

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.02.2021

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

CRP (NPD).No.1570 of 2015

and

M.P.No.1 of 2015

1. Seetharama Chettiar (deceased)
2. Kamala
3. Rajendran
4. Ganesan
5. Kanjana
6. Arumugam
7. Ezhumalai
8. Sankar

[Petitioners 2 to 8 brought on record as LR's of the deceased sole petitioner viz., Seetharama Chettiar vide Court order dated 05/03/2018 made in CMP.No.9624/2016 in CRP.No.1570/2015].

... Petitioners

Vs.

Mannu Nattar (dead)

1. Ramachandran
2. Elumalai
3. Prakash
4. Ramesh
5. Rajaveni
6. Suresh
7. Jayasudha

... Respondents

PRAYER: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, against the fair and decretal order dated 14.10.2014 passed in I.A.No.587 of 2005 in A.S.No.224 of 2003 on the file of I Additional Sub Court, Villupuram.

For Petitioners : Mr.K.Govi Ganesan

For Respondents : Mr.R.Rajarajan for
Mr.R.Balakrishnan

ORDER

This Civil Revision Petition is directed as against the fair and decretal order passed in I.A.No.587 of 2005 in A.S.No.224 of 2003 dated 14.10.2014 on the file of I Additional Sub Court, Villupuram, thereby, dismissing the petition seeking appointment of Advocate Commissioner.

2. The petitioners 2 to 8 herein are the legal heirs of the deceased/plaintiff. The plaintiff (since deceased) has filed a suit for declaration and recovery of possession, in respect of the suit schedule property. While pending the suit, at the request of the plaintiff herein, the Advocate Commissioner was appointed and his report and sketch, additional report and sketch were marked as Exs.C.1 to C.4. After

considering the report submitted by the Advocate Commissioner as well as the examination of Surveyor, the suit was dismissed by the trial Court. Aggrieved by the same, the plaintiff preferred an appeal suit. While pending the appeal suit, the plaintiff filed an application again for appointment of Advocate Commissioner, on the ground that the Advocate Commissioner failed to note down the physical features of the adjacent property to the suit property and failed to measure the same. Whereas, the land Surveyor categorically stated that there is a pathway between the plaintiff's suit schedule property and the defendants' property and it was not noted by the Advocate Commissioner and as such, he sought for re-appointment of Advocate Commissioner.

3. The learned counsel for the respondents contended that without scraping the first Advocate Commissioner's report, the second Advocate Commissioner cannot be appointed. In support of his contentions, he also relied upon the judgment in 2009 (2) CTC 205 (***Anna Sudha Devi -vs- P.George Samuel***), in which, this Court held as follows:-

“6. From the perusal of the order dated 13.12.2004, it is evident that the report filed by the earlier Advocate Commissioner was not set aside and the Court itself felt that

it can be considered after the examination of the Commissioner to find out the present status of the suit property. Thus, appointing Second Advocate Commissioner before recording dissatisfaction of the report submitted is definitely in violation of Order 26, Rules 10(3) and 12, C.P.C. and the Court has no jurisdiction to appoint a second Commissioner before setting aside the report already submitted. Similar issue is already decided by this Court in the decision reported in R. Sivasubramanian v. S. Balamurugan, 2006 (2) CTC 54: 2006 (1) MLJ 580, wherein the learned Judge followed earlier judgments reported in K. Kandaswamy v. K.R. Ramaswami, 1988 (2) LW 440 and R. Viswanathan v. P. Shanmugam, 1985 (1) MLJ 254, and held that merely because objections were filed by the respondent to the earlier report, the Trial Court cannot appoint a Second Commissioner, unless it renders a finding that the earlier Commissioner's report is unsatisfactory. The same is the view taken by the Division Bench of the Kerala High Court in the decision reported in Swami Premananda Bharathi v. Swami Yogananda Bharathi and another, AIR 1985 Ker. 83. Paragraph 8 of the judgment reads as follows:

“8. We shall consider as to whether the appointment of a second Commissioner without setting aside the report and proceedings of the first Commissioner is a

jurisdictional error. In this connection we may refer usefully the decisions of the Madras and Travancore High Courts. In the decision reported in Thottamma v. C.S. Subramaniyan, AIR 1922 Mad 219, the Court deprecated or condemned the practice of appointing successive Commissioners. The aforesaid decision was followed and the principle again reiterated in Ambi v. Kunhikavamma, AIR 1929 Mad 661 and Kunhi Kutti Ali v. Mohammed Haji, AIR 1931 Mad 73. The Courts have held that a specific order superseding the first order is imperative and a choice of one of the Commissioner's report from successive reports, is wrong (vide 2 TLT (lviii) ? S.A. No. 114 of 1102) and AIR 1931 Mad 73. We are aware of a different note on this aspect of the matter struck by the Division Bench of the Patna High Court in the decision reported in Shib Charan Sahu v. Sarda Prasad, AIR 1972 Punj & Har 265. The Patna decision was referred to with approval by Velu Pillai, J. in 1964 Ker LT concur with the decisions of the Madras High Court and Travancore High Court and the decisions of the Kerala High Court reported in 1974 Ker LT(SN) 22 and 1983 Ker LT 258; (AIR 1984 NOC 197), referred to hereinabove and also in Para 6 supra and do not find our way to agree with the decisions to the contrary as laying down the law on the point correctly. Time and again, the Courts have condemned or deprecated the tendency of the

Subordinate Courts in the appointment of a second Commissioner before superseding the first Commissioner's report and proceedings. That the first Commissioner's report and proceedings should be set aside for reasons to be recorded and then only the Court can proceed to appoint another Commissioner to do the work is a wholesome rule of law based on public policy. The proceedings in the Court below could be expedited, without waste of time and money. We are of the view, that only if the Court has reason to be dissatisfied with the proceedings and report of the first Commissioner for reasons stated, it can appoint a second Commissioner for further inquiry. This is a condition precedent”.

4. This Court held that the first Advocate Commissioner's report and proceedings would be set aside and only thereafter, second Advocate Commissioner can be appointed. Further, it was held that merely because objections were filed by the party concerned to the first Advocate Commissioner's report, the trial Court cannot appoint second Advocate Commissioner, unless it render a finding that the earlier Advocate Commissioner's report is un-satisfactory.

5. In the case on hand, admittedly the Advocate Commissioner's report and sketch, additional report and sketch were marked as Ex.C.1 to C4 and elaborately he was examined before the Court below. In the appeal stage without scraping the first Advocate Commissioner's report, the second Advocate Commissioner cannot be appointed. Therefore, the Court below rightly dismissed the petition and this Court finds no irregularity or infirmity in the order passed by the Court below.

6. Accordingly, this Civil Revision Petition is dismissed. Consequently, the connected Miscellaneous Petition is closed. No costs.

15.02.2021

Speaking/Non-speaking order
Index : Yes/No
Internet : Yes/No
kv

To

The I Additional Sub Judge, Villupuram.

G.K.ILANTHIRAIYAN,J.

kv



CRP (NPD).No.1570 of 2015

15.02.2021

WEB COPY