



C.R.P.(MD)No.758 of 2019

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on : 27.02.2024

Delivered on : 15.03.2024

CORAM:

THE HON'BLE MR.JUSTICE K.MURALI SHANKAR

C.R.P.(MD)No.758 of 2019

and

C.M.P.(MD)No.4627 of 2019

M.Ahamed Nasira

: Petitioner/1st Respondent/
1st Defendant

Vs.

1.Yusuf Rifaya

: Respondent/Petitioner/Plaintiff

2.The Tahsildar,
Taluk Office, Vandikara Street,
Ramanathapuram Town,
Ramanathapuram Taluk & District.

3.The Special Officer,
Kilakarai 3rd Class Municipality,
Vallal Sethakathi Salai,
Kilakarai Town, Kilakarai Taluk,
Ramanathapuram District.

: Respondent/Respondents 2 & 3/
Defendants

Prayer : This Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the fair and executable order passed in



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I.A.No.498 of 2018 in O.S.No.9 of 2012, dated 08.11.2018 on the file of the District Munsif Court, Ramanathapuram District.

For Petitioner : Mr.S.A.Ajmal khan

For Respondents : Mr.J.Barathan, for R1.

: Mr.ASivanu Pandian,
Government Advocate, for R2

: No Appearance, for R3.

ORDER

The Civil Revision Petition is directed against the order passed in I.A.No.498 of 2018 in O.S.No.9 of 2012, dated 08.11.2018 on the file of the District Munsif Court, Ramanathapuram District, appointing an Advocate Commissioner under Order 26 Rule 9 of the Code of Civil Procedure.

2.The revision petitioner is the first defendant and the first respondent/plaintiff has filed the suit in O.S.No.9 of 2012 against the revision petitioner and other defendants, claiming permanent injunction restraining the revision petitioner/first defendant from making any constructions in the suit property and for mandatory injunction directing



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the first defendant to remove the constructions made by encroaching the portion of the suit property.

3. The revision petitioner/first defendant has filed a written statement and is contesting the suit. When the suit, after the completion of both side evidence, was pending for arguments, the above petition came to be filed under Order 26 Rule 9 of C.P.C for appointment of Commissioner to visit the suit property and measure the same with the help of surveyor and Village Administrative Officer with reference to the survey documents and to submit a report and plan.

4. The plaintiff has shown the east-west common pathway of 9 feet north-south 13 ½ feet east-west situated in G.R.S.No.324/1461 in Esa Thandayal Street, 5th Ward, Keelakarai Town, as the suit property.

5. The case of the plaintiff is that the property in G.R.No.324/1462 belonging to the plaintiff is situated on the north of the suit pathway; that the property in G.R.No.324/1460/2 belonging to the first defendant is situated on the east of the property in G.R.No.324/1462; that the suit



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pathway is belonging to the Government and is under the control and maintenance of the third defendant; that the first defendant has been making constructions in his property in S.No.324/1460/2 and while making constructions, he is attempting to encroach a portion in the suit pathway and making constructions therein; that the plaintiff has lodged a complaint with the third respondent for which, the third respondent informed that no permission was granted to the first defendant for making any constructions; that when a complaint was lodged before the District Revenue Officer, Ramanathapuram, the second defendant had visited the suit property and passed an order, dated 10.01.2012, directing the first defendant not to make any encroachment in the suit pathway; that since the first defendant has started to make constructions and as there was no action from the defendants 2 and 3, the plaintiff was constrained to file a suit and to file an injunction application in I.A.No.43 of 2012; that the trial Court, after enquiry has *suo motu* appointed an Advocate Commissioner to visit the property and measure the same with the help of surveyor and the Village Administrative Officer and directed the parties to maintain *status quo* to be found by the Advocate Commissioner; that the Advocate Commissioner had visited the property and measured the same and found



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that the first defendant had made constructions by encroaching a portion of the suit property; that the Advocate Commissioner before filing of the report, was appointed as an Assistant Public Prosecutor and went to some other place and that since the plaintiff has also claimed mandatory injunction, appointment of Advocate Commissioner is very much necessary and that is why, the plaintiff was forced to file the above application.

6. The defence of the revision petitioner/first defendant is that he is not aware of the any order passed by the second defendant on 10.01.2012 restraining him from making constructions; that the first defendant has preferred an appeal in C.M.A.No.4 of 2012 before the Sub Court, Ramanathapuram, challenging the order passed in the injunction petition in I.A.No.43 of 2012; that the Advocate Commissioner appointed earlier has neither visited the property nor measured the same; that since the suit was pending without any progress, the first defendant has allowed the appeal to be dismissed and participated in the trial; that after the closure of both side evidence and after hearing the arguments, the case was reserved for judgment; that the plaintiff has then filed an application to examine the



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third defendant and the same was allowed and after the examination of the third defendant, when the case was pending for arguments, the above petition came to be filed to drag on the proceedings and to cause hardship to the first respondent and that therefore, the petition is liable to be dismissed.

7. Admittedly, the plaintiff has filed the suit claiming permanent injunction and also mandatory injunction against the first defendant for removal of the alleged constructions made by him in the suit property.

8. It is not in dispute that the learned trial Judge, after enquiry in the injunction application in I.A.No.43 of 2012 has appointed an Advocate Commissioner, directing him to visit the suit property, measure the same with the help of surveyor and Village Administrative Officer with reference to the revenue documents and the documents of both the parties and to file report with plan and also directed both the parties to maintain *status quo* to be found by the Commissioner and also granted temporary injunction restraining both the parties from making any encroachments or constructions in the suit property.



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9. It is the specific case of the plaintiff that the Advocate Commissioner had visited the property and measured the same with the help of Village Administrative Officer and Surveyor and before filing of his report and plan, he was appointed as an Assistant Public Prosecutor and as such, he left the practice. But according to the first defendant, the Advocate Commissioner appointed *suo motu* by the trial Court has neither visited the property nor measured the same and that therefore, the question of filing report and plan does not arise.

10. As rightly contended by the learned counsel for the plaintiff, Advocate Commissioner was appointed vide order, dated 22.02.2012 and even according to the first defendant, the Advocate Commissioner was appointed as Assistant Public Prosecutor and went to some other place in the year 2015. The first defendant in his counter statement has specifically stated that the appeal filed by him, challenging the order passed in injunction petition in I.A.No.43 of 2012 in C.M.A.No.4 of 2012 was allowed to be dismissed and he had taken part in the trial.

11. It is evident from the records that closure of both side evidence and after hearing the arguments of both the sides, when the suit was



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reserved for judgment, the plaintiff has filed an application seeking permission to examine the third defendant and the same was allowed and on that basis, the third defendant was examined and again when the case was pending for arguments, the above petition came to be filed.

12. No doubt, the plaintiff has not taken any steps for appointment of commission till the conclusion of trial. But that by itself, is not a ground to reject the application filed at the arguments stage.

13. The learned counsel for the revision petitioner has relied on the decision of this Court in ***K.Subramaniam Vs. R.K.Angappan*** reported in ***2009 4 MLJ 201***, wherein the Advocate Commissioner, after visiting the property, has filed his report and plan and after the completion of trial, when the case was posted for judgment, the plaintiff has filed an application for reissuing the commission warrant, directing the Commissioner to measure the properties of both the parties and locate the suit wall and file the report with sketch. A learned Judge of this Court, by observing that without setting aside the earlier report of the Commissioner, a fresh Commission warrant could not be issued, allowed



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the revision and thereby setting aside the order of the trial Court appointing the Advocate Commissioner.

14. In the case on hand, as already pointed out, the Commissioner appointed earlier has not filed his report and plan and as such, the question of seeking for setting aside the earlier report does not arise. It is settled law that commission cannot be appointed to note down the possession of a party. But in the case on hand, since the plaintiff has taken a specific stand that the first defendant has been attempting to encroach a portion of a suit pathway and making constructions, the learned trial Judge has appointed an Advocate Commissioner and that since the Commissioner has not chosen to file his report and plan and that since he has claimed mandatory injunction, the trial Court has rightly allowed the petition.

15. No doubt, the plaintiff has filed the above petition belatedly, but that by itself is not a ground to reject the same. On considering the entire facts and circumstances of the case and also taking note of the case put forth by the plaintiff and the relief claimed by him and also the fact that the Advocate Commissioner appointed earlier, has not filed his report and



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plan, the impugned order appointing an Advocate Commissioner cannot be found fault with. Hence, this Court concludes that the Civil Revision Petition is devoid of merits and the same is liable to be dismissed.

16. In the result, the Civil Revision Petition is dismissed. Since the suit is pending from 2012 onwards, the Advocate Commissioner appointed by the trial Court is directed to execute the warrant and file his report with plan within a period of one month from the date of receipt of copy of this order and the trial Court is directed to dispose of the suit within a period of one month from the date of receipt of the Commissioner's report. Consequently, connected Miscellaneous Petition is closed. No costs.

15.03.2024

NCC :yes/No
Index :yes/No
Internet:yes/No
das



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To

- 1.The District Munsif, Ramanathapuram District.
- 2.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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K.MURALI SHANKAR,J.

das

Order made in
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