



C.R.P(PD)No.1630 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.03.2022

CORAM:

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

C.R.P(PD).No.1630 of 2017

and

CMP.No.7706 of 2017

Devaki

..Petitioner

Vs.

1.P.Ganesan

2.The Chairmen

3.The Estate Officer

2 to 3 having Office at No-5,
T.P.Chatram, Tamilnadu Slum Clearance Board,
Chennai – 05.

..Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the order passed in I.A.No.9040 of 2016 in O.S.No.3669 of 2016 dated 24.03.2017 pending on the file of the XV-Assistant City Civil Court, Chennai

For Petitioner : Mr.C.B.Muralikrishnan

For Respondents : Mr.R.Sivakumar for R2 & R3



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ORDER

This Civil Revision Petition has been filed by the 1st defendant in O.S.No.3669 of 2016 on the file of the XV-Assistant City Civil Court, Chennai, questioning the order dated 24.03.2017 in I.A.No.9040 of 2016, which Interlocutory Application had been taken out by the plaintiff in the said suit under Order 26 Rule 9 of C.P.C., for appointment of an Advocate Commissioner.

2.The learned XV-Assistant City Civil Judge, after having examined the averments made in the affidavit and in the counter affidavit had thought it necessary to appoint an Advocate Commissioner to inspect the 'A' and 'B' schedule properties and also the adjacent properties. Questioning that particular decision taken by the learned XV-Assistant City Civil Judge, Chennai, this present Civil Revision Petition had been filed by the 1st defendant in the suit.

3.There are two other defendants in the suit namely, the Chairman and the Estate Officer of the Tamilnadu Slum Clearance Board. They would assume importance to decide the issues in the suit. The relief sought in the



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suit was for mandatory injunction, directing the 1st defendant namely, the revision petitioner herein to remove encroachment in a portion, which is found in 'B' schedule to the suit. The 'B' schedule was described as a common pathway to a width of 5 feet and an extent of 0.22 square metres.

4.The suit had also been filed for a permanent injunction restraining the 1st defendant / revision petitioner from putting up any structure or construction preventing an easementary right in the aforementioned common pathway / 'B' schedule property. Pending the particular suit, the plaintiff had filed I.A.No.9040 of 2016 seeking appointment of an Advocate Commissioner.

5.The plaintiff will necessarily have to establish while getting any relief in the suit, that there is a common pathway as stated in 'B' schedule to the plaint. Determination of existence of common pathway should be on the basis of the evidence adduced by the plaintiff and not on the basis of any report of any Advocate Commissioner, who is a third party to the proceedings. Thereafter, if any construction had been put up by the 1st



defendant as alleged by the plaintiff then, again that fact will have to be stated, asserted and established only by the plaintiff in the suit and he cannot rely on the report of any Advocate Commissioner. The Advocate Commissioner cannot be called upon to let in evidence or to gather materials regarding existence of a common pathway or even atleast a pathway and existence of a construction. Primary evidence with respect to aforementioned aspects will have to be let in first by the plaintiff. If that evidence is unreliable, the learned Judge can proceed further to decide the issues in the suit accordingly.

6.If the plaintiff had put up a case that a particular construction affects an easementary right, which is vested with the plaintiff, then to determine whether that particular construction would actually affect the easementary right, can be determined by appointment of an Advocate Commissioner. But, an Advocate Commissioner cannot be appointed to determine whether a construction had actually been put up or not. Therefore, the reasoning of the learned Judge that an Advocate Commissioner is required, has to be interfered with.

7.I also examined with the rough sketch of the schedule



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mentioned properties. This actually is a document of the 2nd and 3rd defendants / Slum Clearance Board. The plaintiff property bears Nos.230 and 230A. To the West of the property bearing Nos.230 and 230A, there is a lane. The plaintiff can access that particular lane from his property itself. The property of the 1st defendant is to the East and bears No.229 and is also to the South and East namely, 232. The said pathway is said to be between Nos. 230 and 229.

8. Whether there is a pathway and if there is a pathway, whether it can be used in common and if it is to be used be in common, whether the 1st defendant had actually put up a construction obstructing such common usage are all aspects, which have to be established first by the plaintiff and by the plaintiff alone. They cannot be established on the basis of any inspection made by an Advocate Commissioner. If an Advocate Commissioner files a report regarding these aspects then, it would only mean that the Advocate Commissioner has been appointed to gather evidence on behalf of the plaintiff to speak about existence of a pathway and the existence of a construction. That cannot be the purpose, for which a



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commission can be issued by the Court.

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9. Even though notice had been directed to the 1st respondent / plaintiff in this revision petition, there appears to be a considered decision taken not to appear before the Court.

10. Mr. C. B. Muralikrishnan, learned counsel for the revision petitioner also stated that the learned counsel, who appears for the plaintiff in the City Civil Court had also been informed about the pendency of the Civil Revision Petition.

11. I would therefore, interfere with the order of the learned XV- Assistant City Civil Judge, Chennai and direct the plaintiff to get into the witness box, adduce evidence regarding existence of pathway, adduce evidence regarding existence of that particular pathway or a common pathway and further adduce evidence, on the said particular pathway, which according to the plaintiff, is a common pathway, a construction had been put up and that therefore, the easementary right had been affected.

12. These are aspects which will have to be established only by the



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plaintiff and he cannot lean upon the report of any Advcate Commissioner for that particular purpose.

13.The order under revision namely, the order in I.A.No.9040 of 2016 dated 24.03.2017 is therefore, set aside. This Civil Revision Petition is allowed. The parties are directed to go back to the Trial Court and an obligation is placed on the XV-Assitant City Civil Judge, Chennai, since the written statement has been filed, to frame issues, if the issues had not been framed already and proceed further with trial and make every endeavour to dispose of the suit itself on or befoe 31.03.2023.

14.With the above observation, this Civil Revision Petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

21.03.2022

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



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C.V.KARTHIKEYAN, J.

KKN

To:-

The XV-Assistant City Civil Court,
Chennai.

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and
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