



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 11.08.2016

CORAM

THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

C.R.P (PD) (MD) No.809 of 2016

and

CMP (MD) No.4095 of 2016

1.Samsudeen

2.Rajamohamed

: Petitioners/Petitioners/Defendants

Vs.

Selvamani

: Respondent/Respondent/Plaintiff

Prayer: Civil Revision Petition is filed under Article 227 of the Constitution of India, against the fair and decreetal order, dated 10.02.2016 made in I.A.No.532 of 2015 in O.S.No.59 of 2011 on the file of the District Munsif, Periyakulam.

For Petitioners

: Mr.A.Arumugam

for M/s.Ajmal Associates

For Respondent

: Mr.K.P.S.Palanivel Rajan

O R D E R

This revision is directed against the fair and decreetal order, dated 10.02.2016 made in I.A.No.532 of 2015 in O.S.No.59 of 2011 on the file of the District Munsif, Periyakulam.

2.The petitioners are the defendants in the suit O.S.No.59 of 2011 on the file of the District Munsif, Periyakulam. The respondent filed the suit for the following reliefs:-

(a))Declaring that the lane between the houses of the plaintiff and the defendants as a common lane to the plaintiff and the defendants;

(b)Restraining the defendants, their men or agents from making any construction of cross wall and close the common lane in any way by way of permanent injunction;

(c)Directing the defendants to demolish or remove the encroachment I.e., the cross wall of 4-1/2 feet height put by them by way of mandatory injunction, failing which the court may remove it in accordance with law;

(d)Directing the defendants to pay the cost of the suit;

<https://hcservices.ecourts.gov.in/hcservices> (e)And pass such other relief that this Hon'ble Court may deem fit and proper and thus render justice.



3.The suit is being contested by the petitioners stating that the plaintiff is entitled for 45 feet east-west, 66 feet north-south, 40-1/2 feet on the southern side and he encroached upon the common lane. During trial, the petitioners filed I.A.No.532 of 2015 for appointment of an Advocate Commissioner to note down the physical features of the suit property raising the same ground that the plaintiff has encroached on the common lane.

4.The application was opposed by the respondent contending that the plaintiff's side evidence is over and when the suit was posted for defendants' evidence, on 12.08.2015 this application was filed in order to drag on the proceedings. It is further submitted that the application cannot be filed to collect evidence from the parties. The District Munsif, Periyakulam, dismissed the application. Aggrieved over the order, the present revision is filed.

5.Heard Mr.A.Arumugam, learned counsel appearing for the petitioners and Mr.P.T.S.Palanivel Rajan, learned counsel appearing for the respondent and perused the materials available on record.

6.The learned counsel appearing for the petitioners would submit that the suit was filed for declaration and also for mandatory injunction; that the report and plan of the Advocate Commissioner are absolutely necessary to elucidate the matter in dispute and in fact, this application ought to have filed by the plaintiff and for his fault, the petitioners/defendants were constrained to file this application. It is further submitted that on the ground of delay, the application cannot be rejected. The learned counsel has relied upon the decision reported in 1996-1-LW.278 [A.Nagarajan vs. A.Madhanakumar] in support of his contention.

7.Per contra, the learned counsel appearing for the respondent would submit that the plaintiff has already cross examined the Village Administrative Officer to prove that the defendants have encroached upon the common lane and also constructed a wall on the larger height of 4-1/2 feet, obstructing the free access to the plaintiff. The application for appointment of the Advocate Commissioner is not at all necessary in this case.

8.It is seen from the records that the third prayer in the suit is for removal of the encroachment by way of mandatory injunction. It is true that this application was filed when the suit was posted for defendants' side evidence. However, considering the nature of the prayer sought for in the suit, this court is of the opinion that the report and plan of the Advocate Commissioner would be helpful for elucidating the matter in dispute. The judgment cited supra supports the view taken by this court.



9.The specific case of the defendants is that the plaintiff in fact encroached the common lane to an extent of 4-1/2 feet. So, the properties of both the plaintiff and the defendants are required to be measured in the interest of justice.

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10.In view of the above findings, the impugned order, dated 10.02.2016 passed in I.A.No.532 of 2015 in O.S.No.59 of 2011 is liable to be set aside and it is set aside. The District Munsif, Periyakulam is directed to appoint an Advocate Commissioner to measure the properties of the plaintiff and the defendants and also the common lane with the help of the surveyor, with a direction to the learned Advocate Commissioner to file a report within a period four weeks. The trial court shall dispose of the suit in O.S.No.58 of 2011 on merits and in accordance with law, within a period of four weeks therefrom.

11.Accordingly, this revision is allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(T&P)

/True copy/

Sub Assistant Registrar(CS)

To

The District Munsif, Periyakulam, Theni District.

+1cc to M/s.Ajmal Associates, Advocate in SR.44064

+1cc to Mr.K.P.S.Palanivelrajan, Advocate in SR.43976

C.R.P(PD) (MD) No.809 of 2016

11.08.2016

er.

PBK/GSV-PM/SAR-I 12.08.2016 ::3P-4C:(TI)