

DATED : 02-06-2017

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

**C.R.P. PD No.1509 of 2017
and C.M.P.No.7018 of 2017**

1.R.Sivakumar		
2.T.R.Rathinam	...	Petitioners

 V_S

1.K.P.N.Raajesh		
2.Sumathi Raajesh	...	Respondents

Civil Revision Petition is filed under Article 227 of the Constitution of India against the fair and decreetal order of the learned 1st Additional Subordinate Munsif, Salem made in I.A.No.269 of 2016 in O.S.No.164 of 2016 dated 27.03.2017.

For Petitioners : Mr.Parthasarathy
Senior Counsel for
Mr.J.Ramakrishnan

For Respondents : Mr.S.Kalyanaraman

ORDER

This Civil Revision Petition is filed against the fair and decreetal order of the learned 1st Additional Subordinate Munsif, Salem made in I.A.No.269 of 2016 in O.S.No.164 of 2016 dated 27.03.2017.

2. The petitioners are the defendants and the respondents are the plaintiffs. The respondents filed suit in O.S.No.164 of 2016 on the file of the 1st Additional District Munsif, Salem to declare the respondent's right to take water through the pipeline laid beneath the land in S.F.No.160/2, 172/2, 162/2 and 163 described in the schedule properties by the respondents' vendors on the basis of the license/permission granted by the petitioners' vendors to the "A" Schedule properties and the restrain the petitioners' and their men by means of permanent injunction from in any manner interfering with the respondents' peaceful possession and enjoyment of the suit "A" schedule properties by taking water through the "B" schedule cement pipeline water course to irrigate the suit "A" schedule properties. The 2nd petitioner filed written statement and is contesting the suit. The 2nd petitioner also filed counter claim alongwith the written statement.

3. According to the respondents, they are the owners of the plaint 'A' schedule property for having purchased the same by deed of sale dated 23.11.2015. There is a well in Survey No.159/2B4 and the respondents are drawing water from the said well to 'A' schedule properties through 'B' Schedule property and poromboke odai. The

predecessors in title of the respondent obtained permission from the predecessor in title of the petitioners and laid pipeline in 'B' schedule property at the depth of 6 feet beneath the ground. The petitioners were objecting for drawal of water through 'B' schedule property and are denying the existence of such pipeline. In the said circumstances, the respondents have filed the present suit. The petitioners are denying that there is a pipeline laid in 'B' Schedule property and the government poromboke odai.

4. The respondents have filed I.A.No.269 of 2016 in O.S.No.164 of 2016 for appointment of Advocate Commissioner to note down the physical features of the suit schedule property and also note the existence of the cement pipeline water course in the suit "B" schedule property with the assistance of VAO and qualified surveyor and to file report with plan drawn to scale.

5. The petitioners filed counter affidavit and denied the existence of pipeline in 'B' schedule property and government poromboke odai and denied that the petitioners' vendors or petitioners gave permission at any point of time to lay down the pipeline in their land. The petitioners have stated that it is for the respondents to prove the existence of the pipeline

and the Advocate Commissioner cannot be appointed for collecting the evidence. They also submitted that the predecessor in title of the respondents one Saraswathi lodged a complaint before the Inspector of Police, Panamarathupatty Police Station against the second petitioner alleging that when she went to repair the pipeline, she was prevented. The said complaint was registered as Cr.No.227/2015 under Section 430 of IPC. Subsequently, police closed the said complaint as mistake of fact on 14.12.2015. The said Saraswathi also filed CrI.OP No.209 of 2016 against the petitioners for police protection and W.P.No.2024 of 2016 against the respondents before this Court with regard to the representation given by her before the District Collector, Salem. Suppressing these facts, the respondents have come out with the present application. Therefore, the respondents are not entitled to the relief of appointing Advocate Commissioner to collect the evidence.

6. Before the learned Judge, the petitioners filed a memo to consider Exs.A1 to A13 which were marked by the respondents in I.A.No.1270/2016. The petitioners marked seven documents as Exs.B1 to B7.

7. The learned Judge, considering the averments in the affidavit,

counter affidavit, documents filed by the petitioners and the judgments relied on by the parties, allowed the application holding that in view of the contradiction in Ex.B7 filed by the petitioners in the report of the Inspector of Police wherein it has been stated that there is no pipeline in the first petitioner's land and also in odai poromboke and in the final report marked as Ex.A.13 filed by the Inspector of Police wherein it has been stated that the pipeline was laid down 30 years back and due to lapse of time, water is seeping from the pipeline and second petitioner's men did not threaten the said Saraswathi who went to repair the pipeline, appointment of Advocate Commissioner is necessary.

8. Against the order dated 27.03.2017 made in I.A.No.269 of 2016 in O.S.No.164 of 2016, the present Civil Revision Petition is filed.

9. The grievance of the petitioners is that the learned Judge has misconstrued the scope of Section 75 and Order 26 Rule 9 CPC while allowing the application and that the learned Judge is not correct in allowing the application for appointment of Advocate Commissioner which amounts to collection of evidence on behalf of the respondents. It is for the respondents to prove that there is a pipeline laid down in 'B' Schedule property by letting in evidence. The judgments relied on by the

learned counsel for the respondents before the learned Judge are not applicable to the facts of the present case. The learned Judge has misconstrued himself in applying the judgments relied on by the learned counsel for the respondents and rejecting the judgments relied on by the learned counsel for the petitioners.

10. The learned Senior Counsel for the petitioners relied on the following unreported orders of this Court in support of his contention and submitted that the Advocate Commissioner cannot be appointed for collection of evidence to prove the case of the respondents.

(i) CRP (MD) No.98 of 2017 (PD) [Maheswari vs. Malarmani]

4. The learned District Munsif, Aranthangi, considering the averments made in the affidavit, counter affidavit and the materials available on record, allowed the application on the ground that there is dispute with regard to, who is in possession of the suit property and description of the suit property and if the Advocate Commissioner inspects the suit property and filed a report with the above details and physical features, unnecessary oral evidence can be avoided and the report of the Advocate Commissioner will be very helpful for the better appreciation of the main suit.

(ii) CRP (MD) No.134 of 2017 (PD) [Sooriah Naickar v. Subbaiah]

7. From the materials available on record, it is seen that the respondent filed the suit for bare injunction against the petitioners. As rightly contended by the learned counsel for the respondent before the learned District Munsif that it is for the respondent to 5 prove and substantiate his case. When the petitioners have disputed the description of the property given by the respondent in the plaint, it is for the respondent to prove that the description of the property as given by him in the plaint is correct. The petitioners cannot collect evidence through Advocate Commissioner to prove their case that the description of the property given by the respondent in the plaint is not correct. In the circumstances, the judgment relied on by the learned counsel for the petitioner is not applicable to the facts of the present case. There is no irregularity or illegality in the order dated 02.06.2015, passed in I.A.No.614 of 2014 in O.S.No.79 of 2014, by the learned District Munsif, Virudhunagar, warranting interference by this Court.

11. Per contra, the learned counsel for the caveator / respondents submitted that the suit is filed for declaration that the respondents have right to take water through the pipeline laid beneath the land in the 'B' Schedule property. In the complaint given before the police, the police enquired the matter and in the report Ex.B7, it has been stated that there is no pipeline in 'B' schedule property but in the final report filed by the Inspector of Police before the court marked as Ex.A13, the Inspector of

Police has stated that the pipeline has been laid in the 'B' Schedule property thirty years back and water is leaking from the said pipeline and men of the second petitioner did not threaten the predecessor in title. The learned Judge properly appreciated the contradiction in two reports filed by the Inspector of Police and the fact that the petitioners are disputing the existence of the pipeline in 'B' Schedule property and has rightly appointed the Advocate Commissioner to inspect the suit property and to note down the existence of pipeline, which will not amount to collection of evidence and will be the best evidence to assist the court.

12. The learned counsel for the caveator/respondents relied on the judgment of this Court reported in **2017 (2) L.W. 226 [Shanmugathai v. Kamalammal & another]** in support of his contention, wherein it is held as follows –

*12. At this juncture, it is useful to refer the Judgment of this Hon'ble Court in the case of **Panjavarnam and others –Vs- Visuvasam Jeyaseeli (CRP(NPD)(MD)No.2192 of 2012)** wherein it was held that the advocate commissioner if appointed would be able to visit the suit property with the help of a surveyor, measure the same and locate it and also note down as to what are all in existence in the suit property. Noting down the physical features would not amount to culling out the evidence. Further this court enunciated the importance of the maxim that "A Picture is worth a thousand words". Further it was held by this Hon'ble Court in the said Judgment that it is mandate on the part of Lower court to appoint an advocate*

commissioner with a mission to visit the suit property with the help of surveyor and measure the same by referring to the survey map and documents of both sides and note down the physical features.

*13. In yet another decision of this Court in the case of **Vaithinattar and another v. Sakkubal Ammal** reported in **AIR 2004 Madras 419** it is held that in a suit for Declaration and Permanent Injunction, the dispute pertaining to portion of adjoining lands allegedly encroached by the defendants and the defendants denying that there was no such encroachment. This Hon'ble Court held that the best evidence in such case could be obtained only by the Appointment of advocate commissioner. Therefore in my considered view, no prejudice will be caused to the respondent herein by appointing the advocate commissioner to visit the suit property along with the surveyor and note down the physical features. In fact, the advocate commissioner's report and plan would enable the court for the purpose of throwing more light or enlighten to arrive at a fair decision. Thus the appointment of commissioner is necessary and therefore the order of court below is liable to be set-aside.*

13. Heard the learned Senior Counsel for the petitioners, counsel for the respondents and perused the materials available on record.

14. It is well settled law that the parties must prove their case by acceptable evidence and court cannot appoint an Advocate Commissioner to collect the evidence. These principles are specifically set out in a suit for permanent injunction. At the same time, it is held that when it is necessary, the court can appoint an Advocate Commissioner to note down the physical features to measure the property and do other necessary acts to assist the court in deciding the issue. The report of the Advocate Commissioner is to assist the court and the final decision has to be taken by the learned Judge. In the present case, the suit is for declaration that the respondents have right to take water through pipeline already laid in 'B' Schedule property belonging to the petitioners. The petitioners have denied the existence of such pipeline and have denied that their predecessor in title or they have given any permission to the predecessor in title of the respondents or to the respondents to lay down the pipeline.

15. It is pertinent to note that from the document Ex.A13 and Ex.B.7, the reports filed by the Inspector of Police, there are contradictions. In Ex.B.7, the Inspector of Police has stated that there is no pipeline in the 'B' schedule property. In Ex.A17, the Inspector of

Police has stated that there is a pipeline in the 'B' Schedule property which was laid thirty years back. In view of these contradictions, it is necessary for appointment of Advocate Commissioner to inspect the property to find out whether there is pipeline as mentioned in Ex.A13 or there is no pipeline as mentioned in Ex.B7, submitted by the Inspector of Police.

16. In the above said circumstances, the judgment relied on by the learned counsel for the respondents reported in *2017 (2) LW 226 cited supra* for appointment of Advocate Commissioner to inspect the suit property and to note down the physical features of the suit schedule property and also to note down the existence of the cement pipeline water course in the suit "B" schedule property with the assistance of VAO and qualified surveyor and to file report with plan will not amount to collection of evidence, is squarely applicable to the facts of the present case. In the said circumstances, the judgment relied on by the learned Senior Counsel for the petitioners are not applicable to the facts of the present case as there is dispute with regard to the existence of the pipeline in the suit schedule property. The learned Judge has considered all these aspects in a proper perspective by exercising the powers conferred upon him. Hence, I do not find any illegality or irregularity in

the order passed by the Trial Court warranting interference by this Court.

17. In the result, this Civil Revision Petition is dismissed. No costs.
Consequently, connected Miscellaneous Petition is closed.

02.06.2017

Speaking/Non-speaking order
Index : Yes
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To

The 1st Additional Subordinate Munsif,
Salem.

V.M.VELUMANI, J.

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C.R.P. PD No.1509 of 2017

02.06.2017