

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.11.2016

CORAM

THE HONOURABLE THIRU JUSTICE **M. DURAISWAMY**

C.R.P.(NPD)No.4411 of 2015
and MP No.1 of 2015

A.D. Vajravelu Mudaliar

... Petitioner

vs

A.K. Kumaravelu Mudaliar

.... Respondent

Civil Revision Petition filed under Section 115 of the Civil Procedure Code against the petition and order dated 02.06.2015 made in E.A.No.50 of 2013 in E.P No.34 of 2010 in O.S.No.1764 of 2000 passed by the Subordinate Judge, Tambaram.

For Petitioner : Mr.M. Rajaraman

For respondent : Ms.M. Sneha

ORDER

Challenging the order passed in E.A No.50 of 2013 in E.P.No.34 of 2010 in O.S.No.1764 of 2000, the Decree Holder has filed the above Civil Revision Petition.

2. The petitioner filed the suit in O.S.No.1764 of 2000 for partition, declaration and for permanent injunction. The trial Court passed preliminary decree on 02.07.2002. Pursuant to the preliminary decree passed in the Suit, the petitioner filed the Final Decree application in I.A.No.49 of 2003. The trial Court passed the Final Decree on 19.01.2004.

3. Challenging the Final Decree passed in I.A.No.49 of 2003, the petitioner filed an appeal in A.S.No.132 of 2004 before this Court. During the pendency of the appeal, the parties entered into a Memorandum of Compromise between themselves and also filed a Memorandum of Compromise, requesting the Court to pass a decree in the Appeal in terms thereof and based on the Memorandum of Compromise, the Division Bench of this Court disposed of the appeal on 16.07.2004.

4. As per the decree passed in A.S.No.132 of 2004, "D" schedule was allotted to the petitioner and "E" schedule was allotted to the respondent. In Clause-5 of the decree, it has been

stated that the petitioner shall take the drainage line, water line and electricity connections separately and individually underneath the common passage connecting to the main Road at Karpagavinayagar Koil Street. Further, the respondent should put up the drainage line, water line and electricity connection separately and individually connecting the main line at Nara Lane, through the same passage at the same time. Further, it has been stated that after provision of amenities, the common passage should be constructed to its original form at their own cost.

5. Pursuant to the Final Decree passed in A.S.No.132 of 2004, the petitioner has filed an Execution Petition in E.P.No.34 of 2010. In the said Execution petition, the petitioner/decreed holder filed an application in E.A.No.50 of 2013 to direct the respondent/judgment debtor to remove the alleged encroachment put up by him as shown in " Yellow " and " Red " colours in the Surveyor's report dated 11-01-2003. In the affidavit, filed in support of the petition, the petitioner has stated that the Executing Court had ordered delivery of possession on 02.01.2012 and on 11.01.2013, the bailiff, who went to the suit property to execute the warrant along with the Surveyor, measured

the property as per the decree and while surveying and measuring the said property, the Surveyor had found constructions in the common passage. In order to remove the constructions put up in the common passage, the Decree Holder has filed an application in E.A.No.50 of 2013.

6. The application filed by the petitioner was opposed by the respondent.

7. It is not the case of the petitioner that the respondent had put up constructions after the passing of the decree in A.S.No.132 of 2004. The learned counsel on either side submitted that the constructions in the passage were put up much prior to the filing of the suit. That being the case, the petitioner should have filed the suit for removal of the alleged encroachment made by the respondent. In the case on hand, the petitioner has not filed the suit for removal of the alleged encroachment.

8. On a perusal of the decree in A.S.No.132 of 2004, it is clear that this Court has not given any direction for removal of the

alleged encroachment. When there is no decree passed for the removal of the alleged encroachment, the petition, filed by the decree holder for removal of obstruction, was rightly dismissed by the Executing Court.

9. The learned counsel, appearing for the petitioner, in support of his contention, relied upon the judgment reported in **1979 (1) MLJ 380 (Duraismi Mudaliar vs Ramasami Chettiar and another)**, wherein this Court held that in an application filed under Order 21 Rule 97 of Civil Procedure Code, the Executing Court can order removal or demolition of the superstructure which were put up by the defendant during the pendency of the suit or after the decree.

10. In the case on hand, admittedly, the construction was put up much prior to the filing of the suit. It is not the case of the petitioner that the constructions were put up either during the pendency of the suit or after passing of the decree. Therefore, the judgment relied upon by the learned counsel appearing for the petitioner is not applicable to the present case.

11. As already stated since there is no decree or order passed either by this Court or by the Courts below for removal of the alleged encroachment, the Executing Court has rightly dismissed the petition. In these circumstances, I do not find any error or irregularity in the order passed by the Executing court. The Civil Revision Petition is devoid of merits and the same is dismissed. No costs. Consequently, connected MP is closed.

08-11-2016

sr

Index:no
website:yes

To

The Subordinate Court, Tambaram

M. DURAISWAMY,J.,

sr

CRP(NPD)No.4411/2015

08-11-2016

<http://www.judis.nic.in>