



WEB COPY



CRP.PD.No.263 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.07.2021

CORAM :

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

CRP(PD).No.263 of 2017
and CMP No.1166 of 2017

P.Mani.

... Petitioner

Vs.

1. P.Kandasamy @ Aasaikannan

2. R.Natarajan @ K.R.Nandakumaran

... Respondents

PRAYER : Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the petition and order dated 08.08.2016 in IA.No.75 of 2016 in OS.No.172 of 2004 on the file of the II Additional District Munsif, Salem.

For Petitioner : Mr.T.S.Baskaran
For Respondents : Mr.P.Jagadeesan for R1 and R2.

ORDER

(This case has been heard through video conference)

This civil revision petition has been filed seeking to set aside the petition and order dated 08.08.2016 made in IA.No.75 of 206 in OS.No.172 of 2004 on the file of the II Additional District Munsif, Salem.



CRP.PD.No.263 of 2017

WEB COPY

2. The brief facts :-

The revision petitioner is the plaintiff in the suit in OS.No.172 of 2004. The suit was filed by the revision petitioner/plaintiff against the respondents/defendants directing them to close the pits and to remove the damage to the cart-track and raise the portions lowered on the western side of the cart-track and restore the cart track and for other incidental reliefs. In the suit, the petitioner had originally filed IA.No.1656 of 2006 for appointment of Advocate Commissioner and the trial Court had appointed one Ms.Kumudha as an Advocate Commissioner and based on the warrant she conducted inspection along with the qualified surveyor and filed report dated 02.04.2007. Subsequent to filing of the report, the defendant caused damage to the suit property and altered the pathway. Thereby, the petitioner/plaintiff had filed IA.No.717 of 2008 for appointing new Commissioner to revisit the schedule property and to file the report.

3. The trial Court appointed one Mr.M.Govindaraj by an order dated 11.06.2008. Against the appointment of a new Commissioner, the respondents/defendants approached this Court by filing CRP.No.4208 of



CRP.PD.No.263 of 2017

WEB COPY

2008. This Court while disposing the revision, finding that the earlier Commissioner would be the right person to file the report about the subsequent events had directed the trial judge to direct the earlier Advocate Commissioner to inspect the property and to submit the report as expeditiously as possible. Unfortunately, the original Advocate Commissioner Ms.Kumudha who had been appointed earlier had left practice. Thereafter, the case was adjourned for several hearings by the Court and ultimately, with the consensus of both parties on 10.10.2013, one Mr.P.Elangovan was appointed as Advocate Commissioner in the place of the earlier Advocate Commissioner to visit the suit property. The Commissioner was directed to file his report by 11.11.2013 and the plaintiff was also directed to pay the remuneration of Rs.5,000/- and the Court had directed to pay a sum of Rs.3,000/- directly to the Commissioner and directed to deposit a sum of Rs.2,000/- as Commissioner fee into the Court. In due compliance to the order of the trial Court, the petitioner had paid a sum of Rs.5,000/- towards remuneration to the Advocate Commissioner.



CRP.PD.No.263 of 2017

WEB COPY

4. Despite the insistence by the plaintiff the Commissioner had been expressing his inability to conduct inspection for want of a qualified surveyor. The Court had been regularly adjourning the case. Whiles, on 21.01.2014, the trial Court finding that the report of the Commissioner was not filed had extended the warrant of commissioner and posted the matter on 25.02.2014. Further, the case was adjourned to several dates. Whiles, the Advocate Commissioner also visited the suit schedule property and thereafter for want of time he had been seeking extension and the Advocate Commissioner had also paid batta for the surveyor. While, the petitioner/plaintiff was expecting that the Commissioner would come and inspect and file the report, the trial Court without conducting a proper enquiry by a cryptic order dated 08.08.2016 had closed the petition, against which the present revision has been filed.

5. The learned counsel for the revision petitioner would submit that immediately on appointment of Advocate Commissioner, the petitioner also paid the remuneration of the Advocate Commissioner and the counsel for the petitioner had been following with the Advocate Commissioner and the Advocate Commissioner had been continuously



CRP.PD.No.263 of 2017

paying batta for the surveyor. Since, the surveyor was not available he was unable to inspect the property and file report. Whereas the trial Court without conducting an enquiry and without hearing the Advocate Commissioner had closed the petition. When the Advocate Commissioner has been appointed a duty is cast upon the Advocate Commissioner to conduct an inspection and to file the report within the specified time. In that event of him being unable to inspect within the time for any reason, as an officer of the Court he ought to have brought to the knowledge of the Court by filing memo seeking extension of time. It is not the case where there was non cooperation from either side. In the event of the report not being filed within the time fixed, the trial judge ought to have put the Advocate Commissioner and the parties on notice and conducted an enquiry to findout on whose fault there was delay in filing the report. In such event, the trial Court ought to have passed detailed order with regard to the same and closed the application. The trial Court without bestowing its attention to the relief prayed for and without conducting an enquiry as to who is responsible for delay had by a cryptic order closed the application to the detriment of the revision petitioner/plaintiff. He would submit that if the order is not set aside and



CRP.PD.No.263 of 2017

WEB COPY

the Advocate Commissioner is not allowed to file the report, grave prejudice would be caused to the revision petitioner/plaintiff and thereby would seek to allow the revision.

6. In support of his contention, he would rely on the unreported judgment of this Court in CRP.1546 of 2017 dated 23.06.2021 (K.Muthu and another v. P.Thangammal).

7. The learned counsel for the respondents/defendants would oppose stating that having got an Advocate Commissioner appointed, a duty is cast on the revision petitioner/plaintiff to follow up the matter with the concerned Presiding officer. If the report of the Advocate Commissioner is not filed within the time, the petitioner ought to have filed appropriate petition seeking for extension of time. Since, in this case, the petitioner/plaintiff has not filed appropriate petition seeking for extension of time, the trial Court had rightly dismissed the application.

8. Heard the counsel and perused the materials available on record.



CRP.PD.No.263 of 2017

WEB COPY

9. The appointment of Advocate Commissioner is not in dispute, subsequently, since the earlier Advocate Commissioner Ms.Kumudha had left practice, by consensus of both parties one Mr.P.Elangovan has been appointed as Advocate Commissioner on 10.10.2013, and he had been directed to file the report by 11.11.2013. The revision petitioner/plaintiff has also paid necessary remuneration to the Advocate Commissioner Mr.P.Elangovan. Thereafter, the case had been adjourned to various hearing dates for filing of report and as stated by the learned counsel for the petitioner, the Advocate Commissioner had also paid necessary Batta for the surveyor. Whiles, on 08.08.2016 the trial Court finding that no petition under Section 83 CPC has been filed had closed the petition by a critic order.

10. This Court in CRP.No.1546 of 2017 dated 23.06.2021 referring to the earlier judgments of this Court discussed about the procedure to be followed in such events. The relevant paragraphs are extracted hereunder.

“13. In this case, there is no doubt at the instance of the petitioners/plaintiffs, the Trial Court had



CRP.PD.No.263 of 2017

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



CRP.PD.No.263 of 2017

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



CRP.PD.No.263 of 2017

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.



WEB COPY



CRP.PD.No.263 of 2017

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



WEB COPY



CRP.PD.No.263 of 2017

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



CRP.PD.No.263 of 2017

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. 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



CRP.PD.No.263 of 2017

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.



WEB COPY



CRP.PD.No.263 of 2017

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.”

11. As stated above, the trial Court instead of following the procedure had repeatedly granted time for filing commissioner report and plan and on 08.08.2016 had closed the petition by a cryptic order. The impugned order lacks merit and exposes total non application of mind by the Court below. In view of the above the impugned order of the Court below has to be set aside and the matter has to be remitted back to the trial Court and IA.No.717 of 2008 in OS.No.172 of 2004 has to be reopened. If Mr.P.Elangovan is in practice he may be directed to file a report within the prescribed period of time, if he expresses unwillingness to execute the warrant he may be directed to return the remuneration paid by the plaintiff and a new Advocate Commissioner may be appointed. If Mr.P.Elangovan has left practice, some other Advocate Commissioner may be appointed.



CRP.PD.No.263 of 2017

WEB COPY

12. In the result, the Civil Revision Petition stands allowed and the order dated 08.08.2016 made in IA.No.75 of 2016 in OS.No.172 of 2004 on the file of the II Additional District Munsif, Salem stands set aside and the IA.No.717 of 2008 stands reopened. No costs. Consequently, connected miscellaneous petition is closed.

13. The trial Court shall follow the matter vigilantly and see to that the report is filed within the prescribed period. The learned counsel for the respondent would submit that it is the case of the year 2004 and thereby a time frame may be fixed to complete the trial. Taking into consideration that the suit is of the year 2004, the trial judge is directed to complete the trial as expeditiously as possible preferably within a period of one year from the date of receipt of copy of this order.

16.07.2021.

tsh

To
The II Additional District Munsif, Salem.



WEB COPY



CRP.PD.No.263 of 2017

A.D. JAGADISH CHANDIRA, J.,

tsh

CRP(PD).No.263 of 2017

16.07.2021.