

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 15.11.2019

Coram:

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

C.R.P.(PD)No.226 of 2014

Shanmugam

..

Petitioner /
9th Defendant

versus

1.Devarajan

2.Symala

3.Vadivukkarasi

4.Mallika

Respondents 1 to 4 /
Plaintiffs

5.Thiyagaraja Iyyar (died)

6.Thindal Village Panchayat Board,
By its President,
Thindal, Erode - 9.

7.S.Lakshmanan

8.L.Ananthi

9.Manian

10.Thangeswari

11.Sivalingam

12.Selvamani

13.Giri

14.Kailasam

..

Respondents 5 to 14 /
Defendants 1 to 8,10&11

[R-5 Died for taking steps to bring LR's on record is dispensed with and taking notice to R-11 to R-13 are also dispensed with as per memo dated 15.11.2019 vide order dated 15.11.2019 made in C.R.P.(PD)No.226 of 2014]

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and decretal order dated 04.11.2013 made in I.A.No.598 of 2013 in O.S.No.434 of 2007 on the file of the learned Second Additional Subordinate Judge, Erode.

For Petitioner	: Mr.N.Manokaran
For Respondent Nos.1 to 4 & 14	: No Appearance
For Respondent No.5	: Died
For Respondent No.6	: Mr.S.Jaganathan
	: Government Advocate (CS)
For Respondent Nos.7 to 10	: Mr.Zeenath Begum
For Respondent Nos.11 to 13	: NDW

ORDER

Aggrieved over the order dated 04.11.2013 made in I.A.No.598 of 2013 in O.S.No.434 of 2007 on the file of the learned Second Additional Subordinate Judge, Erode, the petitioner, who is the 9th defendant in the above referred suit had preferred this Civil Revision Petition.

2. Before the trial Court, the respondents 1 to 4 in this Civil Revision Petition had filed a suit in O.S.No.434 of 2007 as against the revision petitioner and respondents 5 to 14, seeking the relief of declaration, declaring that the plaintiffs are the absolute owners of the suit schedule property. Further, for the relief of direction, directing the second respondent to deliver the suit schedule property to the plaintiffs, within a time to be specified by the Court.

3. Before commencing the trial, the plaintiffs / respondents 1 to 4 had filed an application under Order 26 Rule 9 of the Code of Civil Procedure in I.A.No.10 of 2011 in O.S.No.434 of 2007 for appointment of an Advocate Commissioner to note down the physical features of the suit schedule property. The Advocate Commissioner has been appointed and filed his report. Immediately, after filing the report, the petitioner / 9th defendant herein has filed his objection before the learned Second Additional Subordinate Judge, Erode.

4. Thereafter, the petitioner herein has filed one application in I.A.No.598 of 2013 in O.S.No.434 of 2007 to reissue the Commission Warrant, directing the Commissioner to note down all the existing physical features including the houses built by the petitioner in R.S.Nos.18/3A and 18/3B and to take necessary measurements to all the existing roads and file a report with plans and also for suitable orders.

5. The learned Second Additional Subordinate Judge, Erode, after affording an opportunity to the respondents herein, by an order dated 04.11.2013, had dismissed the application filed by the petitioner. In the

impugned order, the learned Second Additional Subordinate Judge has stated that the defendants 1, 3 to 10 are having the right to use the roads formulated by the second defendant. In the said circumstances, measuring the suit schedule property is unnecessary and thereby, reissue the Commission Warrant to the Advocate Commissioner is not necessary. Challenging the same, the petitioner is before this Court with the present Civil Revision Petition.

6. Today, when the petition is taken up for hearing, the learned counsel appearing for the petitioner is present and there was no representation on behalf of the respondents 1 to 4. The learned Government Advocate (CS) appearing for the 6th respondent and the learned counsel appearing for the respondents 7 to 10 alone present.

7. The learned counsel appearing for the petitioner as well as the Government Advocate (CS) appearing for the 6th respondent and the learned counsel appearing for the respondents 7 to 10 had reiterated the contentions raised in the counter affidavit filed before the trial Court.

8. The learned counsel appearing for the petitioner would contend that though at the time of visiting the suit schedule property, the

learned counsel for the petitioner was present. The Commissioner, who visited the suit property did not care about the instructions given by the learned counsel for the petitioner / 9th defendant. In fact, in the suit property, there was a pacca thar road and buildings. Further, the petitioner himself constructed 4 storied buildings consisting of many houses in R.S.No.18/3A and a 4 storied building consisting of number of houses in R.S.No.18/3B. The Advocate Commissioner without mentioning the said structures had filed his report and thereby, reissue the Commission Warrant to the Advocate Commissioner for visiting the property is necessary.

9. Now, on considering the submissions made on either side, it is seen that the objection filed before the Court below, the petitioner / 9th defendant has stated that, in paragraph No.2, in R.S.Nos.18/3A and 18/3B, there was a road and a multi storied building, which were not stated in the report and the plan filed by the Advocate Commissioner. Further, the measurement has also not mentioned in respect to R.S.No.18/3B. The affidavit filed by the petitioner in support of this petition has also stated that the roads and buildings situated in the suit schedule property are not mentioned in the report filed by the Advocate Commissioner.

10. Now, on going through the report filed by the Advocate Commissioner, it is true he has not measured the property according to the resurvey. In any portion of his report, he has not stated about the buildings and roads, which were situated in the suit schedule property, he has merely mentioned that the property was measured and thereafter, receiving the report from the Taluk Surveyor, he filed a report.

11. In this occasion, it is necessary to consider the judgment of this Court in **KAMALA DEVI vs. T.P.MANOCHARAN** reported in **(2009) 1 MLJ 1334**, wherein, it has held as follows;

“9. Therefore, the trial Court was wrong in dismissing the application, as if the petitioner seeks an order for second commission, which was actually intended to clarify the earlier report of the Commissioner by way of reissuance of warrant of commission. Similarly, the trial Court was wrong in holding that the measurements given by the Commissioner in his first inspection are sufficient to decide the issue. Therefore, it has become necessary to interfere with the order of the trial Court in this revision.”

12. Therefore, the learned counsel for the petitioner has filed

application for remeasuring the suit schedule property, specifically clarifying the measurement stated in the earlier report. Hence, it is necessary for the Court below to direct the Advocate Commissioner already appointed to revisit the suit schedule property.

13. The object of order 26 Rule 9 of the Code of Civil Procedure denotes from its peculiar nature can best be had from the spot itself. Such evidence enables the Court to properly and correctly understand and assess the evidence on record. The Commissioner had not stated the required particulars, Court can issue second Commissioner, if necessary. Court can issue direction to the same Commissioner to revisit the suit property.

14. In the said circumstances, the learned Second Additional Subordinate Judge, Erode, even after knowing the details of the objection filed by the petitioner to the report already filed by the Advocate Commissioner refused to call for the supplementary report from the same Commissioner, is nothing but a grave error. It would clearly show that the interference of this Court is necessary in the impugned order passed by the learned Second Additional Subordinate Judge, Erode.

15. Therefore, in the light of the above discussions, the impugned order dated 04.11.2013 made in I.A.No.598 of 2013 in O.S.No.434 of 2007 on the file of the learned Second Additional Subordinate Judge, Erode, is set aside and the Application in I.A.No.598 of 2013 is allowed. The learned Second Additional Subordinate Judge, Erode, is directed to reissue Commission Warrant to the same Advocate Commissioner and obtain a report in respect to the clarification called for by the petitioner / 9th defendant.

16. In the result, this Civil Revision Petition stands allowed. No costs.

15.11.2019

Speaking Order/Non Speaking Order

Index : Yes / No

Internet : Yes

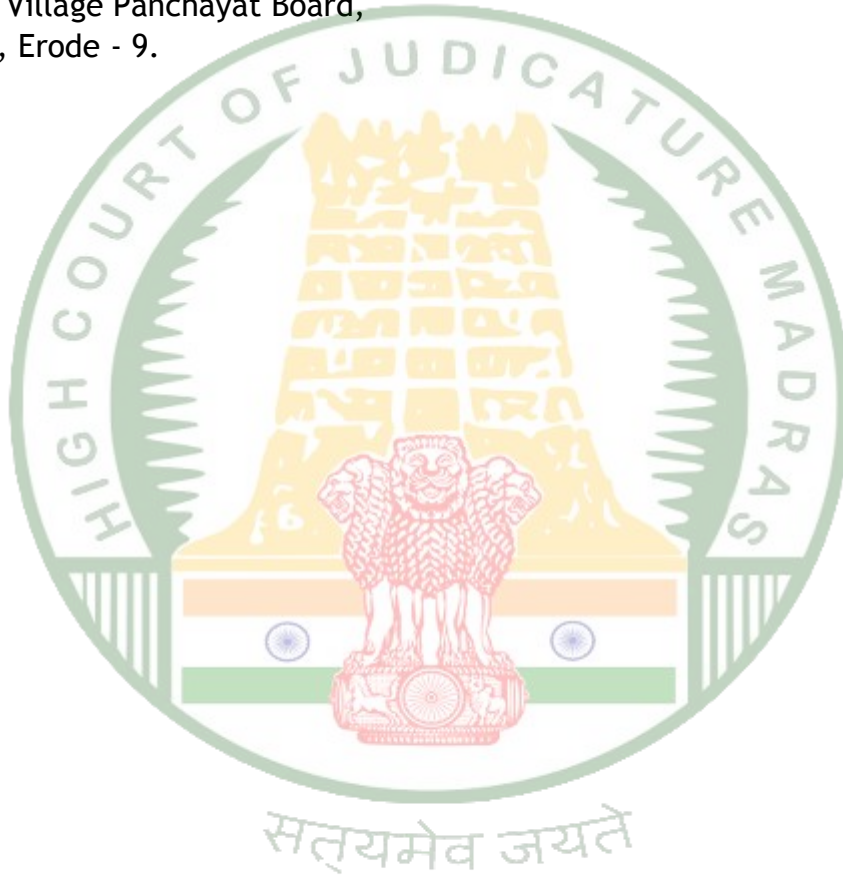
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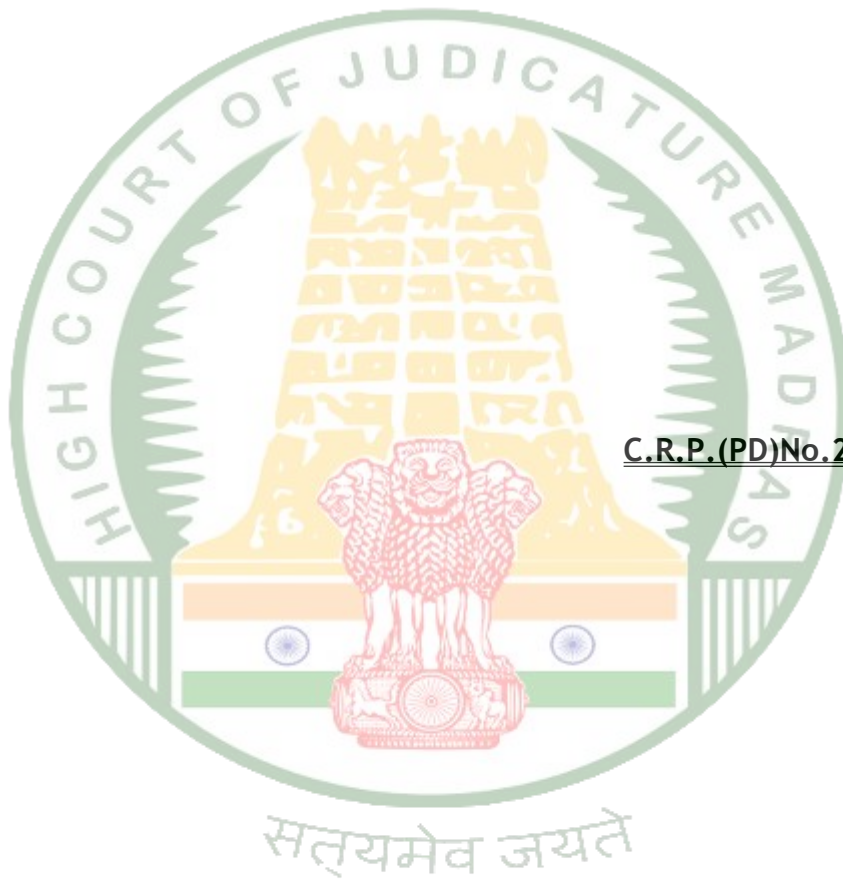
To

- 1.The Second Additional Subordinate Judge,
Erode.
- 2.The President,
Thindal Village Panchayat Board,
Thindal, Erode - 9.



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R.PONGIAPPAN, J.,
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