



C.R.P(MD)No.2538 of 2014

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 23.06.2023

CORAM:

THE HONOURABLE MRS.JUSTICE L.VICTORIA GOWRI

C.R.P(MD)No.2538 of 2014

and

M.P(MD)No.1 of 2014

A.Vedarathinam (Died)

2.Selvam

3.Jasmine Shanthi

4.Grace

5.Neethiraja

... Petitioners

(Petitioners 2 to 5 are brought on record as legal heirs of the deceased sole petitioner vide Court order dated 18.11.2021 made in C.M.P(MD)Nos.2951 of 2020 and 9919 and 9921 of 2021 in C.R.P(MD)No.2538 of 2014)

Vs.

1.M.Vincent Jerold

2.Minor V.Nancy Siron Santhia

3.Minor V.Amal Jeoffrey

... Respondents

(Minors 2 and 3 are represented through their father and natural guardian 1st respondent Mr.M.Vincent Jerold)



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PRAYER : Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order dated 12.06.2014 by the District Munsif Court, Madurai Taluk made in I.A.No.80 of 2014 in O.S.No.605 of 2004.

For Petitioners : Mr.S.Madhevan

For R-1 : Mr.G.Aravinthan

R-2 & R-3 : Minors represented by R-1

ORDER

This Civil Revision Petition is filed by the petitioner / respondent / defendant assailing the order passed by the learned District Munsif Court, Madurai in I.A.No.80 of 2014 in O.S.No.605 of 2004. For the sake of convenience, the parties herein are referred to as arrayed in I.A.No.80 of 2014 in O.S.No.605 of 2004.

2. O.S.No.605 of 2004 on the file of the District Munsif Court at Madurai was a suit for bare injunction seeking to restrain the defendant and his agents from interfering with the plaintiff's peaceful possession and enjoyment of the suit common ABCD pathway. At the time of filing, the suit along with the plaint, I.A.No.367 of 2004 was also filed, wherein an



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Advocate Commissioner was appointed by the learned Trial Court. The Advocate Commissioner, who was appointed in I.A.No.367 of 2004 duly visited the plaint schedule pathway and filed his report. The said report was set aside by the learned Trial Court by its order in I.A.No.779 of 2011 and a new Commissioner was appointed. This I.A.No.779 of 2011 was filed at the instance of the petitioner / respondent / defendant herein. The newly appointed Commissioner also inspected the plaint schedule pathway and has filed his report. That particular Commissioner report was not set aside and it is still in force. Thereafter, the plaintiff in O.S.No.605 of 2004 preferred in I.A.No.80 of 2014 seeking to appoint a new Commissioner in the same suit for the reason that when the Commissioner appointed by the learned Trial Court in I.A.No.779 of 2011 inspected the suit property, his Counsel and the plaintiff was not present.

3. However, a perusal of the impugned order in I.A.No.80 of 2014 dated 12.06.2014 would reveal that an objection dated 11.12.2013 has been filed by the plaintiff in O.S.No.605 of 2004 for the said Commissioner report dated 22.10.2013. Immediately in time, an objection has been filed.



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Despite filing an objection, the plaintiff in the said suit has preferred I.A.No.80 of 2014 seeking to appoint a new Commissioner, thereto without setting aside the Commissioner report dated 22.10.2013 filed in I.A.No.779 of 2011. It is settled preposition of law and this Court had held several times that the learned Trial Court when being approached for appointment of a second Advocate Commissioner, the Courts shall not appoint a second Advocate Commissioner without setting aside the first Advocate Commissioner's report.

4. Heard the learned Counsels for the petitioner and the respondent and perused the materials available on record.

5. This Court in the case of ***Kitnammal Vs. Nallaselvan and Others reported in 2005 (1) CTC 356*** dated 19.03.2005 has dealt with a similar matter, the relevant portion of which is extracted as follows:

“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



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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.”

6. In another case of ***R.Sivasubramanian Vs. S.Balamurugan*** reported in 2006 (1) MLJ 580 dated 14.02.2006 has dealt with a similar matter, the relevant portion of which is extracted as follows:

“4. “It is a well settled proposition that until the Court is dissatisfied with the proceedings and report of the Commissioner earlier appointed, it will not be proper to ignore the same and direct even further enquiry, much less the scrapping of the earlier report as a whole and appoint a fresh Commissioner. The power in this behalf is circumscribed by the principles under Order XXVI, Rule 10(3) of the Civil Procedure Code, hereinafter referred to as the Code. The power has to be exercised only after the Court below renders a finding that the proceedings and the report of the earlier Commissioner are not satisfactory and there is need for a further enquiry. In the present case, the order of the Court below does not express an opinion that the proceedings and the report of the earlier Commissioner are not satisfactory.....

6.In the present case, merely because objections were filed by the respondent herein to the earlier report, the trial Court cannot appoint a second Commissioner unless it



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renders a finding that the earlier Commissioner's Report is unsatisfactory. No such finding of dis-satisfaction has been made in the impugned order and hence it is liable to be set aside.”

7. In such circumstances, in view of the fact that the petitioner / plaintiff has filed I.A.No.80 of 2014 seeking appointment of the fresh Commissioner without setting aside the report filed by the Commissioner in I.A.No.779 of 2011 is not sustainable. However, this Court is inclined to give liberty to the petitioner / plaintiff to examine the said Commissioner in the learned Trial Court with respect to the objection dated 11.12.2013 whatever he has filed before the learned District Munsif Court, Madurai by way of an objection.

8. With the above said observation, this Court is inclined to allow this Civil Revision Petition. In the result, this Civil Revision Petition stands allowed. There shall be no order as to costs. Consequently, connected Miscellaneous Petition stands closed.

23.06.2023



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Index : Yes / No
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BTR

To

1. The District Munsif Court,
Sivagangai.
2. The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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L.VICTORIA GOWRI, J.

BTR

Order made in
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23.06.2023