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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 09.08.2023
Delivered on : 27.09.2023

CORAM

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

C.R.P(MD)No.1635 of 2023
and
C.M.P(MD)No.8038 of 2023

Balasubramanian ... Petitioner/Respondent/Appellant

Vs.

Aathimoolam ... Respondent/Petitioner/Respondent

Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order dated 03.06.2023 made in I.A.No.1 of 2022 in A.S.No.12 of 2018 passed by the Additional Subordinate Judge, Srivilliputhur.

For Petitioner :Mr.M.Thirunavukkarasu
For Respondent :Mr.Aayiram K.Selvakumar

ORDER

This civil revision petition is filed as against the fair and decreetal order dated 03.06.2023 made in I.A.No.1 of 2022 in A.S.No.12 of 2018 passed by the Additional Subordinate Judge, Srivilliputhur.



2. According to the revision petitioner, the petitioner filed a suit in O.S.No.118 of 2012 before the Additional District Munsif Court, Srivilliputhur, for permanent injunction restraining the respondent from interfering with his peaceful possession and enjoyment over the suit schedule property. In the said suit, the respondent filed written statement and made a counter claim to declare the lane situated in S.No.1318/67 as common lane and for mandatory injunction to remove the steps and drainage channel put up by the plaintiff in the common lane. The said suit was dismissed and the counter claim was allowed. Against which, the petitioner filed an appeal suit in A.S.No.12 of 2018, before the Additional Sub-Court, Srivilliputhur. Thereafter, the respondent filed an application in I.A.No.01 of 2022, for appointment of Advocate Commissioner to measure the property with the help of Surveyor.

3. The said I.A., was resisted by the petitioner stating that it is not necessary for appointing an Advocate Commissioner and already at the instance of the respondent, Advocate Commissioner was appointed, who also filed his report. The trial Court, after considering the averments made in the petition and in the counter affidavit, allowed the application and appointed the Advocate Commissioner to find out whether any encroachment is made by the petitioner/plaintiff by fixing the boundaries in S.No.1318/67 with the help of surveyor and to file his report. Aggrieved by



this, the petitioner has filed the present civil revision petition.

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4. The learned counsel appearing for the petitioner submitted that at the instance of the respondent, Advocate Commissioner was appointed by the trial Court for second time in the aforesaid appeal suit. Earlier an Advocate Commissioner was appointed and filed is report. Therefore, without scrapping the earlier report, the second Advocate Commissioner cannot be appointed. The learned counsel would further submit that the appeal suit was filed in the year 2018 and when the appeal was heard and posted for judgment on 13.06.2022, the respondent filed the said I.A.No.01 of 2022, after a lapse of 6 months from the date of filing the appeal. The respondent has not stated about the exact measurements in respect of the alleged encroachment in his petition. The learned counsel would further submit that for the relief of mandatory injunction, the exact measurement has to be given by the person, who alleges the encroachment. Therefore, in order to fill up the lacuna, the respondent has filed the above application seeking to appoint the Advocate Commissioner for the second time. As per the revenue records, S.No.1318/67 is a common lane and there are house on both sides of the said lane and the petitioner's house is also situated in S.Nos.13128/62 and 63 and the door numbers of the said houses are mentioned as D.Nos.339/4 and 340/4, as per the Advocate Commissioner's report. The learned counsel would further submit that the Advocate



Commissioner has given a specific measurements for the petitioner's property and the common lane, for which, the respondent did not file any objection. Therefore, without scraping the earlier report, the order passed by the appellate Court to appoint the Advocate Commissioner for the second time is unsustainable. By allowing the present petition, the report to be filed by the Commissioner will virtually tantamount to scrap the earlier report. Hence, the order passed by the appellate Court is liable to be set aside.

5. On the other hand, the learned counsel appearing for the respondent would submit that though the Advocate Commissioner has measured the suit property, he failed to mention in his report about the encroachment made by the plaintiff. Therefore, it has become necessary for appointment of fresh Advocate Commissioner to elucidate the above aspects. Hence, no interference calls for in the order passed by the appellate Court.

6. Heard the learned counsel appearing for the petitioner and the learned counsel appearing for the respondent and perused the materials available on record.

7. It is well settled law that the Advocate Commissioner cannot be appointed to collect the evidence and it is for the parties to prove the case by oral and documentary evidence. As observed in C.R.P(MD)Nos.1392 and



1393 of 2022, referred by the learned counsel appearing for the petitioner, the Court shall not appoint an Advocate Commissioner for taking measurement of the suit properties in a mechanical manner without considering the need for appointment of Advocate Commissioner. Moreover, it is also well settled law that in the absence of any tangible ground for setting aside the earlier report of the Commissioner, the Court will not appoint the second Commissioner.

8. In the present case, the Advocate Commissioner has also filed his report and therefore, the second Advocate Commissioner cannot be appointed, without scraping the report of the earlier Advocate Commissioner. If the present application is allowed, the report to be filed by the Commissioner will virtually tantamount to scrap the earlier report. When the report of the first Commissioner is on record, the Court, before appointing the second Advocate Commissioner, should record its dissatisfaction about the report submitted by the first Commissioner. Object behind this is to avoid conflicting reports before the Court. If it is satisfied with the report filed by the earlier Commissioner, the respondent/defendant ought to have made a request before the trial Court to direct the first Commissioner himself to make a local inspection again in respect of the dissatisfaction portion. The Court can appoint the second Commissioner only when it is not satisfied with the report of the earlier commissioner.



Therefore, the Court below erred in allowing the application filed by the respondent/defendant for appointment of Advocate Commissioner for the second time, without scraping the earlier report.

9. Accordingly, the fair and decreetal order dated 03.06.2023 passed in I.A.No.1 of 2022 in A.S.No.12 of 2018 by the Additional Subordinate Judge, Srivilliputhur, is hereby set aside and the Civil Revision Petition is allowed. Considering the fact that the appeal suit is of the year 2018, the Additional Sub-Court, Srivilliputhur, is directed to dispose of the appeal suit in A.S.No.12 of 2018 on merits and in accordance with law, as expeditiously as possible. No costs. Consequently, connected miscellaneous petition is closed.

27.09.2023

NCC:Yes/No

Index:Yes/No

Internet:Yes/No

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To

1.The Additional Sub-Court,
Srivilliputhur.

2.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



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K.GOVINDARAJAN THILAKAVADI, J.

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