

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.07.2020

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.R.P. (PD) No.2753 of 2018
& C.M.P.No.16167 of 2018

V.S.Ponnusamy .. Petitioner

Vs.

1. Eswaramurthy

2. Malliga

3. Ramathal

4. Soundari

.. Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order dated 04.08.2018 made in I.A.No.668 of 2018 in O.S.No.289 of 2016 on the file of Principal District Munsif, Erode.

For Petitioners : Mr. M.V.Venkataseshan

For Respondent : Mr. C. Ramaraj
for M/s. M.Guruprasad for RR 1 & 2

ORDER

This matter is taken up for hearing through Video-Conferencing.

The plaintiff in OS No.289 of 2016 aggrieved by the dismissal of an Application for appointment of an Advocate Commissioner to visit the suit property and note down the physical features, has come up with this Civil Revision Petition.

2. The suit was filed by the petitioner seeking permanent injunction restraining the defendants from interfering with the plaintiff's peaceful possession of the Suit A Schedule property and permanent injunction restraining the defendants from interfering with the plaintiff's user and enjoyment of the item 2 of the Suit B Schedule properties, which is a pathway and for mandatory injunction to restore the disconnected portions of the underground pipe lines described as item 1 of the Suit B Schedule properties and for other reliefs.

3. The suit was resisted by the defendants contending that the entire area around the suit properties is now a developed residential cum industrial

lay out. The plaintiff has not been using the pathways are the underground pipe lines for irrigating his property. It was specifically contended that the plaintiff has got industrial units manufacturing cattle feed and a poultry farm in the area in question and he has got six commercial Electricity connections. Therefore, according to the defendants, the plaintiff has abandoned all the rights and he has not been enjoying the same. When the suit was posted for trial, the plaintiff came up with an application for appointment of an Advocate Commissioner to note down the physical features as well as the existence of the pipe line.

4. This was resisted by the defendants raising the same contentions as in the written statement. They also pointed out that the plaintiff in the Writ Petition filed by him has conceded that the pipe lines have been destroyed in several places and entire area has become a residential cum industrial lay out and submitted that the pipe lines have been removed in many places. On the above contentions, the defendants sought for dismissal of the application.

5. The learned Trial Judge, who heard the application, concluded that the plaintiff has not made out a case for appointment of an Advocate Commissioner. He also noted that the defendants have not denied the right of the plaintiff to the common Well or the fact that the pipe lines were in existence at some point of time. The court pointed out that the defendants has taken a specific plea that the pipe lines were destroyed much earlier and the entire area has become the industrial and residential lay out. Therefore no agriculture is possible in that area, hence the pipe lines had fallen into disuse and therefore, the plaintiff cannot enforce his right at this point of time. The Trial Court also pointed out that the right claimed by the plaintiff is a easementary right and it is for him to prove that he was enjoying the right on the date of filing of the suit. On the above conclusions, the learned Trial Judge dismissed the application for appointment of Advocate Commissioner.

6. I have heard Mr.M.V.Venkataseshan, learned counsel appearing for the petitioner and Mr.C.Ramaraj, learned counsel appearing for Mr.M.Guruprasad, for the respondents.

7. While Mr.M.V.Venkataseshan, learned counsel appearing for the petitioner would vehemently contend that being the suit on easement, the burden is on the plaintiff to prove the existence of the pipe lines and that can only be done by appointment of an Advocate Commissioner. Therefore, according to him, the Trial Court was not justified in dismissing the application.

8. Contending contra Mr.Ramaraj, learned counsel appearing for the respondents would submit that it is not the case of the respondents that the plaintiff has no right. All that they would contend is that the plaintiff/petitioner is not having any agricultural land in that area. The entire area has now become an industrial cum residential colony and therefore, there is no occasion for the plaintiff to use those pipe lines. In fact there is a specific plea that even if some pipe lines are found underneath the ground, they are not being used for irrigation by the plaintiff. Therefore, according to Mr.Ramraj, learned counsel, there is no need for appointment of an Advocate Commissioner to note down the physical features. I have

considered the rival submissions.

9. No doubt true, the suit is one for permanent and mandatory injunctions relating to a right of way as well as the right of irrigation. In the normal circumstances, the plaintiff would be entitled to an appointment of an Advocate Commissioner to note down the physical features of the property, in order to aid the Court in deciding the rights of the parties. In the case on hand, the existence of the pathway or the pipe lines was not denied. All that the defendants would plead is that the entire area has now become commercial area and therefore, no agricultural activities have been carried on there. Hence both the pathway as well as the pipe lines have fallen in disuse and therefore, there is no need for appointment of an Advocate Commissioner. The Trial Court agreed with the said contention.

10. I find force in the submissions of the learned counsel appearing for the respondents when he points out that there is no dispute regarding the existence of the Well, the entitlement of the plaintiff, the fact that the pipe lines and the pathway existed. The dispute is relating to the right of the

plaintiff to get those facilities restored in the present day circumstances, where the entire area has become the Industrial cum commercial lay out. In order to establish this, I do not think a Commissioner should be appointed. It is for the plaintiff to prove his case in a manner known to law. The plaintiff cannot seek to gather evidence by appointment of an Advocate Commissioner. The Trial Court has also found that the application is belated, since the same was filed on the day when the trial was about to commence.

11. I do not see any illegality or material irregularity in the order of the Court below in rejecting the application for appointment of Commissioner. In view of the same, the Civil Revision Petition is **dismissed**. There shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.

jv

31.07.2020

Index: Yes/No
Internet: Yes/No
Speaking order/ Non speaking order

To

The Principal District Munsif,
Erode.



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R.SUBRAMANIAN, J.

jv



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