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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.03.2022

CORAM

THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

CRP NO.1398 OF 2017

AND

CMP.NO.6520 OF 2017

Periyasamy

...Petitioner / Plaintiff

Vs.

1.Ramani

2.T.K.Narayanan

...Respondents / Defendants

Prayer : This civil revision petition has been filed under Article 227 of the Constitution of India against the order and decreetal order dated 07.11.2016 made in I.A.No.271 of 2015 in O.S.No.63 of 2007 on the file of the Additional District Munsif, Gudalur.

For Petitioner : Mr.T.M.Naveen

For Respondents : Mr.C.A.Diwakar

ORDER

The Civil Revision Petition has been filed against the order and decreetal order dated 07.11.2016 made in I.A.No.271 of 2015 in O.S.No.63 of 2007 on the file of the Additional District Munsif, Gudalur.

2.Plaintiff in O.S.No.63 of 2007 which is now pending on the file of the District Munsif Court, Nilgiris at Gudalur is the revision petitioner herein. The Plaintiff Mr.Periyasamy and the defendants Mrs.Ramani and her husband T.K.Narayanan appear to have been involved in lis not only in O.S.No.63 of 2007 and also in a subsequent suit in O.S.No.42 of 2008 which is pending on the file of the Sub-Court, The Nilgiris, at Udhagamandalam, in which, the petitioner herein, Periyasamy was acting as Power of Attorney Agent of the plaintiff in that particular suit.

3.The suit relates to a particular passage, which both the parties claim.



4.The suit in O.S.No.63 of 2007 came to be filed owing to the fact that the revision petitioner/plaintiff wanted to put up a compound wall in the said passage and this was objected to by the respondents/defendants necessitating institution of the suit seeking permanent injunction restraining the defendants Mr.Ramani and her husband T.K.Narayanan from preventing the revision petitioner/plaintiff putting up the said compound wall.

5.Written statement was filed in the said suit and the parties were invited to adduce evidence. On 30.06.2011, the learned District Munsif, Gudalur, The Nilgiris, had delivered a judgement dismissing the suit. Mr.Periyasamy had been examined as PW1 and one Nagaraj had been examined as DW1. On the side of the plaintiff, Exs.A1 to A4 were marked.

6.Thereafter, the plaintiff/revision petitioner herein filed A.S.No.50 of 2011, which came up for consideration before the Sub Court, The Nilgiris at Udhagamandalam and the learned Sub Judge, by judgment dated 09.03.2012 found that the issue of construction over the passage, required a commissioner to be appointed for noting down the physical feature and also to file a report and in the absence of such report, a proper judgment could not have been delivered and therefore, exercising power under Order 41 Rule 23(A) of CPC, remanded the suit back for fresh disposal and had also directed that it would only be in the interest of Court that an Advocate Commissioner is appointed.

7.Accordingly, I.A.No.516 of 2012 was filed by the revision petitioner herein/plaintiff in the suit, after the suit had been remanded back by the first Appellate Court for appointment of Advocate Commissioner.

8.The learned counsel for the revision petitioner pointed out the warrant, which was issued to the Advocate Commissioner, and stated that the task of the Advocate Commissioner surrounded Survey No.339/35 in Gudalur Village. The warrant also stated that the Advocate Commissioner should examine that particular survey number with the assistance of the Taluk Surveyor and file a report.

9.The Advocate Commissioner actually filed a report. It is the grievance of the learned counsel for the revision petitioner is that the Advocate Commissioner had stated about R.S.No.339/15A1A1A and had not examined. Survey No.339/35, which was mentioned in the warrant.

10.Thereafter, objections were also filed to the report of the Advocate Commissioner.



11. Thereafter, I.A.No.271 /15 came to be filed again by the petitioner herein/plaintiff, seeking a direction to the Commissioner to reinspect the suit schedule property and give a further report with respect to the issues which were covered under warrant. A counter was filed by the respondent herein. That application came to be dismissed by an order dated 07.11.2016 necessitating filing of the the present Revision Petition.

12. In the order, the learned Principal District Munsif cum Judicial Magistrate, Gudalur, who was holding additional charge of the Additional Munsif, Gudalur stated that the Advocate Commissioner had fixed four boundaries and the boundary line between the petition property and the pathway as directed in the warrant. It was stated that objections raised by the revision petitioner were not valid and unsustainable under law. It was therefore stated that there was no necessity to scrap the report of the Advocate Commissioner. The application was therefore dismissed. This order is now challenged and is put in question in the present revision petition.

13. Heard Mr.T.M.Naveen, learned counsel for the revision petitioner and Mr.C.A.Diwakar, learned counsel for the respondents.

14. Even before I could examine the issues in the present suit, Mr.T.M.Naveen drew the attention to the report of the Advocate Commissioner, which had been filed in the other suit, which had mentioned at the beginning of the order in O.S.No.42 of 2008. That particular suit had travelled far. I informed that as on date, S.A.No.432 of 2012 is now pending on the file of this Court. It is stated by Mr.T.M.Naveen, the learned counsel for the petitioner that in that particular suit which also was with respect to an allegation of encroachment by the respondents herein, with respect to another portion of the same suit property, an Advocate Commissioner had the benefit of visiting the property and filing a report in January, 2009. It is urged by Mr.T.M.Naveen that the said report filed in January 2009 in O.S.No.42 of 2008, which suit was pending on the file of the Sub Court, The Nilgiris at Udthagamandalam, should be called for by this Court. I decline to do so. O.S.No.42 of 2008 is now consideration in S.A.No.432 of 2012 and it is the privilege of the learned Judge, who examines that particular second appeal to examine the veracity and applicability of the Advocate Commissioner's report filed in January 2009 in O.S.No.42 of 2008. In the absence of any material surrounding O.S.No.42 of 2008, it would be inappropriate on the part of this Court to rely on that particular report of the Advocate Commissioner.



15. It is thereafter stated by the learned counsel for the revision petitioner that the Advocate Commissioner's warrant contained a particular survey number and his report contained another survey number. If that be the case, then to appreciate the fact whether the Advocate Commissioner had actually visited the particular suit schedule property, where the compound wall is being put up and which is the subject matter of O.S.No.63 of 2007, since a part of the wall had already been completed, it would only be appropriate that the parties issue summons to the Advocate Commissioner to graze the witness box and if they are so advised, examine him with respect to the actual place or places which he visited, which he measured and for which, he gave a report.

16. On the basis of the evidence of the Advocate Commissioner, if the property is identifiable or not identifiable, the learned District Munsif may take an appropriate decision. Moreover, without the earlier report being scrapped, a further commission cannot be issued either to the same commissioner or to a fresh commissioner. To determine whether the report has to be scrapped or retained, evidence is required. It can be adduced by issuing summons to the Commissioner and he has to substantiate the report which he filed. It is the prerogative and privilege of the District Munsif to so examine and it is not for this Court to give any finding of view on that particular aspect.

17. For the above reasons, the revision petition is dismissed, but, the parties are directed to go back to the trial Court. If at all the report of the Advocate Commissioner is to be scrapped, let it be done in the manner known to law and if advised, let the parties take a conscious decision to scrap the same. Giving that particular liberty to either the petitioner herein or to the respondent, the revision petition is dismissed. The trial Court has to take up all the issues surrounding the report of the Advocate Commissioner afresh.

18. I hope that the trial Court will bestow its attention and dispose of the suit as early as possible. Even though the civil revision petition is dismissed, I would still grant that particular liberty to the revision petitioner herein to adduce evidence by summoning witness with respect to the report and also particularly, the Commissioner if so advised. No costs. Consequentially, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-VI)

//True Copy//

Sub Assistant Registrar

sms



To

The Additional District Munsif,
Gudalur.

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+1cc to Mr.C.A.Diwakar, Advocate Sr.No.20723

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and
CMP.No.6520 of 2017

AK-II (CO)
RVM(08/04/2022)