

IN THE HIGH COURT OF JUDICATURE AT MADRAS

[ORDERS RESERVED ON : 28.10.2020]

[ORDERS PRONOUNCED ON : 14.12.2020]

CORAM:

THE HONOURABLE MR. JUSTICE **RMT.TEEKAA RAMAN**

C.R.P. [PD] No.1642 of 2020

and

C.M.P.No.10080 of 2020

Fawzunissa

... Petitioner/Plaintiff

.. Vs ..

1. The Indian Hotels Co., Ltd.,
Represented by its Managing Director,
15/17, N.F.Road, 3rd Floor, OX Fort House,
Appollo Bunder, Mumbai.
2. Savoy Hotel (Taj Group of Hotels),
Represented by its General Manager,
Sylk's Road, Ootacamund.

... Respondents/Defendants

Prayer:- Civil Revision Petition is filed under Article 227 of the Constitution of India, against the Order and decreetal order passed in I.A.No.953 of 2016 in O.S.No.5 of 2016, dated 05.09.2018 on the file of the District Munsif at Udhagamandalam.

For Petitioner : Mr.M.L.Ramesh

For Respondents : Mr.Elambharathi

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ORDER

This Civil Revision Petition has been filed under Article 227 of the Constitution of India, against the order and decretal order passed by the learned District Munsif at Udhagamandalam, in I.A.No.953 of 2016 in O.S.No.5 of 2016, dated 05.09.2018.

2. The plaintiff is the revision petitioner herein.

3. The brief facts of the case are as follows:-

(i) The revision petitioner/plaintiff has filed the above said suit for mandatory injunction directing the respondents/defendants to remove the soil dumped on the plaintiff's land more fully described in the suit schedule property to the extent of ground level and to strengthen the retaining wall put up by the respondents/defendants.

(ii) The suit was pending for trial as the respondents/defendants having denied the averments of the petitioner/plaintiff.

(iii) During the month of July, 2016, due to the monsoon rain as apprehended by the petitioner/plaintiff, the entire retaining wall collapsed and fell on the plaintiff's suit schedule property and as much damaged to her property due to the negligence and carelessness of the respondents/defendants.

(iv) Since the respondents/defendants did not care to put proper foundation for the wall, they sustained it collapsed as expected which fact the plaintiff had already mentioned in her plaint.

(v) Further, the suit schedule property has to be inspected by the Court Commissioner with qualified Surveyors/Engineers to assess the physical features and the nature of damage to the suit schedule property and to give a report on the quality of work by the respondents in putting up the revetment wall with special mention about the foundation so that the plaintiff will be able to prove her case without cumbersome evidence.

4. The case of the respondents/defendants are as follows:-

(i) The respondents/defendants did not dump soil over the

suit property as alleged by the plaintiff. The Hotel Savoy Property is situated on higher elevation and the suit property is situated in lower elevation on the southern side to the depth of more than 10 feet. The northern boundary line of the suit property is about 10 feet in higher elevation from the southern side of the suit property along which common mud road is running through.

(ii) The said road is used by others, who purchased house site from the relations of the petitioner and had constructed residential building over it.

(iii) The natural formation of the suit property is like a small mount with strong sloppy terrain and the same was not formed due to alleged dumping of soil by the respondents' servants. Taking advantage of the said sloppy terrain, the plaintiff has come forward with false and untenable allegation that the defendants' servants had dumped soil over the land which was kept leveled by her to a height of 10 width of 24' and the length 21.2 meters. The retaining wall fell on the suit property during the month of July 2016 due to monsoon rain.

(iv) On account of heavy rain on 16.07.2017 and 17.07.2017, the rain water stagnating hours for hours in the said holes further lessened the soil and eroded the soil said adjacent to the retaining wall causing it to tilt and fell horizontally according to slope of the land over the suit property. The suit property is barren land and there was no damage or injury or loss cause to the petitioner's property.

(v) The Court cannot appoint commissioner to collect evidence enabling either party to the suit to prove her case based on such evidence. She wanted the Court Commissioner to collect evidence to prove her case which is not permissible in law.

(vi) On consideration of the submissions made by both the counsel, the Trial Court had dismissed the application in I.A.No.953 of 2016 and hence, the present Civil Revision Petition is filed by the petitioner/plaintiff.

5.The learned counsel for the petitioner/plaintiff would contend that in order to have the damage as to whether the side support wall built by the defendants and to give a report of the damage caused to the property due to collapse of the retaining wall, badly constructed by the respondents and to asses the amount of damage on the suit property and hence, an expert Advocate Commissioner has to be appointed to note down the physical features of the suit property, which cannot be let in by way of any evidence. The learned counsel for the petitioner/plaintiff relied upon a decision of this Court reported in **1982 (2) MLJ 340 [M.P.Appulu Vs. Fatima Zohra and Ors.]** and also a decision of this Court reported in **CDJ 1992 MHC 087 = (1992) 2 LW-768 [R.V.Ramalingam Vs. Abdul Muthaliff]**.

6. Per contra, the learned counsel for the respondents/defendants would contend that due to non-cooperation of the plaintiff in not allowing the Chief Engineer to make a periodical inspection from the side of the plaintiff's property, during the heavy rain on 16.07.2017 and

17.07.2017, the compound wall fallen and rested horizontally into the suit property without breaking into pieces. The learned counsel for the respondents/defendants would contend that by way of appointment of Advocate Commissioner and his report, the petitioner/plaintiff cannot allow to collect evidence and he also relied upon the decisions of this Court reported in [i] **2018 (Vol-I) TLNJ 385 (Civil) [Dhanapal and another Vs. Rasammal]** and [ii] **2016 (3) MWN Civil 737 [A.Elumalai Vs. G.Vijayalakshmi and others]**.

7. On a perusal of the pleadings before the Trial Court, it is seen that the suit has been filed for the relief of mandatory injunction and to remove the soil dumped on the plaintiff's land and to strengthen the wall put up by the respondents/defendants. From the written statement filed by the defendants and also taking note of the claim of the plaintiff, it is seen that the issue involved in the suit is whether the soil has been dumped on the plaintiff's land and the so dumped soil belonged to the defendants. Pending suit, during the heavy rainfall, it is admitted by the defendants that the supporting wall has fallen and collapsed and the whole structure horizontally fall over the suit property. When that being

the case, unless an Advocate Commissioner is appointed to note down the physical feature as to the felling of the compound wall in entirety on the suit property belonged to the plaintiff is to be ascertained only through the Advocate Commissioner and photographs of the local site.

8. In the case of ***Ponnusamy Vs. Salem Vaiyappamalai Jangamar Sangam***, reported in ***1985 (1) MLJ 380 : AIR 1986 Mad. 33***, this Court has held as follows:-

"A controversy, as we would see from the pleadings, has arisen as to whether the constructions put up by the third defendant are within his land or whether they have encroached into the lands of the plaintiff. A local investigation is the best way to find out the position and the party, viz., the third defendant coveting the evidence to place before the Court through local investigation by the Commissioner cannot be shut out of their right".

9. In the case of ***Appu Vs. A.Fatima Zohra and another***, reported in ***1983 (96) LW 369 : 1982 TLNJ 482***, this Court has held as

follows:-

"there may be very many circumstances in which only a Commissioner inspecting the property promptly and recording timely assessment of what obtains relating to the building, could alone assist Courts to decide correctly. If such prompt actions are not taken, it may destroy the valuable right of the parties".

10. As per Section 75 of C.P.C., the Court is empowered to appoint an Advocate Commissioner for the purpose of making local inspection and such appointment of Advocate Commissioner is for the purpose of local inspection as to whether the soil is dumbled in the plaintiff's land by the defendant and the wall constructed by the defendants could be dangerous or not, or would it fall on the plaintiff's land and therefore, this activities cannot be termed as collecting of evidence, since there cannot be any special evidence to enlighten the above alleged factum, on those aspects, except by an expert opinion, as mere oral assertion and oral denial by the other side is not solve the dispute.

11. Whenever there is a dispute regarding boundaries or physical features of the property or any allegation of encroachment as narrated by one party and disputed by another party, the facts have to be physically verified, because, the recitals of the documents may not reveal the true facts and measuring of land on the spot by a Surveyor may become necessary. It is always better if the parties are allowed to adduce evidence at the stage of trial for better appreciation of the facts which will help the Court in effectively deciding the main dispute between the parties.

12. The prayer in the I.A. is for an appointment of Advocate Commissioner for local inspection with the help of a qualified Surveyor and Engineer to submit his report. Considering the nature of the dispute between the parties and the gravity of the issue and admitted position in the written statement that a retaining wall put up by the defendants had fallen on the suit property and hence, I find that in view of the pleadings by the respective parties and stand in the respective statements, report by the Advocate Commissioner as to state on ground is necessary.

13. No doubt, there can be no appointment of Commissioner for collecting evidence or gathering materials. However, the object of a Commission under Order 26 Rule 9 of the Code of Civil Procedure is not to collect evidence, which has to be done only by the Court, but for elucidating matters which are local in character, which can be done only local investigation at the spot.

14. In my view, a local investigation is requisite and proper and the lower Court was in error in declining to appoint an Advocate Commissioner. Absolutely no prejudice would be caused by the appointment of an Advocate Commissioner.

15. In the result,

[i] This Civil Revision Petition is allowed.

[ii] The order dated 05.09.2018 passed in I.A.No.953 of 2016 by the learned District Munsif at Udhagamandalam, is set aside.

[iii] I.A.No.953 of 2016 shall stand allowed.

[iv] The Advocate Commissioner so appointed has to inspect the property with the assistance of a qualified Surveyor and Engineer and file a report as expeditiously as possible, within a period of six weeks from the date of receipt of a copy of this order.

[v] No costs.

[vi] Consequently, connected miscellaneous petition is closed.

14.12.2020

Index : Yes
Internet : Yes
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To

The District Munsif,
Udhagamandalam.

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RMT.TEEKAA RAMAN, J.

Jrl



**Order made in
C.R.P. [PD] No.1642 of 2020**

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14.12.2020