

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.09.2021

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(NPD).No.3275 of 2017

and

C.M.P.No.15289 of 2017

R.Ponnusamy

.. Petitioner

Vs.

Arumugasamy

.. Respondent

Prayer: This Civil Revision Petition is filed under Section 115 of C.P.C., against the fair and decretal order dated 20.06.2017 made in I.A.No.57 of 2017 in A.S.No.53 of 2016 on the file of the Sub Court, Sathyamangalam, Erode.

For Petitioner : Mr.S.Nagarajan

For Respondent : Mr.S.Parthasarathy

ORDER

(The matter is heard through “Video Conferencing/Hybrid Mode”.)

This Civil Revision Petition is filed against the fair and decretal order dated 20.06.2017 made in I.A.No.57 of 2017 in A.S.No.53 of 2016 on the file of the Sub Court, Sathyamangalam, Erode.

2.The petitioner is the defendant in O.S.No.12 of 2013 on the file of the District Munsif Court, Sathyamangalam. The respondent filed the said suit for declaration, mandatory injunction and permanent injunction. The petitioner filed written statement on 19.04.2013 and was contesting the suit. The respondent filed I.A.No.176 of 2013 under Order XXVI Rule 9 C.P.C. for appointment of Advocate Commissioner to measure the suit property for the purpose of removal of encroachment made by the petitioner. After contest, the said I.A. was ordered and Advocate Commissioner was appointed. Advocate Commissioner after inspection, filed report on 08.04.2015 in I.A.No.176 of 2013. The petitioner filed objection to the said report and filed I.A.No.578 of 2015 in I.A.No.176 of 2013 under Order XXVI Rule 10 C.P.C. for a direction to the Advocate Commissioner to file additional report to the objections filed by the petitioner. The respondent filed counter affidavit in the said I.A.No.578 of 2015.

3.The learned Judge after Trial, by the judgment and decree dated 05.10.2016, decreed the suit filed by the respondent.

4.Against the said order dated 05.10.2016, the petitioner filed First Appeal in A.S.No.53 of 2016. In the First Appeal, the petitioner filed the

present I.A.No.57 of 2017 under Order XXVI Rule 9 for re-issue of warrant to the Advocate Commissioner appointed in O.S.No.12 of 2013 for re-measuring the suit property and file report along with plan. According to the petitioner, the suit filed by the respondent was decreed. During the cross examination of Advocate Commissioner, he admitted that there is no survey stones in the suit property and that the Advocate Commissioner has filed a wrong report by inspecting the suit property after two years. The Advocate Commissioner has not filed any report measuring the suit property by fixing survey stones and hence, it is necessary for re-issue of warrant for the same Advocate Commissioner. The respondent filed counter affidavit and denied all the averments and submitted that I.A.No.578 of 2015 in I.A.No.176 of 2013 in O.S.No.12 of 2013 filed by the petitioner for the very same relief was dismissed by the Trial Court. Hence, the petitioner cannot seek for re-issue of warrant in the First Appeal and prayed for dismissal of I.A.No.57 of 2017.

5.The learned Judge considering the averments in the affidavit, counter affidavit and dismissal of I.A.No.578 of 2015 filed by the petitioner in the suit, dismissed the I.A.No.57 of 2017.

6. Against the said order of dismissal dated 20.06.2017 made in I.A.No.57 of 2017, the petitioner has come out with the present Civil Revision Petition.

7. The learned counsel appearing for the petitioner contended that the First Appellate Court failed to note that the Advocate Commissioner did not measure the suit property by fixing survey stones and the Advocate Commissioner also admitted the same in his cross examination. The Advocate Commissioner without measuring the suit property of the petitioner, has filed a wrong report stating that the petitioner has encroached the respondent's property. The First Appellate Court did not properly consider the order of the Trial Court in I.A.No.578 of 2015, as the Trial Court failed to consider that Advocate Commissioner filed report stating that respondent only encroached 1 sq. feet in the petitioner's property and put up sun shade. The First Appellate Court failed to see that C.R.P.(PD).No.4711 of 2015 filed by the petitioner against the order of dismissal passed in I.A.No.578 of 2015 was dismissed by this Court vide order dated 14.11.2016 not on merits, but it was dismissed as infructuous as the suit was decreed when the C.R.P. was taken up for hearing. The petitioner constructed a compound wall about 10 years prior to filing of the suit and the Advocate Commissioner cannot decide the life of the

compound wall. The Advocate Commissioner has to file a supplementary report to this point and prayed for allowing the Civil Revision Petition.

8.The learned counsel appearing for the respondent reiterated the averments in the counter affidavit and submitted that the learned Judge considering the entire materials as well as the report of the Advocate Commissioner and objection of the petitioner, dismissed the I.A.No.57 of 2017 filed by the petitioner for the very same relief. In view of the dismissal of I.A.No.578 of 2015 filed for a direction to the Advocate Commissioner to file additional report to the objection of the petitioner, the petitioner is not entitled to the relief now sought for in the present I.A. and prayed for dismissal of the Civil Revision Petition.

9.Heard the learned counsel appearing for the petitioner as well as the learned counsel appearing for the respondent and perused the entire materials on record.

10.From the materials on record, it is seen that the respondent filed the suit for declaration, mandatory injunction and permanent injunction and the said suit was decreed. It is the case of the respondent that petitioner

encroached his property and put up compound wall. While the suit was pending, the respondent filed I.A.No.176 of 2013 for appointment of Advocate Commissioner to inspect and measure the suit property. The Advocate Commissioner appointed in the said I.A., inspected and measured the suit property and filed the report. The petitioner also filed his objection to the report. Thereafter, the petitioner filed I.A.No.578 of 2015 for a direction to the Advocate Commissioner to file additional report. The said I.A. was dismissed. Then the petitioner filed C.R.P.(PD).No.4711 of 2015 before this Court. By the time C.R.P.(PD).No.4711 of 2015 was taken up for hearing, the suit was decreed. Recording the same, C.R.P.(PD).No.4711 of 2015 was dismissed as infructuous by the order of this Court dated 14.11.2016. The petitioner filed First Appeal in A.S.No.53 of 2016 challenging the judgment and decree passed in O.S.No.12 of 2013. In the First Appeal, the petitioner filed the present I.A.No.57 of 2017 for re-issue of warrant to the same Advocate Commissioner to inspect and measure the suit property and to file additional report. The petitioner has filed objection to the report of the Advocate Commissioner making various objections, mainly with regard to measurement of the property of the respondent and failure on the part of the Advocate Commissioner to measure the property of the petitioner. It is to be noted that the petitioner filed I.A.No.578 of 2015 before the Trial Court for

the very same relief and the same was dismissed. The learned Trial Judge considering the entire materials, dismissed the I.A. Again it is not open to the petitioner to file the present I.A. for the very same relief.

11.It is the contention of the learned counsel appearing for the petitioner that Trial Court decreed the suit only based on the report of the Advocate Commissioner. It is well settled that report of the Advocate Commissioner is only to assist the Court to arrive at a conclusion in the suit. The report of the Advocate Commissioner cannot be taken into consideration to decide the issue in the suit. It is for the Court to consider all the materials placed before it, including the oral and documentary evidence and it cannot only consider the report of the Advocate Commissioner while deciding the issue in the suit. The objection filed by the petitioner is on record. It is open to the petitioner to raise all the objections before the Appellate Court that the suit was decreed only based on the wrong report of the Advocate Commissioner without considering his objections. If any submission is made before the Appellate Court challenging the judgment of the Trial Court, the same will be considered on merits in view of the fact that objection filed by the petitioner to the report of the Advocate Commissioner is on record and the further report of the Advocate Commissioner is not necessary. The

learned Judge has considered entire materials and has given valid reason for dismissing the I.A. There is no error or irregularity in the order of the learned Judge warranting interference by this Court.

12.In the result, this Civil Revision Petition is dismissed.
Consequently, the connected Miscellaneous Petition is closed. No costs.

20.09.2021

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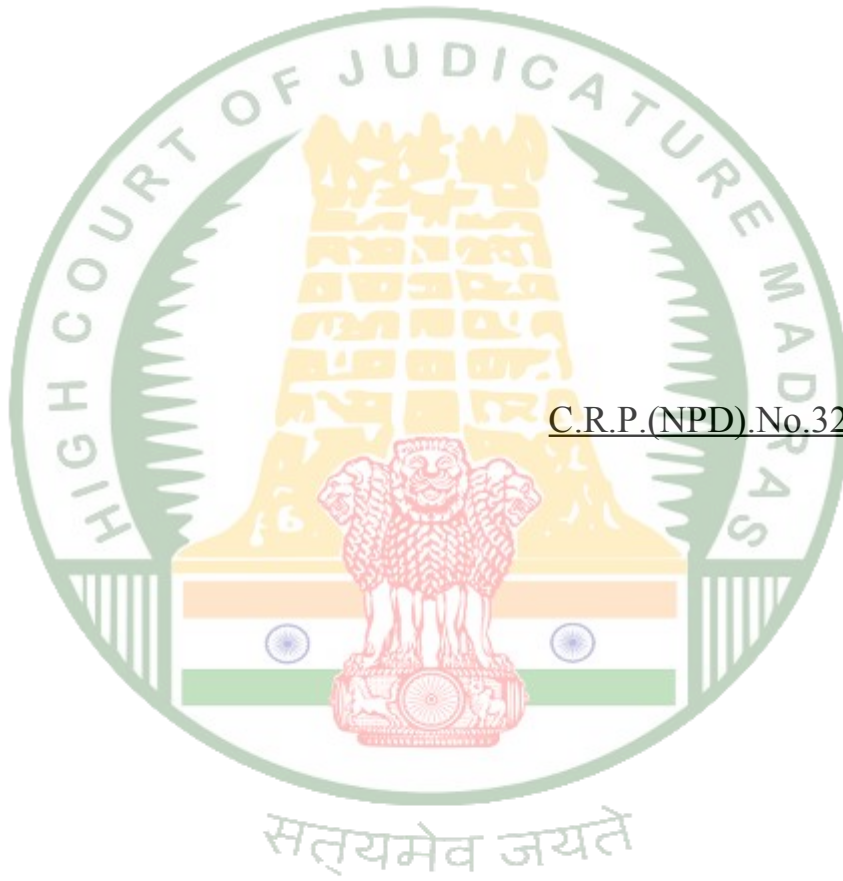
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To

The learned Subordinate Judge,
Sathyamangalam,
Erode.

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V.M.VELUMANI, J.
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