



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Orders Reserved on : 20.08.2018

Orders Pronounced on : 31.08.2018

WEB COPY

CORAM:

THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

C.R.P (MD)No.1981 of 2010 (PD)

and

M.P. (MD)No.1 of 2010

Mrs.B.Vijayakumari

...Petitioner/1st Respondent/
1st Defendant

Vs.

1.S.Jeyaraman

...1st respondent/Petitioner/
Plaintiff

2.G.S.R.Boomibalagan

3.Muthukutti

... Respondents 2 and 3/
Respondents 2 and 3/
Defendants 2 and 3

PRAYER: Civil Revision Petition is filed, under Article 227 of the Constitution of India, to set aside the order dated 03.08.2010 passed in I.A.No.732 of 2010 in O.S.No.25 of 2010, on the file of Principal District Munsif Court, Tirunelveli.


For Petitioner : Mr.Niranjan S.Kumar for Mr.V.Balaji

For R1 : Mr.M.P.Senthil

O R D E R

The order dated 03.08.2010 passed in I.A.No.732 of 2010 in O.S.No.25 of 2010, on the file of Principal District Munsif Court, Tirunelveli, is being challenged in the present Civil Revision Petition.

2.The first respondent herein as plaintiff has instituted Original Suit No.25 of 2010 on the file of the Court below for declaration that the suit 2nd schedule property is a common pathway for himself and the defendants and for consequential injunction restraining the defendants from interfering with his enjoyment by putting up any construction, wherein the present revision petitioners and other respondents have been shown as defendants in Original Suit No.25 of 2010. Pending suit, the first respondent herein as petitioner has filed Interlocutory Application No.54 of 2010 so as to appoint an Advocate Commissioner and accordingly an



Advocate Commissioner has been appointed and he inspected the suit property and ultimately filed his report. Thereafter, the first respondent/plaintiff has filed I.A.No.732 of 2010 in O.S.No.25 of 2010 to re-issue the Commissioner's warrant.

3.The Court below after considering the rival contentions put forth on either side has allowed the said petition. Aggrieved by the said order the present Civil Revision Petition has been filed at the instance of the first defendant, as revision petitioner.

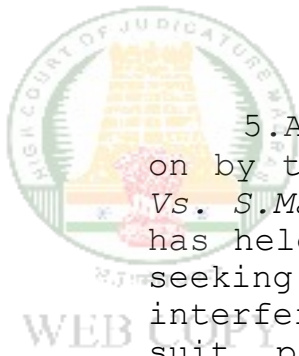
4.Heard the learned counsel appearing for the petitioner; the learned counsel appearing for the first respondent and also perused the entire materials on record.

5.The learned counsel appearing for the revision petitioner/first defendant has contended that Original Suit No.25 of 2010 has been instituted for the relief of declaration and for consequential injunction. In the meanwhile, the first respondent/plaintiff as petitioner has filed Interlocutory Application No.54 of 2010, so as to appoint an Advocate Commissioner wherein an Advocate Commissioner has been appointed and he has inspected the suit schedule property and filed his report and no objections filed on the side of the first respondent/plaintiff in time. Under the said circumstances, the question of re-issue of Commissioner warrant does not arise and therefore, the order passed by the Court below is liable to be interfered with.

6.In support of his contentions, the learned counsel for the petitioner, has relied on the following Judgement:-

(i)In CDJ 2017 MHC 434 (G.KOTHANDARAMAN v. D.KESAVAN AND ANOTHER), wherein this Court has observed as follows:-

"4.Admittedly, the Petitioner has filed a suit for declaration and for mandatory injunction in respect of the encroachment area mentioned as 'CDEF' Portion. The Petitioner is claiming his right in respect of 81.75 sq.ft site measuring east-west 27 feet 3 inch and north-south 3 feet in part of S.No.93/8.The Commissioner report was filed before the trial Court, along with plan and sketch. The Trial Court, based on the above said documents, on merits had dismissed the suit. Aggrieved by which, the Petitioner has filed the appeal suit in A.S.No.114 of 2012 before the Subordinate Court, Sivagangai.The present application in I.A.No.147 of 2014 in A.S.No.113 of 2012 filed by the revision petitioner before the appellate Court to reissue of commission warrant to the Commissioner with a direction to inspect the suit schedule property and to file a fresh report along with rough sketch under Order 26 Rule 9 of Civil Procedure Code. The aforesaid application was dismissed on 22.4.2016. On a perusal of the order passed by the appellate Court in the above I.A, it is seen that the Petitioner has already filed I.A.No.1267 of 2011 before the trial Court for the same relief and the same was dismissed on 28.2.2016. The aforesaid order has become final.



5. At this juncture, it is to consider the decision relied on by the learned counsel for the petitioner in *Anwar Batcha Vs. S. Mahuedoom* reported in 2014(5) CTC 85, wherein this Court has held that in the suit filed by the respondents/plaintiffs seeking permanent injunction restraining the respondent from interfering with his peaceful possession and enjoyment of the suit property, the contention of the defendant clearly demonstrated that object of appointment of advocate commissioner is to elucidate matter in dispute.

6. At this stage, it is appropriate to extract para 16 of the said decision, which reads as follows:

"16. On the other hand, leaned counsel appearing for the respondent/plaintiff has vehemently argued that the order passed by the learned trial Judge did not suffer with any infirmity and therefore the interference of this Court did not require. Further, he has submitted that it is settled principles of law that for procuring evidence Advocate Commissioner need not be appointed. This proposition will not be made applicable to the instant case on hand as the contention of the revision petitioners/defendants clearly demonstrates their object for elucidating the matter in dispute by local investigation of the Commissioner at the spot. Therefore, as contemplated under Rule 9 to Order 26, C.P.C., this Court deems that a local investigation by the Advocate Commissioner is proper for the purpose of throwing more light on enlighten the Court to take a fair decision."

7. Perusal of the said judgment would show that the petitioner therein has filed the application for appointment of advocate commissioner to note down the physical features of the suit property and also to file a report along with plan. The said citation is not applicable to the facts of the present case. Because, in the instant case, the petitioner/plaintiff has filed the application only for the purpose of proving his possession of the suit property. It is settled law that advocate commissioner cannot collect the evidence to prove the possession of the suit property and hence, the reasons stated by the petitioner for appointment of advocate commissioner cannot be accepted.

8. In the decision in *Krishnamurthy T.K. Vs. Tamil Nadu Water and Drainage Board* reported in 2006(5) CTC 178, this Court, in para 9, has held as follows:

"9. The report of the Advocate Commissioner alone can never be the basis for deciding the Suit as Commissioner should not be appointed to gather evidence to prove the case of the parties. Parties should prove



their case by themselves by letting in legally acceptable evidence and the report of the Commissioner can only aid the Court in evaluating the evidence to come to a just conclusion. But in this case, Advocate Commissioner was sought for and appointed to gather the evidence to disprove the case of the revision petitioner in respect of a property which is not subject matter of the suit."

9. In another decision in Chandrasekaran Vs. V. Doss Naidu reported in (2005) 3 M.L.J. 473, wherein, this Court in para 10, 21 and 22, has held as follows:

"10. Countering the arguments, learned counsel for the respondent has drawn the attention of the Court to the number of documents filed along with the plaint and has submitted that in the light of the documents filed by the plaintiff and the earlier litigation, the appointment of Advocate Commissioner is not warranted. It is further submitted that the factum of possession and age of the trees are the main issues to be determined by the Court in the suit and the same cannot be delegated to the Advocate Commissioner. He has further submitted that the factum of possession is to be proved by adducing evidence.

21. The power under Art. 227 of the constitution is to be exercised by the Court in its discretion and cannot be claimed as of right by any party. Under Art. 227 of the Constitution of India, the well settled position is:-

(1) The High Court's power to revision under Art. 227 of the Constitution would be restricted to interference in cases of grave dereliction of duty or flagrant violation of law, and would be exercised most sparingly, in cases where grave injustice would be done unless the Higher Court interferes. It cannot be used as appellate or revisional power.

(2) The Power would not be exercised to correct an error of fact or of law, not being an error of law apparent on the face of the record, of an irregularity or illegality of procedure unless such error affects the jurisdiction, or involves a breach of the principles of natural justice; or to reappraise the evidence.

(3) Nor will the High Court, in exercise of this power, substitute its own judgment for that of the inferior court, whether on a question of fact, or of law or interfere with the intra vires exercise of a discretionary power, unless it is arbitrary or capricious or unless there was no evidence at all on which the inferior Court could have come to the conclusion it did, or there was error of finding on a jurisdictional fact. Whether the High Court found fault with the appellate court in declining to take into



consideration certain documents and took them on record, instead of substituting its opinion on the merits of the case, it should have remanded the matter back for the opinion of the appellate Court, it being the final Court of fact.

(4) Nor can the High Court, nor being an appellate Court, pass an order of remand. In short, as regards findings of fact of the inferior Courts, the jurisdiction under Art.227 is limited to only examining whether the subordinate Court kept itself within the bounds of its authority in reaching the findings of fact. Consequently, the High Court cannot quash the judgment of the subordinate Court merely on the ground that its findings of fact were erroneous, but could do so only if the subordinate Court came to its conclusion without any evidence or upon a misreading of the evidence, or if its conclusions were perverse.

There is nothing to suggest that the impugned order is perverse or in violation of law warranting interference under Art.227 of the Constitution of India.

22. Upon consideration of the facts and circumstances of the case, learned District Munsif has rightly declined to appoint Advocate Commissioner to note down the physical features and thereby elucidating the factum of possession. The impugned order does not suffer from any material irregularity. This revision petition has no merits and is bound to fail."

10. In view of the above facts and circumstances and in view of the dictum laid down in the decision reported in 2014(1) MWN(Civil) 268, this Court is not inclined to entertain the present Civil Revision Petition filed by the Petitioner and hence the Civil Revision Petition fails.

11. Accordingly, the Civil Revision Petition is dismissed at the stage of admission itself. Consequently, connected Miscellaneous Petition is dismissed. No costs."

7. Per contra the learned counsel appearing for the first respondent herein has contended that in Interlocutory Application No.54 of 2010 an Advocate Commissioner has been appointed and he has filed his report. But the Commissioner's report and plan are not proper and he has wrongly mentioned the survey stones and hence, to re-issue the Commissioner's warrant, the present petition has been filed in Interlocutory Application No.479 of 2010 and the Court below has rightly allowed the petition and hence, it does not warrant any interference. To substantiate his contentions, the learned counsel appearing for the respondent cited the following Judgement:-

<https://hcservices.ecourts.gov.in/hcservices/>

In 2013 (2) MWN (Civil) 619 (V.GANESAN v. KAMAL JAIN AND ANOTHER), wherein it has been held as follows:-

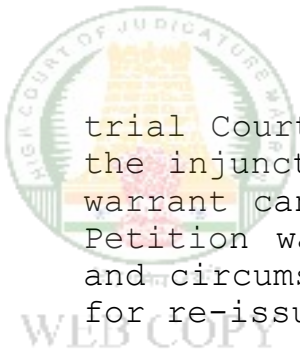


"7. A perusal of the pleadings of both parties will make it clear that there is an issue as to whether the pathway really forms part of the suit property. Of course, the Commissioner in his earlier report has submitted that there is a pathway. That is very seriously objected to by the petitioner/plaintiff. But, the Commissioner did not have the benefit of measuring the suit property and give a specific finding as to whether the so called pathway forms part of the suit property or not. Apart from that, at the time the Commissioner visited the property, the petitioner was not present to identify the suit property. In such circumstances, in my considered opinion, it will be appropriate to request the very same Commissioner to measure the suit property with the help of surveyor and to file a supplement report.

8. Of course, it is true that in the normal course, without scraping the earlier report for defects, it is not possible to appoint a Commissioner for the same purpose. But here, the earlier Commissioner's Report need not be scrapped because by re-issuing the warrant, the Commissioner is directed only to submit an Additional Report. Thus, both Reports will be on the file of the Court. Above all, a perusal of the impugned order of the lower Court would go to show that the Lower Court has dismissed the Interlocutory Application on the ground that the present Application was filed when the Interlocutory Application for Temporary injunction was under consideration and also because the earlier Commissioner Report was available.

9. In my considered opinion, this reasoning cannot be accepted at all for the reason that the Commissioner's report is mainly for the purpose of resolving the issues in the suit. May be not that the Commissioner's report can be used at the interlocutory stage. But, simple because, the interlocutory application for injunction is in progress, the request for re-issuance of Commissioner's warrant should not have been rejected. Thus, the reason stated by the learned Additional District Munsif, Alandur, for the dismissal of the interlocutory application is not at all acceptable. For the foregoing reasons, I am inclined to interface with the order of the Lower Court."

8. The decision relied upon by the learned counsel appearing for the respondent is not applicable to the case on hand. It was a case where the suit was filed for the relief of bare injunction restraining the defendants therein from any manner interfering with his peaceful possession and enjoyment of the suit property. In the said suit, earlier an Advocate Commissioner was appointed and report was filed by the Commissioner. However, alleging that the pathway was not measured by the Advocate Commissioner properly and the Commissioner did not determine whether the pathway formed part of the suit property. Under such circumstances, on an application filed by one of the parties for re-issuance of Commissioner warrant, the




trial Court dismissed the said application on the ground that since the injunction petition was pending, the re-issuance of Commissioner warrant cannot be ordered. Challenging the same, the Civil Revision Petition was filed, wherein this Court after considering the facts and circumstances, allowed the Civil Revision Petition and ordered for re-issuance of Commissioner warrant.

9. But in the case on hand, the suit is for declaration and for permanent injunction. Earlier an application was filed in I.A.No.54 of 2010 seeking appointment of an Advocate Commissioner to visit the property and file a report and plan. Accordingly, an Advocate Commissioner was appointed and he inspected the suit property and filed a report. However, it is seen that to the Advocate Commissioner's report, the first respondent/petitioner/plaintiff has not filed any objection. But without filing any such objection, he has come forward with another application seeking for re-issuance of Commissioner warrant alleging that the report filed by the Advocate Commissioner was not proper.

10. This Court is of the view that the first respondent/petitioner/plaintiff cannot be permitted to file a fresh application for the re-issuance of Commissioner warrant, when he has not chosen to file even an objection to the earlier report filed by the Advocate Commissioner. This attitude of the first respondent/petitioner/plaintiff shows that he has not interested in prosecuting the suit, but instead, he wants to drag on the suit. Further, a perusal of the order of the trial Court shows that the trial Court has not adverted to the facts of the case, but simply allowed the application without any discussion to the facts of the case. As rightly contended by the learned counsel appearing for the petitioner the first respondent/petitioner/plaintiff wants to collect the evidence to prove his possession of the suit property by appointment of Advocate Commissioners, which cannot be accepted.

11. When this Court perused the affidavit filed in support of the application seeking for re-issuance of warrant, this Court finds that no specific reasons are made by the petitioner to seek re-issuance of warrant to the Commissioner. If at all he is aggrieved, it is for him to file his objection to the Commissioner's report, before the Court below. It is for the Court below to either accept the report or reject the same based on the objections raised by the petitioner. The petitioner without filing any objection and nullify the Advocate Commissioner's report, has filed I.A.No.732 of 2010 to re-issue the Commissioner's warrant. When that being the factual position, seeking re-issue of warrant to the Commissioner does not arise at this stage, without nullifying the report of the Advocate Commissioner filed in I.A.No.732 of 2010. Hence, the order passed by the Court below is liable to be set aside.



2010 is set aside. The first respondent/plaintiff shall file his objections to the Commissioner's Report within a period of two weeks from the date of receipt of a copy of this order and thereafter, the learned Principal District Munsif, Tirunelveli shall dispose of the said objection of the first respondent/plaintiff on the Commissioner's Report on merits. Consequently, connected Miscellaneous Petition is closed. There is no order as to costs.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

Sub Assistant Registrar (CS-III)

To

The Principal District Munsif Court, Tirunelveli.

Copy to:
The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai. (2 COPIES)

+1cc to Mr.NIRANJAN S.KUMAR, Advocate, SR.No.81866
+1cc to Mr.M.P.SENTHIL, Advocate, SR.No.81997

C.R.P (MD) No.1981 of 2010 (PD)
31.08.2018

RJ2
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