

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.08.2020

CORAM

THE HON'BLE MR.JUSTICE P.VELMURUGAN

CRP.No. 3537 of 2012
and M.P.No. 1 of 2012

1.Salma Beevi
2. Abusali
3.Alisha Nachiar
4.Abdul Khader
5.Syed Ibrahim Nachiar
6.Syed Farook
7.Mohammed Rafeek

..Petitioners

Vs

1.S.Dawood
2.Sheik Allauddin

..Respondents

Prayer : Civil Revision Petition is filed under Article 227 of Constitution of India to set aside the fair and decreetal order dated 08.03.2012 passed by the learned Sub Judge, Nagapattinam in I.A.No. 174/2011 in A.S.No. 75/2010 in which rejecting the request of the petitioners for appointment of Advocate Commissioner under Order 26 Rule 9 of CPC.

For Petitioner : M/s.K.Raghuraman
for M/s.J.Ramakrishnan

For Respondents: Mr.P.Paramasiva Doss - R2

ORDER

The Civil Revision Petition is filed against the fair and decreetal order dated 08.03.2012 passed by the learned Sub Judge, Nagapattinam in I.A.No. 174/2011 in A.S.No. 75/2010 in which rejecting the request of the petitioners for appointment of Advocate Commissioner under Order 26 Rule 9 of CPC.

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2. The petitioners herein had filed the suit against the respondents in O.S.No.252 of 2006 on the file of the District Munsif Court, Nagapattinam for recovery of possession and also mesne profits. The said Suit was dismissed after trial. Challenging the said Judgment and decree, the petitioners herein have preferred an Appeal before the Sub Court, Nagapattinam in A.S.No. 75 of 2000. After two years, when the said appeal was posted for arguments, the appellants have an application in I.A.No. 174 of 2011 seeking to appoint an Advocate Commissioner to measure the property and file a report. The said petition was also dismissed by the lower appellate Court. Aggrieved by the same, the present Civil Revision Petition is filed.

3. The learned counsel for the petitioners would submit that the trial Court while dismissing the suit had observed that the plaintiffs had failed to file an application to appoint the Advocate Commissioner in order to measure the land. Therefore, appointing of Advocate Commissioner is necessary and the lower appellate Court had failed to allow the application seeking appointment of Advocate Commissioner, which needs interference.

4. Heard the learned counsel appearing for the petitioners and the learned counsel appearing for the 2nd respondent and perused the documents available on record.

5. Admittedly, the petitioners have filed a Suit against the respondents in O.S.No.252 of 2006 before the District Munsif Court, Nagapattinam for recovery of possession and also mesne profits and the said suit was dismissed against the petitioners. Challenging the said judgment, the petitioners have preferred an Appeal in A.S.No. 75 of 2010 before the Sub Court, Nagapattinam. When the said appeal was listed for arguments, the petitioners have filed an application in I.A. NO. 174 of 2011 seeking appointment of Advocate Commissioner to measure the property and submit a report. The said application was dismissed by the lower appellate court.

6. Though it is contended by the learned counsel for petitioners that the appointment of Advocate Commissioner is necessary to proceed with the case, it is seen that the trial Court had observed that when the 2nd respondent had filed an application in I.A. No. 201 of 2010 before the trial Court seeking permission to file additional written statement and also to appoint an advocate commissioner, the petitioners herein had vehemently objected the said plea of the 2nd respondent by stating that if the Advocate commissioner is appointed, it would lead to change in the measurements of the property. On this ground, the trial Court had dismissed the said application. But

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the said order was not challenged by either parties.

7. Neither the petitioners nor respondents challenged the said order passed by the trial Court. After the trial Court completed the trial and passed the judgment and decree, the petitioners have filed an application seeking the same relief before the lower appellate court. Therefore the plaintiffs ought to have filed an application for appointment of advocate commissioner which was very much available before the trial Court and they failed to do the same. But after completion of trial and judgment passed by the trial Court, in order to fill up the lacuna they cannot file an application in the appeal. It is for the plaintiff to prove his case on his own and he cannot take advantage of the loopholes left by the defendants.

8. Considering the facts and circumstances of the case and the contradictory stand taken by the petitioners before the trial court and the lower appellate court, which clearly shows the intention of the petitioners to protract the appeal proceedings, this Court is of the opinion that there is no perversity or illegality in the order passed by the lower appellate court and there are no merits in the present Civil Revision Petition and liable to be dismissed.

9. Accordingly, the the Civil Revision Petition is dismissed. No Costs. Consequently, connected Miscellaneous Petition is closed.

10. Considering the pendency of the appeal which is pending from the year 2010, the lower appellate court viz., the Sub Court, Nagapattinam is directed to dispose of the appeal on merits, in accordance with law, within a period of three (3) months from the date of receipt of a copy of this order.

Sd/-

Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

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To

The Subordinate Judge,
Nagapattinam.

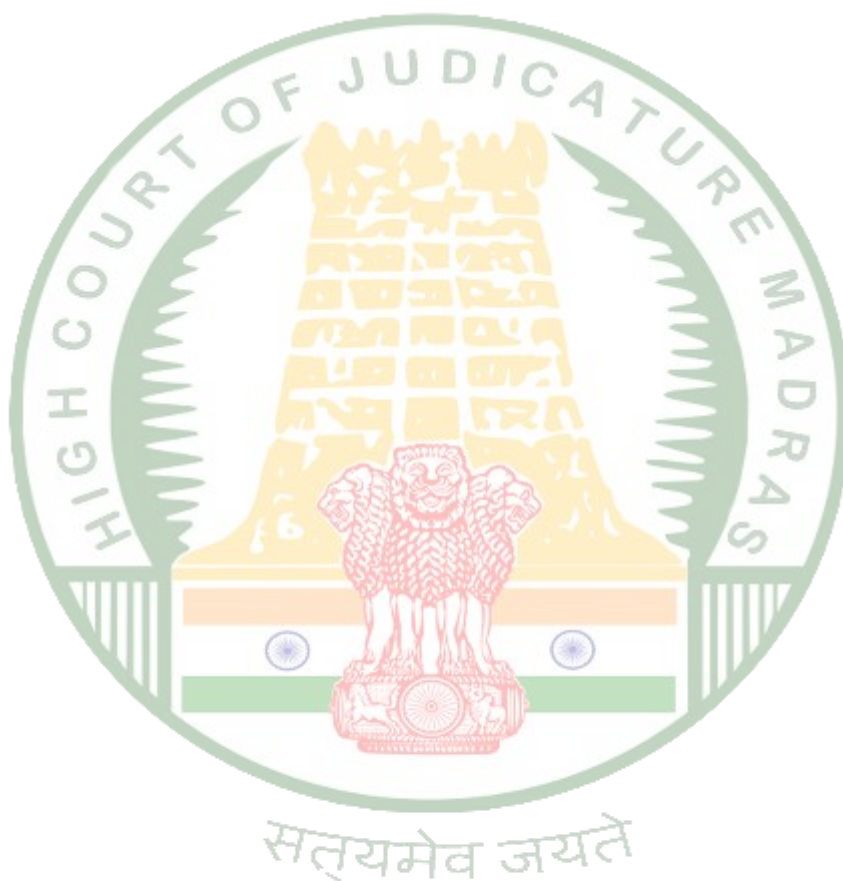
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The Section Officer,
VR Section, High Court,
Madras-104.

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