

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.01.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)No.786 of 2015
& M.P.No.1 of 2015

Ramasamy

.. Petitioner

Vs.

Valli
Rep by her Power of Attorney
Agent Subramanian

.. Respondent

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the fair and decretal order dated 07.11.2014 made in I.A.No.38 of 2014 in A.S.No.14 of 2013 on the file of the Additional Subordinate Judge Puducherry.

For Petitioner : Mr.V.Sairam

For Respondent : Mr.P.Veeraraghavan

ORDER

This Civil Revision petition is filed to set aside the fair and decretal order dated 07.11.2014 made in I.A.No.38 of 2014 in A.S.No.14 of 2013 on the file of the Additional Subordinate Judge Puducherry.

2.The petitioner is appellant and respondent is the respondent in A.S.No.14 of 2013 on the file of the Additional Subordinate Judge Puducherry. The petitioner is the defendant and respondent is the plaintiff in O.S.No.1737 of 2007 on the file of the III Additional District Munsif, Puducherry. The respondent filed the said suit for declaration of easmentary right and mandatory injunction directing the petitioner not to resist the respondent from demolishing the compound wall for access over her property from the southern side of her house. The petitioner contested the suit. The suit was decreed by the judgment and decree dated 28.08.2013. The petitioner has filed the appeal in A.S.No.14 of 2013, challenging the said judgment and decree of the Trial Court. Pending appeal, the petitioner filed I.A.No.38 of 2014 under Order XXVI Rule 9 read with Order 41 Rule 33 of C.P.C for appointment of an Advocate Commissioner to note down the physical features of the petitioner's property, the nature of pathway meant exclusively for the petitioner, nature and the physical features of the property of the respondent and of the existence of New street and to file a report with necessary photos. According to the petitioner, the Trial Court failed to appreciate properly the evidence of P.W.1, the sale deeds marked

as Ex.A3 by the respondent and the judgment and decree marked by the petitioners as Exs.B2 and B3. The petitioner made various averments on merits.

3.The respondent filed counter affidavit and opposed the said application on the ground that appeal can be decided based on the evidence and documents already on record. Therefore, there is no necessity for appointment of Advocate Commissioner in the appeal. The respondent also denied the allegations made by the petitioner.

4.The learned Judge, considering the averments in the affidavit, counter affidavit and materials on record, by the order dated 07.11.2014, dismissed the application on the ground that the grounds of appeal can be decided only in the main appeal and not in the present petition. Hence, appointing an Advocate Commissioner would cause multiplicity of proceedings.

5.Against the said order of dismissal dated 07.11.2014 made in I.A.No.38 of 2014 in A.S.No.14 of 2013, the present Civil Revision Petition is filed by the petitioner.

6. According to the learned counsel for the petitioner, the Trial Court failed to properly appreciate oral and documentary evidence let in by the parties and erroneously decreed the suit based on the evidence of the petitioner and failed to see that respondent did not prove her case. The appointment of Advocate Commissioner is necessary to decide the issue as the dispute is with regard to the existence of pathway. The reason given by the learned Judge for erroneously dismissing the application for appointment of Advocate Commissioner is that the same can be decided in the main appeal. By appointing Advocate Commissioner, no prejudice would be caused to the respondent and prayed for allowing the Civil Revision Petition. The learned counsel for the petitioner in support of his contentions, relied on the decision reported in **(2013)7 MLJ 600 (Ganesa Gounder Vs. Chakkaravarthy and others)**:

"6. At any event, it is only an application seeking for appointment of Advocate Commissioner to note down the physical features of the suit property. Admittedly, the suit is one for mandatory injunction for restoration of the pipeline and for damages. Whether the pipeline was in existence or not in the suit property can be ascertained by appointing an Advocate Commissioner and such appointment will not prejudice the interest of the other side and on the other other

hand it would help the Court below to decide the issue. No doubt the petitioner has filed the application at the appellate stage. He has also given sufficient reason for filing such application at the appellate stage. It is well settled that commission application can be filed even at the appellate stage. Therefore, the delay cannot be the reason for rejecting such application, when the petitioner has given valid reasons for appointment of Advocate Commissioner."

7.The learned counsel for the respondent submitted that appeal can be decided only based on the evidence and document already on record. Hence, there is no necessity for appointment of Advocate Commissioner in the appeal and prayed for dismissal of the application.

8.Heard the learned counsel for the petitioner as well as the respondent and perused the materials on record and judgment relied on by the learned counsel for the petitioner.

9.From the materials on record, it is seen that the petitioner has filed the present application for appointment of Advocate Commissioner to note down physical features of the petitioner's

property, the nature of pathway meant exclusively for the petitioner, nature and the physical features of the property of the respondent and of the existence of New street and to file a report with necessary photos. Admittedly, the suit is for declaration of easementary right of the respondent and for mandatory injunction. Whether the respondent has easementary right in the suit property or not can be ascertained by appointing the Advocate Commissioner and such appointment will not prejudice the interest of the respondent. On the other hand, it would help the Court to decide the issue. This Court in the decision relied on by the learned counsel for the petitioner held that in appellate stage also an Advocate Commissioner can be appointed and his report would assist the Court in deciding the issue. This decision is squarely applicable to the facts of the present case. In view of the above facts, the order of the learned Judge is liable to be set aside and is hereby set aside.

10.I.A.No.38 of 2014 is remitted back to the learned Additional Subordinate Judge, Puducherry. The learned Additional Subordinate Judge is directed to appoint an Advocate Commissioner within a period of two (2) weeks from the date of receipt of a copy of this order and direct the Advocate Commissioner to inspect the

property and file a report within a period of four (4) weeks from the date of his appointment.

11. With the above direction, this Civil Revision Petition is allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

08.01.2018

Index :: Yes
Internet :: Yes/No
gsa

To

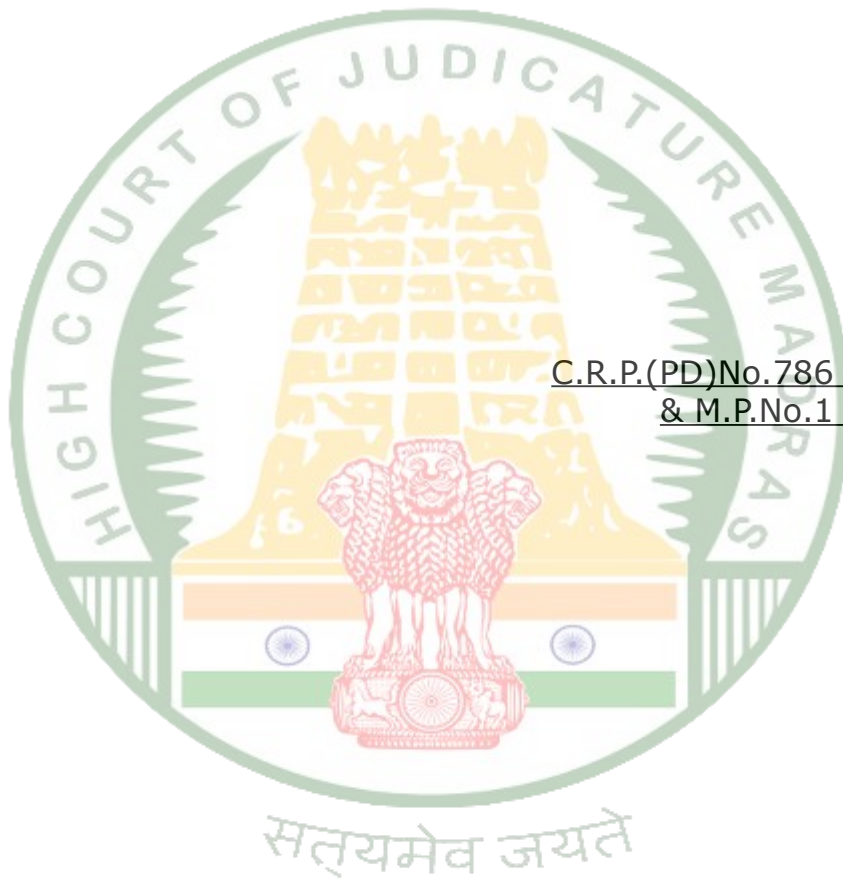
The Additional Subordinate Judge,
Puducherry.



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V.M.VELUMANI,J.

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