



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 28.11.2024

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THE HONOURABLE MR.JUSTICE N.SENTHILKUMAR

C.R.P.(MD)(PD)No.595 of 2021

and

C.M.P.(MD)No.3286 of 2021

S.Rajammal

... Petitioner

vs.

S.Syamali

...Respondent

PRAYER: Civil Revision Petition is filed under Article 227 of Constitution of India, to set aside the fair order and decreetal order dated 06.01.2021 made in I.A.No.1 of 2020 in O.S.No.755 of 2019 on the file of the District Munsif cum Judicial Magistrate, Srirangam.

For Petitioner :Mr.K.S.Kathiravan

ORDER

This Civil Revision Petition has been filed against the order passed in I.A.No.1 of 2020 in O.S.No.755 of 2019 seeking to appoint new Advocate



Commissioner and to re-issue the Commissioner warrant to inspect the suit property.

2. Originally, the plaintiff filed a suit for permanent injunction restraining the defendants from interfering with the plaintiff from using the pathway and for mandatory injunction to remove the obstructions put up in the pathway. During the trial process, an application in I.A.No.898 of 2012 was filed by the plaintiff for appointment of an Advocate Commissioner to measure the pathway, which is in dispute. The Advocate Commissioner has filed a report after completing the investigation.

3.The learned counsel for the plaintiff and the defendant in the suit have made their respective objections to the Advocate Commissioner's report. The plaintiff has made an objection with regard to the commissioner's report stating that warrant may be re-issued directing the Commissioner to answer about all the physical features noted in the memo. The defendant also made his objection stating that there are discrepancies with regard to the measurement of the property. Since the plaintiff and the defendant have raised their objection, the report of the Advocate Commissioner was not taken cognizance by the trial Court.



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4.It is pertinent to point out that earlier the plaintiff filed an application to abandon the Commissioner's report in I.A.No.348 of 2013, which was allowed by the trial Court. Challenging the same, the defendant filed an application in I.A.No.411 of 2018 seeking to reopen the application of the plaintiff and the same was dismissed. Further, the plaintiff and the defendant have filed C.R.P(MD)Nos. 2283 and 2782 of 2018 challenging the above said orders and the same were disposed of by way of a common order dated 29.07.2020. The relevant portion of the said order is extracted hereunder:

“The order passed in I.A.No.348 of 2013 in O.S.No.808 of 2012 by the learned III Additional District Munsif, Tiruchirappalli, is set aside. The matter is remitted back to the learned III Additional District Munsif, Tiruchirappalli, to pass appropriate orders on merits and in accordance with law. Only if the respondent satisfies the Court that the earlier report of the Commissioner is liable to be scrapped for valid, lawful grounds, it is permissible for the lower Court to appoint a fresh Commissioner. In case, the Commissioner's report filed earlier is incomplete or the Commissioner has failed to note down any features, it is relevant to resolve any issue which arise between the parties, the lower Court may re-issue the warrant to the same Commissioner to get additional report.



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4. With the above observations and directions, the Civil Revision Petition in C.R.P.(MD)No.2762 of 2018 is allowed and the learned III Additional District Munsif, Tiruchirappalli, is directed to dispose of the application in I.A.No.348 of 2013 within a period of twelve weeks from the date of receipt of a copy of this order.”

5. Now, the present application was filed by the plaintiff seeking to reissue the Commissioner's warrant to inspect the suit property. The trial Court evaluated the Advocate Commissioner's report on the following grounds:

“(i) the Commissioner report and the plan not reflected the true facts of the case;

(ii) Commissioner report suppressed material facts;

(iii) there is many variation from original measurement and Commissioner's measurement in which inclined in the side of the plaintiff;

(iv) Commissioner opinioned in his report, not confirmed the statement and measurement and he assumed and marked the same in which are not correct, since he inspected the sit property in person;

(v) Commissioner never described about sunshade put up by the petitioner for 1.5 feet situated within the petitioner property boundary limits of east west portion alone which is clearly shown in Corporation plan;



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(vi) *The measurement in the report and plan given by the Commissioner is not matched with the measurement given by the Corporation Surveyor Plain;*

(vii) *“Note” regarding suit property given in Corporation Surveyor Plan on 18.08.2012 is not mentioned in Commissioner report;*

(viii) *In Commissioner report on para 2, reveals that his plan “ABCDEFGH” is the suit property. But there is no marking of “ABCDEFGH” in his plan. The Commissioner assumed “AE” as 10 feet but which part “AB” is not mentioned in his plan;*

(ix) *Commissioner report reveals that a bathroom outlet released by way of an PVC pipe from the upstairs of the petitioner house is not correct and it is false content report;*

(x) *Commissioner wrongly mentioned eastern boundary limit from south to north is 42.9 feet but the Corporation Surveyor plan report clearly shows 51 feet. Similarly commissioner wrongly mentioned northern boundary from east to west in this plan as 39.2 feet but Corporation Surveyor plan report was clearly shown as 46 feet;*

(xi) *Commissioner report filed after the lapse of nearly 11 months period and Commissioner failed to submit the reason for his delayed report; and*

(xii) *Commissioner report blamed the petitioner that the petitioner encroaching and reduce the width of the said land is not totally correct.”*



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6. After analysing the facts and circumstances of the case, the trial Court had come to the conclusion that in the Commissioner's report, he had mentioned the property as "ABCDEFGH", but he not mentioned the same in the plan and regarding the measurement of the petitioner's property, there is no clarity. The trial Court had given a finding that it is a settled principle of law that the Court should first have considered whether the first Commissioner Report should be superceded and must have recorded the reason in writing when the first Commissioner Report is to be superceded. Further, under Order 26 Rule 10 (2) CPC, the report of the Commissioner is an evidence in the suit and forms part of the record and the ambiguity in Commissioner report is the Commissioner failed to mention the denotation of "ABCDEFGH" in Plan, whereas he denotes the suit property as "ABCDEFGH" in his report and the above ambiguity could be rectified by examination of the Commissioner during trial. The commissioner cannot be expected to adjust his measurement according to the Corporation Surveyor Plan. On this ground, the application has been dismissed. Challenging the same, the plaintiff has filed this Civil Revision Petition.



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7.The learned counsel for the defendant contends that the Advocate Commissioner ought to have described the pathway in the plan.

8.Heard the submissions made on either side and perused the materials placed on record.

9.Admittedly, there are some material differences in the Commissioner's report an the plan. However, the other findings rendered by the Commissioner has been made after inspecting the property. It is pertinent to note that the trial Court while passing this order, had not followed the common order passed by this Court in CRP(MD)Nos.2283 and 2762 of 2018 in letter and spirit, which has been directed that *“In case, the Commissioner's report filed earlier is incomplete or the Commissioner has failed to note down any features, it is relevant to resolve any issue which arise between the parties, the lower Court may re-issue the warrant to the same Commissioner to get additional report”*.

10.In view of the same, the order passed by the trial Court is set aside and the trial Court is directed to consider the application for appointment of Advocate



Commissioner filed by the plaintiff or by the defendant, if any, and decide the same by taking note of the findings rendered in the common order in C.R.P. (MD)Nos.2283 and 2762 of 2018.

11.With the above observation, this Civil Revision Petition is dismissed.
No costs. Consequently, connected miscellaneous petition is closed.

28.11.2024

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

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To

1.The District Munsif cum Judicial Magistrate Court,
Srirangam



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N.SENTHILKUMAR, J.

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