277 of 2017 in O.S.No.264 of 2010 on the file of the Principal Sub-Court, Nagercoil.

For Petitioners : Ms.J.Anandhavalli

For Respondents : Mr.R.Devaraj (for R2)
No Appearance (for R1)

ORDER

This revision has been filed against the order dated 18.8.2017 passed in I.A.No.277 of 2017 in O.S.No.264 of 2010 on the file of the learned Principal Subordinate Judge, Nagercoil.

2. The petitioners are plaintiffs in the suit. The plaintiffs have filed the suit for declaration to declare the title of the plaintiffs over the suit property and for recovery of possession and also mesne profits. The plaintiffs have also sought mandatory injunction directing the defendants to remove the encroachments, all constructions and building from the suit property and also prohibitory injunction restraining the defendants from further



encroaching, trespassing, constructing any structure or interfere or otherwise doing anything prejudicial to the plaintiffs' rights over the suit property including burial of any dead body in the suit property.

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3. The plaintiffs have filed I.A.No.277 of 2017 seeking to re-issue the warrant to the same advocate commissioner appointed in I.A.No.227 of 2010 to give a detailed answer regarding all points asked therein. In the affidavit filed in support of the petition, it has been stated that they have earlier filed I.A.No.227 of 2010 seeking to appoint an advocate commissioner to measure the suit property with the help of either Taluk Surveyor or Municipal Surveyor and to file a report noting various buildings available in the suit property; find out the extent of vacant land available in the suit property and its physical features; note down the name of the various centres available in the suit property; collect details regarding the nature of possession of the buildings by the occupiers of the buildings. The plaintiffs further stated that since the advocate commissioner has filed a simple report with plan without any further details, it is necessary to re-issue the warrant to the same advocate commissioner to give a detailed report regarding the entire points asked in I.A.No.227 of 2010.

4. Resisting the petition, the defendants filed counter stating that the advocate commissioner appointed by this Court visited the suit property several times in the presence of plaintiffs and the defendants and measured the property again and again and filed his report. It is stated that in order to drag on the suit proceedings, the plaintiffs have filed the petition. The present petition cannot be entertained on the basis of the subject matter of the suit.

5. Upon consideration of the rival submissions, the trial Court dismissed the petition. Aggrieved by the same, the plaintiffs have filed this revision.

6. I heard Ms.J.Anandhavalli, learned counsel for the petitioners and Mr.R.Devaraj, learned counsel for the 2nd respondent and also perused the materials available on record. No representation on behalf of the 1st respondent.

7. The learned counsel for the petitioners/plaintiffs submitted that the trial Court has failed to see that admittedly the advocate commissioner has not complied with the warrant issued by the Court in its proper perspective. He would submit that the finding of the trial Court that the plaintiffs' application was for collection of evidence is total erroneous. Since the report of the advocate commissioner not answered the points raised in I.A.No.227



of 2010, it is necessary to re-issue the warrant to the same advocate commissioner to file a detailed report regarding the entire points raised in I.A.No.227 of 2010.

8. The trial Court dismissed the petition holding that the present application seeking to re-issue the warrant to the same advocate commissioner is nothing but a process to collect evidence for their side with the help of the advocate commissioner and the plaintiffs were not entitled to collect evidence.

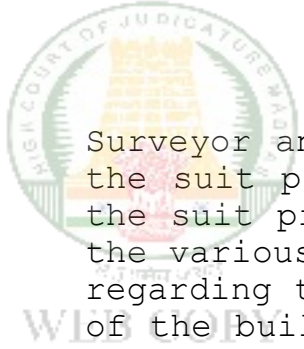
9. It appears that the suit was originally filed before Sub-Court, Nagercoil and numbered as O.S.No.296 of 2002, wherein the plaintiffs have took out application being I.A.No.511 of 2002 to appoint an advocate commissioner. Subsequently, the suit was transferred to the file of the District Court, Nagercoil and numbered as O.S.No.83 of 2004. Again the suit was transferred to the file of the Principal Sub-Court, Nagercoil and numbered as O.S.No.264 of 2010 and petition seeking to appoint an advocate commissioner was numbered as I.A.No.227 of 2010.

10,. It also appears from the report of the advocate commissioner that he was appointed way back on 8.12.2003 in I.A.No.511 of 2002 and despite earnest efforts, finally on 10.3.2017 only the advocate commissioner inspected the suit property with the assistance of Taluk Surveyor. The advocate commissioner carried out his work in the presence of plaintiffs' counsel and nobody was present on the side of the defendants at the time of the inspection.

11. In his report, the advocate commissioner stated that he was unable to measure the property with the old survey plan for S.No.2478. However, based on the order passed in I.A.No.11 of 2011 in O.S.No.264 of 2010, which was confirmed in C.R.P.(MD) No.1309 of 2012, dated 10.12.2013, the advocate commissioner identified the property and measured the same with the assistance of the Taluk Surveyor and filed the report.

12. The allegation of the plaintiffs is that the plaintiffs 3 and 4 have purchased 14 cents each from the plaintiffs 1 and 2. Though the suit property was already demarcated as per the plan drawn by the Taluk Surveyor and patta regarding 59 ½ cents was given in favour of the plaintiffs and were in possession of the area demarcated, during the year 2000, the defendants have encroached upon the suit property and had constructed 16 shops and leased out to many tenants.

13. Earlier, the plaintiffs have filed I.A.No.227 of 2010 seeking to appoint an advocate commissioner to measure the suit property with the help of either Taluk Surveyor or Municipal



Surveyor and to file a report noting various buildings available in the suit property; find out the extent of vacant land available in the suit property and its physical features; note down the name of the various centres available in the suit property; collect details regarding the nature of possession of the buildings by the occupiers of the buildings. As rightly argued by the learned counsel for the plaintiffs, the report of the advocate commissioner was silent about the aforesaid aspects.

14. By relying upon the decisions of this Court in *Karuppannan v. Thavasiappan and others*, reported in 2006-4-L.W. 971 and *Chinnathambi and others v. Anjalai*, reported in 2006-4-L.W. 516, the learned counsel for the respondents argued that advocate commissioner should not be appointed to find out the possession of the property, which has to be adjudicated only by oral and documentary evidence and the trial Court was right in dismissing the petition of the plaintiffs seeking to re-issue the warrant.

15. It is settled law that advocate commissioner should not be appointed to find out who is in possession of the property, which has to be adjudicated only by oral and documentary evidence.

16. Admittedly, in the case on hand, the plaintiffs have not filed the petition to re-issue the warrant to collect the evidence. On a perusal of the report of the advocate commissioner, it is seen that the report is silent even about the physical features of the suit property. The advocate commissioner has simply annexed the plan drawn by the Taluk Sub Inspector, Agastheeswaram Taluk along with his report. The sketch drawn by the Taluk Sub Inspector is silent about the extent of vacant land available and shops constructed in the suit property and also name of shops functioning in the suit property.

17. Though it is the bounden duty of the plaintiffs to prove their title to the suit property and the alleged encroachment said to have been made by the defendants and also the construction of buildings in the suit property by the defendants by encroaching upon the same, considering the nature of the suit and in order to resolve the real controversy between the parties, if the advocate commissioner re-visit the suit property with the help of Taluk Surveyor and filed a detailed report regarding the measurement of the suit property, its location, physical features, vacant land, if any, available, it would be little helpful to the trial Court to decide the suit. It is to be noted that the earlier report of the advocate commissioner states that at the time of his inspection, nobody was present on behalf of the defendants.

18. Therefore, in the interest of justice and in order to



find out the existing features of the suit property, this Court is inclined to remand the matter to the trial Court to re-issue the warrant to the same advocate commissioner, who earlier visited the suit property and filed the report with a direction to the advocate commissioner to measure the suit property with the assistance of Taluk Surveyor and file a report along with rough sketch qua the total measurement of the suit property, its location, physical features, vacant land, if any, available.

19. For the foregoing reasons, the Civil Revision Petition is allowed and the order of the trial Court is set aside and the matter is remanded to the trial Court with the following directions:

- (i) The trial Court is directed to re-issue the warrant of the earlier advocate commissioner to measure the suit property with the assistance of Taluk Surveyor and file a report along with rough sketch qua the total measurement of the suit property, its location, physical features, vacant land, if any, available.
- (ii) The trial Court is directed to re-issue the warrant of the advocate commissioner by giving a reasonable date, as it thinks fit, for filing report.
- (iii) Both the plaintiffs and the defendants are directed to co-operate the advocate commissioner to do his work and file his report at the earliest.
- (iv) If any one of the parties failed to co-operate with the advocate commissioner and if the advocate commissioner files a memo to that effect, then the trial Court shall proceed with the suit in accordance with law.
- (v) Both parties are entitled to file an objection, if any, to the advocate commissioner's report.
- (vi) Since the suit is of the year 2002, upon filing of the report and the objection, if any, the trial Court is directed to dispose of the suit expeditiously as possible, preferably within a period of three months thereafter.
- (vii) It is made clear that only for proper adjudication of the dispute between the parties, re-issue of commission warrant is ordered in this



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matter and not collection of evidence.

(viii) No costs. Consequently, connected miscellaneous petition is closed. Consequently, CMP(MD).10534 of 2017 is also dismissed.

Sd/-

Assistant Registrar (CO)

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Sub Assistant Registrar (CS-III)

To

The Principal Subordinate Judge,
Nagercoil.

order made in
C.R.P. (MD) (PD) No. 2117 of 2017
22.10.2018

vs

TR/SKN/SAR-III (13.11.2018) 6P 2C