IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.09.2019

CORAM:

THE HONOURABLE Mr.JUSTICE R.SURESH KUMAR

C.R.P.(PD)No.3307 of 2018
and
C.M.P.No.18711 of 2018

1.S.Govindarajan
2.Charulatha
3.Narayanan
4.Ramesh K
5.L.Raji Bai
6.G.Santhi
7.K.K.Suresh Kumar
8.A.Srinivasan
9.P.Babu
10.Y.K.Geetha ... Petitioners

Vs.

Viswanathan ... Respondent

Prayer: Petition filed under Article 227 of the Constitution of India, praying to set aside the fair and decretal order passed in I.A.No.4695 of 2015 in O.S.No.3717 of 2013 dated 11.04.2018, pending on the file of XII Assistant City Civil Court, Chennai.

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For Petitioners : Mr.R.Karthikeyan

For Respondent : Mr.G.V.Sridharan

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ORDER

This revision petition has been filed against the fair and decretal order passed by the trial Court i.e. XII Assistant Judge, City Civil Court, Chennai dated 11.04.2018 in I.A.No.4695 of 2015 in O.S.No.3717 of 2013.

2. The revision petitioners are the plaintiffs before the trial Court where a suit was laid for a mandatory injunction.

3.In the said suit, an application was filed in I.A.No.4695 of 2015 by the petitioners/plaintiffs for appointment of Advocate Commissioner.

4.The application, after having been considered, was accepted and accordingly, an Advocate Commissioner was appointed in the year 2015 itself. However, for the reason best known to the said Advocate Commissioner, he could not execute the warrant by visiting the property and to file a report, as directed by the Court, after sometime, when the inaction on the part of the Advocate Commissioner was brought to the notice of the trial Court, the Court below decided to

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appoint yet another Advocate Commissioner to execute the warrant, but, he also, for the reason best known to him, could not execute the same and in that stage, when the case came up for hearing on 11.04.2018, when the trial Court found that the Advocate Commissioner not only has not executed the warrant, but also had not chosen to appear before the Court and the learned counsel appearing for the petitioners also did not appear before the Court on the said date, the learned Judge, recording the said absence especially on the part of the Advocate Commissioner, who has not executed the warrant and not chosen to appear before the Court, has directed the Advocate Commissioner to return the warrant and also to refund the Advocate Commissioner initial fee received by him from the petitioners/plaintiffs side and consequently, the said petition i.e., I.A.No.4695 of 2015 was dismissed. As against the said order, the present revision has been filed.

5.Heard Mr.R.Karthikeyan, learned counsel for the petitioners and Mr.G.V.Sridharan, learned counsel for the respondent.

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6.The learned counsel for the respondent submits that, the suit is of the year 2013 and for the purpose of appointment of Advocate Commissioner and to file a report to that effect, which has been pending from 2015 for four long years and two times though Advocate Commissioners were appointed, they had not executed the warrant for the reason best known to them and in this context, it is the duty of the petitioners/plaintiffs, who sought for appointment of Advocate Commissioner, to ensure that the Advocate Commissioner to visit the property, after giving notice to both sides, but no fruitful steps to that effect seems to have been taken by the petitioners/plaintiffs side. Therefore, for such inaction on their part along with the Advocate Commissioner, the learned Judge passed the said order, which is impugned herein. Therefore, the same need not be interfered with.

7.However, Mr.R.Karthikeyan, learned counsel appearing for the revision petitioners submits that, two times, for both the Advocate Commissioners, the remuneration fixed by the Court below have been paid promptly, without any default and whenever order of appointment of Advocate Commissioner was made and warrant is issued to that effect and the remuneration also, as fixed by the Court, is paid, it is

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the duty of the Advocate Commissioner to fix a date, to giving notice to both sides to visit the property and in this regard, the petitioners/ plaintiffs cannot compel the Advocate Commissioner to visit the property on a particular date, as the Commissioner is the Officer of the Court and he acts only on the basis of the warrant issued by the Court and therefore, in this regard, no blame can be made against the petitioners/plaintiffs. Therefore, the said order passed by the learned Judge dismissing the petition, may not be justifiable.

8.He would further submit that, if at all the learned Judge finds that, the second Advocate Commissioner also was not able to execute the warrant any suitable Advocate Commissioner from the Bar could have been found and he could have been appointed, instead, since the learned Judge has dismissed the application through the impugned order, by thus, the valuable right of the parties, especially the petitioners/plaintiffs, is getting defeated. Therefore, it is very much essential to interfere with the impugned order.

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9.I have considered the submissions made by the learned counsel for both sides and perused the materials placed before this Court.

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10.On perusal of Order XXVI Rule 9 C.P.C., it discloses that, the Court may issue a commission to such person as he thinks fit directing him to make such investigation and to report thereon to the Court. The said language used in the said Order XXVI Rule 9 C.P.C. makes it very clear that, it is the Court to appoint an Advocate Commissioner and once an Advocate Commissioner is appointed by the Court and warrant is issued, the Advocate Commissioner, being an Officer of the Court, is to act upon as per the warrant issued in this regard. Therefore, neither the petitioners/plaintiffs nor the respondent can meddle with the execution of the warrant issued to the Advocate Commissioner.

11.In that view of the matter, this Court feels that no blame can be put against the Advocate Commissioner. While accepting the order passed by the trial Court, through the impugned order, directing the Advocate Commissioner to return the warrant and the fee paid to him, this Court is unable to accept the dismissal of the application. Instead, the trial Court could have found out some suitable Advocate Commissioner from the Bar to execute the warrant. Accordingly, fresh appointment could have been made by issuing time frame within which he could have been directed to complete the task and file a report.

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Instead of adopting the said method, since the application itself abruptly was dismissed by the learned Judge, by thus, the valuable right of the parties may get affected, as the Advocate Commissioners report may throw some light, with regard to the issue raised in the suit, which is a bare injunction suit. Therefore, this Court is of the considered view that the impugned order is liable to be interfered with.

12.In that view of the matter, this Court is inclined to dispose the Civil Revision Petition with the following direction:

> That the impugned order is set aside. The matter is remitted back to the trial Court with a direction that, a fresh Advocate Commissioner in the said application can once again be appointed with a direction that, the Advocate Commissioner shall visit the property in question and file a report as per the warrant to be issued in this regard by the trial Court, within a period of 30 days from the date of receipt of a copy of the warrant of the trial Court. The trial Court also can monitor the progress being made by the Advocate Commissioner to be appointed, pursuant to the issuance of the warrant by posting the

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interim application every week till the one month period, which is the outer limit, to be given to the Advocate Commissioner to complete the task, as indicated above.

13.It is however made clear that once the Advocate Commissioner files a report within the time stipulated in this regard, as indicated above, the trial Court can hear the arguments of both sides, as the suit is already in the argument stage and accordingly decide the same within a period of two months thereafter. It is needless to mention that, once the Advocate Commissioner's report is filed, any objection to be made by both sides, they can do so in the manner known to law.

14.With this direction, this Civil Revision Petition is disposed of. No costs. Consequently, connected Miscellaneous Petition is closed.

24.09.2019

Index: Yes/No

Speaking Order: Yes/No

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To

The XII Assistant Judge,
City Civil Court,
Chennai.

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R.SURESH KUMAR, J.

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