



C.R.P(MD)No.817 of 2014

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 26.04.2023

CORAM:

THE HONOURABLE MRS.JUSTICE L.VICTORIA GOWRI

C.R.P(MD)No.817 of 2014

1.Pitchammal
2.Karuppasamy
3.Subbulakshmi

... Petitioners

Vs.

1.Sivaniyapillai Ammal
2.Perumal (Died)
3.Ayyana Pillai
4.Velayudham
5.Petchiammal

... Respondents

(Second respondent died and third respondent (mother of R2) who is already on record, is recorded as legal representative of the deceased second respondent vide Court order dated 25.01.2021 made in C.R.P(MD)No. 817 of 2014)

PRAYER : Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order dated 13.12.2013 passed in I.A.No.370 of 2013 in O.S.No.397 of 2011 on the file of the Additional District Munsif Court, Tuticorin.



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For Petitioners : Mr.M.P.Senthil

For R-1 : Mr.S.Vignesh

R-2 : Died

For R-3 : No appearance

For R-4 & R-5 : Mr.S.Kadarkarai

ORDER

This Civil Revision Petition has been preferred as against the order passed by the learned Additional District Munsif Court, Tuticorin in I.A.No. 370 of 2013 in O.S.No.397 of 2011 dated 13.12.2013 by the petitioners / 5th to 7th defendants. I.A.No.370 of 2013 was filed by the petitioners / 5th to 7th defendants in the month of September, 2013 under Order XXVI, Rule 9 and Section 151 of the Code of Civil Procedure, 1908, seeking to re-issue the warrant directing the Advocate Commissioner to measure the plaint schedule property from West to East in terms of the original partition deed covering the shares of each and every shareholder along with the petitioners' share with the assistance of a surveyor. For the sake of convenience, the parties herein are referred to as arrayed in the I.A.No.370 of 2013 in O.S.No.397 of 2011.



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2. The said application was resisted by the 1st respondent / plaintiff, stating that the petitioners / 5th to 7th defendants have not made any objection to the Commissioner's report filed as early as on September 2012. Moreover in the facts and circumstances of this case, since the 1st respondent / plaintiff has already proved his case on the basis of documents and the Commissioner's report with plan, now the petitioners / 5th to 7th defendants cannot seek to measure the plaint schedule property at their sweet will without making any objection to the said Commissioner's report. This suit is one for declaration and recovery of possession and the primordial question which has to be decided is as to the quantum of encroachment made in the plaint schedule property. Since it has been decided that there is no encroachment at all, the other details of the plaint schedule property as reported by the Commissioner's report nil dated filed in the month of September 2012 would suffice to decide this case. On that basis, the Trial Court dismissed the said application seeking to re-issuance of warrant to the Advocate Commissioner.



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3. Heard the learned Counsel for the revision petitioners and the first respondent anxiously and perused the materials available on record. The learned Counsel for the revision petitioners took me through the various grounds of the Civil Revision Petition and the contents of the documents.

4. I.A.No.370 of 2013 is an application filed under Order XXVI, Rule 9 and Section 151 of the Code of Civil Procedure, 1908. The revision petitioners in their grounds have stated that the Trial Court failed to observe that they are not seeking appointment of a new Commissioner but only re-issuance of warrant to the same Commissioner, which would facilitate the Court to arrive at a right conclusion. However, the learned Counsel for the first respondent submitted that without scrapping the report filed by the Commissioner, who has been already appointed and without filing objections to the said report, the revision petitioners have no *locus standi* to file a petition seeking re-issuance of warrant to the same Commissioner. In this case, the primordial point to be considered is whether the Trial Court is justified in dismissing an application under Order XXVI, Rule 9 and Section 151 of the Code of Civil Procedure, 1908, seeking re-issuance of warrant to the Advocate Commissioner in the pending suit.



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5. The provisions of Order XXVI, Rule 10 (3) of the Code of Civil Procedure, 1908 is as follows:

“(3) Commissioner may be examined in person.-
Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.”

6. Thus, it is understood from Order XXVI, Rule 10(3) of the Code of Civil Procedure, 1908, that whenever there is any reason dissatisfied with the proceedings of the Commissioner, Court may direct such further inquiry to be made as it shall think fit. In our case, the revision petitioners were set *ex parte* in the original suit and thereafter filed I.A.No.2082 of 2012 to set aside the *ex parte* order and the same was allowed on 19.11.2012. Even before the *ex parte* order was set aside, the Commissioner visited the plaint schedule property, on which date the revision petitioner sought for measuring the property in terms of the old partition deed from West to East, for which the Commissioner refused to heed to such request for the reason



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that they have been set *ex parte* and the request could be accomplished only after setting aside the *ex parte* order. Hence, the revision petitioners have filed this application to re-issuance of warrant to the same Commissioner after setting aside the *ex parte* order as against them.

7. This Court in the case of ***Kamala Devi Vs. T.P.Manoharan*** reported in [MANU/TN/0944/2008] dated 14.10.2008 in paragraph Nos.8 and 9 has held as follows:

“8.The judgments cited by the learned Counsel for the respondent would on the point that when the second commissioner is appointed, the report of the earlier Commissioner and sketch which may be contrary to the second Commissioner's report have to be scrapped. But the petitioner had applied for re issuance of the Warrant of Commission to the same Commissioner to measure the entire property which was not done by the Commissioner when the warrant of commission was issued to him at the earlier point of time.....

9. Therefore, the trial Court was wrong in dismissing the application, as if the petitioner seeks an order for second commission, which was actually intended to clarify



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the earlier report of the Commissioner by way of re issuance of warrant of commission. Similarly, the trial Court was wrong in holding that the measurements given by the Commissioner in his first inspection are sufficient to decide the issue. Therefore, it has become necessary to interfere with the order of the trial Court in this revision.....”

8. Even in this case, the learned Trial Court in its order has stated that the re-issuance of warrant of Commission is not necessary as the Trial Court held that the measurements given by the Commissioner in his report would suffice to substantiate the real nature of encroachment over the plaint schedule property which ought not to have observed so.

9. Without taking into consideration that, this application has been made by the revision petitioners after setting aside the *ex parte* order and they were not given with an opportunity to duly represent their case during visit by the Advocate Commissioner, the Trial Court ought not to have dismissed the said application. The Hon'ble High Court of Kerala in a judgment reported in **[MANU/KE/0037/1987] Sivaraman Vs. V.C.Narayanan dated 19.02.1986** in paragraph No.8 has held as follows:



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“8.So I do not think that the court has no lack of jurisdiction (sic) if the court, for any reason is dissatisfied with the proceedings of the Commissioner to send the same Commissioner to note things which he ought to have noted but he omitted to have noted in the report. This is asking for a report to supplement the earlier report. Just to supply the omission. The decision cited by the counsel for the respondent may not assist him to say that under no circumstance without setting aside an earlier report, the court can issue a second commission or the same commission to note details which have been omitted by him when he made the first report. It is clear from the provision. Order 26, Rule 10(3) that "where the court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit". "Further enquiry to be made" presupposes that an enquiry by the same Commissioner also is possible if the court feels so., If the report of the first Commissioner is found to be deficient on any point, the proper course would be to direct the same Commissioner to remedy the defects.....”

Here in this case, at the time of inspection of suit property by the Advocate Commissioner, the revision petitioners / 5th to 7th defendants were set *ex parte*, as a result of which, the Commissioner refused to note the points



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sought to be ascertained by them, though they were present therein at the time of inspection.

10. In a similar case, this Court in a judgment reported in **[MANU/TN/0177/2000] Veppanathar and Others Vs. Kaliappan dated 16.08.1999** in paragraph No.17 has held as follows:

“17. In paragraph 8 of the Order, lower Court found that the contention of respondent that the report is to be scrapped cannot be accepted. It also found against the respondent that the request for appointing second Commissioner after scrapping the report also cannot be accepted. Even if there is any deficiency or defect in the report, same commissioner could be asked to rectify the mistake.....”

11. In this case, the petitioners have applied for re-issuance of warrant of Commission to the same Commissioner to measure the entire property, in terms of their Memo, which was not done by the Commissioner, when the warrant of Commission was issued to him in an earlier point of time. Moreover, the revision petitioners are seeking to file a supplementary report



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in addition to the already existing Commissioner's Report and such an exercise is permissible under Order XXVI, Rule 10(3) of the Code of Civil Procedure.

12. The learned Counsel for the petitioner has relied on the judgments of this Court reported in **2013 (2) MWN (Civil) 619 (V.Ganesan Vs. Kamal Jain and Another) dated 18.04.2013**, **2016 (6) CTC 66 (Semitta Kounder 2. Santhi Vs. Murugesan) dated 21.10.2016** and **2022 (5) CTC 550 (S.Shanmugam Vs. K.Rajasekaran) dated 23.02.2021**.

13. Hence, this Court is of the considered view that, the re-issuance of warrant for proper measurement of property by the same Commissioner at the instance of a party, who has resumed conducting his case after setting aside the *ex parte* order against him, would not cause any prejudice to the other side. On perusal of the pleadings of both the parties, it would be clear that there was a cart track abutting the eastern side of the plaint schedule property, which was later converted into a bus route. The Trial Court's observation in the impugned order that there is no encroachment at all is without any basis and hence the same is not sustainable without a clear



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report by the Advocate Commissioner. No prejudice would be caused if warrant is re-issued to the same Commissioner, directing the Commissioner to file an additional report by measuring the suit property with the assistance of a qualified surveyor on the basis of the memo to be furnished by the revision petitioners / 5th to 7th defendants to the Advocate Commissioner at the time of inspection. In fine, the order dated 13.12.2012 passed in I.A.No.370 of 2013 in O.S.No.397 of 2011 on the file of the learned Additional District Munsif Court, Tuticorin is set aside. In the result, this Civil Revision Petition stands allowed. There shall be no order as to costs.

26.04.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes / No
BTR

To

- 1.The Additional District Munsif Court,
Tuticorin.
- 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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