

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **30.09.2016**

CORAM:

THE HONOURABLE MR.JUSTICE T.MATHIVANAN

C.R.P.(N.P.D.) No.3660 of 2011 and

MP.No.1 of 2011

Govindan

...Petitioner

versus

Periyathambi

...Respondent

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India against the judgment and decree dated 29.06.2011 passed in I.A.No.57 of 2010 in A.S.No.15 of 2010 on the file of the Principal Sub Court, Sankari.

For Petitioner : Mr.P.Jagadeesan

ORDER

This Civil Revision Petition is directed against the fair and decretal order dated 29.06.2011 and made in the Interlocutory Application in I.A.No.57 of 2010 in A.S.No.15 of 2010 on the file of the Principal Sub Court, Sankari.

2.The revision petitioner herein is the plaintiff in the suit in O.S.No.213 of 2008, whereas the respondent is the defendant.

3. When the revision petition is taken up for hearing today, Mr.P.Jagadeesan, learned counsel appearing for the revision petitioner is present. However, the respondent, despite service of notice, has not chosen to appear either in person or through his counsel. Hence, he is called absent.

4. This Court has perused the grounds of the memorandum of revision along with the impugned order dated 29.06.2011 and after taking into consideration of the relevant facts and circumstances of the case, the following order is being passed on merits in the absence of respondent.

5. The revision petitioner had filed the suit in O.S.No.213 of 2008 on the file of the learned District Munsif, Sankari as against the respondent seeking the relief of permanent injunction. The respondent had contested the suit by filing his written statement.

6. After formulating necessary issues and on appreciation of the evidences as placed before him, the learned trial Judge had proceeded to dismiss the suit with a finding that the revision petitioner had laid the pipeline in the middle of the defendant's property instead of laying it in

his own land. Further, the learned trial Judge had found that in order to clarify this position, he had not taken effective steps to file an application for appointment of Advocate Commissioner. Challenging the judgment of the trial Court dated 23.04.2010, the revision petitioner had preferred an appeal suit in A.S.No.15 of 2010 on the file of the learned Subordinate Judge, Sankari.

7.During the pendency of the appeal, the revision petitioner had taken out an application in I.A.No.57 of 2010 under Order 26, Rule 9 of Code of Civil Procedure, seeking the relief of appointment of an Advocate Commissioner to note down the physical features of the suit property and to file a detailed report. That application was dismissed by the learned Subordinate Judge, Sankari on the ground that the revision petitioner/ plaintiff had filed this application belatedly only for the purpose of protracting the appeal proceedings. Further, he has reiterated the same view taken by the trial Court saying that instead of laying the pipeline in his land, the plaintiff had laid the pipeline in the middle of the agricultural land of the defendant.

8.Now Mr.P.Jagadeesan, learned counsel appearing for the revision petitioner has submitted that the revision petitioner had not

laid the pipeline in the land of the defendant, and that in order to elucidate this fact before the Appellate Court, he had taken out an application under Order 26, Rule 9 of Code of Civil Procedure to appoint an Advocate Commissioner. According to him, the first Appellate Court had not appreciated the reason for filing the application with proper perspective and that was why the learned first Appellate Judge had taken a wrong decision, which resulted in dismissal of the petition.

9. In this connection, it is imperative on the part of this Court to make reference to the provisions of Order 26, Rule 9 of CPC.

Rule 9. Commissions to make local investigations:- In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

10. In the above provision, it is thus made clear that in any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court.

11. Coming to the instant case on hand, the entire case of the revision petitioner/plaintiff is revolving around the center point of laying of the pipeline.

12. According to the respondent, the revision petitioner had laid the pipeline in the middle of his land but it was effectively denied by the revision petitioner.

13. Under this circumstance, this Court is of view that only to clarify this position and to file a detailed report so as to enable the Court to take a fair decision, a report from the Commissioner is very much essential and therefore it cannot be heard to say that the revision petitioner was trying to collect new evidence from the suit property to substantiate his case.

14. In this connection, this Court finds that without considering the efforts taken by the petitioner to get an advocate commissioner appointed, the learned Subordinate Judge, Sankari had simply proceeded to dismiss the application which is absolutely not sustainable and liable to be set aside.

15. Keeping in view of the above fact, this revision petition is allowed. Consequently, connected miscellaneous petition is closed. The impugned order dated 29.06.2011 and made in the Interlocutory Application in I.A.No.57 of 2010 in A.S.No.15 of 2010 on the file of the Principal Sub Court, Sankari is set aside and the Interlocutory Application in I.A.No.57 of 2010 is allowed.

16. The learned Subordinate Judge, Sankari is directed to appoint an Advocate Commissioner from the Panel of lawyers maintained by them, with a direction to make a local visit to the suit property and file a detailed report with regard to the physical features existing there in.

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Index: Yes/No
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To

The Subordinate Judge,
Sankari.

T.MATHIVANAN, J.

(dn)

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