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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.09.2018

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THE HONOURABLE MR.JUSTICE M.S.RAMESH

C.R.P. (PD) 659 of 2018
and C.M.P.No.3405 of 2018

S.Kalavathi

...

Petitioner

Vs

R.A.Swaminathan

...

Respondent

Prayer:- This Civil Revision Petition is filed under Article 227 of the Constitution of India against the fair and decretal order dated 18.12.2017 made in I.A.No.51 of 2017 in O.S.No.578 of 2014 on the file of the learned Third Additional District Munsif Court, Coimbatore.

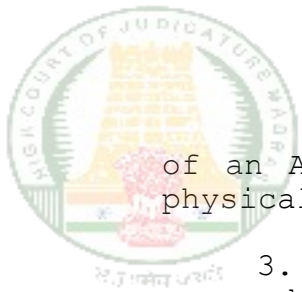
For Petitioner : Mr.N.Manokaran

For Repondent : Mr.J.Ramkumar

ORDER

The petitioner herein who is the defendant in the suit had filed an application under Order XXVI Rule 9 CPC seeking for appointment of Advocate Commissioner to inspect the suit property in which a passage runs North - South leading to a public road. The said application came to be rejected on the ground that the report of the Commissioner would amount to collection of evidence and that the petitioner herein requires to prove the case by production of his own evidence and not through the evidence from the Commissioner's report.

2. The learned counsel for the petitioner submitted that the purpose of filing the present application is only to note down the physical features of the property and not for collection of evidence. The learned counsel further submitted that the very purpose for which the application has been filed is to elucidate the matter in dispute and resolve the same. As such, the learned counsel submitted that the Trial Court was not justified in rejecting the application seeking for appointment



of an Advocate Commissioner for the purpose of noting down the physical features of the suit property.

3. The learned counsel for the respondent on the other hand opposed such a submission and stated that the very purpose for which the petitioner seeks for appointment of an Advocate Commissioner is for collecting evidence which is prohibited under law. The learned counsel submitted that by collecting such an evidence, the legal rights of the respondent/plaintiff would be defeated. Even otherwise, the application was rightly rejected since the same was made after filing of the written statement, counter affidavit and when the suit was ripe for trial.

4. I have given careful consideration to the submissions made by the respective counsels.

5. The prayer in the suit is for permanent injunction restraining the defendant from interfering with the plaintiff's peaceful possession and enjoyment of the suit property including the pathway which runs North - South. In the plaint, the respondent herein had come out with a specific case that the petitioner has no right of access over the suit property and that the petitioner has a different access. Such a statement in the plaint is based on oral Panchayat Muchaliga. According to the respondent herein, he is in peaceful possession and enjoyment of the suit property and since the respondent apprehends that the petitioner herein would trespass into the suit property, the present suit has been filed. On the other hand, the averments in the written statement would go to show that the petitioner herein had denied the oral Panchayat Muchaliga. In the application filed for appointment of an Advocate Commissioner, the petitioner herein had come out with a specific case that there are certain underground electric pipes concealed in the passage which is a part of the suit property. Since the right over the passage is an easementary right, the report of an Advocate Commissioner would facilitate the court to come to a just and fair conclusion.

6. The purpose of appointing an Advocate Commissioner under Order XXVI Rule 9 CPC is to elucidate the matter in dispute. The object of Order XXVI Rule 9 CPC is to find out the ground reality from a personal inspection and the report as such, vis-a-vis, the relief sought for would only enable the court to elucidate the matter in dispute. In a case of this kind wherein the right of usage over the pathway is in serious dispute, the report of an Advocate Commissioner would only facilitate the court to analyze the reality existing in the suit property. In my view, the appointment of such a Commissioner would only enable the court below to render substantial justice to the parties. I do not find any justification on the part of the



court below in rendering a finding that by appointing an Advocate Commissioner the same would amount to collection of evidence. As mentioned earlier, when the relief sought for is for a permanent injunction and the dispute is with regard to the pathway, the Advocate Commissioner's report would only assist and enable the court to elucidate the matter in dispute and the object of Order XXVI Rule 9 CPC is also for such a purpose. It would not be out of context to mention that such an Advocate Commissioner's report will not be totally binding on the court below and that the respondent herein is also entitled to raise his objections to such a report, if required.

7. In the light of the above observations, the order of the learned III Additional District Munsif Court, Coimbatore rejecting the petitioner's request for appointment of Advocate Commissioner may not be proper. Accordingly, the order dated 18.12.2017 passed in I.A.No.51 of 2017 in O.S.No.578 of 2014 on the file of the III Additional District Munsif Court, Coimbatore is set aside and the application in I.A.No.51 of 2017 is remanded back to the learned III Additional District Munsif Court, Coimbatore for fresh consideration by appointing an Advocate Commissioner for the purpose of inspecting and noting down the physical features of the suit property including the passage running North - South leading to the public road. Such an exercise of appointing an Advocate Commissioner shall be done within a period of one week from the date of receipt of a copy of this order and the court below shall endeavour to dispose the application in I.A.No.51 of 2017 within a period of three months from the date of receipt of a copy of this order. Simultaneously, the court below shall also endeavour to dispose of the suit in O.S.No.578 of 2014, as expeditiously as possible.

8. With the above direction, this Civil Revision Petition stands ordered accordingly. No costs. Consequently, connected Miscellaneous Petition is closed.

-s/d-
Assistant Registrar (CS-IV)

True Copy

Sub-Assistant Registrar

rgr



To

The III Additional District Munsif Court,
Coimbatore.

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+1 CC to Mr.N. Manokaran, Advocate sr 66419.

+1 CC to Mr.J. Ramkumar,advocate sr 66062.

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SP(08/10/2018)