



C.R.P(MD)No.2590 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **31.03.2023**

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

C.R.P(MD)No.2590 of 2022

and

C.M.P(MD) No.12704 of 2022

1.M.S.Mohamed Yusuf

2. Fathima Kani

... Petitioners/ Petitioners/
Appellants

Vs.

K.Alagarsamy

... Respondent/ Respondent
Respondent

PRAYER: Civil Revision Petition is filed under Article 227 of Constitution of India, to set aside the order in I.A.No.2 of 2022 in A.S.No.3 of 2022, dated 08.11.2022 on the file of the Learned Subordinate Judge, Mudukulathur.

For Petitioners : Mr.S.A.Ajmalkhan

For Respondent : Mr.C.Karthik

ORDER

The present Civil Revision Petition has been filed against the fair and decreetal order, dated 08.11.2022 in I.A.No.2 of 2022 in A.S.No.3 of 2022 on the file of the Learned Subordinate Judge, Mudukulathur.



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2. The petitioners are the unsuccessful defendants in O.S.No.35 of 2017 filed before the District Munsif Court, Mudukulathur. The said suit has been filed by the respondent for a bare injunction which was thereafter modified for a declaration and for a mandatory injunction for recovery of possession.

3. The respondent appears to have purchased the suit schedule property on 14.06.1964. It was the case of the respondent before the trial Court that the petitioners have encroached an extent of 18 square feet of land in S.No.60/50 measuring an extent of 5 cents in Mudukulathur by the petitioners herein. In the said proceedings, the respondent had filed I.A.No.2 of 2017 under Order 26 Rule 9 of C.P.C pursuant to which, an Advocate Commissioner was appointed who visited the property on 11.11.2017 and filed a report to the trial Court on 27.11.2017 together with a sketch. These documents have been taken on record by the trial Court as Exhibit C1 and C2.

4. The suit was also decreed as prayed for against which the petitioners have now filed an appeal before the Subordinate Judge,



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Muthukulathur in A.S.No.3 of 2022. In the said appeal, the petitioner has now in turn filed I.A.No.2 of 2022 for appointment of Advocate Commissioner to examine the property and to give a fresh report. It appears that the petitioners have earlier filed the similar application in I.A.No.1 of 2022 which was however withdrawn on account of the certain defects in the description of the property. It also appears that the petitioners had also filed I.A.No.28 of 2021 before the trial Court to make spot visit to inspect the property, which was also dismissed.

5. In this civil revision petition, the petitioner is aggrieved by the impugned order rejecting the prayer of the petitioner to appoint an Advocate Commissioner. It is submitted that the report was made in the absence of the petitioner, though notice was served. That apart, it is submitted that discrepancy in the description of the property as the suit was originally filed with only one schedule and thereafter, amended to two schedules, where second schedule is a part of the first schedule. It is submitted that the respondent has himself entered into the property of the petitioners and therefore, it is a fit case for interfering with the order as the order has wrongly rejected the request for appointment of Advocate Commissioner.



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6. The learned counsel for the petitioners has placed reliance on the decision of this Court in the case of *M.Ammasayappan and others Vs Muthusamy (died) and others* reported in **2017-3-L.W.521**, wherein, it has been held that fresh warrant can be issued without scrapping the earlier report and would not any way affect parties.

7. On the other hand, the learned counsel for the respondent has placed reliance on the following judgments:

1. Swami Premananda Bharathi Vs Swami Yogananda Bharathi and others reported in AIR 1985 Kerala 83.

2. R.Sivasubramanian Vs S.Balamurugan reported in 2006 (2) CTC 54.

3. Anna Sudha Devi Vs P.George Samuel reported in 2009 (2) CTC 205.

8. He submits that the impugned order passed by the Court rejecting the request for appointment of Advocate Commissioner cannot be find fault. The Advocate Commissioner inspected the property on 11.11.2017. It is further submitted that the petitioner had also filed



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I.A.No.28 of 2021 before the Trial Court which was dismissed. It is further submitted that no objection was filed before the trial court and the report was accepted. More importantly, it is stated that the Advocate Commissioner was himself examined as D.W.2 and therefore, the re-issuance of warrant at the appeal stage will not arise as the original report remains stalled unless the report was scraped, fresh warrant for appointing Advocate Commissioner does not arise.

9. I have considered the arguments advanced by the learned counsel for the petitioners and the learned counsel for the respondent.

10. Though the suit has been filed by the respondent for declaration and mandatory injunction and recovery of possession, the appointment of Advocate Commissioner in the facts of the case did not arise in the first instance. The trial Court ought not to have allowed I.A.No.279 of 2017. However, the petitioner accepted the order passed in I.A.No.279 of 2017 and the Advocate Commissioner has inspected the said property on 11.11.2017 and has given a report on 27.11.2017 and the trial Court marked as Exhibits C1 and C2. That apart, the petitioner has also examined the Advocate Commissioner as witness on behalf of



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the petitioner as D.W.2. The petitioner having participated in the trial based on the report of the Advocate Commissioner, the attempt of the petitioner is only to collect evidence by appointing an Advocate Commissioner at the appellate stage.

11. Therefore, the present Civil Revision Petition is liable to be dismissed. However, liberty is given to the petitioners to make submissions questioning the report that was filed by the Advocate Commissioner pursuant to the order in I.A.No.279 of 2017 before the Sub Court, Mudukulathur. The Sub Court, Mudukulathur is directed to dispose of the appeal on merits and in accordance with law as expeditiously as possible preferably within a period of 12 months from the date of receipt of copy of this order. Hence, the present Civil Revision Petition stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

31.03.2023

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

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To

- 1.The learned Subordinate Judge,
Mudukulathur.
- 2.The Section Officer
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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C.SARAVANAN,J.

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