

IN THE COURT OF PRINCIPAL DISTRICT JUDGE, TIRUVALLUR
PRESENT: Tmt.J. JULIET PUSHPA, B.Sc., M.L.
Principal District Judge, Tiruvallur

Thursday, the 5th day of December, 2024

I.A.1/2023 in Commercial O.S.No.244/2022

C. Elumalai

...Petitioner/Plaintiff

//Versus//

M. Devaraj @ Selvamani

...Respondent/Respondent

This Petition is coming on for final hearing on 27.11.2024 in the presence of M/s B. Dinesh Kumar, P. Kavitha, Jothi and S. Gopinath, learned counsel for Petitioner, M/s S. Nizar Ahamed, D. Saravanan, N. Navamane, learned counsels for the respondent upon hearing both side, perusing the material case records and having stood over for consideration till this date, this Court delivered the following:-

ORDER

This Petition is filed by the petitioner under order XXVI Rule 9 of Civil Procedure Code to appoint an Advocate Commissioner to note down the physical features of the petition schedule property and assess the cost of construction of the building constructed therein with the aid of an Engineer cum Assessor and file a detailed report as the value of the said building.

2. The averments in the petition in brief :

According to the petitioner, he is an independent private contractor for 25 years as agreed with the respondent, he had constructed the building in the suit

property wherein the cost of constructions is incurred is as follows.

S.No.	Nature of work	Area x sq. ft.	Rate (Rs.)
1	Main building	4504 x 1600	72,06,400/-
2	Balcony	761x1400	10,64, 400/-
3	Septic Tank	14168 x 9	1,27,512/-
4	Weather tiles	2247 x 120	2,69,640/-
5		1.6 = 1504x90	1,35,360/-
6	Compound Wall	318 x 2100	6,67,800/-
7	Pooja room tiles	322 x 75	24,150/-
8	Outer tiles	363 x 35	12,705/-
9	Park, base tiles, site tiles		1,70,000/-
10	Concrete well rings for waste line sump	14 x 1200	16,800/-
11	Border skirting and border designs		81,000/-
12	Bathroom	74 x 1100	81,400/-
13	Difference of cost for marble laying charges instead of tiles	4,652 x 17	79,084/-
14	Staircase beading	175 x 100	17,500/-
	Total		99,54,751/-

Each stage of construction from digging for foundation was supervised by respondent and his son, Santhoshkumar. Petitioner completed the construction to the best satisfaction of respondents. The respondent agreed for escalation cost towards raw materials as follows :

S.No.	Material	Amount
1	Sand 54 units x 9000	4,86,000/-
2	Bricks 16 load x 8000	1,28,000/-
3	Electrical fittings	40,000/-
4	Front elevation	2,00,000/-
5	Grill 12 mm, checked windows material and labour	31,000/-
	Total	9,21,000/-

Since the respondent insisted for expeditious completion for his son's marriage in November 2018, the petitioner put extra manpower and completed 90% of the work and housewarming ceremony held on 18.10.2018, *Aayudha pooja* was also celebrated in grand manner with his workmen. With the remaining 10% pending, the respondent's family occupied and utilizing the premises as residential premises. Since the respondent sought time for payment owing to son's marriage expense, petitioner also accepted and completed the work. Though the respondent assured to settle the due of Rs.37,25,748/- he did not come forward to settle the same. . The petitioner received total amount of Rs.71,50,003/- from the respondent for which acknowledgement also given to the respondent. But, the respondent is evading payment of balance Rs.37,25,748/- even after issuance of legal notice dt. 27.11.2021 and even police complaint on 12.06.2019, for which he filed the suit with interest at 24% totally amounting to Rs.59,61,196.80 for the period from May 2019 to November 2021 for 30 months. The purpose of noting down the physical features of schedule property and assess the value of construction cost will enlighten this Court to decide the dispute in the suit. Hence, it is necessary to appoint the advocate commissioner to assess the value of the construction costs.

3. Counter by adopting written statement as counter in brief :

The respondent resisted the petition stating that the cost agreed were much lesser than the prevailing PWD rates which is false and denied. All the averments in para 1 to 10 in the affidavit are denied. The plaintiff has received extra money from the defendant mentioning worker wages, urgent requirements and

construction works. As per the agreement, the cost of construction per sq. ft. was fixed at ground floor at rs.1,450/-, first and head room at Rs.1,350/-, balcony, portico and side extension at Rs.1,000/- and pergola at Rs.600/- per sq. ft. Even after the demand made by the defendant, the plaintiff failed to execute the agreement. Apart from receiving Rs.72,00,000/- directly , the defendant paid Rs.12,86,390/- for procurement of materials. Apart from that, the plaintiff also collected money for the difference in materials used in the construction as against originally agreed. In June 2018, the plaintiff handed over incomplete work stating that major work was completed and has no time to complete the pending work as he has got major contract which should be commenced immediately and if he concentrate with pending work, he should have loose the contract. The plaintiff has received Rs.84,86,390/-. Only on 13.06.2019, about one year later, the defendant received a call from Inspector of Police regarding complaint given by the plaintiff towards unsettled due, but the enquiry was closed since everything was revealed to the investigating authority and advised to approach civil Court. On 08.08.2021, the plaintiff and rowdy elements trespassed into the house and the defendant stopped his attempt, but police did not take any action. The plaintiff has made another attempt to get illegal and wrongful gain by sending a threatening notice dated 27.08.2021 from Thamizhaga Kattada Thozhilalar Madhiya Sangam demanding money. The respondent suffered a lot in the hands of the plaintiff and should be compensated by the plaintiff. The plaintiff defamed the defendant to the extent of maximum as he can. Hence, the defendant field the suit before District

Munsif, Ambattur in OS No.246/2021 against the plaintiff. If he is really interested, he should have filed the application before District Munsif, Ambattur in OS.246/2021 or filed this application along with the suit. The advocate commissioner or Engineer are unable to know who constructed the building, further lapse of more than 6 years they cannot assess the real value of the building and construct cost. It is very difficult to find out which portion constructed by the plaintiff and what constructed by the defendant with other builders. The plaintiff has filed the suit only to get wrongful gain from the defendant filed the vexatious suit which cannot be entertained, and only to protract the proceedings, this application is filed. Hence, prayed to dismiss the application.

4. No oral or documentary evidence adduced on both sides.

5. Now, the point for consideration is

1. **Whether petitioner is entitled for the relief of appointment of Advocate Commissioner as sought for?**

2. **Whether this petition is to be allowed ?**

6. **POINT:**

Heard both sides.

This petition is filed by the petitioner, who is the plaintiff in the Commercial Original suit seeking appointment of advocate commissioner along with licenced Engineer for valuation of the suit premises and cost of the construction of the building.

7. The case of the petitioner is that he has filed the commercial original suit for recovery of a sum of Rs.59,61,196/- along with the interest rate of 24% per annum from the date of plaint till the date of realization stating that he was engaged by the respondent for construction of his residential premises , which is the suit property for a total construction value of Rs.99,54,751/-. However, the defendants paid only Rs.71,50,003/- and as on the date of completion of the construction, the defendant was in due of Rs.37,25,748/-, hence, it is necessary to value the construction of the building in the suit property, for which an advocate commissioner has to be appointed to assess the value of the construction material with the help of Engineer or Assessor.

8. This petition is vehemently opposed by the respondent stating that the respondent has already paid in excess to the construction value and illegally claiming more amount than the agreed construction value and in fact, the respondent has paid excess payment of Rs.14,86,390/- for which counter claim is also filed by him. Further, to restrain the petitioner from interfering with the respondent , he has filed OS.246/2021 before the District Munsif Court, Ambattur. Already six years lapsed, hence, the valuation of the building by this time is not proper and the same has to be dismissed.

9. On perusal of records, it is seen that the petitioner is the plaintiff who had filed Commercial Original suit for recovery of Rs.59,61,196/- being the outstanding payment to be made by the plaintiff towards cost of construction made by the plaintiff to the residential premises of the respondent. The petitioner has

listed the cost of construction of the suit premises by giving details of cost of construction materials as well as the construction by extent and claims that totally cost of construction at Rs.99,54,751/- and that the respondent is still in due of the balance amount out of the amount already paid is Rs. 71,50,003/-.

10. On considering the dispute between the petitioner/plaintiff and the respondent/defendant, it pertains to the cost of the construction of the building as agreed between the parties. While the petitioner claim that the respondent is in due to be paid which is the suit claim, the defendant claims that he has paid in excess as the cost of construction has been wrongly calculated by the petitioner. Therefore, it is important to assess the construction value of the materials and also the value of the construction of the building in the suit property.

11. It is settled law that Advocate Commissioner could be appointed only when the Court is satisfied that on the materials available on record, the party is not able to produce the desired evidence, the Court may assist the party to appoint the Advocate Commissioner to obtain the evidence. It is also not in dispute that Advocate-Commissioner be appointed to inspect any property relating to the dispute for the purpose of noting down the physical features of the property. In case if measurement or valuation is needed, the Advocate Commissioner so appointed may be directed to inspect the property and take measurement with the help of qualified and licenced Engineer. It is a settled proposition of law that an Advocate-Commissioner cannot be appointed to find out the factum of pos-

session of any property relating to the dispute, since the same could be adjudicated upon by adducing oral and documentary evidence in the manner known to law before the Court.

12. Here, the respondent does not dispute the construction of the suit property by the petitioner. The dispute is with respect to the payment received and paid by the respondent to the petitioner. The respondent mainly contends that the defendant has paid more than Rs.12,86,390/- which is more than the entire cost of the construction by which time the construction was not completed fully. Therefore, it can be ascertained that the respondent herein dispute the value of construction made by the plaintiff for the suit premises .

13. In this case, the plaintiff claims the total cost of the construction at Rs.99,54,751/- out of which the defendant paid only Rs.71,50,003/-. On the contrary, the respondent filed counter claim stating that on mutual discussion and agreement, the cost of the construction per sq. ft. was Rs.1450/- per sq. ft. for ground floor, Rs.1,350/- per sq. ft. for first floor and Rs.1000/- per sq. ft. for balcony, portico and side extension and Rs.600/- per sq. ft. for pergola. Accordingly, he has paid Rs.84,86,390/- , but the actual cost of construction is only Rs.65,00,000/-, so he made an excess payment of Rs.14,86,390/-. Therefore, it is clear that the real dispute between the parties is with respect to cost of construction.

14. Admittedly, there is no registered agreement for construction of the suit premises entered between the petitioner and the respondent , but only mutually

agreed towards cost of construction. Therefore, in the absence of any written agreement towards cost of construction, when both parties dispute and varies in their assessment towards cost of construction, it is necessary to ascertain the actual value of the constructions by a qualified Engineer, which would help to arrive at the just decision of the case. Even though the respondent disputes that as years gone by, the value of the building cannot be assessed to its actual value. However, this Court is of the opinion that the engineer may very well assess the value of the building on ground as on date, with value of depreciation from the date of its original construction. Therefore, the valuation of the building will not in any way detrimental to assess the actual value of construction at the time when the building was constructed. Therefore, in order to decide both the claim of plaintiff as well as the counter claim of the defendant, it is just and necessary for valuation of the building on ground. As such, this Court is inclined to appoint an advocate commissioner to inspect the suit premises and for valuation with the value of depreciation as on date with the help of a qualified Engineer, which would certainly help to arrive at the just decision of the issues involved in the suit .

15. Therefore, considering the nature of subject matter in dispute in this case, this Court considers that best evidence in this case could be obtained only by the Appointment of advocate commissioner with the help of licenced and qualified Engineer to submit the report on the physical existence and valuation of the building in the suit property. Here, there is no chance for the advocate commissioner to gather evidence on behalf of either party, instead it would be only the report on the

valuation and existence of building on ground. It is only noting down the valuation of the building as on date with depreciation value. Truly, it would reduce much oral and documentary evidence to substantiate the claim of both parties.

16. The appointment of the Commissioner and his the report firsthand would stand as firsthand information about the condition of the materials employed for construction and also the existence of the building and its valuation to the Court which my help the Court in arriving at a just conclusion. Though, the commissioner cannot decide the disputes, the report would help the Court in deciding the issue in dispute. It is made clear that the Advocate Commissioner shall mention the depreciation value of the building as on date in the report of the valuation .

17. For the reasons stated above, this Court considers that appointment of advocate commissioner with the help of licenced Engineer to inspect the suit premises for its valuation and cost of construction as sought for. The points are answered accordingly in favor of petitioner.

In the result, this petition is allowed. Thiru.L. Sasirajan, Advocate, Tiruvallur is appointed as Advocate Commissioner to inspect the suit property premises and note down the physical features and valuation of the building and cost of construction with the help of a Licenced Engineer and file the report along with the depreciation in valuation as on date. The Advocate commissioner is directed to execute the warrant after due notice to both

parties and also record objections if any by either party. The commissioner fee is fixed at Rs.20,000/. The petitioner is directed to pay the fees to the Commissioner directly within 10 days and to file a memo before this Court to that effect. For commissioner Report with valuation report of licenced Engineer call on 03.01.2025

Dictated to Steno-typist, transcribed and typed by him, corrected and pronounced by me in Open Court, this , 5th day of December , 2024

**PRINCIPAL DISTRICT JUDGE,
TIRUVALLUR**

Petitioner and respondent side witnesses and Exhibits : NIL

**PRINCIPAL DISTRICT JUDGE,
TIRUVALLUR**