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C.R.P.(PD)..No.4649 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.08.2024

Coram

THE HON'BLE MR JUSTICE V. LAKSHMINARAYANAN

C.R.P.(PD). No.4649 of 2023

and

CMP.No.27676 of 2023

K.Palanisamy

... Petitioner

-Versus-

1.P.Palanisamy

2.PRP Granites and Export Limited,

Represented by its Proprietor,

P.Palanisamy

3.The Tahsildar,

Perundurai Taluk Office,

Perundurai.

4.The State of Tamil Nadu,

Represented by its Collector,

Erode District Collector Officer,

Erode.

5.The Village Administrative Officer,

Chinnamallampalayam Village,

Thudupathi,

Perundurai Taluk.

... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India
against the fair and final order dated 09.10.2023 made in I.A.No.4 of 2022 in



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O.S.No.145 of 2018 on the file of the District Munsif, Perundurai.

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For Petitioner : *Mr.C.Ramaraj*
For Respondents : *Mr.N.S.Suganthan*
 1 & 2
For Respondents : *Dr.S.Suriya,*
 3 to 5 *Additional Government Pleader*

ORDER

This civil revision petition arises against the order of the learned District Munsif at Perundurai in I.A.No.4 of 2022 in O.S.No.145 of 2018 dated 09.10.2023.

2. The plaintiff is the civil revision petitioner.

3. O.S.No.145 of 2018 was presented for the relief of mandatory injunction and other allied reliefs. According to the plaintiff, the suit schedule mentioned property and other properties originally belonged to one Ramaya Gounder and his co-sharers. They created a 10 feet wide pathway over S.F.No.52/A for convenient enjoyment of the said property. In order to enjoy their properties individually, Ramaya Gounder, one Koppana Gounder, and



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other sharers entered into a partition deed on 18.12.1975.

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4. By virtue of this partition deed, a 10 feet wide cart tract was shown as common to all the owners and the D schedule mentioned property fell to the share of the petitioner's father. The cart tract, that had been set apart for the common use of all the owners, had been left open for several decades, till the death of Koppuna Gounder on 02.02.2007. Subsequently, his legal heirs Pavathal, Palaniammal, Kolandhayammal, and Pavalakodi executed a release deed for the suit schedule mentioned property in favour of the plaintiff on 09.04.2012.

5. The plaintiff would plead that the only way to access his property is through the common cart tract. On 15.12.2018, the defendants dug up a pit to an extent of 100 feet in and over the said cart tract and thereby damaged the cart tract. In order to note the existence of the cart tract as well as to measure the damages that had been caused to it, he took out an application under Order XXVI Rule 9 seeking appointment of an Advocate Commissioner to inspect the property. This application was received in I.A.No.4 of 2022.



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6. Notice was issued to the respondents 1 and 2 who are the defendants in the suit. They filed a counter stating that no such cart tract exists and as DW1 was in the witness box, this application was an attempt by the plaintiff to drag on the matter.

7. The learned District Munsif came to a conclusion that the plaintiff is attempting to collect evidence by appointment of an Advocate Commissioner and that, the plaintiff must prove the existence of cart tract only by way of documentary evidence, and in any event, it is an attempt by the plaintiff to collect evidence and fill up the lacuna in his case. Finally she would point out that the suit has been pending for more than 5 years and whatever damage that the defendant would have caused to the cart tract, would have vanished by the lapse of time and hence, dismissed the said petition. Against the said order, the present civil revision petition arises.

8. Heard Mr.C.Ramaraj for the civil revision petitioner and Mr.N.S.Suganthan for the respondents 1 and 2.

9. Mr.C.Ramaraj would invite my attention to the plaint and the



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averments made in the affidavit and would contend that apart from documentary evidence, an additional way in which the plaintiff may prove the existence of cart tract is by appointment of Advocate Commissioner. He would state that dismissal of the application on the basis that the same is an attempt to fill up the lacuna is untenable and would hence plead that revision be allowed and the order be set aside.

10. Per contra, Mr.N.S.Suganthan appearing for the respondents 1 and 2 would submit that the suit is at the stage of examination of DW1 and at this stage, an Advocate Commissioner need not be appointed. He would further point out that, from the order of the learned Trial Judge, the application amounts to collection of evidence through the good office of the Advocate Commissioner and that, having failed to prove his case, the plaintiff is attempting to fill up the lacuna by filing this application. He would state that the existence of cart tract can be proved only by documents. Relying upon the pleadings in paragraphs 7 and 8 of the written statement, he would urge that the defendants have taken possession of the property pursuant to an order passed by the Government on 14.02.2011 and through a lease deed registered by the District Collector in their favour in document No.1817 of 2011. However, as in



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those documents the alleged cart tract is not found, the defendants would plead that there is no *prima facie* case for the plaintiff/petitioner. He would also point that since there is no prayer for declaration, the plea for appointment of Advocate Commissioner is untenable.

11. I have carefully considered the arguments on either side and perused the records.

12. The suit is based on an allegation that a cart tract exists over the suit schedule mentioned property namely in S.F.No.52/A of Chinnamallampalayam Village in Perundurai Taluk, Erode District. According to the plaintiff, the cart tract had been created by his predecessor in title and had been continuously enjoyed by them for several decades. Apart from the production of the partition deed, under which his father Koppana Gounder had been allotted the D schedule property, the plaintiff would plead that the cart tract created in the aforesaid S.F. number had been kept in common for all the co-owners.

13. This existence of cart tract has been stoutly denied by the defendants



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1 and 2. Therefore, the “matter in dispute” in the present suit is the existence of very cart tract itself. According to the plaintiff, though the cart tract existed prior to the development of the property by the defendants 1 and 2, by virtue of the latter taking possession of the property, they had obliterated the cart tract by putting up a pit of more than 100 feet in depth.

14. In terms of Order 26 Rule 9 of the Code of Civil Procedure, a local investigation can be done for elucidating any matter in dispute. The usage of the word “elucidation” would show that in addition to the evidence already on record by way of oral and documentary evidence, any party to the suit can take out an application for appointment of Advocate Commissioner to inspect the property. It is not as if the court is going to decree the suit on the basis of the report of the Advocate Commissioner. The report of the commissioner will be in addition to the evidence already on record. Having found the law on this position, let me now proceed through the objections that have been raised by Mr.N.S.Suganthan.

15. His first objection is that the plaintiff has not sought for a declaration of title, but has only sought for mandatory injunction. The suit for mandatory



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injunction is presented in terms of Section 39 of the Specific Relief Act.

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16. Under section 39 of the Specific Relief Act, the said relief is sought for in order to enforce the duty that is imposed on another person, to prevent the breach or performance of certain acts by the defendant in a manner inconsonant with the duties imposed on him.

17. The case of the plaintiff is that there exists a cart tract which had been interfered with by the neighbouring owner. It is the duty of every person, in whose land a cart tract runs to maintain the same as it is, unless and until by way of an agreement the parties agreed to obliterate the same or by providing for an alternative pathway.

18. If that is not the situation, then any user of the cart tract can come forth with a suit for mandatory injunction as against the other persons who, though are entitled to use the cart tract, had made attempts contrary to the duty imposed on them. Therefore, it is not necessary in all cases the relief of declaration of title must be sought for. In any event, this is only a prima facie finding that had been given for the purpose of disposal of this application.



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Whether the frame of the suit is correct or not is a matter which has to be dealt with at the time of final disposal.

19. With respect to the second plea that an Advocate Commissioner cannot be appointed since the evidence had already been recorded, as pointed out by me in the previous paragraphs, under Order XXVI Rule 9 of the Code of Civil Procedure, an Advocate Commissioner is appointed for elucidating the matter in dispute. Elucidation implies that there is some evidence on record. At the same time, I hasten to add that this does not mean that the court does not have the power to appoint the Advocate Commissioner exparte. I do not have to labour myself too much on this point because it has been settled by a judgment of this Court in *A.Nagarajan v. A.Madhanakumar, (1996) 1 CTC 229*.

20. The next objection that Mr.N.S.Suganthan would argue is that the appointment of Advocate Commissioner would amount to collection of evidence at the hands of the Advocate Commissioner. This argument is overruled by Order XXVI Rule 10 of the Code of Civil Procedure. Under Order 26 Rule 10, the report of the Advocate Commissioner is *per se* evidence in terms of Order 26 Rule 10 (2). Therefore, the Advocate Commissioner, who acts as “eyes and



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ears” of the court, can always proceed to inspect the property and submit a report and this report will be read in conjunction with evidence presented in the suit.

21. In the case of mamool cart tract, there are possibilities that it is not reflected in the revenue records. This is because, it is result of an arrangement between the parties, who set apart certain portion of lands for the purpose of beneficial enjoyment of all. The demand of the learned District Munsif which is voiced here by N.S.Suganthan, that if a cart tract is not found on the revenue records, it does not certainly exist does not appeal to me.

22. The parties/common owners are entitled to set apart a portion of their property as has been pleaded in the present case and this factum can be noticed only when the Commissioner visits the property. This is because, it is not the case of the plaintiff that the cart tract runs only over the property belonging to the defendants. The cart tract obviously has to start somewhere and has to end somewhere. If the cart tract exists outside the property to the defendants and if this the factum is recorded in the report of the Advocate Commissioner, then the burden would be on the defendant to show as to where the cart tract vanished



while it was running over his property. Furthermore, if the Advocate Commissioner were to visit the suit property and submit a report that there is no such cart tract, the defendant can take advantage of such a report.

23. Moving to the next argument of Mr.N.S.Suganthan that the plaintiff is trying to fill up the lacuna, I am not able to appreciate this argument. Filling up of lacuna was a principle developed by the Courts in order to prevent the parties, who have lost before the court of first instance, from attempting to create gaps or fill up the gaps at the appellate stage. To add, the Code of Civil Procedure is not a whip to be used by the Court to punish the plaintiff, but it is a Code of fairness that gives both the parties an equal playing field.

24. Lacuna means a gap or some error left open during the time of evidence. It is admitted by both sides that DW1 is yet to enter the witness box and therefore, at this stage, if the Commissioner visits the property, it will certainly help the defendant to explain his case relying upon the report of the Advocate Commissioner. The suit is still open and the Code of Civil Procedure permits both the parties to let in as much evidence as possible at their instance in order to prove their respective cases. Therefore I will not use this boogie of lacuna in order to dismiss this petition.

25. The last argument that the Government Order and the lease deed



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executed by the Collector pursuant to the Government Order granting the right to quarry to the first and second defendants do not mention the cart tract actually begs the issue. The Government merely grants lease of its property for the purpose of exploitation by any person who it thinks fit or capable of exploiting the same. At the time of grant of such lease, the Collector or the other authorities under the Mines And Minerals (Development And Regulation) Act, 1957 are not going to be concerned with the pathway or canals which have been created by the parties. They would obviously go by as per their FMB sketch and other documents maintained by the revenue department. It is not the case of the plaintiff that this is a pathway which is reflected in the records of the revenue department, but it is his case that the pathway had been created by an agreement between the parties. Therefore, the argument on Mines And Minerals (Development And Regulation) Act, 1957 is based on an erroneous reading of the agreement.

26. Finally the view of the learned Judge that the suit had been filed in the year 2018 and the Advocate Commissioner is sought to be appointed in the year 2023 does not come to the help of the defendants.

27. It is a clear and categorical case of the plaintiff that the defendants had obliterated the pathway by digging up a 10 feet wide pit. A 10 feet wide pit can always be taken note of by the Advocate Commissioner. It is not as if the



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pit will vanish over a period of time.

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28. Therefore in the light of the above discussion, I am of the view that it will be appropriate that an Advocate Commissioner visits the suit schedule mentioned property and submits a report. The order of the learned District Munsif in I.A.No.4 of 2022 in O.S.No.145 of 2018 dated 09.10.2023 is set aside. The application shall stand allowed. The learned District Munsif is requested to appoint an Advocate Commissioner, with sufficient experience in the civil side, to inspect the property along with a surveyor and submit a report as per the prayer made in the application.

29. With the aforesaid directions, this civil revision petition stands allowed. No costs. Consequently, the connected miscellaneous petition is closed.

01.08.2024

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Index : Yes/No
Speaking Order/Non-speaking order
Neutral Citation : yes/No

To



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1.The District Munsif, Perundurai

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V.LAKSHMINARAYANAN, J.

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