

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.03.2019

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THE HONOURABLE MR.JUSTICE C. SARAVANAN

C.R.P(NPD) No.1896 of 2014

and

M.P.No.1 of 2014

S.Thaj Mohammed

.. Petitioner

VS

1.Chinnusamy

2.Thalamayammal

3.Saravanan

4.Muthunaicker

5.Sarasu

6.Shanmugavel

.. Respondents

Prayer: Civil Revision Petition is filed under Article 227 of the Constitution of India to set aside the fair and final order dated 18.03.2014 passed in I.A.No.16 of 2014 in A.S.No.24 of 2013 on the file of the Sub-Court, Rasipuram.

For Petitioner : Mr.S.Sounthar

For Respondents : No appearance

ORDER

The petitioner is the plaintiff in O.S.No.176 of 2011 before the District Munsif Court, Rasipuram. The suit was filed for a mandatory injunction and to direct the respondents to remove the wire fencing at Survey No.29/3. It is the case

of the petitioner that the respondents have put up the wire fencing to deny access on the land of the petitioner.

2. In the suit, the petitioner had also filed an application for appointment of Advocate Commissioner and the Advocate Commissioner, who has also given a report regarding the existence of wire fencing, noted down the physical features of the land. The Court below dismissed the suit on the ground that the petitioner has not proved whether the wire fencing is on the petitioner's land or on the respondents land, by a judgment and decree dated 10.07.2013. Aggrieved by the same, the petitioner filed a civil miscellaneous appeal before the Sub-court, Rasipuram in A.S.No.24 of 2013. In the said appeal, the petitioner also filed an application under Section 26 of C.P.C for appointment of an Advocate Commissioner to inspect the suit property and to note down the physical features and to measure the suit property with the help of the qualified surveyor.

3. The Court below has dismissed the application filed by the petitioner on the ground that the appellant has to succeed in the appeal only through documentary evidence and cannot attempt to collect evidences by way of appointing an Advocate Commissioner, that too in the belated stage. Consequently, the Court has dismissed the application for appointment of an Advocate Commissioner as unnecessary at the stage of final hearing of the appeal,

with the observation that it was the only intended to drag on the appeal. Aggrieved by the same, the petitioner has preferred this civil revision petition in the year 2014 and has obtained an interim injunction. Today, despite notice to the respondents, there is no representation.

4. I have considered the rival submissions. Only point that requires determination is whether the wire fencing is situated in Survey No.29 of 2003 on the land of the petitioner or on the land of the respondents. This aspect has to be determined only by a report from an Advocate Commissioner duly assisted by a surveyor of land, even though the application appears to have been filed belatedly. The appeal itself is of the year 2013 and the application for appointment of Advocate Commissioner has been filed in the month of February, 2014 and therefore it cannot be proper to say that the application was filed belatedly with a view of drag on the proceedings. The Court below has to ascertain the facts based on the available records and should not shy away from appointing an Advocate Commissioner. The report of Advocate Commissioner will assist the Court to come to a fair conclusion on facts. Consequently, I am of the view that the present civil revision petition deserves to be allowed, however subject to payment of costs.

5. Consequently, the civil revision petition is allowed subject to payment of costs of Rs.7,500/-. The petitioner shall deposit the amount to the credit of the

C.SARAVANAN,J.

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A.S.No.24 of 2013 on the file of the Sub Court, Rasipuram, within a period of four weeks from the date of receipt of a copy of this order. On such deposit of cost and on production of proof of payment, the appellate Court shall appoint local advocate to make inspection with the help of surveyor, with a direction to give the report with in a period of four weeks thereafter. The respondent is at liberty to withdraw the cost. Needless to state that all expenses in connection with the remuneration and incidental charges payable to the Advocate Commissioner and Surveyor shall be paid by the petitioner. The respondent shall also at liberty to raise all defences that are available in law and in facts. The appellate Court shall endeavour to dispose the appeal by 31st of August 2019.

6. The Civil Revision Petition is allowed with the above directions. No costs. Consequently, the connected Miscellaneous Petition is also closed.

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Index : Yes/No
Internet : Yes/No
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To
Sub-Court, Rasipuram.

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