

IN THE COURT OF THE PRINCIPAL DISTRICT MUNSIF, ATTUR

PRESENT : **THIRU. G. YUVARAJ, M.A., M.L.,**
PRINCIPAL DISTRICT MUNSIF, ATTUR.

Wednesday, 8th day of March 2023.

I.A. No. 10 of 2022 in I.A. No. 3 of 2022

in

O.S. No. 107 of 2022

and

I.A. No. 11 of 2022 in O.S. No. 107 of 2022

(CNR No. TNSA-1300-0113-2022)

1. K. Periyasamy

2. Kala

.. Petitioners / Defendants

Vs.

Nallathambi

.. Respondent / Plaintiff

These petitions came up for final hearing before me on 28.02.2023 in the presence of Thiru. K. Santhanam, Advocate for the Petitioners / Defendants and Thiru. P. Sivarajan, Advocate for the Respondent / Plaintiff and upon hearing the arguments on either side, and upon perusing the materials records, and having stood over till this day for consideration, this date, this court delivers the following,

COMMON ORDER

I.A. No. 10 of 2022 in O.S. No. 107 of 2022 : The Petitioners / Defendants have filed this petition u/o. 26, Rule 10 and u/s. 151 of C.P.C. to scrap the Advocate Commissioner filed in I.A. No. 3 of 2022.

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2. **I.A. No. 11 of 2022 in O.S. No. 107 of 2022 :** The Petitioners / Defendants have filed this petition u/o. 26, Rule 9 and u/s. 151 of CPC to appoint an Advocate Commissioner to inspect the property covered under S. No. 920/1 and to note down the existing features found in the same and also to inspect the properties of the Petitioners / Defendants covered under S. No. 920/4 situated on the eastern side of S. No. 920/1 and to note down the present physical features, house and car shed of the Respondent / Plaintiff and their location and physical features with reference to the survey number and location and nature of and to note down the iron gate fixed in the house of the Petitioners / Defendants with help of qualified surveyor along with village officials and to file report and plan.

3. **Brief averments made in the petition and affidavit filed in I.A. No. 10 of 2022 in I.A. No. 3 of 2022 :** The 1st Respondent / 1st Defendant in affidavit had stated that, in the above suit, the Commissioner has field his report and plan with regard to the physical features and survey number has not been given in the description of property in the plaint as well as in the connection applications. Boundaries also not given in the description of the suit property and there is no mention about the survey number of the suit property in any portion of the plaint and whileso, the Commissioner has inspected the property and submitted report for the land shown to him as suit property by the Plaintiff and without verification, the Commissioner has given the survey number of the Plaintiff on his own accord without any basis and the Commissioner has completely failed to make proper inspection and simply shown the portion of the property on the southern side of the Plaintiff's house as the car shed which is a new construction and yet to be completed and the Commissioner has not mentioned this particular in his report and the Commissioner has failed to mention the fact that the iron gate put up by the Plaintiff is completely a new one and that it has been fixed on the wall of the

Defendant, which is a very crucial aspect for the Defendants and the Commissioner has failed to mention that there is an entrance on the western wall of the defendant on the southern side near the iron gate and the Commissioner has failed to verify anything regarding the properties inspected by him and has simply submitted his report without any material and suppressing the true facts and the commissioner has gone out of his way in submitting the report purposely in favour of the Plaintiff without following any norms and hence prayed to scrap the report and plan filed in I.A. No. 3/2022 in the above suit.

4. **Brief averments made in the petition and affidavit filed in I.A. No. 11 of 2022 in O.S. No. 107 of 2022 :** The 1st Respondent / 1st Defendant in his affidavit had stated that, the Commissioner inspected the suit property and noted down the physical features of the properties, viz., house and other super structures which are situated on the western side and simply mentioning the location of their property without noting down the physical features and fixture of the iron gate in their wall and which is recently fixed by the Petitioner and all these facts should have been noted down with the help of a qualified surveyor and with village officials with necessary records, since the survey numbers and location of the properties is the only essential man fact to be decided in this suit and earlier report submitted by the Commissioner will not be of any use since even the survey number of the suit property has been given either in the plaint or in the applications and as such the earlier Commissioner had inspected and submitted a report for a property without any survey number and hence prayed to appoint a new Commissioner.

5. **Brief averments made in the counter filed by the Respondent / Plaintiff in I.A. No. 10 of 2022 and I.A. No. 11 of 2022 :** The petition is not maintainable in law and on facts. The petition is stated to be filed u/o. 26, Ruled 10 CPC. Order

26, Rule 10 has three sub rules, none of which provides for the scrapping of a Commissioner's report. Even in Order 26, Rule 10A, 10B, 10C, there is no provision for such scrapping. In the objections to the Commissioner's report, which was filed belatedly, the Petitioners herein have not prayed for scrapping the report. The Defendants have filed their written statement only after the Commissioner filed his report and even in the written statement, the allegations made in the affidavit filed in support of this petition are not mentioned or included and on the basis of the objections filed by either party, the Court can either call for clarification from the Commissioner, re-issue the Commissioner warrant calling for further details, or appoint a new Commissioner in case the re-issue to the same Commissioner is not considered or desirable by the Court and hence without going into the objections to the Commissioner's report and considering the validity or maintainability of the objections and considering the course to be adopted, a petition to scrap the report cannot be filed by any of the parties to the suit and when there is no provision for entertaining this petition to scrap the Commissioner report and plan at this stage, this court ought not to have numbered the petitions and hence prayed to dismiss these petitions.

6. *Now the points for consideration are ;*

1) Whether the petition filed by the Petitioners / Defendants in I.A. No. 10 of 2022 for scrapping the report and plan filed by the Advocate Commissioner in I.A. No. 3/2022 is to be allowed or not?

2) Whether the petition filed by the Petitioners / Defendants in I.A. No. 11 of 2022 for appointment of new Advocate Commissioner is to be allowed or not?

7. No oral and documentary evidence have been adduced on either side.

8. The learned counsel for the Petitioners / Defendants contended by reiterating the averments made in the affidavits and prayed to allow both the petitions. In support of his contention, he has relied on the judgment of the Hon'ble Madras High Court reported in **2005 (2) CTC 356, Kitnammal Versus Nallaselvan & Others.**

9. Per contra, the learned counsel for the Respondent / Plaintiff contended by reiterating the averments made in the counters and prayed to dismiss the petitions. In support of his contention, he has relied on the following judgments of the Hon'ble Madras High Court.

- 1) **2005-2-M.L.J., P. No. 227 Kitnammal Versus Nallaselvan & Others.**
(Same judgment as relied on by the Petitioners / Defendants side)
- 2) **2009-2-CTC – P. No. 205, Anna Sudha Devi Vs. P. George Samuel**
Hon'ble Madras High Court, Madurai Bench

10. Both side heard. Perused the records. On perusal of the records, it comes to know that, on 28.04.2022, the Respondent / Plaintiff had filed the above suit against the Petitioners / Defendants for the relief of permanent injunction, restraining the Petitioners / Defendants and their persons not to disturb the Respondent / Plaintiff's peaceful possession and enjoyment of the cart track with iron gate and also filed an application in I.A. No. 2/2022 for temporary injunction till the disposal of the suit.

11. The records further discloses that, on the date of filing the suit itself, the Respondent / Plaintiff has also filed an application in I.A. No. 3/2022 for appointment of Advocate Commissioner to inspect and note down the existing

physical features of the suit property. This court has also appointed an Advocate Commissioner and directed him to note down the existing physical features and to take photographs. The learned Advocate Commissioner has also filed his report and plan.

12. In the description of property in the plaint as well as in the injunction petition and commission petition, it was stated as the cart track leading to the agricultural lands in Survey No. 198/7 and the houses situated in Natham Survey No. 920/6 and 913/27. Whereas, the survey number in which the said cart track is situated is not stated in the description of property. Therefore, the Respondent / Plaintiff has filed applications for amendment of the plaint and injunction petition in I.A. No. 6/2022 and 7/2022 and the same are being allowed today. Now, by way of amendments in the plaint and I.A. No. 2/2022, the words 'சர்வே எண் 920/1-ன் வழியாக' are being added.

13. The main dispute in the suit is usage and enjoyment of the cart track by the Plaintiff. Whereas, in the plaint and in the affidavits filed in injunction petition and Commissioner petition, the Respondent / Plaintiff has not stated the survey number in which the cart track is leading to the Respondent / Plaintiff's lands and houses. The learned Advocate Commissioner in his report has stated that, he has identified the houses situated in Natham Survey Nos. 920/6, 913/27 and the lands in Survey No. 198/7. But, he has not stated in his report that, by whom and how he was identified the said properties.

14. Further, when the main dispute in the suit is in respect of usage and enjoyment of cart track by the Respondent / Plaintiff, neither the Plaintiff stated the survey number in which the said cart track is situated nor the Advocate

Commissioner has stated about the survey number in which the cart track is situated. Therefore, particulars such as, survey number in which the cart track is existing, length and breadth of the cart track are necessary for proper adjudication of the controversy between the parties, but the same are not mentioned in the report and plan. When these additional particulars are essential for proper appreciation of the commissioner report and plan, now the question arises, whether the report and plan of the Commissioner has to be scrapped as contended by the learned counsel for the Petitioners.

15. The learned counsel for the Respondent / Plaintiff contended that, there is no any provision in the CPC to scrap the report and plan of the commissioner and as such the petition to scrap the report and plan is not maintainable and new Commissioner also cannot be appointed without set-aside the earlier report and plan. In the judgments relied on by the learned counsel for the Respondent / Plaintiff as well as Petitioners / Defendants, it has been stated that, unless the earlier report is set-aside, second commissioner cannot be appointed. Scrapping the report or set-aside the report are literally same meaning. In the objection filed to the Commissioner's report and plan, it is the contention of the learned counsel for the Petitioners that, since the report and plan are not containing requisite particulars and the Commissioner has stated the survey numbers without proper identification by the revenue officials, the report is to be scrapped and new Commissioner to be appointed. Since the petitioners herein have filed petition for scrapping the report as well as appointment of new commissioner, the contention of the learned counsel for the Respondent on the ground that, without set-aside the earlier report, new commissioner cannot be appointed is rejected.

16. Here, it is relevant to refer Order 26, Rule 10 (3) of CPC.

Order 26, Rule 10 (3) : Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

17. The words '***it may direct such further inquiry to be made as it shall think fit***' in sub rule 3 of Rule 10 are nothing but the power of the Court to direct the Commissioner for further inquiry and to file supplementary report or to scrap the report in toto and to appoint new Commissioner. Therefore, this court is not dissatisfied with the entire report and plan. On the other hand, this court is dissatisfied with the survey number of the properties given in para No. 1 of the report and breadth of the cart track stated in para No. 3 of the report and to that extent, the report and plan of the Commissioner is set-side. Therefore, finding these things, such as, survey number of the cart track, length and breadth of the cart track are essential for proper adjudication of the dispute. Therefore, in exercise of the powers conferred on this court u/o. 26, Rule 10 (3) CPC, it is just and necessary to direct the learned Commissioner to further inquiry into the matter by inspecting the suit property with help of the qualified Surveyor and VAO with reference to the relevant revenue records and to file the supplementary report. In this aspect, this court rely upon the recent judgment dt. 11.01.2023 of the Hon'ble Madurai Bench of the Madras High Court, reported in ***CDJ-2023-MHC, P. No. 376, R.M. Ponnusamy Vs. G. Thangaraj***. In para 11, 13 of the said judgment, the Hon'ble High Court has held as follows;

11. When Order 26 Rule 10(3) CPC provides for further enquiry by the Court, if the Court is not satisfied with the proceedings of the Commissioner, it cannot be made as a hard and fast rule that in all the cases, the earlier Commissioner's report has to be scrapped before ordering for another Advocate Commissioner. It has to be decided on the facts of the individual cases. Here, the trial Court has held that the

earlier Commissioner failed to mention certain details, for which, the new Commissioner is appointed. The trial Court did not note any adverse remarks as against the earlier report, which may warrant its scrapping.

13. The new Advocate Commissioner was appointed only for elucidating the matter in dispute as required by the Court for the just adjudication of the suit and the same does not require the scrapping of the earlier report, unless or otherwise the Court so require.

Therefore, even without scrapping the earlier report, u/o. 26, Rule 10 (3) of CPC, the court has got power to appoint second commissioner and to direct him to file supplementary report. Thus, this court comes to a conclusion that, the report and plan filed by the Commissioner is set-aside in respect of the survey numbers of the properties given in para No. 1 and measurements of the cart track given in Para No. 3 of the report and in respect of the remaining aspect, the report and plan are sustained. This court reissues the warrant to the same Advocate Commissioner and further directs him to inspect the suit property including cart track that runs in Survey No. 920/1, property of the petitioners / defendants situated in S. No. 920/4, with help of the qualified surveyor and VAO with reference to the relevant revenue records and also note down the car shed of the Respondent / Plaintiff and iron gate fixed in the house of the Petitioners / Defendants and file the supplementary report and plan. On these terms, this court inclined to allow these petitions.

18. IN THE RESULT;

1) That, the petition filed by the Petitioners / Defendants in I.A. No. 10 of 2022 to scrap the report and plan filed in I.A. No. 3 of 2022 is allowed in part and thereby, the report and plan of the learned Advocate Commissioner is set-aside in respect of the survey number

of the properties given in Para No. 1 and breadth of the cart track given in Para No. 3 of the report and in respect of the remaining aspects in the report and plan, the petition is dismissed and the report and plan are sustained.

2) That, the petition filed by the Petitioners / Defendants in I.A. No. 11 of 2022 is allowed and thereby, the warrant will be reissued to the same Advocate Commissioner, viz., Mr. M. Senthil Kumar to inspect the suit property, cart track situated in Survey No. 920/1, property of the Petitioners / Defendants situated in S. No. 920/4 with help of the qualified Surveyor and VAO with reference to the relevant revenue records, car shed of the Respondent / Plaintiff, iron gate fixed in the house of the Petitioners / Defendants, and note down the existing physical features and file report and plan.

3) The Petitioners / Defendants are directed to pay a sum of Rs.7,000/- to the Advocate Commissioner directly. Warrant will be re-issued to the Advocate Commissioner on filing memo for payment of remuneration.

4) The parties shall bear their own costs.

This order is typed by me in my Laptop, corrected and pronounced by me in the open court on this the 8th day of March 2023.

(Sd/- G. Yuvaraj)

Principal District Munsif,

Attur.

Annexure :

Petitioner / Plaintiff side witnesses :

Nil

: 11 :

Respondents / Defendants side witnesses : Nil

Petitioner / Plaintiff side exhibits : Nil

Respondents / Defendants side exhibits : Nil

(Sd/- G. Yuvaraj)

Principal District Munsif,

Attur.

P.D.M. Court, Attur.

COMMON DRAFT / FAIR ORDER

in I.A. No. 10/2022 in I.A. No. 3 of 2022 in

O.S. No. 107/2022 &

I.A. No. 11/2022 in O.S. No. 107/2022

Dated : 08.03.2023.

I.A. No. 10 of 2022 &

: 2 :

I.A. No. 11 of 2022

in

O.S. No. 107 of 2022

DATE : 08.03.2023 : Common orders pronounced. In the result,

1) That, the petition filed by the Petitioners / Defendants in I.A. No. 10 of 2022 to scrap the report and plan filed in I.A. No. 3 of 2022 is allowed in part and thereby, the report and plan of the learned Advocate Commissioner is set-aside in respect of the survey number of the properties given in Para No. 1 and breadth of the cart track given in Para No. 3 of the report and in respect of the remaining aspects in the report and plan, the petition is dismissed and the report and plan are sustained.

2) That, the petition filed by the Petitioners / Defendants in I.A. No. 11 of 2022 is allowed and thereby, the warrant will be reissued to the same Advocate Commissioner, viz., Mr. M. Senthil Kumar to inspect the suit

property, cart track situated in Survey No. 920/1, property of the Petitioners / Defendants situated in S. No. 920/4 with help of the qualified Surveyor and VAO with reference to the relevant revenue records, car shed of the Respondent / Plaintiff, iron gate fixed in the house of the Petitioners / Defendants, and note down the existing physical features and file report and plan.

3) The Petitioners / Defendants are directed to pay a sum of Rs.7,000/- to the Advocate Commissioner directly. Warrant will be re-issued to the Advocate Commissioner on filing memo for payment of remuneration.

4) The parties shall bear their own costs.

P.D.M.

