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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.11.2023

CORAM:

THE HON'BLE MR.JUSTICE J. SATHYA NARAYANA PRASAD

**C.R.P.(PD).No.4208 of 2019
and CMP.No.27445 of 2019**

P.Duraisamy

... Petitioner

Vs.

1. M.M.Ramasamy
2. R. Jayalakshmi

... Respondents

This Civil Revision Petition is filed under Article 227 of the Constitution of India praying to set aside the fair and decreetal order dated 27.02.2019 made in I.A.No.330 of 2018 in O.S.No.1572 of 2013 on the file of the learned V Additional District Munsif Court, Coimbatore by allowing this Civil Revision Petition.

For Petitioner	:	Mr.V.Anandhamoorthy
For Respondents	:	Mr.N.Krishnakumar for M/s.Sarvabhauman Associates



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ORDER

The present civil revision petition has been filed to set aside the fair and decreetal order dated 27.02.2019 made in I.A.No.330 of 2018 in O.S.No.1572 of 2013 on the file of the learned V Additional District Munsif Court, Coimbatore.

2. The learned counsel appearing for the petitioner submitted that the revision petitioner is the plaintiff in suit O.S.No.1572 of 2013, which was filed for declaration and permanent injunction. The revision petitioner has already filed a suit in O.S.No.123 of 2005 for declaration and permanent injunction for the same cart track before the District Munsif Court, Avinashi and the suit was decreed on 13.04.2006. Aggrieved by the decreetal order, the respondents/defendants have filed A.S.No.43 of 2006 on the file of the Sub Court, Tirupur and the same was dismissed on 27.04.2007 confirming the judgment and decree passed in O.S.No.123 of 2005. Thereafter, the plaintiff/revision petitioner filed an application I.A.No.1566 of 2013 for appointment of an Advocate Commissioner and the trial Court allowed the application by appointing an Advocate Commissioner. The learned Advocate Commissioner has



filed his report and no objection were filed by the respondents/defendants. Since in the earlier commissioner's report survey numbers were not mentioned the respondents/defendants have filed I.A.No.330 of 2018 to re-issue warrant to earlier Advocate Commissioner and the application was allowed by appointing a fresh Advocate Commissioner. In I.A.No.1566 of 2013 the Advocate Commissioner was appointed by the trial Court and he visited the property without giving notice to the respondents/defendants and he has not mentioned the survey field numbers in his report and the assistance of the Revenue Officials were not taken while inspecting the property. Therefore, I.A.No.330 of 2018 was filed to re-issue the warrant to note down the cart track and to submit his report. Accordingly, vide order dated 27.02.2019, fresh Advocate Commissioner was appointed by the trial Court.

3. The Advocate Commissioner's report was filed in the year 2013. After the plaintiff's side evidence was over and when the case was posted for defendants' side evidence, the respondents/defendants have filed the Application I.A.No.330 of 2018. Even though, Advocate Commissioner's



report was filed in the year 2013 no objection was filed by way of an application to reject the commissioner's report by the respondents/defendants. After a delay of five years that too after the evidence of plaintiff was over and when the case was posted for defendants side evidence, the respondents/defendants have come forward with the present application for appointment of a new Advocate Commissioner.

4. He further submitted that though, the respondents/defendants have sought for re-issue of warrant to the same Advocate Commissioner, the trial Court appointed a new Advocate Commissioner by order dated 27.02.2019 and directed him to survey the property which has already been surveyed by the previous Advocate Commissioner. The previous Advocate Commissioner's report was filed in the year 2013, but no objection was filed by way of application to reject/object the commissioner's report and application in I.A.No.330 of 2008 was filed after a delay of 5 years that too after the evidence of plaintiff's side is over and when the case is posted for defendant side evidence, the respondents/defendants have come forward



with the present application for appointment of the new Advocate Commissioner. The learned counsel appearing for the petitioner drew the attention of this Court to the order passed by the V Additional District Munsif Court, Coimbatore in I.A.No.330 of 2018 dated 27.02.2019 and the same is extracted hereunder:-

“ The respondent in his counter stated that already filed a Commission Application in I.A.No.1566 of 2013 in O.S.No.1572 of 2013 to appoint an advocate commissioner and filed commissioner report. On perusal of records the above I.A.No.1566 of 2013 in O.S.No.1572 of 2013 commissioner report was exparte commission and without giving notice to the petitioner. In this situation this Court is of opinion that the appointment of Advocate Commissioner as mentioned in the petition is necessary to the disposal of this case and find out the which cart-track is located to reach his land in S.F.No.483 and 486 of the parties in respect of suit property. The aforesaid reason this Court of opinion that the advocate commissioner report as mentioned in the petition is necessary to this case and also this Court find that the appointment of advocate commissioner would facilitate to find out the suit cart-track is located to reach his land in S.F.No.483 and 486 it would also facilitate this Court to know the correct physical features of the property. The petitioner relied upon ruling The Hon'ble High Court of Madras 1) 213 (2) MWN (Civil) 619, 2) 2015 (3) CTC 689 are supported the petitioner case. Hence I am inclined to allow this petition”.

5. In the earlier application in I.A.No.1566 of 2013



Mr.S.Vivekanandan has been appointed as Advocate Commissioner and in the present application another Advocate Commissioner by name Mr.K.Rajesh Kumar has been appointed by the trial Court. The learned counsel appearing for the revision petitioner further submitted that the purpose of filing this application belatedly after a lapse of 5 years from the date of earlier commissioner's report in the year 2013 is only to collect evidence since the respondents/defendants have already suffered decree vide O.S.No.123 of 2003 by the District Munsif Court, Avinashi on 13.04.2006.

6. In this context, the learned counsel appearing for the petitioner relied upon the judgment passed by this Court in 2005 (1) CTC 356 in the case of *Kitnammal Vs Nallaselvan and others* wherein it has been held that:-

“10. As rightly argued for the plaintiffs, the very appointment of the second advocate-commissioner without setting aside the report and plan of the first advocate-commissioner itself is not proper and therefore, the report and rough plan of the second advocate-commissioner cannot form part of the records unless the report and rough plan of the first advocate-commissioner are eschewed”.



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He also relied upon in another judgment passed by this Court in CRP (PD).No.1938 of 2013 reported in 2017 SCC Online Mad 6982 in the case of ***Raju Vs Easwaran and others***, this Court held as under:-

“16. Thus, once when an Advocate Commissioner has been appointed and has submitted a report the Court cannot for the same purpose appoint an Advocate Commissioner for the second time without scrapping the report of the first Advocate Commissioner and the Courts also should be cautious in ensuring that under the grab of appointing a second Advocate Commissioner, the parties cannot try to get over the difficulties or adverse findings of the report that could have been filed by the first Advocate Commissioner. If the same is allowed, it would be nothing but permitting a party to abuse the process of law which at any cost shall not be permitted by the Courts.

17. Looked from this angle, it is quite clear in the instant case that the disputed suit cart track has been already inspected by the first Advocate Commissioner, who has in turn filed a report with findings adverse to the respondents herein and the said report of the Advocate Commissioner still remains intact. This being the position, the respondents, without getting the report of the first Advocate Commissioner scrapped by leading in satisfactory and proper evidence, cannot be permitted to sabotage the report of the first Advocate Commissioner by seeking appointment of a new Advocate Commissioner allegedly claiming it is for a different purpose. At this juncture, it is also relevant to point out that if the lower Court found that there were some deficiencies or certain facts which have properly not been ascertained by the first Advocate Commissioner in his report, it could have very well reissued the



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Warrant to him and directed him to inspect the property and file a report. Admittedly, the same has also not been done. This Court, recently, in Samitta Kounder Vs. Murugesan reported in 2016 (6) CTC 66, while considering a similar issue has only directed the Warrant to be raised to the very same Advocate Commissioner since in that case, it was found that there were some deficiencies in the first report that was filed. However, here, though it has been vociferously contended by the learned counsel for the respondents that the appointment of the second Advocate Commissioner is for a different purpose, I am unable to accept the submission for a simple reason that if the suit cart track was in fact obliterated, it would have been quite evident in the report of the first Advocate Commissioner itself. On the contrary, the first Advocate Commissioner report only weakens the case of the respondents by stating that there is no presence of a cart track. Hence, by adding one phrase, “obliteration of the Cart track” in addition to “physical features of the suit property”, the respondents cannot be permitted to do something indirectly which they could not have done directly.

18. From the above discussion, this Court is of the categorical view that the appointment of the second Advocate Commissioner by the I Additional District Munsif, Bhavani in I.A.No.131 of 2012 in O.S.No.71 of 2009 is not for a different purpose but for the same purpose for which a Commissioner was previously appointed in I.A.No.705 of 2010 in O.S.No.71 of 2009. Thus, the order of the trial Court is liable to be interfered with and accordingly, this Civil Revision Petition is hereby allowed and the order passed by the I Additional District Munsif, Bhavani in I.A.No.131 of 2012 in O.S.No.71 of 2009 dated 28.02.2013 ought to be set aside.”



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7. Per contra, the learned counsel appearing for the respondents submitted that without giving notice to the petitioner, the Advocate Commissioner has inspected the suit property and filed the report. The learned counsel further submitted that the respondents/defendants have not filed any objection or application to reject/object the report filed by the Advocate Commissioner and it is not in dispute and it is an admitted fact. The delay of five years in filing the application and the reason submitted by the learned counsel is that only after PW1 was examined they came to know about the fact that the survey numbers were not mentioned in the Advocate Commissioner's report which is not sustainable for the reason commissioner's report was filed way back in the year 2013 and the respondents/defendants have ample opportunity to peruse the advocate commissioner's report which they failed to do so and are now coming forward with the present application to appoint a new Advocate Commissioner which is not maintainable as per law.

8. In support of his contention, the learned counsel relied upon the judgment of this Court reported in 2008 (3) CTC 602 in the case of ***A.Palaniappan Vs K.Nallasamy and others.***



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“7. It is true that at an earlier point of time, an Advocate Commissioner was appointed by the Trial Court at the instance of the respondents. In pursuance of the warrant issued to the Advocate Commissioner, he had inspected the property and submitted the report. After a period of about two years, the petitioner has come up with the present application to remit the report to the Advocate Commissioner and to file a fresh report in the light of the objections filed by the petitioner to the earlier Commissioner's report. The learned Trial Judge observed that the details which are sought to be collected by way of remitting the report to the Advocate Commissioner could be elicited by examining the Advocate Commissioner and such being the case, the application to remit the warrant to the Advocate Commissioner with a prayer to file a fresh report is clearly unwarranted in the facts and circumstances of the case. However, the fact remains that the petitioner has preferred objection to the report of the Advocate Commissioner and it was his case before the Trial Court that the plan drawn by the Advocate Commissioner was not in accordance with the actual measurement of the property and in fact, the inspection was conducted in the absence of the petitioner. The prayer in the application is only to remit the warrant to the very same Advocate Commissioner for the purpose of filing a fresh report after measuring the property with the help of a surveyor, but of course, taking into consideration the objection filed by the present petitioner. All the procedures are man made and the ultimate goal is to do complete justice. The petitioner being the plaintiff in the suit, the burden is on him to prove the plaint averments and for the purpose of projecting his case, the petitioner has sought the report of an Advocate Commissioner by



remitting the warrant to the very same Commissioner and as such I do not find any reason to deny the relief to the petitioner. Therefore, I am inclined to allow this Civil Revision Petition by setting aside the order dated 18.06.2007 in I.A.No.394 of 2007”.

He also relied upon in another judgment in the case of ***Marichamy Vs Dhatchinamoorthy in C.R.P. (PD) (MD) No.1040 of 2015 dated 20.06.2018***

“7. Of course, it is true that in the normal course without scraping the earlier report for defects, it is not possible to appoint another Commissioner for the same purpose. But here, the earlier Commissioner's report need not be scrapped because by re-issuing the warrant, the very same Commissioner is directed to submit an Additional report. Thus both reports will be on the file of the Court and by doing so, no prejudice would be caused to the respondent herein also.”

9. Heard both sides and perused the materials available on record.

10. In the case on hand, the issue involved is, when the earlier Advocate Commissioner has filed his report, whether for the same purpose, new Advocate Commissioner can be appointed or not. The earlier commissioner has filed the report in the year 2013 and the same was not objected by the respondents/defendants and now the application



in I.A.No.330 of 2018 was filed for the appointment of new Advocate Commissioner for the very purpose which was allowed by the trial Court. The reason stated in the affidavit filed by the respondents/defendants in the application is that no survey number has been mentioned in the report, no notice given to the parties and assistance of the revenue officials were not taken while the Advocate Commissioner inspected the property in dispute. In the Advocate Commissioner report, it is clearly mentioned that notice has been given to the parties through post and after that only he has inspected the suit property. **In regard to the absence of the survey number the Advocate Commissioner has not taken the assistance of the revenue officials, the defendants/respondents would have very well object the same by filing the application to reject/object the Advocate Commissioner report which was not done for the reason best known to them.** The orders relied upon by the learned counsel for the respondents are not applicable to this case for the reason that in the case of *A.Palaniappan Vs K.Nallasamy and others* reported in 2008 (3) CTC 602, the same commissioner has been directed to inspect the property and file an additional report. In the other judgment in the case of *Marichamy Vs Dhatchinamoorthy in C.R.P. (PD) (MD)*



No.1040 of 2015 dated 20.06.2018, warrant has been issued to the same commissioner and he was directed to file an additional report and the Court has held that no prejudice would be caused to the respondent by allowing the applications. **But in the instant case, the Advocate Commissioner who was appointed is one Mr.Vivekanandan who has filed the earlier report in the year 2013, now a new commissioner by name Mr.K.Rajesh Kumar has been appointed by the trial Court in I.A.No.330 of 2018 by order dated 27.02.2019.**

11. In view of the above factual matrix of the case and the ratio laid down by the learned Single Judge of this Court in 2005 (1) CTC 356 in the case of *Kitnammal Vs Nallaselvan and others* and another judgment in CRP (PD).No.1938 of 2013 reported in 2017 SCC Online Mad 6982 in the case of *Raju Vs Easwaran and others*, this Court is of the considered view that the order dated 27.02.2019 in I.A.No.330 of 2018 in O.S.No.1572 of 2013 passed by the V Additional District Munsif Court, Coimbatore in appointing a new Advocate Commissioner is hereby set aside. The learned counsel appearing on either side requested that the trial Court may be directed to dispose



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of the suit within a stipulated period. Since the suit is of the year 2013, this Court is inclined to accept the above submission and the V Additional District Munsif Court, Coimbatore is hereby directed to dispose of the suit in O.S.No.1572 of 2013 as expeditiously as possible preferably within a period of three months from the date of receipt of a copy of this order.

12. The civil revision petition is allowed with the above direction and observation. No costs. Consequently, connected miscellaneous petition is also closed.

Index : No
Internet : Yes
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21.11.2023

To

1. The V Additional District Munsif Court,
Coimbatore.



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J. SATHYA NARAYANA PRASAD, J.

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