

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.06.2021

CORAM

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

**C.R.P(PD).No.790 of 2021
and
C.M.P.No.6627 of 2021**

M.Devagi Devi

...Petitioner

Vs

1.I.D.Nagamani
2.S.Padmapriya

...Respondents

Revision Petition filed under Article 227 of the Constitution of India, to set aside the order dated 08.12.2020 made in I.A.No.1252 of 2018 in O.S.No.77 of 2013 passed by the learned District Munsif, Pollachi.

For Petitioner : Mr.L.P.Maurya

For Respondents : No appearance

ORDER

The second defendant in O.S.No.77 of 2013, now pending on the file of the District Munsif Court at Pollachi is the revision petitioner herein.

2.The revision petitioner had filed I.A.No.1252 of 2018 before the Trial Court under Order 26 Rule 9 of Code of Civil Procedure seeking appointment of an Advocate Commissioner. It has to be mentioned that the suit in O.S.No.77 of 2013 has progressed to quite an extent. The suit had been filed for declaration of the right of the plaintiff over an underground pipeline and a pathway which had been described as suit 'B' schedule property and for consequential permanent injunction restraining the first defendant from interfering with the plaintiff's peaceful enjoyment and for costs.

3.The first and second defendants had entered appearance. They had also filed their written statements separately. Trial had commenced. The plaintiff had been invited to adduce evidence. The plaintiff had also let in

evidence. Thereafter, the stage is now for the defendants to adduce evidence. At that stage, the second defendant had filed I.A.No.1252 of 2018, as stated above under Order 26 Rule 9 of Code of Civil Procedure seeking appointment of an Advocate Commissioner. It must be mentioned that even while the suit was instituted, the plaintiff had also filed a similar application for appointment of an Advocate Commissioner and an Advocate Commissioner had actually been appointed and had also filed a report. The said report is on the file of the Court but had not been marked as an exhibit and the Advocate Commissioner had also not been examined as a witness till now. The application of the present revision petitioner was heard by the learned District Munsif, Pollachi and by order dated 08.12.2020, the application had been dismissed. Primarily the learned District Munsif held that the petitioner herein had not filed objections to the earlier report of the Advocate Commissioner and therefore, stated that since there is already a report, appointment of another Advocate Commissioner may not be a proper procedure.

4.The learned counsel for the petitioner however raised grievances

over the said order. The learned counsel stated that the said application for appointment of an Advocate Commissioner by the plaintiff was filed at the time when the the plaint was presented and an exparte order was passed. The learned counsel also stated that in the said report there is a very material omission, particularly, with respect to the existence or otherwise of the pathway. It must now again be pointed out that the suit relief is for declaration of the right of the plaintiff over the suit underground pipeline and pathway which had been described as schedule 'B' to the plaint. Naturally, the existence or otherwise of the pathway and its physical features are required for effective determination of the issues raised by the parties. One of the manner in which the physical features can be determined is by appointment of an Advocate Commissioner as provided under the provisions of the Code of Civil Procedure. But if unfortunately the report filed by the Advocate Commissioner is not complete, in the sense that it does not give the actual details of both the underground pipeline which of course cannot be done viewed from the surface but also of the pathway, then naturally a grievance will be raised and will have to be addressed. In the present case, the second defendant has raised such grievances.

5. Instead of interfering with the said order, I would rather issue directions regarding the manner in which the trial is to be proceeded. The defendants may adduce evidence and may also be permitted to adduce evidence regarding the report which had been filed and if according to him, there is no mention about the pathway, point that during examination-in-chief. The defendants may also take up the opportunity of summoning the Advocate Commissioner and mark the report and also put questions regarding the pathway in the said report. If it is found as a fact that the pathway had not been mentioned in the report, naturally the defendants can also urge upon the Court to interfere with the said report so far as disclosure/non-disclosure of the pathway is concerned and request the Court to appoint either the same Advocate Commissioner to re-visit the property or appoint a separate Advocate Commissioner to visit the property again for the limited purpose of determining the existence or otherwise of the pathway and its physical features. If however, sufficient materials are given in the report itself regarding the pathway, the learned District Munsif may take a considered decision on such application accordingly.

6.At any rate, the learned District Munsif will have to base his reasoning on the affidavit filed by the defendants and also on any counter filed to it. Let the procedure of analysis of evidence be followed by the learned Trial Court and thereafter let a considered decision be taken on either appointing an Advocate Commissioner or not. The parties may therefore go back to the Trial Court, commence adducing evidence and lay their case before the learned District Munsif, Pollachi.

7.With the said observations, the Civil Revision Petition is disposed of. No costs. Consequently, connected miscellaneous petition is closed.

8.It must be mentioned that the respondent/plaintiff, is not represented before this Court. Notice had been directed by order dated 30.03.2021. It is informed by the learned counsel that notice had been served and affidavit of service had been filed. Additionally, notice was also permitted to be served on the learned counsel for the plaintiff appearing before the Trial Court. It is again mentioned by the learned counsel for the

revision petitioner that the counsel was informed about the pendency of the revision petition. Unfortunately there is no appearance. However since it would serve no purpose by keeping the revision petition continuously on file, orders are passed. Needless to point out that the plaintiff would also have every opportunity to examine the Advocate Commissioner on all aspects raised by the revision petitioner/second defendant.

16.06.2021

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Index: Yes/No

Internet: Yes/No

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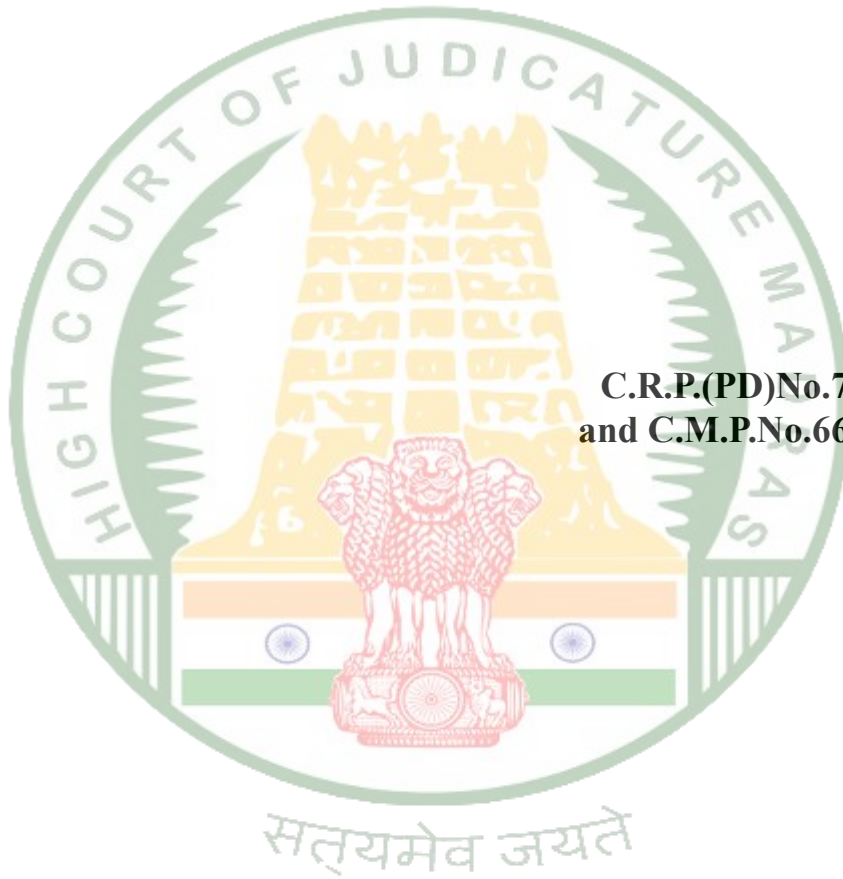
The District Munsif,
Pollachi.



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C.V.KARTHIKEYAN, J,

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