

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.11.2021

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.R.P. (PD) No.1834 of 2021
and CMP No.14293 of 2021

Devasagayam

... Petitioner

Vs.

1. M.Madalaimuthu

2. Siluvai Mary

3. M.Pushparaj

4. Moovarasu

.. Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, praying to set aside the order dated 06.09.2019 in I.A.No.1 of 2019 in I.A.No.532 of 2015 in O.S.No.306 of 2015 on the file of the III Additional District Court, Salem.

For Petitioner : Mr. S.Mayilnathan

For Respondents : Mr. P.Jagadessan

ORDER

Challenge is to the order of the learned III Additional District Judge, Salem, made in IA No.1 of 2019, an application to reopen the Commissioner Application in IA No.532 of 2015. The suit in OS No.306 of 2015 is one for declaration that the partition deed is null and void, declaration that the plaintiff is the absolute owner of 50 cents of land in suit properties 1 to 3 and 5, for recovery of possession and for other reliefs.

2. Pending suit, the plaintiff filed an application in IA No.532 of 2015 seeking appointment of a Commissioner to inspect the suit property and measure the same and note down the encroachment made by the respondents/defendants as well as the physical features. This application came to be allowed by the Court and one V.P.Gayathri, was appointed as a Commissioner. The remuneration was fixed at Rs.6,000/-. However, the Commissioner did not file a Report and Plan even though it is stated that she has visited the property.

3. The application was being adjourned from time to time till 05.07.2017. On 05.07.2017, the learned Additional District Judge, directed the Registry to address the Commissioner to return the warrant or to file a report by 04.08.2017, despite such order, the Commissioner neither filed the report nor returned the warrant till 18.12.2018, on which date the learned District Judge closed the Commissioner Petition. Immediately thereafter, the petitioner filed the present application seeking to reopen the Commissioner Application for the purpose of filing the report.

4. Upon service of notice in the application, the respondents had made an endorsement that no counter, despite the same, the learned Additional District Judge, dismissed the application concluding that the respondents are in collusion with the petitioner. The manner in which the application has been disposed of by the Trial Court is wholly unsatisfactory. Once the Trial Court has felt the need for appointment of a commissioner and appointed a Commissioner it should have taken steps to replace the Commissioner and issued a warrant to another Commissioner to have the same executed. Closure of an application for commissioner for the default of the

Commissioner would definitely prejudice the parties for no fault of theirs.

5. It is not the case of the parties that the remuneration payable to the Commissioner was not paid. It is stated that the remuneration was paid and the Commissioner in fact inspected the property in question. The non filing of report by the Commissioner and cannot and shall not prejudice the parties. The Court ought to have re-issued the warrant to another Commissioner and should have directed him/her to file a report in compliance with the earlier order. The very closure of the application without resort to the above procedure, in my opinion, is erroneous. At least after the application for reopening the Commissioner Petition was filed, the Court could have allowed the same and appointed a fresh Commissioner to carry out the warrant.

6. The closure of the application for appointment of Commissioner itself being erroneous, I have no doubt in my mind that the order of the Trial Court suffers from material irregularity and is a result of total non-application of mind on the part of the learned District Judge. Therefore the

order is set aside, the Civil Revision Petition will stand **allowed**, I.A.No.1 of 2019 will stand allowed, IA No.532 of 2015 will stand restored.

7. The learned III Additional District Judge is required to appoint a new Commissioner and issue a warrant afresh and require the Commissioner to execute the warrant within a time frame. It will be open to the Commissioner to take assistance of Firka Surveyor for measurement of the property. No costs. Consequently, the connected miscellaneous petition is closed.

09.11.2021

Index: No
Internet: Yes
Speaking order
jv
To

1. The III Additional District Court,
Salem.
2. The Section Officer, V.R.Section,
High Court of Madras.

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R.SUBRAMANIAN, J.

jv



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