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C.R.P. No. 2368 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.10.2022

CORAM

THE HONOURABLE MRS. JUSTICE T.V.THAMILSELVI

C.R.P.No. 2368 of 2019
and
C.M.P. No. 15420 of 2019

1. G.Kamatchi,
W/o. Sathyanarayanan

2 R.Sathyanarayanan,
S/o. Ramachandran

... Petitioners

Versus

G.Suguna,
W/o. C.Perumal

... Respondent

PRAYER : Civil Revision Petition filed under Art.227 of Constitution of India, praying to set aside the Fair Order and decreetal order dated 27.03.2019 passed in I.A.No.3401 of 2018 in O.S.No. 3592 of 2009 on the file of XVII Asst. Judge, City Civil Court, Chennai.

For Petitioners : Mr.P.Mohan Raj

For Respondent : Mr.M.Kamalanathan



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ORDER

The Revision Petitioners are the defendants in the suit in O.S.No.3592 of 2009 on the file of learned XVII Asst. Judge, City Civil Court, Chennai, which was filed by the respondent/plaintiff for the relief of mandatory injunction and permanent injunction with regard to common passage, toilet, doors and windows lying in the plot bearing Door No. 43/101, Adam Sahib Street, Royapuram, Chennai.

2. The defendants contested the suit. After contesting the suit, the suit was decreed in favour of plaintiff, against which, the defendants preferred an appeal. In the meanwhile, during the pendency of the proceedings before the trial court, a Commissioner was appointed to note down the physical features of the suit property. With regard to Commissioner's report, the plaintiff has raised her objections. But, the fact reveals that the said Commissioner was not examined as a witness on either side of parties. Though the plaintiff is not satisfied with the report of Commissioner, the defendants preferred an appeal in A.S.No. 269 of 2015



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on the file of VII Addl. Judge, City Civil Court, Chennai, wherein the lower appellate judge allowed the appeal and the suit was remanded back to the trial court with a direction to give a finding on the objections for the Commissioner's report and plan filed on behalf of respondent/plaintiff by giving opportunity to both parties to let in evidence and to dispose the case according to law. Thereafter, as per the remand order, the suit was again taken on file.

3. Again, the defendants filed an application in I.A.No. 3401 of 2018 under Order 26 Rule 10(3) of C.P.C. to scrap the earlier Commissioner's report and to appoint a fresh commissioner to note down the physical features along with the Surveyor and to submit a report. The said application was strongly contested by the plaintiff. On hearing both sides, the trial judge held that the earlier report of Commissioner has not been objected and not taken any steps to examine the Commissioner at the earlier occasion. However, both parties not taken any steps to examine the Commissioner, and inspite of that, they have filed another application to appoint a new Commissioner, as such, is not maintainable in law.



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Accordingly, the said application was dismissed. Challenging the said findings, the defendants preferred this Civil Revision Petition.

4. The learned counsel for Revision Petitioners submitted that the trial court failed to take note of the fact that inspite of notice given to the Commissioner, he was not available, so the earlier report could not be considered. Furthermore, even though they are ready to cross-examine the Commissioner, Commissioner is not available. Therefore, the report filed by the commissioner is to be eschewed from the records and a fresh commissioner is to be appointed. But, without appreciating the said fact, the trial court dismissed the application. Hence, he prayed to set aside the order passed by the trial court.

5. By way of reply, the learned counsel for respondent/plaintiff submitted that already she has filed her objection to the Commissioner's report and for the appointment of new Commissioner as prayed by the Revision Petitioners, as such, is not maintainable for the reason that they have not raised any objections to the Commissioner's report at the earliest



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point of time. Admittedly, the defendants have not filed any objections to the Commissioner's report, however, the plaintiff raised objections to the Commissioner's report, but the same was not discussed by the trial court while dismissing the application. Now, the change in circumstances, the said application was filed for appointment of new commissioner that the Commissioner is not available, however, even if the opportunity is given to the parties, they could not able to examine the Commissioner due to his non-availability. Hence, she prayed to dismiss this Civil Revision Petition.

6. Heard and considered rival submissions made by learned counsel for revision petitioners as well as respondent and perused the records.

7. On seeing the facts, the application for appointment of commissioner was filed to note down the construction of toilet and pipeline, for the main issue is to be adjudicated between the parties, for that, the report of Commissioner is necessary. However, earlier report of the Commissioner is only to note down the physical features, now also, they wanted to note down the physical features with Surveyor. The earlier report



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of the Commissioner has not been appreciated by the court below for the reason that objection was not discussed. Therefore, the earlier report of the Commissioner is eschewed.

8. In the result, this Civil Revision Petition is allowed and the reasons stated by the trial judge in I.A.No. 3401 of 2018 is set aside. The Trial Court is directed to appoint a new Commissioner and the Commissioner is directed to note down the physical features along with the Surveyor within a period of eight weeks from the date of receipt of copy of this order. On filing report, the trial court is directed to proceed with the case and dispose the same on merits within a period of six months thereafter. No costs. Consequently, connected Civil Miscellaneous Petition is closed.

12.10.2022

Index : Yes/No
Internet: Yes/No
Speaking/Non Speaking order
rpp
To
XVII Asst. City Civil Judge,
Chennai.



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T.V.THAMILSELVI, J.

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