



CRP (PD) No.3819 of 2017

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	30.06.2023
Pronounced on	28.07.2023

CORAM:

**THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN
THILAKAVADI**

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and

C.M.P.No.17852 of 2017

1.R.Natarajan(died)

2.N.Manonmani

3.N.Karthic

4.Minor R.N.Nirmal

(Represented by his Mother/Natural Guardian
N.Manonmani)

... Petitioners

(Sole petitioner died, petitioners 2 to 4 brought on
record as LR's of the deceased sole petitioner viz.,
R.Natarajan vide Court order dated 01.06.2023
made in CMP.Nos.23060, 23063 and 23064 of 2022)

Vs.

1. S.Venkatesan

2.S.Vijayalakshmi

3.S.Vasanthakrishnan

4.V.Veni

... Respondents



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PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India seeking to set aside the fair and final order dated 31.07.2017 made in I.A.No.402 of 2017 in O.S.No.37 of 2008 on the file of II Additional District Munsif Court, Coimbatore.

For Petitioners : Mr.R.Bharath Kumar

For R1 to R3 : Mr.M.Rajasekar

For R4 : No appearance

ORDER

This Civil Revision Petition is filed as against the decreetal and fair order dated 31.07.2017 made in I.A.No.402 of 2017 in O.S.No.37 of 2008 on the file of Second Additional District Munsif Court, Coimbatore.

2. The first petitioner as plaintiff filed the above suit against the respondents for the reliefs of Mandatory Injunction directing the respondents/defendants to hand over the possession of encroached portion in the suit property by removing the iron gate installed in the encroached portion that is on the south side of the suit property and for Permanent Injunction restraining the



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defendants from interfering with the first petitioner/plaintiff from interfering with his peaceful possession and enjoyment in the suit properties. During pendency of the suit, the first petitioner/plaintiff filed a petition in I.A.No.39 of 2008 under Order 26 Rule 9 of CPC seeking for appointment of an Advocate Commissioner to visit the suit properties and note down its physical features and to measure the same with assistance of Taluk Surveyor and file a report. One Mr.A.Dhandapani was appointed as Advocate Commissioner to measure the suit property with the help of competent Taluk Surveyor and was directed to file a report. Accordingly, the Advocate Commissioner inspected the suit property with the help of Taluk Sub Inspector of Survey, North Taluk Office and measured the suit properties and filed a report along with a sketch mentioning the encroachment portion. Thereafter, the respondents/defendants filed another application in I.A.No.1557 of 2008 under Order 26 Rule 9 of CPC seeking to appoint an Advocate Commissioner to measure the suit properties as well as the properties of the defendants. The Court below appointed the very same Advocate Commissioner and directed him to inspect both the properties with the help of Taluk Surveyor.



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3. According to the revision petitioners, the Advocate Commissioner has measured both the properties with the help of different Taluk Surveyor and filed a report containing mutually contradictory information and details that of his earlier report. The details furnished by the Taluk Sub Inspector of Survey, who assisted the Advocate Commissioner in I.A.No.39 of 2008 and the details furnished by the Taluk Surveyor, who assisted the Advocate Commissioner in I.A.No.1557 of 2008 are mutually contradictory and the same will no way be helpful to decide the case and minimize the time of the Court. Therefore, he filed another application in I.A.No.402 of 2017 under Order 26 Rule 9 of CPC seeking to reissue the warrant of commission to the very same Advocate Commissioner to measure the suit properties along with the assistance of District Surveyor to file the report into the Court. However, the Court below erroneously dismissed the application filed by the petitioner against which he preferred this present revision petition. The trial Court without expressing its opinion about the earlier report filed by the Advocate Commissioner in pursuant to the order passed in I.A.No.39 of 2008, allowed the petition filed by the defendants for appointment of Advocate Commissioner. The



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trial Court cannot appoint Advocate Commissioner for the second time without rendering findings that earlier Commissioner's report is unsatisfactory. To support his contention, he has relied upon the following decision reported in **2006 (2) CTC 54**, in the case of **R.Sivasubramanian vs S.Balamurugan**, in which it is held that,

"Trial Court not discussed earlier Commissioner Report and not expressed any opinion before appointing Second Commissioner. Power has to be exercised only after Court records finding that earlier Commissioner Report is not satisfactory and needs further enquiry. In present case trial Court cannot appoint Second Commissioner unless it renders finding that earlier Commissioner's Report is unsatisfactory. No such finding of dissatisfaction of earlier Commissioner Report has been mentioned while appointing Second Commissioner. Hencer, order of Trial Court appointing Second Commissioner in I.A.No.729 of 2003 set aside and remitted back to lower Court for hearing in accordance with law."

4. On the other hand, the learned counsel appearing for the respondents/defendants would submit that at the time of inspecting the property



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as per the order in I.A.No.39 of 2008, the Advocate Commissioner measured the suit properties alone leaving the properties of the respondents, which necessitated the respondents to file I.A.No.1557 of 2008 for appointment of Advocate Commissioner to measure both the properties with the assistance of Taluk Surveyor and to file a report. The very same Advocate Commissioner was appointed who already inspected and measured both the properties with the help of Taluk Surveyor and filed a report stating that no such encroachment found in the suit properties. The first petitioner has filed the petition in I.A.No.402 of 2017 only to drag on the proceedings. The Court below rightly dismissed the said petition. The Commissioner, who has already done work could be directed to file supplementary report and therefore, there is no irregularity committed by the trial Court in appointing Advocate Commissioner in I.A.No.1557 of 2008. To support his contention, he has relied upon the decision report in **2000 (III) CTC 78**, in the case of ***Veppananathar @ Karuppannan and another vs Kaliappan***, in which it is held that,

Commissioner who has already done work could be directed to file supplementary report. Report can be scrapped only if such supplementary report cannot be furnished.



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5. Heard the learned counsel appearing on either side.

6. Order 26, Rule 10 of Code of Civil Procedure deal with procedures of Commissioner, which read thus :

"Order 26, Rule 10 -Procedure of Commissioner -(1)

The Commissioner, after such local inspection as he deem necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

(2) Report and depositions to be evidence in suit -The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence win the suit an shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) Commissioner may be Examined in person

-Where the Court is for any reason dissatisfied with the



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proceedings of the commissioner, it may direct such further inquiry to be made as it shall think fit."

7. In a Division Bench of Kerala High Court in the decision reported in Swami Premananda vs. Swami Yogananada, held thus:

"Only if the Court has reason to be dissatisfied with the proceedings and report of the first Commissioner for reasons stated, it can appoint a second Commissioner for further inquiry. This is a condition precedent. The provision contained in Order 26, Rule 12 is "vital".

It is held in that case that issuing a second commission without recording reasons for setting aside the report or without setting aside the Report is one without jurisdiction and against public policy.

8. On the basis of these decisions, let us consider whether the impugned order is liable to be interfered with. In the present case, the trial Court without



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expressing its opinion about the earlier report of the Advocate Commissioner and without scrapping the earlier report reissued the warrant to the Advocate Commissioner for a fresh report. The trial Court dismissed the said application, against which, he preferred the present revision petition. The trial Court ought to have expressed its opinion about the earlier report and called for the supplementary report. No findings rendered by the trial Court that it was not satisfied with the earlier report. Unless the Court records its reasons that it is not satisfied with the commissioner's first report, it cannot appoint the Commissioner for supplementary report. Therefore, it is required to remand the matter to the trial Court for a fresh consideration, whether the earlier report and the supplementary report are contrary to each other and whether it is necessary to scrap the earlier report or either of them or it is necessary to appoint another commissioner for the said purpose to have a fair adjudication on the issue in dispute.

9. Accordingly, the order passed by the trial Court in I.A.No.402 of 2017 in O.S.No.37 of 2008 is set aside and the matter is remanded back to the trial Court for a fresh consideration as discussed above and the trial Court is directed to



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dispose the petition on merits, in accordance with law within a period of one month from the date of receipt of a copy of this order, after affording sufficient opportunities to the parties concerned to put forth their contentions.

10. This Civil Revision Petition is disposed of with the above observations.

No costs. Consequently, connected miscellaneous petition is closed.

28.07.2023

Index : Yes/No
Internet : Yes
cp/vsn

To
The II Additional District Munsif,
Coimbatore.



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K.GOVINDARAJAN THILAKAVADI

cp/vsn

Pre-Delivery Order made in
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