

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19-04-2017

CORAM

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

**C.R.P. PD No.1361 of 2017
and M.P.No.1 of 2010**

Gunasekar ... Petitioner

Vs

Vijayalakshmi ... Respondent

Civil Revision Petition is filed under Article 227 of the Constitution of India against the order and decree dated 31.10.2014 in I.A.No.159 of 2014 in O.S.No.13 of 2007 on the file of the Principal Sub Judge, Tindivanam.

For Petitioner : Mr.D.Ravichander

ORDER

The petitioner is the defendant in the suit filed by the respondent/plaintiff to declare the easementary right of way over 'B' Schedule property to reach "A" Schedule property, for permanent injunction restraining the defendant from putting up any construction or fence over 'A' and 'B' Schedule properties and for permanent injunction restraining the defendant from interfering with the plaintiff's enjoyment of 'A' schedule property and for other reliefs.

2. The petitioner filed written statement during the month of

September 2009 and contested the suit. Evidence on the side of the respondent was closed and the evidence on the side of the petitioner was commenced and examined in chief and was cross-examined in part. At that stage, the respondent filed application for appointment of Advocate Commissioner to measure the suit property with the help of surveyor. The petitioner filed counter denying the averments made in the application. Thereafter, the respondent filed application in I.A.No.159 of 2014 for amendment of plaint to include the 'C' Schedule property mentioned in the portion encroached upon by the petitioner as mentioned in the plaint filed alongwith the report of the Advocate Commissioner. The petitioner filed counter and opposed the said application and submitted that earlier application for appointment was dismissed and against the same, the respondent filed CRP PD No.1453 of 2013 which was also dismissed by this Court. The Advocate Commissioner, without giving any notice to the petitioner inspected the property and filed his report. The respondent cross-examined the petitioner with regard to Commissioner's report about the encroachment. Only to drag on the proceedings, the respondent has filed application for amendment of the plaint.

3. The learned Judge, considering the averments in the affidavit, counter affidavit and judgments relied upon by the parties, allowed the application holding that the nature of relief sought for by the respondent regarding the correct description of the property must be on record and amendment will change the character of the suit and petitioner can file additional written statement. Against the same, present Civil Revision Petition is filed.

4. The learned counsel for the petitioner submitted that the respondent has filed application for amendment of plaint, though he was aware of the Advocate Commissioner's report, even before the commencement of trial. The report of the Advocate Commissioner cannot be sustained in the eye of law and the application for amendment based on such report and plan is not maintainable. The application for amendment is a belated one.

5. Heard the learned counsel for the petitioner and perused the records.

6. The respondent has filed the suit for declaration of easementary right and for permanent injunction. The Advocate Commissioner was appointed and the Commissioner, after inspecting the property, filed his

report stating that the portion IRD was encroached by the respondent. After commencement of the trial, the respondent filed application for amendment. Even though it is well settled law that the parties seeking amendment after commencement of trial must prove that inspite of deligence, he could not file the application earlier, the principles laid down therein is not applicable to the facts of the present case on the ground that the respondent is seeking amendment based on the plan and report of the Advocate Commissioner to include 'C' Schedule property which is encroached by the petitioner. The learned Judge has considered all the materials on record and held that by allowing the amendment petition, the character of the suit will be changed and the petitioner has been allowed to file written statement. The petitioner has disputed the veracity of the report of the Advocate Commissioner. The Court carefully considered the same in deciding the issue. The petitioner can also file objection and prove that the Advocate Commissioner report is incorrect and that he has not encroached the portion mentioned in the Advocate Commissioner's report. Hence, I do not find any illegality or irregularity in the order passed by the Principal Subordinate Judge, Tindivanam.

7. In the result, this Civil Revision Petition is dismissed. No costs. Since the suit is of the year 2007 and considering the fact that the trial had already commenced and the parties were examined, I direct the

Principal Subordinate Judge, Tindivanam to dispose of the suit in O.S.No.13 of 2007, on merits and in accordance with law, as expeditiously as possible, in any event, not later than 31st July 2017.

19.04.2017

Speaking/Non-speaking order
Index : Yes/No
rgr

To

The Principal Subordinate Judge,
Tindivanam.

V.M.VELUMANI, J.
rgr

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