

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.08.2021

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD).No.1380 of 2013
and M.P.No.1 of 2013

K.Doss

.. Petitioner

Vs.

1.Puspa Rani

2.Sugumar

.. Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order dated 30.08.2012 made in I.A.No.318 of 2011 in O.S.No.18 of 2007 on the file of the District Munsif-Cum-Judicial Magistrate, Thirukalukundram.

For Petitioner : Mr.Rajasekhar

For Respondents : No appearance

ORDER

(The matter is heard through 'video conferencing/hybrid mode')

This Civil Revision Petition is filed to set aside the fair and decreetal order dated 30.08.2012 made in I.A.No.318 of 2011 in O.S.No.18 of 2007, on the file of the District Munsif-Cum-Judicial Magistrate, Thirukalukundram.

2.The petitioner is 1st defendant in O.S.No.18 of 2007, on the file of the District Munsif-Cum-Judicial Magistrate, Thirukalukundram. The 1st respondent filed the said suit for declaration and permanent injunction against the petitioner and the 2nd respondent. The petitioner and 2nd respondent filed separate written statements and are contesting the suit. The petitioner filed I.A.No.310 of 2009, for appointment of an Advocate Commissioner to measure the suit property with the help of Surveyor and to fix the boundary stone and to file a report along with the plan. The 1st respondent filed counter affidavit and sought for a direction to measure the entire Survey No.183, as per FMB. The learned Judge, by the order

dated 30.08.2010, allowed the said I.A. filed by the petitioner and directed the Advocate Commissioner to measure the suit property. The Advocate Commissioner inspected and measured the suit property and filed a report on 07.09.2011. The 1st respondent filed I.A.No.318 of 2011 under Order XXVI Rule 9 and 10 and Section 151 of C.P.C to scrap the Commissioner's report dated 07.09.2011 and for a direction to re-issue the warrant of commission to the same Commissioner to comply with the direction of the Court in I.A.No.310 of 2009, by measuring the entire Survey No.183. According to the petitioner, by the order dated 30.08.2010, the Court allowed the I.A., directing the Advocate Commissioner to measure the suit Survey No.183, as per FMB and to measure the suit property based on the 1st respondent's sale deed dated 30.06.1960. As per the order, the Advocate Commissioner visited the suit property on 09.07.2011 and measured only the Survey No.183/4 and filed report, stating that the suit property is measuring only 17 cents as per FMB. The counsel for the 1st respondent filed objection to the report of the Advocate Commissioner. The 1st respondent contended that the Advocate Commissioner failed to comply with the directions of the Court

while executing the warrant of commission and report of the Advocate Commissioner is not helpful to the Court to decide the issue involved in the suit. Unless entire Survey No.183 and petitioner's property are measured, the question involved in the suit cannot be decided and report of the Advocate Commissioner is irrelevant and will not bring the real facts of the case and prayed to scrap the earlier report and for re-issue of warrant of commission. The petitioner filed counter affidavit and submitted that the Advocate Commissioner measured the property as per the warrant of commission issued by the Court on 30.08.2010. The 1st respondent has not filed any objection to the report of the Advocate Commissioner. The allegation that the Advocate Commissioner did not comply with the direction issued in warrant of commission, is contrary to the direction issued by the Court and prayed for dismissal of I.A.No.318 of 2011. The learned Judge, by the order dated 30.08.2012, allowed I.A., on the ground that the 1st respondent insisted on measuring the entire Survey No.183 of suit property as per the sale deed dated 30.06.1960, in order to resolve the dispute in the suit.

3.Against the said order dated 30.08.2012 made in I.A.No.318 of

2011 in O.S.No.18 of 2007, the petitioner has come out with the present Civil Revision Petition.

4.The learned counsel appearing for the petitioner submitted that the learned Judge erroneously scrapped the report of the Advocate Commissioner, without following the provisions of Order XXVI Rules 9 and 10 of C.P.C. The learned Judge has not given any reason for scrapping the report and re-issuing the warrant of commission to measure the property and prayed for allowing the Civil Revision Petition.

5.Though notice has been served on the respondents and their names are printed in the cause list, on 09.08.2021 there was no representation for them either in person or through counsel. Today also, none appeared for the respondents.

6.Heard the learned counsel appearing for the petitioner and perused the entire materials available on record.

7.From the materials available on record, it is seen that in the application in I.A.No.310 of 2009 filed by the petitioner, an Advocate Commissioner was appointed to measure the suit property i.e., Survey No.183/4. In the counter affidavit filed, the 1st respondent in the said I.A., sought for measuring the entire Survey No.183. In spite of said request, the learned Judge issued warrant of commission only to measure the suit property. As per the direction of the Court, the Advocate Commissioner measured the suit property and filed the report. After such a report is filed by the Advocate Commissioner, the 1st respondent has filed the present I.A.No.318 of 2011 to scrap the report of the Advocate Commissioner dated 07.09.2011 and for re-issue of warrant of commission to the same Commissioner to measure the entire Survey No.183. According to the 1st respondent, the Advocate Commissioner has not complied with the direction of the Court issued in the warrant of commission and therefore, the report must be scrapped and warrant of commission has to be re-issued to measure the entire Survey No.183. The learned Judge, without verifying the earlier order dated 30.08.2010, made in I.A.No.310 of 2009, and the earlier warrant of commission, allowed the I.A. and

scrapped the report only on the ground that the 1st respondent insisted for measuring entire Survey No.183. The learned Judge failed to consider the provisions of C.P.C properly and erroneously scrapped the report of the Advocate Commissioner. In this regard, it is relevant to refer Order XXVI Rule 10 of C.P.C., which reads as under:

“10. Procedure of Commissioner—

(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

(2) Report and deposition to be evidence in suit. Commissioner may be examined in person—The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to suit may examine the Commissioner personally in open Court touching any part of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit. ”

8.As per Order XXVI Rule 10 (3) of C.P.C., only when the Court renders a finding that proceedings and report of Advocate Commissioner is not satisfactory, further inquiry can be ordered. In the present case, without giving any reason or finding on the report of the Advocate Commissioner dated 07.09.2011, the learned Judge scrapped the report of the Advocate Commissioner and ordered revisit and issued warrant to the same Advocate Commissioner to measure the entire Survey No.183 and identify the property of the petitioner and 2nd respondent and fix the boundary for the extent of 20 cents based on the sale deed dated 30.06.1960. The reason given by the learned Judge is erroneous. The learned Judge has not exercised the power conferred on him properly and committed irregularity in scrapping the report of the Advocate Commissioner. In view of such error and irregularity, the impugned order of the learned Judge is liable to be set aside and is hereby set aside. The learned Judge is directed to take the Commissioner's report dated 07.09.2011 on file and consider the same as per law.

With the above directions, the Civil Revision Petition is allowed.

No costs. Consequently, connected Miscellaneous Petition is closed.

17.08.2021

Index :: Yes/No
gsa

To

The District Munsif-Cum-Judicial Magistrate,
Thirukalukundram.

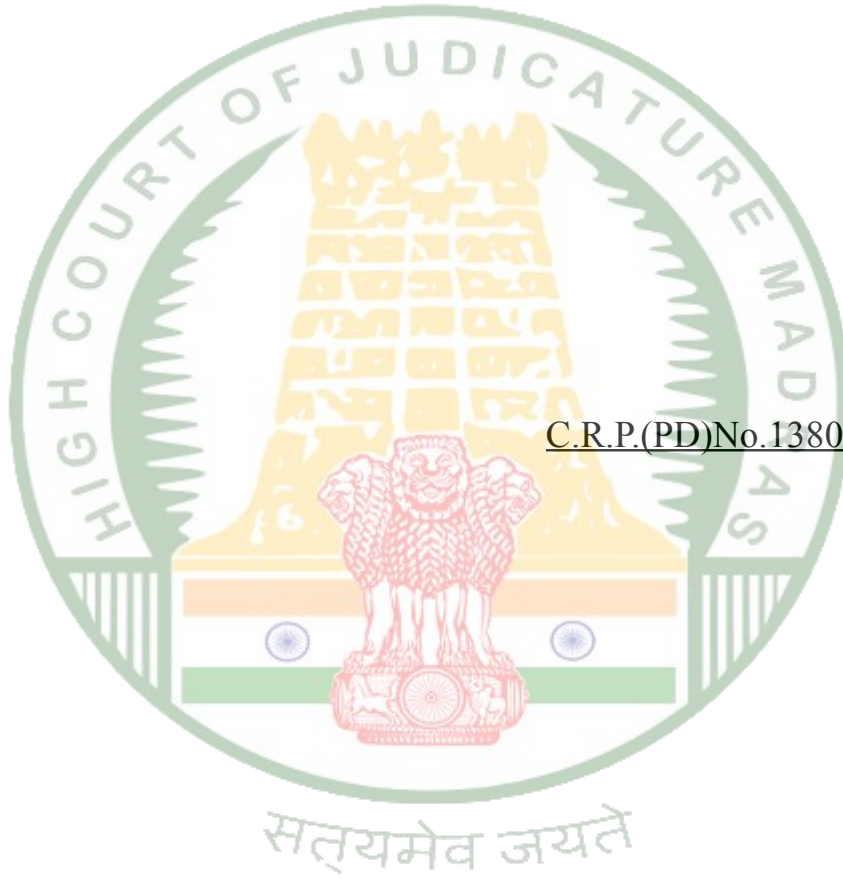


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V.M.VELUMANI, J.

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