

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Civil Appellate Jurisdiction)

Thursday, the Twenty Fourth day of January Two Thousand Nineteen

PRESENT

THE HON`BLE MS.JUSTICE P.T.ASHA

CMP.No.9759 of 2018

in AS.No.372 of 2018

J.K.IRON & STEEL MANUFACTURING, [PETITIONER]
COMPANY, REP.BY ITS PARTNER,MR.B.K.JALAN,
NOW AT RESIDING AT FLAT A3,99,
HARRINGTON ROAD, CHETPET, CHENNAI-600031

Vs

ROHINI HOTELS (MADRAS) PVT.LTD [RESPONDENTS]
REP BY ITS DIRECTOR, NO.43, SARANGAPANI
STREET, T.NAGAR, CHENNAI-600017

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to appoint Advocate Commissioner for measure the property morefully described under the schedule with the assistance of Taluk Surveyor and also with revenue records and file the report and thus render justice(in CMP.NO.9759/2018)

Order : This petition coming on for orders upon perusing the petition and the affidavit filed in support thereof and upon hearing the arguments of M/S.G.KRISHNAKUMAR, Advocate for the petitioner and of M/S.T.VISWANATHA RAO, Advocate for the respondents the court made the following order:-

The above Civil Miscellaneous Petition is filed for appointing an Advocate Commissioner to measure the property morefully described in the Schedule with the assistance of the Taluk Surveyor along with the Revenue records.

2.The facts in brief necessary to dispose of the above application are as follows:

The petitioner herein had filed the suit C.S.No.387 of 2005 on the file of this Court for the following relief:

To declare that the plaintiff is the absolute owner in respect of the B-Schedule property and consequently directing the defendant to deliver the vacant possession of the suit B-Schedule property which had been shown in the Red Colour in the rough sketch filed along with the plaint after removing the construction put up therein and for the permanent injunction

restraining the defendant, its agents, servants, officials, subordinates or anybody claiming through it from any manner putting up any construction over the Schedule B mentioned property.

3.The case of the petitioner is that they had purchased an extent of 2 Grounds and 550 Sq.ft in R.S.No.24 part. Tender Certificate No.24/2 and as per patta shown as TS.No.24/9 wherein bearing door No.104/03 New No.177L, Mount Road, Saidapet, Chennai under sale deed dated 22.06.1981 registered as document No.2323/1981 on the file of the Joint Sub-Registrar II, Saidapet, Chennai. This property was described as the A-Schedule property in the suit Schedule.

4.The case of the petitioner was that the respondent herein, who owned the property to the West of the plaintiff's property, recently while putting up their new Hotel construction had encroached into 800 Sq.ft of the petitioner's property. The encroached property was described as the B Schedule property. The petitioner would further submit that when he measured the property for the purpose of submission of plan to CMRL (Who had acquired the lands for the Metro Project) the encroachment came to light and therefore the petitioner was constrained to file the suit.

5.By reason of the enhancement of the pecuniary Jurisdiction of the City Civil Court, the suit C.S.No.387 of 2005 was transferred to the file of the VII Additional City Civil Court, Chennai and numbered as O.S.No.13524 of 2010.

6.The respondent herein had filed a written statement in which they had denied the encroachment and they would put the petitioner to strict proof of the same. The petitioner had taken out an application for appointment of an Advocate Commissioner when the suit was pending before this Court in Application No.2102 of 2005. This Court by order dated 20.04.2010 was pleased to appoint an Advocate Commissioner who was issued a warrant to inspect the Schedule-A and Schedule-B properties, take physical measurements with the aid of the Taluk Surveyor and with Revenue records after issuing notice to both the parties. Pursuant to the said order the Advocate Commissioner Mr.T.Balasubramanian had visited the suit property on 16.08.2016. The Commissioner would submit a report wherein he had stated that the same was only preliminary report and that the Taluk Surveyor had measured the property but however since he is not in possession to bring FMB record, he had informed the learned Advocate Commissioner that he would verify the old records and prepare the report. Therefore the advocate Commissioner had submitted a preliminary report.

7.Meanwhile, the suit had been transferred to the file of the City Civil Court, Chennai and therefore the learned VII Additional Judge had once again issued a warrant to the Advocate Commissioner. The said order was passed on an application filed

by the respondent herein to eschew the preliminary report of the Advocate Commissioner. The Advocate Commissioner has thereafter submitted his final report after taking the assistance of the Taluk Surveyor. After inspection they had come to the conclusion that the petitioners property had been encroached to an extent of 709 Sq.ft.

8.The respondent had filed his objections to the Advocate Commissioner's report and thereafter the learned VII Additional City Civil Judge, Chennai had passed an order dismissing the suit. The entire basis on which the suit had been dismissed is that the Advocate Commissioner's report had not provided the right details and that the report had been prepared without getting the FMB maintained by the Department and also the measurements found in the town Survey Register. The Judgment had picked holes in the Advocate Commissioner's report practically line by line.

9.Challenging the Order in O.S.No.13524 of 2010 the petitioner has preferred the instant appeal in A.S.No.372 of 2018. Along with the appeal the petitioner has also taken out this petition which is impugned in the instant proceeding for appointing an Advocate Commissioner to measure the property with the assistance of the Taluk Surveyor and with the Revenue records and file a report. In the affidavit filed in support of the said application the petitioner has contended that the Trial Court had eschewed the Advocate Commissioner's report that it is not in accordance with law and that the Commissioner had exceeded the powers by giving his finding and also by not stating the actual extent under the occupation of the respective parties and also whether the road around the properties had been encroached upon.

10.The petitioner would contend that the Advocate commissioner's report had been rejected only on the ground that the measurements had not been taken and the Surveyor had not used the FMB sketch to measure the property therefore the petitioner would submit that this Court should appoint an Advocate Commissioner and the report will be of assistance to this Court to arrive at a decision.

11.The said application was resisted by the respondent herein by contending that the earlier Advocate Commissioner had not adhered to the warrant issued to him and further the Surveyor had taken measurements from the end of the Compound wall without locating the Survey stone. The petitioner has not submitted any objections and the Advocate Commissioner who was appointed filed his report which has been marked as Exhibits and he was also examined as Court witness. In these circumstances, just because the learned trial Judge has eschewed the report it would not give the petitioner a right to file an application for reappointing a second Advocate Commissioner for the very same purpose.

12. Heard Mr.G.Krishnakumar, learned counsel appeared on behalf of the appellant. The learned counsel would argue that the learned Additional Judge had non suited the petitioner/plaintiff primarily on the basis that the Advocate Commissioner's report is not in consonance with the warrant issued and that the Surveyor has filed a report without looking into Town Survey Register, FMB etc,. In these circumstances, the learned counsel would submit that the petition should be ordered so that an Advocate commissioner could go and visit the premises in question and submit his report which would be one piece of evidence which would go long way in assisting the Court.

13. On the Contrary Mr.T.Viswanatha Rao, learned counsel appearing on behalf of the respondent would contend that the petitioner did not have any objection to the Advocate Commissioner's report and he cannot now turn around and have a fresh Advocate Commissioner appointed simply because the learned Judge has non suited him on the basis of the lack of clarity in the report. He would also contend that the plaintiff/petitioner has deliberately suppressed the acquisition of the property by the CMRL. He would place a reliance on the Judgment in **Pappayee Ammal Vs. Subbu Lakshmi Ammal and another** reported in **AIR 1983 Madras 344** wherein this court has held as follows:

"4. The appointment of a Commissioner in appeal is a rarity and is seldom resorted to. Such an appointment is not authorized by O.41 R.27. C.P.C. In the instant application the reference is to O.26 R.9 and Ss.94 and 151. C.P.C. Order 26. Rule 9. C.P.C. reads as follows-

In any suit in which the court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute or of ascertaining the market value of any property or the amount of any mesne profits or damages or annual net profits the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that where the State Government has made rules as to the persons to whom such commission shall be issued. the court shall be bound by such rules."

14. In the said Judgment the learned Judge has pointed out that the appointment of the Advocate Commissioner in an appeal is a rarity and is seldom resorted to. Such an appointment is not authorized under Order XL Rule 27 of the Code of Civil Procedure. In that case the petition which was filed in support of the petition for appointment of an Advocate Commissioner did not set out the purpose for which the appointment was required. It was

also noted that the petitioner had not objected to the report filed by the Advocate Commissioner. In these circumstances the application was disallowed.

15.The learned counsel also relied upon the Judgment in **Subramaniam Vs. Mariappan, represented by his Power Agent Chinnasamy and another** reported in (2005) 1 MLJ 592 where once again this Court has held that at the appeal stage where the suit is for rectifying the document that an application for appointment of Advocate Commissioner can be taken.

16.Yet another Judgement submitted on the side of the respondent is **Tamil Nadu Harijan Sevak Sangh, by its President, S.Pandian Vs. Arulmigu Kamachiamman Koil of 24 Manai Telegu Chettiar** reported in 2018 2 MWN (Civil) 24 where this Court had rejected the application for reappointment of an Advocate Commissioner to inspect physical features of the suit schedule property on the ground that the petition to receive Additional documents had been ordered and the documents taken to file, in those circumstances the application for appointment of an Advocate Commissioner was refused.

17.The counsel for the petitioner would rely upon the Judgment of this Court in **Veppanathar alias Karuppannan and another Vs. Kaliappan** reported in 2000 (1) LW 893 wherein this Court ordered the scrapping of the report of an earlier Advocate Commissioner which was the subject matter of challenge in the said proceedings.

18.The learned Judge after extracting provisions of the Order XXVI Rule 10 observed that the Advocate Commissioner's report should form a part of the record and in case the Court was dissatisfied with the proceedings of the Advocate Commissioner the Court has to apply its Judicial mind to find whether the report suffers from a defect or deficiency. Before scrapping the report the Court must record its reasons as to why it is dissatisfied with the report. The learned Judge relied on earlier Judgments of this Court as well as other Courts and ultimately held that under the provisions of Order XXVI Rule 10 (3) if the Court is dissatisfied with the report it can direct further enquiry without even setting aside the earlier report. The Court could direct the Advocate Commissioner to rectify the defect or deficiency and file a supplementary report and only if that is not possible, the report could be scrapped.

19.Heard the parties and and perused the papers. The defendant in the written statement have themselves submitted as follows:

"The defendant is not only in possession of the property Survey No.24/8 but also the western side properties comprised in Survey No.24/6 and 24/7 as well as southern side property bearing TS No.13, 14 and 15 and measurements are taken of the property of the

plaintiff as well as the defendant's western side property. It will be easily established that the defendant is in possession of suit - B Schedule property also and the plaintiff who might have lost the property on the east as well as north, both sides being roads, is unnecessarily disputing the right to possession of the property denying the suit 'B' schedule property. If eastern and northern side roads are measured with reference to the survey map, the truth will come out and it will be established that the defendant has no title nor in possession of the suit - B Schedule property at any point of time. This defendant states that from the lawful owners of the property, this defendant has entered into an agreement of sale and has been put in possession of the entire suit property also as being part of TS No.24/8."

20.It is further to be noted that the respondent herein had submitted its objections and it appears that the petitioner had not submitted objections since the report was totally in favour of the petitioner as the Advocate Commissioner had filed a report stating that the respondent herein had encroached into an extent of 709 Sq.ft. It is also seen that though objections had been filed the learned VII Additional City Civil Judge had not taken up the objections or the Advocate Commissioner's report before passing Judgment. In fact no issue has been framed on the basis of the Advocate Commissioner's report and therefore the petitioner was totally in the dark as to whether the learned Judge intended to rely upon the Advocate Commissioner's report. It is only after the Judgment that the parties have realised that the learned VII Additional City Civil Judge has relied upon the defects in the Advocate Commissioner's report and the Taluk Surveyor's report to non suit the plaintiff/petitioner.

21.In the instant case the report of the Advocate Commissioner will to a very great extent help the Court in arriving at the conclusion. It is also to be noted that despite orders of this Court to the respondent to produce their sale agreement the same has not been produced. From the Xerox copy of the challan submitted by them it is seen that the respondent to date has not obtained return of the original sale deed executed in their favour. In fact even in the written statement there is no mention about the date on which they have purchased their property. Be that as it may, considering the provisions of Order XXVI Rule 10 (3) and the lacunae that has been projected by the learned VII Additional Judge, Chennai about the earlier report filed by the Advocate Commissioner this Court is of the opinion that in the interest of Justice and to ascertain the lie of the land and the measurement of each of the properties belonging to the petitioner and the respondent the Advocate Commissioner should be appointed. The earlier report shall continue to remain on file. The Court appoints **Ms.B.Shivani**, Advocate, No.21 (Old No.13-A), Kaspagambal Nagar, Mylapore, Chennai - 600004,

Mobile:96000 24767, as the Advocate Commissioner to inspect and execute the following:

a)To inspect and measure the suit A-Schedule property and also the property belonging to the respondent comprised in T.S.No.24/8 with the help of a Taluk Surveyor to measure both properties as well as the road around the properties with the help of the Taluk Surveyor.

b)The Jurisdiction Tahsildar shall depute a Taluk Surveyor to assist the Advocate Commissioner and such Taluk Surveyor shall bring the FMB sketch with reference to the property as also the Town Survey Registers on the date fixed by the Advocate Commissioner. He shall measure and identify the properties that has been acquired by CMRL, the remaining property of the petitioner, the property of the respondent and the road on two sides of the suit property along with its linear measurements.

c)The said Advocate Commissioner shall take steps to intimate the Jurisdictional Tahsildar about the orders of this Court and directing him to make available the aforesaid documents and thereafter issue notice to all their party and inspect the premises on the lines directed herein above.

d)The Advocate Commissioner shall file her report along with the report of the Taluk Surveyor on or before 19.02.2019.

e)The petitioner shall pay the Advocate Commissioner an initial remuneration of a sum of Rs.15,000/- (Rupees Fifteen Thousand only) and the charges for getting the Taluk Surveyor's assistance will also be borne by the petitioner.

22.In the result, the Civil Miscellaneous Petition is allowed.

-sd/-

24/01/2019

/ TRUE COPY /

Sub-Assistant Registrar (Statistics / C.S.)
High Court, Madras - 600 104.

TO

1 THE REGISTRAR,
CITY CIVIL COURT, CHENNAI.

2 M/S.B.SHIVANI
ADVOCATE, NO.21, OLD NO.13-A, KARPAGAMBAL
NAGAR, MYLAPORE, CHENNAI-600 004, MOBILE.
96000 24767

C.C. to M/S.G.KRISHNAKUMAR Advocate on payment of necessary
charges

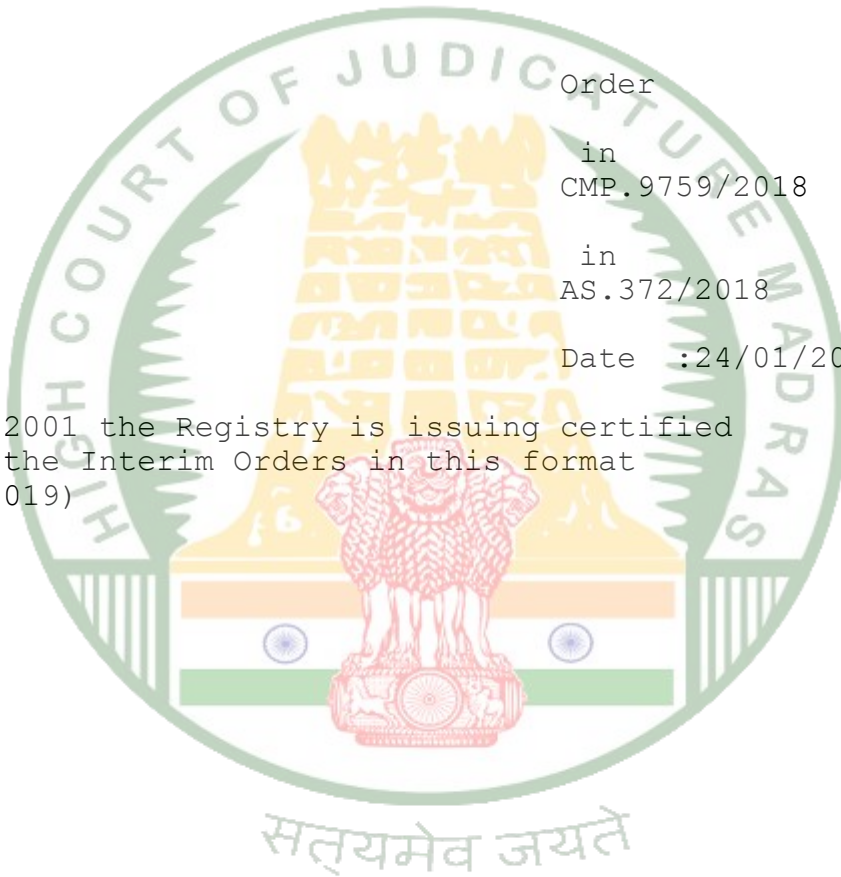
C.C. to M/S.T.VISWANATHA RAO, Advocate on payment of necessary
charges

Order
in
CMP.9759/2018

in
AS.372/2018

Date :24/01/2019

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