

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 04.03.2020

Coram

The Honourable Mr.Justice KRISHNAN RAMASAMY

**C.R.P(PD)No.873 of 2013
and M.P.No.1 of 2013**

M.KaruppusamyPetitioner

Versus

1.R.Palanisamy
2.R.Karuppusamy
3.M.Ponnusamy
4.S.Mohanraj
5.A.Somasundaram
6.S.Narayanamoorthy
7.A.Samiappan
8.K.Periyasamy

....Respondents

This Civil Revision Petition is filed under Article 227 of the Constitution of India praying to set aside the petitioner and order dated 02.07.2012 made in I.A.No.1211 of 2012 in O.S.No.259 of 2012 on the file of the District Munsif Court, Avinashi by allowing this Civil Revision Petition.

For Petitioner : Mr.M.Guruprasad

For Respondents - 1 & 2 : Mr.V.Anandamurthy

Respondents - 3 to 6 & 8 : No Appearance

Respondents - 7 : Died (steps due)

ORDER

The present Civil Revision Petition has been filed challenging the order dated 02.07.2012 passed by the learned District Munsif, Avinashi in I.A.No.1211 of 2012 in O.S.No.259 of 2012, in and by which, the learned District Munsif, Avinashi allowed the Interlocutory Application filed by the respondents 1 & 2 for appointment of a Court Commissioner.

2. The brief facts of the case are as follows:

The respondents 1 & 2 filed the suit O.S.No.259 of 2012 against the petitioner and the respondents 3 to 8 for permanent injunction. While the said suit is pending, the respondents 1 & 2 had filed an Interlocutory Application in I.A.No.1211 of 2012 before the District Munsif Court, Avinashi, praying to appoint a Court Commissioner to measure the petition mentioned properties with the assistance of a Taluk Surveyor and fix the boundaries. By order dated 02.07.2012, the learned District Munsif, Avinashi appointed one Mr.M.Karthik as Commissioner to visit the suit properties with the assistance of qualified Surveyor after giving notice to

both sides, fix the boundaries to the petition mentioned properties, note down the physical feature and file his report. Aggrieved by the appointment of Commissioner, the petitioner/first defendant has filed the present Civil Revision Petition before this Court.

3. The learned counsel for the petitioner would contend that the respondents 1 & 2/plaintiffs sought for the appointment of Commissioner only for the purpose of gathering evidence. He would further contend that the learned District Munsif, Avinashi without properly appreciating the documents filed on both sides to the *lis*, appointed the Commissioner. Though the petitioner raised his objection by way of filing a Memo, however, the same was not considered by the Court below. He therefore prayed that the impugned order may be set aside.

4. *Per contra*, the learned counsel appearing for the respondents 1 & 2 would submit that the respondents 1 & 2/plaintiffs filed the suit O.S.No.259 of 2012 for permanent injunction and while the same is pending, they have filed the aforesaid Interlocutory Application for

appointment of Commissioner to measure the petition premises and fix the boundaries with the assistance of a Taluk Surveyor. The said Application was also allowed by the Court below. However, due to the pendency of the present Civil Revision Petition filed by the petitioner, the Commissioner appointed by the Court below has not yet executed the warrant. He would contend that the petitioner is unnecessarily dragging on the proceedings since 2013. He therefore prayed that the present Civil Revision Petition may be dismissed. He has also relied on the decision taken by this Court in the case of ***K.V.Perumal and Ors. Vs. N.Gokulavasan and Ors.*** reported in ***2019 SCC Online Mad 6931***, wherein, this Court has held as follows:

9. *Considering the facts and circumstances of the present case, I am of the view that the reasons stated by the Court below cannot be accepted, as there is no dispute with regard to the identification of the property, it does not mean that the petitioners/plaintiffs cannot seek for appointment of Advocate Commissioner under Order 26 Rule 9 and Section 151 of C.P.C. The measurement and identification of property is useful to the Court to arrive at a proper conclusion in respect of the property and the Advocate Commissioner will not measure the property on its own, but with the help of Village Administrative Officer and Surveyor, on basis of revenue records. Hence, if the Advocate*

Commissioner visited the property and note down the physical features and measured the property with the help of Surveyor on the basis of the rival documents produced by the parties, it would not cause any prejudice to the respondents/defendants and it would be necessary and it is only a guiding factor to the trial Court to arrive at a conclusion about the property. In this regard, it is useful to extract below the observation of this Court in the case of Saraswathy Vs. Viswanathan reported in 2002 (4) LW 142.

"9. Generally speaking, in a suit filed by the plaintiff, he is a dominus litus and further, this is not an universal rule, in the considered opinion of this Court.

10. At best, an Advocate Commissioner's Report can be taken note of by the first appellate Court along with the other oral and documentary evidence on record. Even if an Advocate Commissioner is appointed, the report filed by the Advocate Commissioner is not binding on a Court of law and a Court is entitled to act independently basing its conclusions on the strength of the documentary and oral evidence on record. It is also an axiomatic fact that a possession has to be proved by a litigating party and not by a Commissioner through his appointment made by a Court of law."

5. Heard the learned counsel on both sides and perused the materials available on record.

6. From a perusal of the materials on record, it is seen that there was a boundary dispute between the plaintiffs and the defendants and that the respondents 1 & 2/plaintiffs filed the suit O.S.No.259 of 2012 for permanent injunction and the Application I.A.No.1211 of 2012 for appointment of Commissioner. The Court below had also appointed the Commissioner as sought for by the respondents 1 & 2/plaintiffs. However, the Commissioner appointed by the Court below was unable to execute the warrant since the present Civil Revision Petition filed by the petitioner herein is pending before this Court.

7. As rightly held by this Court in the case of ***K.V.Perumal and Ors. Vs. N.Gokulavasan and Ors.*** reported in ***2019 SCC Online Mad 6931***, there is no embargo for appointing the Advocate Commissioner in the suit for permanent injunction and the appointment of Advocate Commissioner is a guiding factor to the trial Court to arrive at a conclusion about the suit property. I am of the view that there is no merit in the case of the petitioner and therefore, this Civil Revision Petition is liable to be dismissed.

8. Accordingly, this Civil Revision Petition is dismissed and the order dated 02.07.2012 passed by the learned District Munsif, Avinashi in I.A.No.1211 of 2012 in O.S.No.259 of 2012 is confirmed. Further, the Commissioner appointed by the Court below is directed to execute the warrant and file his report within a period of two months from the date of receipt of a copy of this order. On such report being filed by the Commissioner, the learned District Munsif, Avinashi shall permit the petitioner herein to file his objection, if any and cross-examine the Commissioner. Considering the fact that the suit is of the year 2012, the learned District Munsif, Avinashi is directed to dispose of the suit O.S.No.259 of 2012, as expeditiously as possible, within a period of five months from the date of receipt of a copy of this order. No costs. Consequently, connected Miscellaneous Petition is closed.

mrr

Index : Yes/No

KRISHNAN RAMASAMY, J.,

mrr

To

The District Munsif Court,
Avinashi.



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