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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 15.06.2021
Pronounced on : 23.06.2021

CORAM:

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

CRP(PD) No.1546 of 2017
in
CMP.No.7179 of 2017

1.K.Muthu

2. M.Rameshkumar

Represented by his

Power Agent, M.Madheswari

...Petitioners

Vs.

1. P.Thangammal

2. B.Raja

3. R.Dhanalakshmi

...Respondents

PRAYER: Civil Revision Petition filed under Article 227 of Constitution of India to set aside the fair and decreetal order passed in I.A.No.850 of 2013 in O.S.No.507 of 2013 dated 17.11.2016 on the file of the Court of II Additional District Munsif, Salem and allow the said I.A. by allowing this Civil Revision Petition.

For Petitioners : Mr.A.Muthukumar

For Respondents : Mr.N.Damodaran

O R D E R

(This case has been heard through video conference)

This revision petition has been filed seeking to set aside the fair and decreetal order passed in I.A.No.850 of 2013 in O.S.No.507 of 2013 dated 17.11.2016 on the file of the Court of II Additional District Munsif, Salem.

2. The plaintiffs in O.S.No.507 of 2013 on the file of the Additional District Munsif, Salem, are the revision petitioners. The revision petitioners/plaintiffs had filed a suit for permanent injunction restraining defendants 1 to 3 and their men from putting any construction over the suit property. In the



said suit, the respondents had filed a written statement. The petitioners/plaintiffs had filed I.A.No.850 of 2013 seeking for appointment of Commissioner to note down the physical features of the suit property, to measure the same and to file a report.

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3. The Trial Court, by order dated 31.05.2013, nominated Thiru.G.K.Pugazhendhi as Advocate Commissioner and that he was directed to issue notice to both the parties in advance and to inspect the suit property with the help of a qualified Surveyor, to note down the physical features and measurements and to file his report on 01.07.2013. His remuneration was fixed as Rs.3,000/- directly to be paid by the petitioners/plaintiffs. The petitioners/plaintiffs had paid the remuneration to the Advocate Commissioner, however, for the reasons best known to him, the Commissioner had not proceeded to conduct inspection and had not filed the report.

4. Subsequently, the case had been adjourned on various dates. Whiles, finally on 17.11.2016, the court, finding that the petition under Rule 83 of the Civil Rules of Practice had not been filed, did not extend the time further and closed the petition under Order 26 Rule 18-B CPC.

5. The petitioners/plaintiffs, aggrieved against the closure of the petition, has filed this revision.

6. The learned counsel appearing for the petitioners/plaintiffs would submit that the court had appointed one Thiru.G.K.Pugazhendhi as Advocate Commissioner, by order dated 31.5.2013 and directed him to inspect the suit property with the help of a qualified Surveyor and to note down the physical features and measures and to file a report on 1.7.2013. He would further submit that the court had also fixed the remuneration of Rs.3000/- to him directly to be paid by the petitioners and in due compliance of the order passed by the court below, the petitioners/plaintiffs paid remuneration of Rs.3000/- to the Advocate Commissioner.

7. The learned counsel for the petitioners would further submit that the petitioners and their counsel had been following up with the Advocate Commissioner and the Advocate Commissioner had been taking time on several occasion since he was unable to find out a qualified Surveyor and though the Advocate Commissioner had been directed to file his report on 1.7.2013, he had not filed the report before the court within the time fixed by the court, however, the court had been extending time even without any petition being filed by the Advocate Commissioner.

8. The learned counsel for the petitioners would further



submit that having received the remuneration, a duty is cast upon the Advocate Commissioner to conduct the inspection and file the report within the specified time and in the event of him being unable to file the report within the time for any reason, he, ought to have, being an officer of the court, filed a Memo seeking for extension of time. In the event of non-cooperation of either side, he should have brought it to the knowledge of the court. In such event, the court ought to have directed the parties to appear before the court and conducted an enquiry with regard to the information given by the Advocate Commissioner. In the event of the Advocate Commissioner failing to do so, the Trial Court ought to have issued notice to the Advocate Commissioner and if there had been any lapses on the side of the Advocate Commissioner, the Trial Court ought to have recalled the warrant and directed the Advocate Commissioner to return the remuneration to the learned counsel concerned. The Trial Court, without bestowing its attention to the relief prayed for and without conducting an enquiry as to who is responsible for the delay, had, by a cryptic order, closed the Application detrimental to the petitioners.

9. The learned counsel for the petitioners would rely upon the following decisions in support of his contentions:-

1. C.K.T. (Chennai Kammavar Trust) Rep. by its Chairman P.Balakrishnan Vs. M.Jeyalakshmi and Others, reported in 2010 SCC Online Mad 122

2. P.Sanjeev Kumar and Others Vs. Sree Shirdi Saibhaba Matheswara Trust, Rep by its Managing Trustee N.Dharmalingam reported in (2016) SCC Online Mad 5068

3. In an Unreported judgment of this Court in CRP (PD) No.4040 of 2015 dated 08.12.2016 between D.Shanmugasundaram v. D.Paramasivam and another.

10. Per contra, the learned counsel for the respondents would submit that it is at the instance of the petitioners/plaintiffs, the Advocate Commissioner had been appointed. The petitioners/plaintiffs ought to have been diligent in following up with the Advocate Commissioner and when the Advocate Commissioner had not conducted the inspection, the petitioner/plaintiff ought to have intimated the court about the lapses on the part of the Advocate Commissioner. Since no steps were taken by the petitioners/plaintiffs, the court had closed the petition.

11. In reply, the learned counsel for the petitioners/plaintiffs, in due compliance of the order, the petitioners/plaintiffs have paid the remuneration to the Advocate Commissioner and even as per the order, the Advocate Commissioner was directed to issue notice to both the parties in



advance and to inspect the suit property with the help of a qualified Surveyor. The Advocate Commissioner had informed that he was unable to find a qualified Surveyor and he had been taking time for which, the petitioners/plaintiffs cannot be found fault with. The Trial Court, without recording reasons and without rendering a finding with regard to the reasons for the delay and the party responsible for the delay, had closed the Interlocutory Application thereby causing hardship to the petitioners.

12. Heard the learned counsel for the parties and perused the materials available on record.

13. In this case, there is no doubt at the instance of the petitioners/plaintiffs, the Trial Court had appointed Thiru.G.K.Pugazhendhi as Advocate Commissioner by order dated 31.5.2013. He was directed to inspect the suit property with the help of a qualified Surveyor and file a report on 1.7.2013. His remuneration was fixed as Rs.3000/-. The petitioners/plaintiffs have paid the amount. Counter Affidavit is also filed by the respondents/defendants on 30.7.2013. Thereafter, for the Commissioner's report and plan, several adjournments were granted by the court below and ultimately, on 17.11.2016, the impugned order came to be passed by the Trial Court on the ground that petition under Rule 83 of Civil Rules of Practice is not filed. The impugned order passed by the court below is reproduced hereunder for ready reference:-

"Petition under Rule 83 CRP not filed. Time not extended. Hence this petition is closed. Under Order 26 Rule 18-B C.P.C."

14. The statutory provisions viz., Rule 83 of Civil Rules of Practice and Order 26 Rule 18-B CPC are extracted hereunder:-

"83. Return of Commission:-

Every order for the issue of a Commission shall appoint a period within which the return of the Commission is to be filed in the Court. An application by any party for the extension of the said period may be made by interlocutory application upon notice to the other parties to the suit or matter and shall be supported by affidavit setting forth the grounds on which the extension is prayed."

Order 26 Rule 18-B:-

"18-B. Court to fix a time for return of commission--

The Court issuing a commission shall fix a date on or before which the commission shall be returned to it after execution, and the date so fixed shall not be extended except where the Court, for reasons to



be recorded, is satisfied that there is sufficient cause for extending the date."

15. A cursory reading of the above provisions reveals that a time limit for execution of the warrant will have to be fixed by the court while appointing the advocate commissioner and an application for extension of such time limit may be made by any party to the lis with an accompanying affidavit giving reasons therefor. The scope for fixation of time limit by the court while appointing the advocate commissioner is only avoid delay in conducting proceedings. For the same reason, the interlocutory petition with affidavit stating reasons for extension of time is insisted from the party who seeks for such extension of time. Therefore, it is clear that there should not be any delay in conducting the proceedings and no party, under the guise of seeking extension of time for execution of warrant, can protract the proceedings. It also reveals that extension of time by the court is not totally barred and it has to be done by recording reasons therefor.

16. In the instant case, the petitioners/plaintiffs have paid the remuneration to the Advocate Commissioner as directed by the court below. Therefore, on acceptance of warrant and the remuneration thereof, the Advocate Commissioner is deemed to be an Officer of the Court and a duty is cast upon him to conduct the inspection as directed by the court and file his report within the specified time. When the report is not filed within the time, the court should have issued notice to the Advocate Commissioner and enquired with regard to the delay in not filing the report within the time. If the delay is on the part of the parties to the proceedings, the parties to the proceedings will have to file an interlocutory application seeking extension of time for execution of warrant. If such delay is due to non-cooperation on the part of the parties to the proceedings, that can also be brought to the notice of the court by the Advocate Commissioner. It is not so reported by the Advocate Commissioner.

17. But, peculiarly, when the delay had occurred on the ground of lapse on the part of the Advocate Commissioner, the court should have enquired him with regard to the delay in execution of the warrant and if he is not interested in executing the warrant, it should have directed him to return the remuneration and recalled the warrant and appointed another advocate commissioner. Without undertaking such a procedure, the court below, without application of mind and without bestowing its attention to the relief prayed for and without verifying whether there had been any lapse on the part of the petitioners/plaintiffs, had closed the Application for want of a petition by any party to the suit under Rule 83 of Civil Rules



of Practice.

18. In a similar circumstance, this court has held in C.K.T. (Chennai Kammavar Trust) Rep. by its Chairman P.Balakrishnan Vs. M.Jeyalakshmi and Others, reported in 2010 SCC Online Mad 122, as under:-

"3. It is very unfortunate that the lower court without applying its mind and without bestowing any attention to the relief prayed for and without verifying whether any mistake has been committed by the revision petitioner, dismissed the application after appointing the Commissioner. When a commissioner has been appointed by the lower court and that commissioner did not inspect the premises and submit his report within the stipulated time, the lower court should have recalled the warrant issued and appointed another Advocate Commissioner to inspect the premises. Instead of following that procedure, the lower court has dismissed the application filed by the plaintiff for the default of the Advocate Commissioner in not inspecting the premises and submitting his report. The order of the lower court will expose the total non application of mind by the learned District Munsif, Kovilpatti."

19. In P.Sanjeev Kumar and Others Vs. Sree Shirdi Saibhaba Matheswara Trust, Rep by its Managing Trustee N.Dharmalingam reported in (2016) SCC Online Mad 5068 wherein the defendants, aggrieved by the delay in filing the report by the Advocate Commissioner, had approached this High Court seeking for a direction to the Trial Court for early disposal of the Suit and this court has held as under:-

"3. In the said suit, the plaintiff filed an application in I.A.No.1156 of 2014 seeking for appointment of Advocate Commissioner. Since the defendants had no objection for allowing the application, the trial Court appointed an Advocate Commissioner with a direction to file report and plan by 19.12.2014. Thereafter, the matter is being adjourned periodically for filing the report of the Commissioner. On 10.07.2015, on a memo filed by the plaintiff, a Taluk Surveyor was appointed to assist the Commissioner in measuring the suit property. Thereafter, the matter was being adjourned from 15.07.2015 for issuance of fresh warrant to the Advocate Commissioner till this date."



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The Commissioner has not inspected the suit property and filed his report for more than one and a half years.

4. The learned counsel for the petitioners submitted that in view of the long pendency of the matter, the petitioners are put to hardship and prejudice.

5. Since the Commissioner has not inspected the property yet, inspite of the order being passed on 19.12.2014, I direct the trial Court to direct the Commissioner to file his report within one month from the date of receipt of a copy of this order. In the case of the Commissioner not interested in inspecting the property and filing the report, the warrant of commission issued to be Commissioner may be withdrawn and a fresh Commissioner can be appointed. After the filing of the report by the Commissioner in a month's time, the Principal Sub Judge, Coimbatore is directed to dispose of the suit in O.S.No.1380 of 2014, on merits and in accordance with law, within a period of four months from the date of filing of the report by the Advocate Commissioner."

20. In an unreported judgment of this Court in CRP(PD) No.4040 of 2015 dated 08.12.2016 between D.Shanmugasundaram v. D.Paramasivam and another, this court has held as under:-

"2. I.A.No.950 of 2014 in O.S.No.66 of 2014 was filed for appointment of an Advocate Commissioner and the same was allowed. The report and plan was already posted as NFA. As the petitioner had not taken steps under Rule 83 of the Civil Rules of Practice, the said application was closed. Aggrieved by the same, the above Civil Revision has been filed.

3. As the prayer sought for in I.A.No.950 of 2014 is only for appointment of an Advocate Commissioner, which had already been allowed, the same need not be taken away on mere technical grounds.

4. Be that as it may, the learned counsel for the petitioner represents that the said Advocate Commissioner, has now been appointed as a Judicial Officer and he is not available to execute the warrant. Hence, seeks permission to appoint another Advocate as Commissioner.

5. Hence, I.A.No.950 of 2014 is remitted back to the trial Court and the learned District



Munsif, Erode is directed to appoint a fresh Advocate Commissioner. "

21. In the case on hand, after appointing the Advocate Commissioner by order dated 31.5.2013, the court below, instead of following the above procedure upheld in the above decisions, had repeatedly granted time merely for the commissioner's report and plan and one fine day, on 17.11.2016, had passed the impugned order. The impugned order lacks merit and exposes total non application of mind by the Court below. Therefore, the impugned order is set aside and the matter is remitted back to the Trial Court with a direction to appoint new Advocate Commissioner and warrant may be issued fixing a time frame for execution of the warrant, after recalling the warrant issued in favour of the earlier Advocate Commissioner and directing him to refund the remuneration paid to him.

22. The civil revision petition is allowed. No costs. The connected Civil Miscellaneous Petition is closed.

s/d-
Assistant Registrar(CS VI)

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Sub-Assistant Registrar

ssk.
To

1. The II Additional District Munsif, Salem.

+1 CC to Mr. A. Muthukumar, Advocate, Sr 28908.

P.D. ORDER IN
CRP(PD) No.1546 of 2017
in
CMP.No.7179 of 2017

JPL(CO)
SP(15/07/2021)