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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 28.08.2018

DELIVERED ON : 16.04.2019

CORAM

THE HONOURABLE MRS. JUSTICE R. THARANI

C.R.P. (NPD) (MD) No.897 of 2015

Kalaiselvan .. Petitioner/Respondent/Defendant

Vs.

Gunaseeli .. Respondent/Petitioner/Plaintiff

Prayer : This Civil revision petition is filed under Article 227 of the Constitution of India, to set aside the order dated 19.01.2015 passed in I.A.No.1409 of 2014 in O.S.No.410 of 2012 on the file of the District Munsif Court, Valliyoor and dismiss I.A.No.1409 of 2014 with cost.

For Petitioner : Mr.C.Dhanaseelan
For Respondent : Mr.S.Palanivelayutham

ORDER

Heard Mr.C.Dhanaseelan, learned counsel appearing for the petitioner and Mr.S.Palanivelayutham, learned counsel appearing for the respondent.

2.This petition has been filed to set aside the order dated 19.01.2015 passed in I.A.No.1409 of 2014 in O.S.No.410 of 2012 on the file of the District Munsif Court, Valliyoor and dismiss I.A.No.1409 of 2014 with cost.

3.The respondent has filed a suit against the petitioner in O.S.No.410 of 2012 for permanent injunction and the respondent has also filed I.A.No.1409 of 2014 to appoint a Commissioner with the help of a Surveyor by re-issuing the Commissioner's warrant to inspect the suit property and the Court has allowed the petition and the Commissioner warrant is re-issued to Advocate Mr.T.Sudhagar for the inspection of the suit property. Against the order, the petitioner has filed this petition.

4.As there was no representation on the side of the petitioner who is the respondent in the I.A.No.1409 of 2014, the I.A. was ordered against this revision petitioner. Against the order, the petitioner has filed this revision petition.

5.On the side of the petitioner, it is stated that already the Commissioner has inspected the suit property and has filed a



detailed report and plan. In the report, it is stated that the interior portion of GH segment of the wall has enlargement and it has separate kondikal which is a supporting stone to bear the roof of the respondent's house. It is stated that the property of the petitioner as well the respondent belonged to two brothers. The respondent herein claimed 3 $\frac{1}{4}$ cents along the titled roof house bearing old Survey No.7/51 and new Survey No.7/56 in Perungudi Village, Natham S.No.862 and the land of the petitioner is in Survey No.845/5 and the land of the respondent is in Survey No.845/6. The respondent is on the eastern side and the petitioner is in the western side. The petitioner's Grand father and the respondent's predecessors in title were brothers. There is a common wall in between the houses and when the petitioner demolished his house, the respondent has filed a suit. A Court Commissioner was appointed in the case and both the parties raised objections to the Commissioner report. When the arguments are heard and the case is reserved for Judgment, it was reopened for clarifying the GH portion mentioned in the Commissioner report.

6.On the side of the petitioner, it is stated that the western wall and the eastern wall of both the parties have separate kondikal and the portion of the petitioner's house is constructed with brick and limestone and the house of the respondent is build with mud and granite stones. There is no dispute regarding the wall. Whether the western wall is in joint possession or separate possession is not a issue in the case. The respondent herein is claiming 1 ft beyond the common wall of the petitioner. The suit is only for bare injunction. It is the duty of the respondent to prove possession. The Commissioner's report has clearly stated that there is no such suit property as described in the title deed . One feet beyond the common wall of the petitioner is impossible. Taking advantage of the demolition of the existing house, the respondent is trying to encroach upon the petitioner's property.

7.On the side of petitioner, it is stated that the trial Court has ordered for re-issuing of the Commissioner warrant only on two grounds that is to verify the width of the wall in GH portion and secondly to measure the extent of the house of both the petitioner and the respondent. These measurements are already there in the report of the Commissioner. It is further stated that aerial view of the GH wall is to be verified to decide whether there are two adjoining walls or a single wall is used for both the houses, The lower Court has come to a wrong conclusion that the Commissioner report is not clear as to whether there are two adjoining walls or a single wall from the aerial view. The width of the wall is $\frac{3}{4}$ ft. In the Commissioner's report, it is clearly stated that there is a wall to the width of 9 inch and the wood from the petitioner's roof was inserted upto 3 $\frac{1}{4}$ ft for laying tiles and the meter boxes are fixed on the wall. In the Commissioner's report, it is clearly stated that the petitioner's wall is separate one and there is a very old common wall near the well and in the title deed of the respondent, only old Survey



number is given.

8. On the side of the petitioner, it is stated that the petitioner was ready to build two pillars so that the wall of the respondent will not be destroyed and the petitioner was not allowed to see the inner portion of the respondent until the visit of the Commissioner and the report of the Commissioner is that the wall may be a common wall. If the petitioner demolished the wall along with GH portion, it may damage the house of the respondent and he has approached the petitioner with a suggestion that he will construct two pillars and then he can construct the wall for which the respondent had refused. On side of the petitioner, it is stated that re-issuance of the Commissioner warrant was unnecessary. The measurement sought for by the respondent was already stated in the Commissioner's report. The suit is not filed for fixing the boundaries and the lower Court cannot pass an order for another Commissioner's report without cancelling the previous Commissioner report.

9. The learned counsel appearing for the petitioner relied on the Judgment passed by this Court in the case of **Rajeswari v. Nagarajan and others** reported in **2006(4) CTC 25**, which reads as follows:

"As stated earlier, on the direction of the Court, on the earlier occasion, the Commissioner along with the help of a surveyor, inspected the property and filed a report. It is not in dispute that the parties cannot lay their hands only with the support of the Commissioner's report or his plan. It is for them to specifically allege and substantiate the same by acceptable oral and documentary evidence. The Commissioner's report may be one piece of evidence in support of their case and in the case the said report and other details are available before the Court."

10. The learned counsel appearing for the petitioner relied on the Judgment passed by this Court in the case of **Thangaraj v. Pappathi** reported in **2014 (2) CTC 68**, which reads as follows:

"Plaintiff could also seek permission of Court to withdraw suit with permission to file fresh suit, projecting absence of proper description of suit property-but plaintiff cannot indirectly convert suit for bare injunction into one for identifying and fixing boundary of suit property-already Commissioner was appointed by Trial Court-no infirmity in Order passed by Appellate Court."

11. The learned counsel appearing for the petitioner relied on the Judgment passed by this Court in the case of **Santha Satheesh v. H.J. Walter and others** reported in **2012(6) CTC 502**, which reads as follows:



"Appointment of Commissioner for said purpose, held, would be prejudicial to Defendants- Order of trial Court allowing Application for appointment of Advocate Commissioner, set aside."

12.The learned counsel appearing for the petitioner relied on the Judgment passed by this Court in the case of **S. Anthonidoss and Another v. Sabesthiyan and others** reported in **1996 (1) CTC 472**, which reads as follows:

"There should be sufficient basis and justification as also effective need for Appointment of Commissioner- Such appointment cannot be sought for as a matter of course and that too to achieve ulterior object or motive."

13.The learned counsel appearing for the petitioner relied on the Judgment passed by this Court in the case of **Padmanabhan v. Krishnamurthy** reported in **2005(3) CTC 619**, which reads as follows:

"Mechanical and indiscriminate appointment of second Commissioner merely because Court thinks that such appointment would not prejudice other party or that expenses would be borne by applicant should be avoided"

14.The learned counsel appearing for the petitioner relied on the Judgment passed by this Court in the case of **Kitnammal v. Nallaselvan and others** reported in **2005 (1) CTC 356**, which reads as follows:

"10. As rightly argued for the plaintiffs, the very appointment of the second advocate-commissioner without setting aside the report and plan of the first advocate-commissioner itself is not proper and therefore, the report and rough plan of the second advocate-commissioner cannot form part of the records unless the report and rough plan of the first advocate-commissioner are eschewed.

11. The very appointment of second advocate-commissioner is irregular and illegal and therefore, the report and rough plan of the second advocate-commissioner is to be set aside. The trial Court rightly refused to scrap the report and rough plan of the first advocate-commissioner, in view of the fact, no petition was filed to set aside the same before appointment of the second advocate-commissioner or even thereafter and before inspection of the suit properties by the second advocate-commissioner. It is open to both parties to file appropriate petitions for reissue of the warrant to the first advocate-commissioner, if not satisfied with the report and rough plan filed by the first advocate-commissioner or



for appointment of another advocate-commissioner, after setting aside the report and rough plan of the first advocate-commissioner. In that view, the order of the trial Court in dismissing the petition I.A. No. 325 of 2002 to scrap the report and rough plan of the first advocate-commissioner being justifiable need not be interfered with."

15.The learned counsel appearing for the petitioner relied on the Judgment passed by this Court in the case of **K.Sivachalam v. Subbanna Gounder and others** reported in **2009 0 Supreme (Mad) 634**, which reads as follows:

"The plaintiff being the dominus litis should prove before the trial Court that the suit property bearing S.No.533 is under his exclusive possession."

16.The learned counsel appearing for the petitioner relied on the Judgment passed by this Court in the case of **S.Karpagam v. Suganthi and others** reported in **2013 0 Supreme (Mad) 899**, which reads as follows:

"For appointment of a second or very same Commissioner to visit the suit properties, the petitioner/plaintiff should make out a tangible case, as to how the earlier Advocate Commissioner's report is bad or bristles with infirmities or the same suffers from irregularities or illegalities in the eye of law."

17.The learned counsel appearing for the petitioner relied on the Judgment passed by this Court in the case of **M/s. Vestas RRB (India) limited, rep. By its President v. Anulatha** reported in **2011 0 Supreme (Mad) 3355**, which reads as follows:

"10.Where the Commissioner appointed in the case has furnished a detailed report, without considering the same, the Court will not appoint another Commissioner."

18.The learned counsel appearing for the petitioner relied on the Judgment passed by this Court in the case of **Meenakshi v. Vennila and another** reported in **2008 (5) CTC 181**, which reads as follows:

"In the instant case, the suit has been filed only for permanent injunction and as such in regard to the factum of possession, this Court opines that the lower Court alone can gather evidence through the parties to the ligation and therefore, the same cannot be entrusted to the Advocate Commissioner to gather evidence"

19.On the side of the respondent, it is stated that whether there are two walls available and the nature of the construction are to be decided and the nature of the construction (mud or brick stone) is essential to decide the factors of the case and hence re-



issue of warrant is necessary.

20. The old Survey number belonged to the entire village. The measurement in the title deed is incorrect. The petitioner is the son of the original owner. The respondent is only a subsequent purchaser. No open space is available between the house of the petitioner and the respondent whereas there is an open space available on the other side of the respondent property. There is a wall which belonged to three persons one is the petitioner, other is the respondent and one portion belongs to a third person. The respondent has admitted that the wall was there when he purchased the house in 1985. The Commissioner's report has clearly stated that one portion of the wall is painted yellow and the other is painted in white colour. The respondent has an EB box in the GH wall. The respondent has admitted that the wall belonged to her is a mud wall. She has admitted that there are two separate common walls. She has admitted that there is a wall and the respondent's house is on one side and the petitioner's house is on the other side. P.W.1 has admitted that she has claimed 1 ft in the petitioner's property that portion will go inside the old house of the petitioner but no suit is filed for possession. The petitioner has admitted that there is a common lane on the eastern side of the property but the lane was not stated in the document.

21. A perusal of the records reveals that the suit is only for a bare injunction. After reserving the case for judgment, the trial Court has re-opened the case. The respondent has filed an I.A. Petition for re-issue of the Commissioner's warrant. The Commissioner's warrant is re-issued. The purpose for the re-issue of the Commissioner's warrant is that the respondent has stated that the old Commissioner's report is incorrect and insufficient to decide the case on merits but the respondent has not filed any objection to the earlier Commissioner's report. It is stated that the Commissioner failed to measure the entire extent of the property that belongs to both the petitioner and the respondent. Verification of the Commissioner's report reveals that the Commissioner has already measured the two portions. The contention of the petitioner is that he was not aware there are two walls until the Commissioner visited the property, as the petitioner was not allowed to see the property of the respondent until the visit of the Commissioner, the respondent herein has denied that there is another wall adjoining to the western wall. The respondent has stated that the Commissioner has failed to mention the width of the GH wall. A perusal of the Commissioner's report reveals that the Commissioner has mentioned the width of the wall. The petitioner admitted that the nature of construction is mud wall. The Commissioner's report clearly reveals that the nature of construction of the wall is brick and limestone. The trial Court has not cancelled the earlier Commissioner's report. The respondent has not filed any objection to the earlier Commissioner's report. Hence there is no necessity for the revisit of the Commissioner to peruse the GH portion to decide the nature of the construction.



22. In the above circumstances, the re-issue of Commissioner warrant will further delay the process. Hence, the order of the lower Court is liable to be set aside and the Civil Revision Petition is allowed. No Costs.

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Sd/-

Assistant Registrar (P & A)

// True Copy //

Sub Assistant Registrar (CS)

Mrn

To

1. The District Munsif, Valliyoor.

+1CC TO MR.C.DHANASEELAN, Advocate Sr. No.61525

C.R.P. (PD) (MD) No.897 of 2015

16.04.2019

AVS (CO)

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