

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 22.12.2016

Pronounced on 31.01.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

CRP(PD)No.1938 of 2013

and

M.P.No.1 of 2013

Raju

.. Petitioner

Vs.

1.Easwaran
2.Ramakrishnan
3.Kamalam
4.Senthil Kumar
5.Siva Kumar5

..Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the Fair and Decretal orders, dated 28.02.2013, made in I.A.No.131 of 2012 in O.S.No.71 of 2009, on the file of the Court of the First Additional District Munsif, Bhavani, Erode District and is liable to be set aside.

For Petitioner : Mr.N.Naveen Kumar Murthi
for M/s.V.P.Karthikeyan

For Respondents : Mr.N.Manokaran

ORDER

The issue that arises for consideration in the instant revision petition is regarding the ambit and scope of under Order 26 Rule 9 of the Code of Civil Procedure, 1908 regarding the appointment of Advocate Commissioner.

2.The brief facts leading to the filing of the present civil revision petition is that the civil suit in O.S.No.71 of 2009 was filed by the respondents praying for declaration and permanent injunction with respect to the cart track situated in R.S.No.142 of Patlur Village. During the pendency of the suit, an Advocate Commissioner was appointed at the instance of the revision petitioner who has filed a report and plan. Later it appears that the 1st plaintiff in the original suit had died and his legal heirs were brought on record. It was the case of the respondents in the present petition that subsequent to filing of the suit, the revision petitioner has obliterated the suit cart track and converted it into cultivable land.

3.Since there appears to be obliteration of the suit cart track, the respondents have filed a fresh application in I.A.No.131 of 2012 in O.S.No.71 of 2009 under Order 26 Rule 9 C.P.C. for appointment of

Advocate Commissioner to note down the physical features of the suit property and the obliterated portion over the suit cart track.

4.The said application was resisted by the revision petitioner by contending that there is no cart track in R.S.No.142 which is the suit property in this case and already two Advocate Commissioner reports were filed and scrapped. However in the earlier Interlocutory Application, I.A.No.705 of 2010 filed by the Revision Petitioner for appointment of Advocate Commissioner, the Court had appointed a Commissioner and in turn the suit property was inspected with surveyor that was allowed and the Advocate Commissioner report and plan were filed as per the order and it could be seen that in the Advocate Commissioner report and plan clearly states that there is no cart track in R.S.No.142 and it was the defence of the petitioner that the subsequent application filed by the respondents is only with an oblique motive to mislead the Court and protract the proceedings. It was also contended that the report filed by the Commissioner in I.A.No.705 of 2010 still remains intact and has not been scrapped by the Court. This being so, the present application was filed by the respondents to get over the difficulty caused due to the previous report filed by the Advocate Commissioner.

5.The I Additional District Munsif, Bhavani by order dated 28.02.2013 has allowed I.A.No.131 of 2012 filed by the respondents holding that the Advocate Commissioner is sought to be appointed for a different purpose and not the same purpose for which an Advocate Commissioner was earlier appointed. It was further held by the Court that no prejudice would be caused if a Commissioner is now appointed and accordingly appointed an Advocate Commissioner different from the person who was previously filed his report before the Court to note down the physical features of the suit property and also obliteration of a portion of cart track.

6.Challenging the order passed by the I Additional District Munsif, Bhavani in I.A.No.131 of 2012 appointing an Advocate Commissioner, the present Civil Revision Petition has been filed.

7.Heard Mr.Naveen Kumar Murthi, learned counsel for Mr.V.P.Karthikeyan, learned counsel appearing for the petitioner and Mr.N.Manokaran, learned counsel appearing for the respondents.

8.It is the contention of Mr.Naveen Kumar Murthi, learned counsel appearing for the revision petitioner that the trial Court has grossly erred in appointing an Advocate Commissioner at the instance

of the respondents, especially when an Advocate Commissioner was appointed at the instance of the revision petitioner who has filed a clear and categorical report which revealed that there is no cart track in existence in the suit property and there was no obliteration as alleged by the respondents. It has also been contended that the previous report filed by the Advocate Commissioner still remains intact and the same has not been scrapped. In such a situation, the Court ought not to have appointed a different Advocate Commissioner and the reasoning given by the lower Court that the appointment is for a different purpose and not the same purpose is clearly absurd and untenable.

9.It has also been pointed out by Mr.Naveen Kumar Murthi, learned counsel for the petitioner that in fact, the physical features have already been verified earlier and a report adverse to the respondents was filed. Now what they are trying to do is nothing but a classic attempt to get over the report by describing the previous report as insufficient. If at all the lower Court wanted to ascertain further particulars in the suit property, it ought to have reissued the warrant to the very same Advocate Commissioner and not have appointed a new Commissioner. It was also pointed out by the learned counsel that once when the Subordinate Courts erred in

passing orders without properly appreciating the legal position and factual matrix, this Court should interfere exercising its supervisory jurisdiction under Article 227 of the Constitution of India read with Section 115 of C.P.C. Accordingly, it has been prayed that the order passed by the lower Court be set aside.

10.To substantiate his claim, the learned counsel for the petitioner would rely upon the following judgments:

- (i) ***Kitnammal v. Nallaselvan & Ors.*** reported in **2005 (2) CTC 356**
- (ii) ***Chinnathambi & Others. v. Anjalai*** reported in **2006 (5) CTC 494**
- (iii) ***Hotel Blue Star v. S.Raman Reddiyar & Anr.*** reported in **2003 (4) LW 777**
- (iv) ***Subramaniam v. Liyagath Ali & Anr.*** reported in **CDJ 2012 MHC 6009**
- (v) ***Semitta Kounder & Ors. v. Murugesan*** reported in **2016 (6) CTC 66**
- (vi) ***Anna Sudha Devi v. P.George Samuel*** reported in **2009 (2) CTC 205**

11.Per contra, Mr.N.Manokaran, learned counsel appearing for

the respondents, canvassing his case for the respondents, would contend that the lower Court was absolutely right in appointing an Advocate Commissioner, since, according to him, since one of the plaintiffs in the suit had died and the legal heirs having been brought to record, the said period was used by the revision petitioner to obliterate the Cart track and hence it is just and necessary that an Advocate Commissioner be appointed to verify the physical features of the property and the obliteration of the Cart track.

12. According to Mr.N.Manokaran, learned counsel for the respondents, the previous Advocate Commissioner, in his report, has not taken note of the obliteration of the Cart track and it is only after taking note of this fact, the lower Court has come to a conclusion that the Advocate Commissioner sought to be appointed now is not for the same purpose for which the previous Advocate Commissioner was appointed but with a different purpose and hence, the reasoning given by the trial Judge is perfectly justified and according to him, the revision petitioners are trying to obliterate the Cart track and cause serious prejudice to the respondents by their high handed conduct.

13. Mr.N.Manokaran, learned counsel would also submit that the

scope of interference by this Court exercising its revisional jurisdiction in matters of appointment of Advocate Commissioner is very minimal and according to him, once when an Advocate Commissioner has been appointed by the lower Court, this Court ought not to interfere with such appointment. Hence, it has been prayed by him that the Civil Revision Petition has to be dismissed since it is completely bereft of any merits and the vehement opposition of the revision petitioner in appointing an Advocate Commissioner would clearly indicate their malicious intention to obliterate the suit Cart track. To support his case, he would rely upon the following judgments:

- (i) ***A.Nagarajan v. A.Madhanakumar*** reported in ***1996 (1) CTC 229***
- (ii) ***Anwar Batcha and another v. S.Mahuedoom*** reported in ***2014 (5) CTC 85***

14.I have heard the rival submissions and the question that arises before this Court now is to the interpretation and exercising of power for appointment of Advocate Commissioners under Order XXVI Rule 9 of C.P.C. The scope of this provision has been elaborately

discussed by this Court in a long line of decisions and the issue is perhaps settled on what grounds an Advocate Commissioner can be appointed and when a second Advocate Commissioner could be appointed.

15.A cursory perusal of Order XXVI Rule 9 would make it clear that the Court has the power to issue a Commission to such person to make investigation and report thereon to the Court wherein it deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or for ascertaining the market value of any property or the amount of mense profits or damages or annual net profits. It is quite well settled that the object of this provision is not to assist the party to collect evidence where it can get the evidence itself and the Commissioner cannot be utilized or the purpose of gathering or collecting evidence by either party in any proceeding. The term "elucidate" has been considered by different decisions wherein the Courts have held that it means to make lucid or clear, throw light upon, explain and enlighten. It is also quite well settled that the report so submitted by the Commissioner is not gospel's truth and the same can be countermanded by the party by providing evidence on the contrary. Thus, it can be safely summarized that the object of local inspection under the Rule is to

obtain evidence which would throw light upon the peculiar nature of the spot that is being inspected.

16. Thus, once when an Advocate Commissioner has been appointed and has submitted a report, the Court cannot for the same purpose appoint an Advocate Commissioner for the second time without scrapping the report of the first Advocate Commissioner and the Courts also should be cautious in ensuring that under the grab of appointing a second Advocate Commissioner, the parties cannot try to get over the difficulties or adverse findings of the report that could have been filed by the first Advocate Commissioner. If the same is allowed, it would be nothing but permitting a party to abuse the process of law which at any cost shall not be permitted by the Courts.

17. Looked from this angle, it is quite clear in the instant case that the disputed suit cart track has been already inspected by the first Advocate Commissioner, who has in turn filed a report with findings adverse to the respondents herein and the said report of the Advocate Commissioner still remains intact. This being the position, the respondents, without getting the report of the first Advocate Commissioner scrapped by leading in satisfactory and proper evidence, cannot be permitted to sabotage the report of the first

Advocate Commissioner by seeking appointment of a new Advocate Commissioner allegedly claiming it is for a different purpose. At this juncture, it is also relevant to point out that if the lower Court found that there were some deficiencies or certain facts which have properly not been ascertained by the first Advocate Commissioner in his report, it could have very well reissued the Warrant to him and directed him to inspect the property and file a report. Admittedly, the same has also not been done. This Court, recently, in ***Samitta Kounder & Ors. v. Murugesan*** reported in **2016 (6) CTC 66**, while considering a similar issue has only directed the Warrant to be raised to the very same Advocate Commissioner since in that case, it was found that there were some deficiencies in the first report that was filed. However, here, though it has been vociferously contended by the learned counsel for the respondents that the appointment of the second Advocate Commissioner is for a different purpose, I am unable to accept the submission for a simple reason that if the suit cart track was in fact obliterated, it would have been quite evident in the report of the first Advocate Commissioner itself. On the contrary, the first Advocate Commissioner report only weakens the case of the respondents by stating that there is no presence of a cart track. Hence, by adding one phrase, "obliteration of the Cart track" in addition to "physical features of the suit property", the respondents

cannot be permitted to do something indirectly which they could not have done directly.

18.From the above discussion, this Court is of the categorical view that the appointment of the second Advocate Commissioner by the I Additional District Munsif, Bhavani in I.A.No.131 of 2012 in O.S.No.71 of 2009 is not for a different purpose but for the same purpose for which a Commissioner was previously appointed in I.A.No.705 of 2010 in O.S.No.71 of 2009. Thus, the order of the trial Court is liable to be interfered with and accordingly, this civil revision petition is hereby allowed and the order passed by the I Additional District Munsif, Bhavani in I.A.No.131 of 2012 in O.S.No.71 of 2009 dated 28.02.2013 ought to be set aside.

19.In the result:

(a) this civil revision petition is allowed by setting aside the order in I.A.No.131 of 2012 in O.S.No.71 of 2009, dated 28.02.2013, on the file of the First Additional District Munsif, Bhavani, Erode District.

(b) the trial Court is directed to dispose of the suit in O.S.No.71 of 2009 within a period of three months from

the date of receipt of a copy of this order.

20. Therefore, this civil revision petition is allowed. No costs.
Consequently, connected miscellaneous petition is closed.

31.01.2017

Index: Yes
Internet: Yes

vs

To

The I Additional District Munsif,
Bhavani, Erode District.

M.V.MURALIDARAN, J.

vs

Pre-Delivery order made in
CRP(PD)No.1938 of 2013
and
M.P.No.1 of 2013

31.01.2017