

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.06.2017

CORAM

THE HONOURABLE Ms. JUSTICE V.M.VELUMANI

CRP (PD) No.1589 of 2017
and CMP.No.7509 of 2017

Malarvizhi

.. Petitioner

Vs

1.R.Palaniappan
2.R.Subramani
3.C.Karuppannan

.. Respondents

Prayer:- Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the fair and decretal order dated 17.03.2017 made in I.A.No.398 of 2015 in O.S.No.118 of 2015 on the file of the Subordinate Judge, Tiruchengode, by allowing this Civil Revision Petition.

For Petitioner : Mr.R.Marudhachalamurthy

ORDER

The Civil Revision Petition has been filed to set aside the fair and decretal order dated 17.03.2017 made in I.A.No.398 of 2015 in O.S.No.118 of 2015 on the file of the Subordinate Judge, Tiruchengode.

2. The petitioner is the first defendant; the respondents 1 and 2 are the plaintiffs and the third respondent is the second

defendant in O.S.No.118 of 2015 on the file of Subordinate Court, Tiruchengode. The respondents 1 and 2 filed a suit for mandatory injunction to remove the encroachments made by the petitioner by constructing a compound wall and house in the 'A' schedule property of the suit and to restore the suit cart track as per the sale deed dated 22.02.1968. According to the respondents 1 and 2, their father Mr.Ramasamy Gounder had purchased the suit schedule property situated on the southern side in S.F.No.81 of Amani Village of Tiruchengode Taluk along with 8 feet common pathway. Subsequently, the third respondent/second defendant have purchased a portion of the property situated in northern side in S.F.No.81/2 of Amani Village from one Perumayee and others vide registered sale deed. Thereafter, the third respondent have also purchased a portion of the property in S.F.No.81/3A of Amani Village from one K.T.Nageswara Iyyar and others. Later, the third respondent had sold the aforesaid properties to the petitioner herein vide Document No.1075/2002 registered at Sub Registrar Office, Komarapalayam. While selling the property to the petitioner, the third respondent had mentioned in the sale deed that the suit property includes 20 feet cart track and the same is in existence. Taking advantage of the recitals in the said sale deed, the petitioner attempted to form 20 feet width cart track and accordingly the petitioner/1st defendant encroached a major portion of the "A" schedule property belonging to the respondents 1

and 2/plaintiffs by constructing a compound wall and residential house. Therefore, the respondents 1 and 2 have instituted a suit for mandatory injunction against the petitioner and third respondent herein.

3. The respondents 1 and 2 also filed an application in I.A.No.398 of 2015 under Order 26 Rule 9 and Section 151 of CPC, for appointment of an Advocate Commissioner to visit the suit property and to note down the existing physical features and to measure the encroachments made by the petitioner. The petitioner filed a memo in I.A.No.398 of 2015 along with the written statement and prayed that the written statement may be treated as a counter in the application filed seeking appointment of Advocate Commissioner. In the written statement filed by the petitioner/1st defendant, she had denied the averments made by the respondents 1 and 2 and also contended that the claim of the respondents 1 and 2 seeking mandatory injunction is illegal. It is also contended by the petitioner that the father of the respondents 1 and 2 and the third respondent have mutually agreed and widened the cart track from 8 feet to 20 feet for easy access before several years and the said cart track is common to both to the petitioner and respondents 1 and 2, and therefore the petitioner/1st defendant have not encroached the property of the respondents as alleged in the suit. It is also submitted that the petitioner/1st

defendant upon purchase of property from the third respondent have constructed a compound wall and house in the year 2005 and also obtained electricity connection.

4. The learned Judge considering the averments in the plaint, affidavit and written statement, allowed the application in I.A.No.398 of 2015 vide order dated 17.03.2017 holding that the report and plan submitted by the Advocate Commissioner would be useful to come to the correct conclusion to decide the issue in the suit and therefore, it is necessary to appoint an Advocate Commissioner in the said case.

5. Against the said order dated 17.03.2017, passed by the learned Judge in I.A.No.398 of 2015, the present Civil Revision Petition is filed.

6. Heard the learned counsel appearing for the petitioner and perused the materials available on record.

7. The learned counsel appearing for the petitioner submitted that with an intention to collect evidence to support the case, the respondents 1 and 2 have filed the application seeking appointment of Advocate Commissioner and this application should not have been allowed by the learned trial Judge. It is also contented by the petitioner that in a suit for mandatory injunction, it is for the

plaintiffs/respondents 1 and 2 to prove their case independently that the petitioner had encroached the land belonging to them and not by way of appointing an Advocate Commissioner to collect evidence on their behalf. On the other hand, it is the case of the petitioner that as agreed by the father of the respondents 1 & 2 and the third respondent, the cart track was widened from 8 feet to 20 feet for easy access even before several years and therefore the said cart track is common to both to the petitioner and respondents 1 and 2 and hence the encroachment as alleged by the respondents 1 and 2 is frivolous and false. It is also contended by the petitioner that the third respondent had purchased the land in S.No.81/3A only for the purpose of forming cart track and with an intention to connect his land along with 20 feet cart track which is in existence in S.No.81/2 and therefore the third respondent has valid title and right over the said cart track, and thereafter when the petitioner purchased the said properties from the third respondents, he is entitled to have a right over the same. Hence, according to the petitioner, the question of encroachment will not arise in the said case.

8. Since it appears that the dispute is with regard to the common pathway in the suit property and the issue is to decide whether the petitioner had encroached the land that belonged to the respondents 1 and 2 or not, or there was a common pathway already

in existence, it is necessary to appoint the Advocate Commissioner and to note down the physical features with help of a Surveyor. The learned Judge has considered all the above facts and allowed the application in I.A.No.398 of 2015 for appointment of the Advocate Commissioner filed by the respondents 1 and 2. There is no illegality or irregularity in the order dated 17.03.2017 passed by the learned Sub Judge, Tiruchengode in I.A.No.398 of 2015 in O.S.No.118 of 2015, warranting interference by this Court.

9. In the result, the Civil Revision Petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

05.06.2017

ds

Speaking Order/Non-speaking Order
Index : Yes / No

To:

The Subordinate Court,
Tiruchengode.

V.M.VELUMANI,J

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