



C.R.P.No.1728 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.01.2023

CORAM

THE HONOURABLE MR. JUSTICE N. ANAND VENKATESH

C.R.P.No.1728 of 2019
and C.M.P.No.11064 of 2019

Palanisamy

... Petitioner

Vs.

Sivanandam

... Respondent

Prayer : Civil Revision Petition is filed under Article 227 of the Constitution of India, against the fair and decreetal order passed in I.A.No.1118 of 2017 in O.S.No.3 of 2014 on the file of the District Munsif Court, Dharapuram dated 18.03.2019.

For Petitioner : Mr.C.Kulanthaivel

For Respondent : Mr.Guruprasad

ORDER

This Civil Revision Petition has been filed by the defendant aggrieved by the fair and decreetal order passed in I.A.No.1118 of 2017 in O.S.No.3 of 2014 by the District Munsif Court, Dharapuram, dated 18.03.2019, dismissing the application filed under Order XXVI Rule 9 of C.P.C., to appoint an Advocate Commissioner to



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measure the petition property with the assistance of the Surveyor and to fix the northern side boundary of the property belonging to the petitioner in S.F.No.270.

2.The respondent filed the suit in O.S.No.3 of 2014 seeking for the relief of declaration to declare that he has right of pathway over the northern side boundary of the petitioner's property in S.F.No.270 through an easement by prescription and for a permanent injunction restraining the petitioner/defendant from interfering with the right of pathway.

3.The petitioner filed a written statement by taking a very specific stand that the respondent/plaintiff does not have any right of pathway over the property belonging to the petitioner in S.F.No.270 and that the suit itself has been filed only to prevent the petitioner from surveying his property and to fix the boundaries.

4.The petitioner filed I.A.No.1118 of 2017 seeking for appointment of an Advocate Commissioner to measure the petition mentioned properties with the assistance of the Surveyor and to fix the northern side boundary of the petitioner's property in S.F.No.270 and to file the report along with plan.



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5.The Court below on considering the contentions raised on either side came to a conclusion that an Advocate Commissioner was appointed on an earlier occasion and a report was also filed by the Advocate Commissioner and the petitioner did not make any objections to the report and hence, the petitioner is not entitled to once again seek for the appointment of an Advocate Commissioner. The Court below also came to a conclusion that the respondent/plaintiff has come to the Court claiming for the easement right over the northern side boundary of the petitioner's property in S.F.No.270 and it is for the plaintiff to establish his right. Hence, considering the relief that was sought for the respondent/plaintiff, the Court below found that the appointment of an Advocate Commissioner to note down the physical features with the help of the Surveyor, does not really help the Court to reach a final conclusion in the case. Aggrieved by the same, the petitioner / defendant has filed this Civil Revision Petition.

6.Heard Mr.C.Kulanthaivel, learned counsel appearing on behalf of the



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petitioner and Mr.Guruprasad, learned counsel appearing on behalf of the respondent.

7.The learned counsel for the petitioner submitted that the scope of the application filed by the petitioner in I.A.No.1118 of 2017 was completely different from the purpose for which the earlier Commissioner was appointed and a report was filed. According to the learned counsel for the petitioner, the petitioner had sought for the appointment of an Advocate Commissioner to note down the physical features and to exactly determine the boundaries of S.F.No.270 belonging to the petitioner. If this process is undertaken by the Commissioner with the help of the Surveyor, it will only be more easier for the Court below to arrive at a correct conclusion on the identity of the property and to see if the pathway right that is claimed by the respondent falls within the property belonging to the petitioner in S.F.No.270.

8.Per contra, the learned counsel for the respondent submitted that the application filed by the petitioner is not maintainable, since the petitioner has not



made any objections to the earlier report filed by the Commissioner and without the earlier report being scrapped or an application being filed to re-issue the warrant to the Commissioner by pointing out some defects in the earlier report, an independent application to appoint an Advocate Commissioner to note down the physical features with the help of the Surveyor is not sustainable. The learned counsel further submitted that the Court below has given proper reasons while rejecting the application filed by the petitioner and there is no ground to interfere with the same and hence, sought for the dismissal of the Civil Revision Petition.

9.This Court has carefully considered the submissions made on either side and also the materials available on record.

10.The respondent/plaintiff has approached the Court with a specific case that he has a pathway right over the northern side boundary of the petitioner's property in S.F.No.270. The respondent/plaintiff is asking for his right under easement by prescription. In view of the same, it is for the respondent/plaintiff to prove that the right of pathway is being enjoyed over the property belonging to the petitioner in S.F.No.270 and that such a right has been enjoyed for number of



years as prescribed under law.

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11. When the suit was filed, the respondent/plaintiff also filed an application for appointment of an Advocate Commissioner in I.A.No.11 of 2014 and from the records it is seen that the Advocate Commissioner made an inspection and also filed a report before the Court below on 02.01.2014. A plan was also filed along with the report. For reasons best known to the petitioner, no steps were taken to file any objections against the report filed by the Advocate Commissioner. That apart, even in the affidavit that was filed in support of the application in I.A.No.1118 of 2017, there is not even a mention as to why the earlier report filed by the Advocate Commissioner suffers from any illegality. The petitioner has straight away sought for the appointment of Commissioner to inspect the petitioner's property and to note down the physical features with the help of the Surveyor and file a report along with the plan. The intention behind this petition is that the petitioner wants to perfectly identify the property in S.F.No.270, so that the Court below can reach a conclusion as to whether the pathway right that was claimed by the respondent / plaintiff falls on the northern side boundary of the property belonging to the petitioner in S.F.No.270.



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12. The respondent/plaintiff has knocked the doors of the Court seeking for a particular relief. Hence the burden of proof is upon the respondent to prove that the pathway falls within the property belonging to the petitioner in S.F.No.270 and that such a right has been enjoyed for the period prescribed in law. The Commissioner, who was appointed by the Court below has filed a report. This report, at the best is a piece of evidence and the Commissioner can always be put in the box and the petitioner can even ascertain from the Commissioner as to the basis for filing such a report and whether any effort was taken for identifying the property and thereafter, pinpointed the pathway which was noted down in the report filed along with the plan. When such a right is available to the petitioner, there is no requirement to appoint a Commissioner once again to fix the boundaries for the petition property with the help of a Surveyor. It is not necessary for the petitioner to prove the case of the plaintiff and the entire burden is upon the plaintiff to prove his case. That apart, if yet another report is filed, there will be two reports before the Court and the Court will not be justified in appointing or getting a report of the Commissioner without rendering a finding on the earlier Commissioner's report to the effect that the same is not satisfactory and it requires



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further enquiry.

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13.The Court below on considering the claim made by the petitioner has come to the correct conclusion that the dispute in the present case does not pertain to identity of the property and it only pertains to the right of pathway that was claimed by the respondent/plaintiff. Hence, the Court below found that it is for the respondent to prove their case and there is no requirement for appointing an Advocate Commissioner once again to measure the property and file a report along with the plan. This finding rendered by the Court below does not suffer from any perversity and does not require the interference of this Court in exercise of its jurisdiction under Article 227 of the Constitution of India.

14.In the result, there is no ground to interfere with the fair and decreetal order passed in I.A.No.1118 of 2017 in O.S.No.3 of 2014 by the District Munsif Court, Dharapuram and accordingly this Civil Revision Petition stands dismissed. It is left open to both the parties to raise all the grounds before the Court below and the same shall be considered by the Court below on its own merits and in accordance with law. The Court below shall dispose of the suit in O.S.No.3 of



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2014, within a period of six months from the date of receipt of copy of this order

and compliance shall be reported before this Court. No Costs. Consequently,

connected miscellaneous petition is closed.

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Internet : Yes ./ No

Index : Yes ./ No

Speaking Order / Non Speaking Order

Neutral Citation Case : Yes ./ No

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To

The District Munsif Court,
Dharapuram.



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N. ANAND VENKATESH, J.

SSR

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