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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 28.11.2024

DELIVERED ON : .12.2024

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THE HONOURABLE MR.JUSTICE N.SENTHILKUMAR

C.R.P.(MD)Nos.277 and 278 of 2021

and

C.M.P.(MD)No.1629 of 2021

1.V.Muthumalar

2.S.Narayanasamy

3.P.Velmurugan

... Petitioners in both petitions

vs.

1.A.Periyasamy

2.V.Mani @ Murugan

3.L.Nagalingam @ Nagaiah

4.A.Krishnasamy

...Respondents in both petitions

COMMON PRAYER: Civil Revision Petitions are filed under Article 227 of Constitution of India, to set aside the order passed by the District Munsif Court, Theni dated 09.12.2020 in I.A.Nos.2 and 3 of 2020 in I.A.No.286 of 2017 in O.S.No.11 of 2016 and allow the applications as prayed for.

For Petitioner : Mr.N.Dilipkumar

For R1 & R2 : Mr.B.Jeyakumar

R3 & R4 : No Appearance



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COMMON ORDER

These Civil Revision Petitions have been filed challenging the orders passed by District Munsif Court, Theni in I.A.Nos.2 and 3 of 2020 regarding appointment of Advocate Commissioner.

2.The revision petitioners are the plaintiffs in the original suit in O.S.No.11 of 2016. The respondents herein are the defendants in the suit. For better appreciation the parties herein are referred to as per their rank before the trial Court. The plaintiffs filed an application to appoint an Advocate Commissioner to measure the properties in Survey Nos.299/11, 299/9B, 307/11B and 307/8B as found in the suit schedule property in I.A.No.286 of 2017. The said application was entertained and the Advocate Commissioner was appointed. Based on the warrant issued to the Advocate Commissioner, he had issued notice to all the parties including the Advocates of the parties to appear at the time of inspection to be conducted by the Advocate Commissioner. Though initially, the date was fixed as 01.09.2018 for inspection, later it was adjourned to 28.07.2018 and the said date was also informed to all the parties concerned as well as the Advocates. There is no dispute over the change of date and intimation regarding the same.



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3. According to the plaintiffs, the present I.A.Nos.2 and 3 of 2020 are the applications filed by the plaintiffs to recall the Advocate Commissioner's report and to appoint an another Advocate Commissioner. The contention of the plaintiffs is that when the Advocate Commissioner visited the suit premises to measure property, the parties were present, but the learned counsel for the plaintiffs was not present. However, the Advocate Commissioner proceeded further to conduct inspection. The another objection raised by the plaintiffs is that the Advocate Commissioner has not surveyed the suit properties properly and he had gone beyond the scope of the warrant. The plaintiffs' further contention is that though written objection was filed by the plaintiffs to the report of the Advocate Commissioner, the Commissioner has submitted his report. Being not satisfied with the report of the Advocate Commissioner, the present I.A.No.2 and 3 of 2020 have been filed.

4. The learned counsel for the defendants submits that due notice was given by the Advocate Commissioner to the parties concerned regarding the date and time of inspection. It is for the parties to make themselves to be present at the time of inspection, as the Advocate Commissioner is the person appointed by the



Court to discharge the functions of the judicial work, which has been delegated to him. Therefore, the inconvenience to the parties or to the learned counsel cannot be a reason to reject or not to accept the report of the Advocate Commissioner. The next argument advanced by the respondents is that, the plaintiffs have insisted to survey the lands, which were not scheduled in the suit property and hence, the said request was not considered by the Advocate Commissioner.

5.The trial Court considering the submissions made on either side and after perusing the Advocate Commissioners's report, had dismissed the applications filed by the plaintiffs to recall the Advocate Commissioner and to appoint a new Advocate Commissioner. Challenging the same, the present Civil Revision Petitions have been filed.

6.The learned counsel for the revision petitioners submitted that the Advocate Commissioner in his report, observed that the suit schedule property is situated on the northern side of Koduvilarpatti-Pallapatti east west road between Survey Nos.299 and 307. Survey No.307/1 is the passage, which runs to 36 feet. On measurement, it was found that the passage runs to 15 $\frac{3}{4}$ feet on the southern side and 20 $\frac{1}{2}$ feet northern side. Apart from that the Advocate Commissioner



had referred Survey No.307/1 (LD Road), while measuring Survey No.299/4, 5, 7, 8, 9, 9(b), 11 and 307/2, 7, 8 and 9. The said measurement was made by the Advocate Commissioner along with the Sub Divisional Surveyor, Kovilpatti, Theni District. By taking note of the above recordings, the learned counsel for the revision petitioner contends that the Advocate Commissioner had gone beyond the scope of the warrant.

7.The learned counsel for the petitioners relied upon the judgment in the case of ***Padmanabhan vs. Krishnamurthy [2005 (3) CTC 619]***, in it is held as follows:

“18. By a careful analysis of the above decisions and other decisions, we may sum up the position:

Under Or.XXVI R.10(3) C.P.C. for any reason if the Court is dissatisfied with the proceedings of the Commissioner, the Court may direct such further inquiry to be made as it shall think fit.

In case of deficiency in Report, the Court shall direct further inquiry calling for supplementary Report from the same Commissioner. For collecting more details, like to measure the properties with the help of surveyor and to submit the survey plan or for verifying the measurement, the same Commissioner can be reappointed.



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If the Court is dissatisfied with the Commissioner's Report, if considered necessary, it can issue another Commission for collecting more details, without setting aside the Report of the first Commission. If the Report is not satisfactory, the Court may appoint another Commissioner, but not without recording any finding as to its dissatisfaction about the Report of the first Commissioner.

*Under Order 26 Rule 10(2) C.P.C., the report of the Commissioner is evidence in the suit and forms part of the records. The Report of the Commissioner has therefore, evidentiary value and can be utilised by either of the parties as evidence in support of their case. This provision cannot be set at naught by scrapping the Report. The effect of scrapping the report is that the Report which is evidence in the case and part of the record ceases to be so and cannot be referred to by the parties. The mere fact that the Commissioner has failed to note certain features which according to the Defendant were important does not mean that the whole Report should be scrapped (**K. Viswanathan v. D. Shanmugham Mudaliar and Another** (1986) 1 M.L.J.319).*

*Interference with the result of a long and careful local investigation except upon clearly defined and sufficient grounds is to be deprecated. It is not safe for a Court to act as an expert and to overrule the elaborate Report of a Commissioner whose integrity and carefulness are unquestioned, whose careful and laborious execution of his task was proved by his Report, and who had not blindly adopted the assertions of either party (**Chandan Mull v. Chiman Lal**, AIR 1940 PC 3).*



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*The Court should first have considered whether the first Commissioner's Report should be superseded and must have recorded its reasons in writing when it came to the conclusion that it should be superseded. Then and then alone, it had jurisdiction to appoint a second Commissioner to do the same work allotted to the first (**Visvanadhan v. Mengamma** AIR 1930 MADRAS 236).*

The Report of the earlier Commissioner cannot be scrapped, unless there are allegations that the Commissioner has acted in a partial or vindictive manner.

*Mechanical and indiscriminate appointment of more than one Commission, merely because the Court thinks the other party to the proceedings may not be prejudiced or that the expenses for the Commission are going to be borne by the Applicant for the purpose would create an unhealthy practice of not only more than one Report on records, but also would lead to the vice of a person or party to the proceedings not being satisfied with the Commissioner's Report seeking for the appointment of successive Commissioners till he is able to get a Report of his choice (**Gopalakrishnan v. P. Shanmugam** AIR 1995 Madras 274).*

8.He has relied upon the case in **R.Malligeswari vs. V.Munisamy** [C.R.P.No.3951 of 2011 dated 24.04.2015], wherein this Court has held as follows:



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18. When the Court forms an opinion that it is not satisfied with the Report, it is entitled to call for another report after setting aside the same or get a supplementary report from the same Commissioner. [Irulayee and others vs. Sri. Krishna Vilas Baliya reported in 2000 A I H C 3462]

9. In the case of ***K. Ravi vs. Anandhi and others [C.R.P.(PD) No. 2611 of 2024 dated 19.07.2024]***, the Principal Bench of this Court has held as follows:

*“2. I.A.No.2 of 2003 is an application filed to scrap the report of the Advocate Commissioner which was submitted, pursuant to the orders passed in I.A.No.750 of 2014. The ground on which the petitioner wants scrapping of the report is that the Advocate Commissioner had not measured the property by taking boundary stones of adjacent lands and the surveyor had not cross-checked the measurement of the suit property and further, the surveyor had not measured the entire extent of S.Nos.290/1D and 290/1C. The learned trial Judge has considered the principles laid down by this Court in **Padmanabhan Vs. Krishnamurthy** [2005(3) CTC 619] and has come to a conclusion that the mere fact that the Advocate Commissioner had not measured certain extent does not mean that the report has to be scrapped and consequently dismissed the application, against which, this civil revision petition has been filed.*

.....

5. Unless and until the learned trial Judge is dissatisfied with the Advocate Commissioner's report, the question of scrapping the report does



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not arise. The fact that the Advocate Commissioner has not measured certain extent of the property, which the defendant wants to be measured, cannot be a ground to scrap the report. The appropriate remedy for the petitioner/defendant would be to file an objection to the Advocate Commissioner's report and thereafter, summon the Advocate Commissioner in terms of Order XXVI Rule 10 CPC to the witness box and cross-examine him on these aspects. The learned Judge, after perusing the Advocate Commissioner's report, has no dissatisfaction with the same, hence rejected the application. If certain aspects are not made out in the report, then the defendant can let in evidence to substantiate those aspects, during the course of the trial. This will be in addition to summoning the Advocate Commissioner”.

10.This Court, in the case of ***K.Azhagammal and others vs. G.Krishnamoorthy and others [C.R.P.(MD)No.514 of 2020, dated 21.08.2020]*** has held as follows:

“10.This Court on early occasions have dealt with several situation explaining the scope for appointment of Advocate Commissioner. The Advocate Commissioner is an Officer of Court, who is expected to file a report to help the Court in resolving issues. At the time of appointing the Advocate Commissioner, the revision petitioners have no grievance and the order of appointment of Advocate Commissioner has not been challenged



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by the revision petitioners. Merely because, the report of the Advocate Commissioner is not in favour of the revision petitioners, the revision petitioners can not file an application for scraping the report, as it is open to the revision petitioners to file any objections or document or material to discredit the report of the Advocate Commissioner. In other words, the findings of Advocate Commissioner in his report is not final and subject to scrutiny. Unless, the Advocate Commissioner's report is free from bias, irregularity and within the scope of warrant, it cannot be accepted in full. In the present case, this Court is unable to find that the report of Advocate Commissioner is wholly untrue, unreliable or irrelevant. Hence, it cannot be scrapped. However, the lower Court will examine the credibility of report at the time of hearing on the basis of objections raised by the revision petitioner.

11. In the present case, the Advocate Commissioner has filed the report elaborately after recording the measurements on the basis of documents of title and the contention of parties in their respective pleadings. He has given findings which are relevant. The learned Counsel for the revision petitioner submitted that the Advocate Commissioner has not measured the properties as per the document of title deeds and that therefore, the Advocate Commissioner's report is liable to be scrapped. If the Court starts entertaining applications to scrap the Advocate Commissioner's report, every litigant, who is aggrieved by the report or who finds that the report is not in favour of particular party, will file a petition to scrap the report. The Court cannot indulge in such exercise, as the same will delay the proceedings before any Court. However, the Court



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may see whether the Advocate Commissioner has executed the warrant, so that the report of the Commissioner will have some assistance to the Court to resolve the issue. If the Advocate Commissioner's report is defective, the Court can issue further direction to the same Advocate Commissioner. Similarly, even if the Advocate Commissioner fails to note down certain features, which are required for resolving the issue, the warrant can be re-issued to same Advocate Commissioner to make the report complete and useful.

12.Regarding appointment of second Advocate Commissioner, the Court can exercise such power, only when the report of the Advocate Commissioner is liable to be scraped. The petitioner in the present application has sought for scrapping the report on the ground that the Commissioner has found something, which is beyond the scope of warrant. The Advocate Commissioner is not supposed to resolve any issue, which is not within his purview. The object of Commissioner is to note down the physical feature to the understanding of Court, so that the problems relating to extent and boundaries can be understood for resolving the dispute. Merely because, the Commissioner has stated something beyond his purview in his report, that does not mean that the whole report is liable to be scraped or the Advocate Commissioner's report cannot be relied upon for any purpose. If the Advocate Commissioner's report is challenged on specific grounds, the Court will consider at the time of hearing the case. The Court can always give further direction to the Advocate Commissioner, only when the Court is convinced that it is required in the interest of justice. Leaving it open to the lower Court to do such exercise,



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if warranted at the time of hearing, this Court is of the view that the petition filed by the revision petitioners for scrapping the Advocate Commissioner's report cannot be entertained in this case.”

11.The Principal Bench of this Court in the case of ***R.Pankajam vs. C.Subramanian and others [C.R.P.No.3517 of 2023 dated 09.11.2023]***, has held as follows:

“11. In the present case on hand, the Advocate Commissioner has filed the report elaborately after recording the measurements on the basis of documents of title and the contention of parties in their respective pleadings. He has given findings which are relevant. The learned Counsel for the revision petitioner submitted that the Advocate Commissioner has not measured the properties as per the document of title deeds and that therefore, the Advocate Commissioner-s report is liable to be scrapped. If the Court starts entertaining applications to scrap the Advocate Commissioner-s report, every litigant, who is aggrieved by the report or who finds that the report is not in favour of particular party, will file a petition to scrap the report. The Court cannot indulge in such exercise, as the same will delay the proceedings before any Court. However, the Court may see whether the Advocate Commissioner has executed the warrant, so that the report of the Commissioner will have some assistance to the Court to resolve the issue. If the Advocate Commissioner's report is defective, the Court can issue further direction to the same Advocate Commissioner. Similarly, even if the Advocate Commissioner fails to note down certain



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features, which are required for resolving the issue, the warrant can be re-issued to same Advocate Commissioner to make the report complete and useful.?”

12.The learned counsel for the respondents submitted that the Advocate Commissioner's report is only an opinion and such 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 and to issue new Commission in a given case. In support of his contention he had circulated a judgment of the Hon'ble Supreme Court in ***Civil Appeal No.1973 of 2022 dated 11.05.2022*** in the case of ***M.P.Rajya Tilhan Utpadak Sahakari Sangh Maryadit, Pachama, District and others vs. M/s.Modi Transport Service*** and the relevant portion is extracted below for ready reference:

“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



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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 of functions of the court to decide the issue. Sometimes, on examination of the commissioner, the report forms part of the record and evidence.²⁸ 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."

13. It is not in dispute that the suit was filed by the revision petitioners/ plaintiffs for bare injunction. When the written statement was filed by the respondents/defendants and an Advocate Commissioner was appointed, if the plaintiffs are aggrieved by the scheduled mentioned properties and if they want to



measure the properties, which are not in the plaint schedule, until the petitioner files an application to amend the plaint, the same cannot be considered. Apart from that, the Advocate Commissioner is expected to measure the property based on the details of the warrant issued to him by the trial Court. Without any palpable reasons that the Advocate Commissioner had taken a biased view, the appointment of the Advocate Commissioner cannot be questioned or challenged.

14. Only on the application made by the plaintiffs/revision petitioners, the Advocate Commissioner was appointed. The plaintiffs had not filed any justifiable reason to reject the contention of the Advocate Commissioner and the reasons adduced by the plaintiffs, that is, the absence of the learned counsel for the plaintiffs and the Commissioner has gone beyond the scope of the warrant, are without jurisdiction.

15. Further, the judgments cited by the learned counsel for the revision petitions are only with regard to the scope and power of the Court to appoint an Advocate Commissioner, which is not dispute. The judgments cited by the revision petitioners itself clearly shows that the aggrieved person has every right to file an objection to the Advocate Commissioner's report. Admittedly, the



revision petitioners had not filed any objection to the report filed by the Advocate Commissioner with regard to scrapping of the Commissioner's report demonstrating the defects in the commissioner's report and it is going beyond the scope of the warrant. Though the revision petitioners contended that they had filed written objection to the Advocate Commissioner's report, the trial Court while disposing the applications, had specifically recorded that the revision petitioners had not filed any objection to the report of the Advocate Commissioner and plan.

16. Further, the Advocate Commissioner filed his report on 01.10.2018, whereas the applications were filed to scrap the said report only after a lapse of 1 ½ years. It is an inordinate and unexplained delay. When the report of the Advocate Commissioner was available to the revision petitioners, they were only the fence sitter or a mute spectator to watch and wait the proceedings before the trial Court. The trial Court, taking into consideration all these aspects and relying upon the judgment of this Court in ***Vepananthan vs. Kaliappan 2000 A1HC 1028 (Mad)***, in which it has been held that *the Court would not appoint second commission on the mere allegation of discrepancies in commissioner's report. When the elaborate report is filed by the Commissioner, whose integrity,*



credibility and carefulness are not questioned, interference with the report will be made only in circumstances in exceptional in cases where convincing evidence is available before Court, had dismissed the applications filed by the revisions petitions by way of a well reasoned order.

17. In view of the above deliberations, this Court is of the view that the orders passed by the trial Court in I.A.Nos.2 and 3 of 2020 need no interference by this Court. Accordingly, these Civil Revision Petitions are dismissed.

18. Since the suit is of the year 2016, the trial Court is directed to give priority to the suit and conclude the same within a period of one year from the date of receipt of a copy of this order. The trial Court is also expected not to make any application for extension of time. No costs. Consequently, connected miscellaneous petition is closed.

.12.2024

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The District Munsif, Theni.



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N.SENTHILKUMAR, J.

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Pre-delivery order made in
C.R.P.(MD)Nos.277 and 278 of 2021

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