



CRP(MD)No.1316 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 11.01.2023

CORAM:

THE HONOURABLE MR.JUSTICE **B.PUGALENDHI**

CRP(MD)No.1316 of 2022
and
CMP(MD)No.5448 of 2022

R.M.Ponnusamy

: Petitioner

Vs.

G.Thangaraj

: Respondent

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India to call for the records relating to the docket order passed by the learned II Additional District Munsif, Tiruchirappalli, in O.S.No.1498 of 2012, dated 03.03.2022 and set aside the same.

For Petitioner : Mr.B.Saravanan

For Respondent : Mr.K.S.Kathiravan

ORDER

The petitioner is the defendant in O.S.No.1498 of 2012, which is pending on the file of the II Additional District Munsif Court, Tiruchirappalli and he filed this



revision petition as against the docket order dated 03.03.2022 passed in O.S.No. 1498 of 2012, in and by which, the trial Court has *suo-motu* reopened the petition and appointed a new Advocate Commissioner to inspect the suit property along with a qualified Surveyor to measure the suit property specifically from Trichy to Pudukottai road.

2.Learned Counsel for the petitioner submitted that the suit was filed in the year 2012 for the relief of declaration, injunction and recovery of possession. The trial was concluded, arguments were finished on either side and the suit was posted for judgment. On 17.12.2021, the trial Court *suo-motu* reopened the case for certain clarifications and on 21.12.2021, both sides have filed their written arguments. Thereafter, the trial Court posted the case for judgment on 23.12.2021. While so, on 03.03.2022, the trial Court reopened the case and *suo-motu* ordered for appointment of a new Advocate Commissioner without scrapping the earlier report filed by the earlier Advocate Commissioner, which would cause confusion in the entire suit proceedings. He further submitted that the trial Court has simply reissued the warrant without any reasons and without scrapping the earlier report. Therefore, he prayed for interference. He has also relied upon the following decisions of this Court in support of his contention:-



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- i) ***Visvanadham v. Mangamma and Others***, [AIR 1930 Mad 236];
 - ii) ***Padmanabhan v. Krishnamurthy***, [2005 (3) CTC 619];
 - iii) ***Kitnammal v. Nallaselvan and Others***, [2005 (1) CTC 356];
 - iv) ***Kamala Devi v. T.P.Manoharan***, [CRP.No.2134 of 2008, dated 14.10.2008];
 - v) ***A.Elumalai v. G.Vijayalakshmi and Others***, [CRP.No.2010 of 2016, dated 21.11.2016];
 - vi) ***Chinnasami v. Amudha and Others***, [CRP.No.1045 of 2011, dated 17.08.2017];
 - vii) ***Raju v. Easwaran and Others***, [CRP.No.1938 of 2013, dated 31.01.2017]; and
 - viii) ***Govindasamy v. Raman***, [CRP.No.3115 of 2018, dated 29.07.2021].

3.Learned Counsel for the respondent submitted that he has not filed any application for re-issuance of Commissioner warrant and it is the Court, for its clarification, has issued the warrant. Therefore, there is no reason to interfere with the order passed by the trial Court and he prayed for dismissal.



4.This Court paid it's anxious consideration to the rival submissions and also to the materials placed on record.

5.The suit was filed in the year 2012 and an application for appointment of Advocate Commissioner under Order 26 Rule 9 CPC was filed by the respondent / plaintiff in the year 2012. The said application was allowed by the trial Court and an Advocate Commissioner was appointed. The Commissioner inspected the property and filed his report on 13.12.2018. After the trial, the arguments were concluded on 04.12.2021 and the suit was posted for judgment on 17.12.2021. Thereafter, it was reopened for clarification and subsequently, by order dated 03.03.2022, the trial Court *suo-motu* appointed a new Advocate Commissioner to inspect the property from a particular point.

6.Perusal of the order dated 03.03.2022 discloses that the learned Judge has noted down certain lacuna in the earlier Commissioner's report that the earlier Commissioner has failed to mention the extent with regard to the plaintiff's property and the defendant's property as per their sale deed. Therefore, the learned Judge reissued the warrant and appointed a new Advocate Commissioner to inspect the suit property specifically from Trichy to Pudukottai road. It appears



that the subsequent Commissioner has also inspected the property and filed his report.

7.Appointment of Advocate Commissioner is provided under Order 26 Rule 9 CPC and the same is usefully extracted as under:-

“9.Commissions to make local investigations. - In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.”

8.The procedure of Commissioner is contemplated under Order 26 Rule 10 CPC that the Commissioner, after inspection, shall note down the evidence taken by him and shall return such evidence together with his report in writing to the Court. The Commissioner is liable to be examined and the report and depositions of the Commissioner has to be treated as evidence in the suit.



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9.If the Court is not satisfied with the proceedings of the Commissioner, it may direct such further enquiry to be made as it thinks fit, as per Order 26 Rule 10(3) CPC. It is not explicitly mentioned in Order 26 Rule 10(3) CPC that the earlier Commissioner's report has to be scrapped and only then, a new Commissioner has to be appointed. However, in order to avoid certain confusions with regard to two reports, the Courts are adopting the practice of scrapping the earlier Commissioner's report and ordering for a new Commissioner, if any further report is required. In the decisions relied upon by the petitioner, this Court has held that while ordering for a new Advocate Commissioner, the earlier report has to be scrapped. However, Order 26 Rule 10(3) CPC does not prescribe the same.

10.The grievance of the petitioner is that after the arguments, the trial Court reopened the case and *suo-motu* ordered for a new Advocate Commissioner without scrapping the earlier report. Order 26 Rule 10(3) CPC enables the Court for further enquiry as the Court thinks fit, if the Court is dissatisfied with the proceedings of the Commissioner. In this case, after the arguments and before pronouncing the judgment, the trial Court found certain lacuna in the earlier Commissioner's report that the earlier Commissioner has miserably failed to



mention the extent with regard to the plaintiff's property and the defendant's property as per the sale deed in his report. Therefore, in order to ascertain the correct facts and to elucidate the facts in issue, the Court reissued the warrant by appointing a new Commissioner with a specific direction to measure the suit property with the assistance of a qualified Surveyor from Trichy to Pudukottai road. This cannot be found fault with, in view of the provisions under Order 26 Rule 10(3) CPC. What is required is that the Court has to assign the reasons for ordering for appointment of a new Advocate Commissioner and the Code does not prescribe the manner in which the new Advocate Commissioner has to be appointed.

11. In any suit, if the Court deems a local investigation is required for the purpose of elucidating any matter in dispute, it is the discretion of the Court to appoint the Advocate Commissioner, under Order 26 Rule 9 CPC. However, certain restrictions have been made by the Courts that the Advocate Commissioner cannot be appointed for collection of evidence, *et cetera*. It is the trial Court, which has to decide whether the local investigation is required for the adjudication of the dispute pending before it. When Order 26 Rule 10(3) CPC provides for further enquiry by the Court, if the Court is not satisfied with the proceedings of the



Commissioner, it cannot be made as a hard and fast rule that in all the cases, the earlier Commissioner's report has to be scrapped before ordering for another Advocate Commissioner. It has to be decided on the facts of the individual cases. Here, the trial Court has held that the earlier Commissioner failed to mention certain details, for which, the new Commissioner is appointed. The trial Court did not note any adverse remarks as against the earlier report, which may warrant its scrapping.

12.The Hon'ble Supreme Court, in its latest decision in ***M.P.Rajya Tilhan Utpadak Shaker Sangh Maryadit, Pachama, District Sehore and Others v. Modi Transport Service***, [2022 LiveLaw (SC) 471], has held that the Commissioner's report is only an opinion or noting with the details / statement to the Court the actual state of affairs. Such a report does not automatically form part of the Court's opinion, as the Court has the power to confirm, vary or even set aside the report or in a given case, issue a new Commission. The relevant portion from the said decision is extracted as under:-

“33. Order XXVI Rule 9 of the Code gives wide powers to the court to appoint a commissioner to make local investigations which may be requisite or proper for elucidating any matter in dispute, ascertaining the market value of any property, account of mesne profit



or damages or annual net profits. Under Order XXVI Rule 11, the court has the power to issue a commission in a suit, in which examination of adjustment of accounts is necessary, to a person as it thinks fit directing him to make such examination or adjustment. When a court issues such a commission to such a person, it can direct the commissioner to make such an investigation, examination and adjustment and submit a report thereon to the court. The commissioner so appointed does not strictly perform a 'judicial act which is binding' but only a 'ministerial act'. Nothing is left to the commissioner's discretion, and there is no occasion to use his judgment or permitting the commissioner to adjudicate and decide the issue involved; the commissioner's report is only an opinion or noting, as the case may be with the details and/or statement to the court the actual state of affairs. Such a report does not automatically form part of the court's opinion, as the court has the power to confirm, vary or set aside the report or in a given case issue a new commission. Hence, there is neither abdication nor delegation of the powers or functions of the court to decide the issue. Sometimes, on examination of the commissioner, the report forms part of the record and evidence. The parties can contest an expert opinion/commissioner's report, and the court, after hearing objections, can determine whether or not it should rely upon such an expert opinion/commissioner's report. Even if the court relies upon the same, it will merely aid and not bind the court. In strict sense, the commissioners' reports are 'non-adjudicatory in nature', and the courts adjudicate upon the rights of the parties."



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13. In this case, though the trial Court has pointed out that the earlier Advocate Commissioner has not noted down the measurements of the plaintiff's property and the defendant's property, neither the plaintiff nor the defendant has raised any objections to the earlier Commissioner's report. The new Advocate Commissioner was appointed only for elucidating the matter in dispute as required by the Court for the just adjudication of the suit and the same does not require the scrapping of the earlier report, unless or otherwise the Court so require.

For the foregoing reasonings and discussions, this Court is not inclined to interfere with the order of the trial Court and this revision petition stands accordingly, dismissed. It is made clear that it is open to the petitioner to cross examine the Advocate Commissioner, since the Commissioner's report is also considered to be an evidence in the suit. There shall be no order as to costs. Consequently, connected miscellaneous petition stands closed.

Index : Yes / No
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To
The II Additional District Munsif,
Tiruchirappalli.



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