



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 12.08.2021

Delivered on : 01.09.2021

CORAM:

THE HONOURABLE **MRS. JUSTICE R. THARANI**

C.R.P. (MD) No.1887 of 2017

and

C.M.P. (MD) No.9803 of 2017

M.S.M.Mohamed Basul Ashub (died)

1.M.B.A.Jamal Mohamed

2.M.B.A.Ahamed Neina

3.M.B.A.Mohaideen Sathakathulla Maraika

4.M.B.A.Mohadum Meera Nachi

5.M.B.A.Kaja Moinudeen

6.M.B.A.Kithuru Beevi Fathima

7.M.B.A.Mohamed Saleem

8.M.B.A.Sakina Beham

9.M.B.A.Bowsiya Beham

10.M.B.A.Regina Beham

11.M.B.A.Abdul Nasar

12.M.B.A.Haseena Behum

13.M.B.A.Moghseena Beham

... Petitioners/Petitioners/Plaintiffs

Vs.

V.Veerapandi

... Respondent/1st Respondent/1st defendant

Prayer: This Civil Revision Petition is filed under Article 227 of the Constitution of India, against the fair and decreetal order, dated 21.08.2017 passed in I.A.No.358 of 2016 in O.S.No.118 of 2013, on the file of the District Munsif, Srivaikuntam.

For Petitioners

: Mr.M.P.Senthil

For Respondent

: Mr.R.T.Arivu Kumar

for Mr.N.Ga.Nataraj

ORDER

This Civil Revision Petition is filed against the order, dated 21.08.2017 passed in I.A.No.358 of 2016 in O.S.No.118 of 2013, on the file of the District Munsif, Srivaikuntam.

2.The revision petitioners are the plaintiffs in the suit and petitioners in the I.A. petition. Respondent herein is the first defendant in the suit and first respondent in the I.A. petition. The petitioners filed a suit in O.S.No.118 of 2013 for a prayer of declaration and injunction. The petitioners filed a petition in I.A.No.358 of 2016, for a prayer of re-issuance of the Commissioner Warrant. That petition was dismissed by the District Munsif, Srivaikuntam. Against the same, the petitioners have preferred this



Civil Revision Petition.

3. Brief substance of the petition in I.A.No.358 of 2016 is as follows:-

Before filing of the written statement by the defendant, a Court Commissioner was appointed in this case. In the written statement, it was stated that the plaintiffs are not aware of the survey number of the property and the boundaries in the document of the plaintiffs is wrong. Hence, the Commissioner has to re-visit the property and to verify the averments made in the written statement. A detailed report with the help of Surveyor is necessary and the Commissioner Warrant has to be re-issued.

4. Brief substance of the counter in I.A.No.358 of 2016 is as follows:-

There is no necessity to re-issue the Warrant. Already the Commissioner had visited the suit property and he had filed a sketch and report. Only with a motive to drag on the case, the petitioners have filed the petition.

5. After hearing both sides, the trial Court dismissed the petition. Against which, the petitioners have approached this Court by way of this Civil Revision Petition.

6. On the side of the revision petitioners, it is stated that the earlier Commissioner report was filed, prior to the filing of the written statement. The respondent has disputed the identity of the property in the written statement. Hence, the Commissioner has to re-visit the property, the earlier report was limited only to the physical features of the property. Only because the respondent disputed the identity of the property, the petitioners have to file this petition. The petitioners had no objections for the earlier report filed by the Commissioner and the second report will be only supplementary to the earlier report.

7. On the side of the revision petitioners, it is further stated that boundaries were denied in the written statement and that it is stated that the survey number was not known to the plaintiffs / revision petitioners. The delay in filing the petition is only due to the death of the first plaintiff / M.S.M.Mohamed Basul Ashhub. When steps were taken for the deceased first plaintiff, the second defendant passed away and steps have to be taken for the death of the second defendant and that the delay is reasonable.

8. Delay alone is not a sufficient ground to reject the prayer. A judgment of this Court reported in **2013(2) MWN (Civil 619 [V.Ganesan V. Kamal Jain and another]** is cited, wherein, it is



stated as follows:

8.Of course, it is true that in the normal course, without scraping the earlier report for defects, it is not possible to appoint a Commissioner for the same purpose. But here, the earlier Commissioner's Report need not be scrapped because by re-issuing the warrant, the Commissioner is directed only to submit an Additional Report. Thus, both Reports will be on the file of the Court. Above all, a perusal of the impugned order of the lower Court would go to show that the Lower Court has dismissed the Interlocutory Application on the ground that the present Application was filed when the Interlocutory Application for Temporary injunction was under consideration and also because the earlier Commissioner Report was available.

9.Another judgment of this Court reported in **2016 (6) CTC - 66 [Semitta Kounder and another Vs. Murugesan]**, wherein, it is stated as follows:-

"9.... In the absence of proper measurement and identification of the suit property, the trial Court may not be able to resolve the issue and give a quietus to the dispute between the parties. Mere opportunity to raise objections and cross-examine the Advocate-Commissioner on his report, in the circumstances of the case, will be of no assistance to the trial Judge for resolving the issue. Further, no prejudice would be caused to either side if the same Advocate-Commissioner is directed to properly measure and identify the physical features of the property with the active assistance of the Surveyor and if proper report is submitted on such re-issue of the warrant and the trial Court would be in a better position to adjudicate the claim and resolve the issues in favour of either parties. Therefore, this Court is of the view that the dismissal of the subject I.A. by the Judge, is not in order and the same is required interference of this Court."

10.On the side of the respondent, it is stated that the suit was filed for declaration and injunction. Along with the suit, the petitioners filed a petition in I.A.No.618 of 2013 for appointment of a Court Commissioner. A counter was filed by the respondent that he was in possession and enjoyment of the schedule property by virtue of a sale deed of the year 2012, that the petitioners failed to mention the survey number and the Commissioner could not identify the property. After contesting, that petition was allowed and the



Commissioner visited the property on 20.07.2013. When the commissioner visit the suit property, the Commissioner was accompanied by the plaintiffs / petitioners and their counsel, the first defendant /first respondent and his counsel and the son of the second defendant. No objection was filed against the Commissioner report. Even in the counter filed by the respondent in the earlier I.A. petition, the survey number and boundaries were denied. Wrong description of the property was taken as a defence in the written statement. Only after four years, from the date of filing of the written statement, the petitioners have come forward with this petition. The suit property included a room, but, in the Commissioner report, no such room was mentioned. The delay in filing the petition is not explained. On 26.07.2015, the suit was dismissed for default, and now the suit is at the stage of trial. Without scraping the earlier Commissioner report, the Warrant cannot be re-issued.

11.The main contention of the revision petitioners is that in the written statement, the identity and description of the property is questioned and to prove the boundaries, re-issuance of the Commissioner Warrant is necessary. The contention of the respondent / defendant is that the description of the property is wrong and that there was no prayer to scrap the earlier report and that the petition is a delayed one. No prejudice will be caused to the respondent, in the re-issuance of the Commissioner Warrant. The report of the Commissioner may be of use to decide the issue in the suit and to avoid lengthy oral evidence, the second report of the same Commissioner will be a supplementary report.

12.In the above circumstances, this Civil Revision Petition is allowed. The order, dated 21.08.2017 passed in I.A.No.358 of 2016 in O.S.No.118 of 2013, on the file of the District Munsif, Srivaikuntam, is hereby set aside. The revision petitioners are liable to pay remuneration for the Commissioner as fixed by the trial Court. The second Commissioner Report will be a supplement report to the first Commissioner Report. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS III)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized 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



To

1.The District Munsif,
Srivaikuntam.

2.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

+1 CC to M/s.M.P.SENTHIL, Advocate (SR-27831[F] dated 01/09/2021)

Pre-delivery Order made in
C.R.P (MD)No.1887 of 2017
01.09.2021

RS (15.09.2021) 5P 5C