



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATE: 25.10.2021.

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THE HON'BLE MR.JUSTICE A.D.JAGADISH CHANDIRA

C.R.P.(MD) Nos.1530 and 1531 of 2021

and

M.P.No.8452 of 2021

Thangalakshmi

...Petitioner/Petitioner/
Appellant

vs.

Vaithilingam Pillai

...Respondent/Respondent/
Respondent

Civil Revision Petitions filed under Article 227 of the Constitution of India against the Docket orders dated 6.9.2021 passed in I.A.Nos.2 and 3 of 2021 in A.S.No.8 of 2020 on the file of the I Additional District Judge, Tiruchirappalli.

For Petitioner : Mr.Raguvaran Gopalan

COMMON ORDER

The revision petitions have been filed by the defendant in the suit in O.S.No.62 of 2017 on the file of the Sub Judge, Thuraiyur, challenging the docket orders passed by the I Additional District Judge, Trichy in I.A.Nos.2 and 3 of 2021 in A.S.No.8 of 2020.

2. The said suit was filed by the respondent herein for a declaration, injunction and recovery of possession in respect of the suit property. During trial, at the instance of the respondent/plaintiff, an Advocate Commissioner was appointed to measure the suit property and give a report with regard to the physical features. The Commissioner had filed his report and plan on 19.12.014 and subsequently, the suit was decreed and declaration sought for by the plaintiff was granted. The defendant had filed appeal in A.S.No.8 of 2020 before the I Additional District Judge, Tiruchirappalli. Pending appeal, the defendant had filed two interlocutory applications in I.A.Nos.2 of 2021 under Section 151 CPC to scrap the Commissioner's Report and I.A.No.3 of 2021 under Order 26 Rule 9 and (5) CPC for re-issuance of warrant to the same Advocate Commissioner or any other

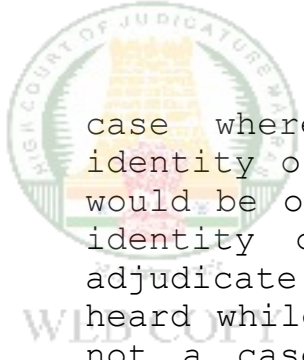


Commissioner with a qualified surveyor The Appellate Court, by docket orders, observed that the said Applications would be taken up alongwith the Appeal.

3. Learned counsel for the revision petitioner would submit that the the Advocate Commissioner has measured the property based on the stones laid by the individual owners of the plots and he had not made measurements based on the survey stones laid by the Revenue Department. He would also submit that the petitioner had made specific objections to the Commissioner's Report, however, the Trial Court had decreed the suit in favour of the respondent/plaintiff against which judgment and decree, the petitioner had filed appeal in A.S.No.8 of 2020 on the file of the I Additional District Judge, Tiruchirapalli and one of the grounds taken therein is that there is an error in the Advocate Commissioner's Report and thereby, the petitioner had filed applications in I.A.Nos.2 and 3 of 2020 to scrap the Commissioner's Report and to reissue warrant to the same Commissioner with specific instructions to measure the property once again on the ground based on the survey stones laid by the Revenue Department. He would further submit that those petitions were filed much earlier viz., on 3.3.2021 and the respondent had also filed counter affidavit, whereas the appellate court had wrongly construed it to be a petition filed under Order 41 Rule 27 CPC as if the petitioner intended to let in additional evidence and thereby observed that those petitions would be taken up alongwith the main Appeal.

4. The learned counsel for the petitioner would further submit that the petitioner had raised his objections to the Advocate Commissioner even before the Trial Court and that the petitioner had also made a valid ground for scrapping of the earlier Commissioner's Report and re-issuance of the warrant and in such circumstances, the appellate court ought to have reissued the warrant and obtained a Report from the Advocate Commissioner and the docket order passed by the appellate court without deciding with regard to the necessity of appointment of Advocate Commissioner is erroneous and he would reiterate that the contentions of the respondent that the application for appointment of Advocate Commissioner had been filed to let in additional evidence and thereby it should be considered alongwith the Appeal is erroneous and he would seek to set aside the order passed by the Court below and for a direction to the Appellate court to hear the Applications afresh on merits. In support of his contention, the learned counsel relied on the decision of this court in **PR.Chockalingam v. M.Pichai (2003-4-LW 77)**.

5. The learned counsel would further submit that it is not a case seeking permission to file additional evidence and it is a



case where the petitioner/appellant had questioned the very identity of the property as per the Commissioner's Report and it would be only proper for the court to collect materials as to the identity of the property from the Report of Commissioner to adjudicate the dispute in the appeal and it cannot be straightway heard while disposing the appeal. He would also submit that it is not a case where the Application was filed at the fag end of arguments stage and the petitions were pending from the month of March 2020 and on account of Covid, there was no progress in the case and the petitioner/appellant is not responsible for the delay.

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

7. A similar issue came up for consideration before this court in **PR.Chockalingam v. M.Pichai (2003-4-LW 77)**, wherein this court, after analysing the distinction between the Application filed under Order 41 Rule 27 and the Application filed under Order 26 Rule 9 CPC and quoting the said provisions has held as under:-

"10. A reading of the said rule would indicate that it relates to only letting in additional evidence. The report of the commissioner is amenable to objections, which may be filed by both the parties, if require so. Then again, the parties are entitled to advance their arguments questioning the report. The Court need not necessarily accept the report of the commissioner in toto. More over, calling for a report even before the appeal is heard is only to enable the Court to consider the same at the time of disposal of the appeal and therefore, the report by itself cannot be considered as an additional evidence and the application filed seeking an order of appointment of commissioner can be brought within the ambit of Order XLI Rule 27 of the Civil Procedure Code.

From a reading of the above rule, it is clear that the Court, if it deems fit that a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, may issue commission. This rule is applicable to all fours to the appellate Court dealing with the appeal also. Hence, an application filed under Order XXVI Rule 9 of the Civil Procedure Code cannot be equated to the application filed under Order XLI Rule 27 of the Civil Procedure Code.

17. An analysis of the above judgments would

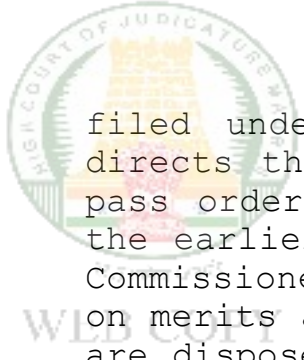
<https://hcservices.ecourts.gov.in/hcservices/> lead to an irresistible conclusion that the



appellate Court, while considering the application for appointment of commissioner, should not order the application for the sake of asking. Since the power could be exercised judicially, the proper application of mind to the facts of the case is essential before either ordering or rejecting such application. No hard and fast rule can be laid down that in all cases of application filed for appointment of commissioner, that it should be only heard along with the appeal and the Court should order the appointment of commissioner only in the event it satisfies for such commission during the hearing of the appeal. While the question of identity of the property is pleaded, it would be only proper for the Court to first collect the materials as to the identity of the property by way of a report from the commissioner to adjudicate the dispute at the time of hearing of the appeal.

18. In our case, the application is filed only under Order XXVI Rule 9 of the Civil Procedure Code and not under Order XLI Rule 27 of the Civil Procedure Code. It is the case of the respondents that the property in dispute is comprised in S. NO. 800 and it correlates to Block No. 7 in Duraisinga Lay Out. The claim of the revision petitioner is in respect of the property in Block NO. 8 and it situates at north of the block to the suit property. The application for survey commission is filed for identification of the property further on the ground that the suit property does not lie in Duraisinga Lay Out. In view of the averments, it would be only proper for the appellate Court to issue survey commission at the first instance and to get the report as to the identity of the property even before the appeal is heard, as there is no embargo for the appellate Court to consider an application filed under Order XXVI Rule 9 of the Civil Procedure Code only along with the appeal. In view of the above discussions, I am unable to agree with the submissions of the learned counsel for the petitioner that the impugned order is unsustainable, as the application filed by the respondents seeking for appointment of commissioner ought to have been disposed of only at the time of hearing of the appeal."

8. In light of the above ratio, this court finds some force in the arguments of the learned counsel for the petitioner that the Appellate Courts, under the misconception that the petitions were



filed under and Order R1 Rule 27 CPC. Therefore, this court directs that the Appellate Court shall hear both the parties and pass orders on merits with regard to the necessity for scrapping the earlier Report and re-issuance of the warrant to the Advocate Commissioner and there after decide the appeal in A.S.No.8 of 2020 on merits and in accordance with law. The civil revision petitions are disposed of accordingly. No costs. The connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

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Sub Assistant Registrar(CS)

ssk.

Note: In view of the present lock down owing to COVID 19 pandemic, a web copy of the order may be utilised for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the Advocate/litigant concerned.

To

I Additional District Judge,
Tiruchirappalli.

+1 CC to M/s.K.PRABHAKAR, Advocate, SR-32716 dated 26/10/2021

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RK/PM(08/11/2021) 5P 3C