

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 26.10.2018

CORAM

THE HONOURABLE MR. JUSTICE M.SATHYANARAYANAN

CRPN.PD.No.2521/2018 & CMP.No.15364/2018

Sumathi .. Petitioner

Versus

Vasantha .. Respondent

Civil Revision Petition filed under section 115 CPC against the fair and decretal order in IA.No.14/2016 in AS.No.6/2016 passed by the learned II Additional Subordinate Judge, Salem, dated 29.01.20158.

For Petitioner : Mr.S.Kaithamalai Kumaran

ORDER

The appellant/plaintiff in AS.No.6/2016 on the file of the Court of the II Additional Subordinate Judge, Salem, has filed an application in IA.No.14/2016 in AS.No.6/2016 praying for an order to appoint an Advocate Commissioner to make a local inspection of the "B" Schedule Property and the said application, after contest, came to be dismissed vide fair and final order dated 29.01.2018 and challenging the legality of the same, she came forward to file the present Civil Revision Petition.

appellant / plaintiff would contend that pendency of the suit, the defendant/respondent has put up a wall and it is not actually located on the "B" Schedule Property and in that regard, a specific ground, i.e., Ground No.5, has been raised in the Memorandum of Appeal and the Lower Appellate Court, without adverting to the relevant facts and circumstances, has committed a serious error in dismissing the application and prays for appropriate orders.

3 This Court has considered the arguments advanced by the learned counsel for the petitioner/appellant/plaintiff and also perused the materials placed before it.

4 The revision petitioner/plaintiff has filed a suit in OS.No.596/2012 on the file of the Court of I Additional District Munsif, Salem against the respondent herein, praying for a declaration that as per the Registered Sale Deed [Ex.A.1] dated 05.09.1990, the "B" Schedule Property belong to her and also for a permanent injunction restraining the defendant / respondent herein from interfering from the user of the "B" Schedule Property. The suit was contested and during the course of trial, the revision petitioner / plaintiff has marked Ex.A3-Police complaint. The

Trial Court found that the complaint pertains to construction of a wall on the part of the defendant on the "B" Schedule Property and recorded a finding that without going for the relief of declaration that the obstruction of the suit pathway is illegal, the suit as framed, is not maintainable and for that purpose, also placed reliance upon section 38 of the Specific Relief Act and dismissed the suit vide judgment and decree dated 25.09.2015.

5 The revision petitioner/plaintiff aggrieved by the dismissal of the suit, has filed the above said appeal and pendency of the appeal, took out an interlocutory application for appointment of Advocate Commissioner, which came to be dismissed and hence, this Civil Revision Petition.

6 The primordial submission made by the learned counsel for the petitioner is that the wall has not been put up on the "B" Schedule Property and however, the Trial Court has misconstrued the contents of Ex.A3 and recorded an erroneous finding and only in the event of appointment of the Advocate Commissioner, the revision petitioner/plaintiff will be able to sustain her case.

7 The learned counsel for the revision petitioner/plaintiff has

also produced a copy of Ex.A3 and this Court has also perused the same and the contents of Ex.A3 would *prima facie* disclose that the wall has been put up on the "B" Schedule Property.

8 At this juncture, the learned counsel for the petitioner would submit that it may be open to the revision petitioner/plaintiff to go for the amendment of plaint to include the prayer for mandatory injunction and for that purpose, the revision petitioner/plaintiff have to file an application for appointment of an Advocate Commissioner to measure the length and breadth and the age of the wall and such liberty may be granted.

9 In the light of the contents of Ex.A3, the Trial Court has recorded the finding that the obstruction wall has actually been put up on the "B" Schedule Property. Moreover, the contents of the affidavit filed in support of the application for appointment of the Advocate Commissioner is not explicit as to the said fact. The Lower Appellate Court has taken note of the findings recorded by the Trial Court insofar as Ex.A3 is concerned and found that there is no necessity for appointment of an Advocate Commissioner. In the considered opinion of the Court, the said findings recorded in the impugned order, does not warrant any interference for the reason that it cannot be construed as a jurisdictional

error or error apparent on the face of the record.

10 In the result, the Civil Revision Petition is dismissed confirming the fair and decreetal order dated 29.01.2018 made in IA.No.14/2016 in AS.No.6/2016 by the learned II Additional Subordinate Judge, Salem.

11 If the revision petitioner/plaintiff is so advised and it is open to her under law, she is always entitled to work out her remedy in accordance with law before the Lower Appellate Court. No costs. Consequently, connected miscellaneous petition is also dismissed.

26.10.2018

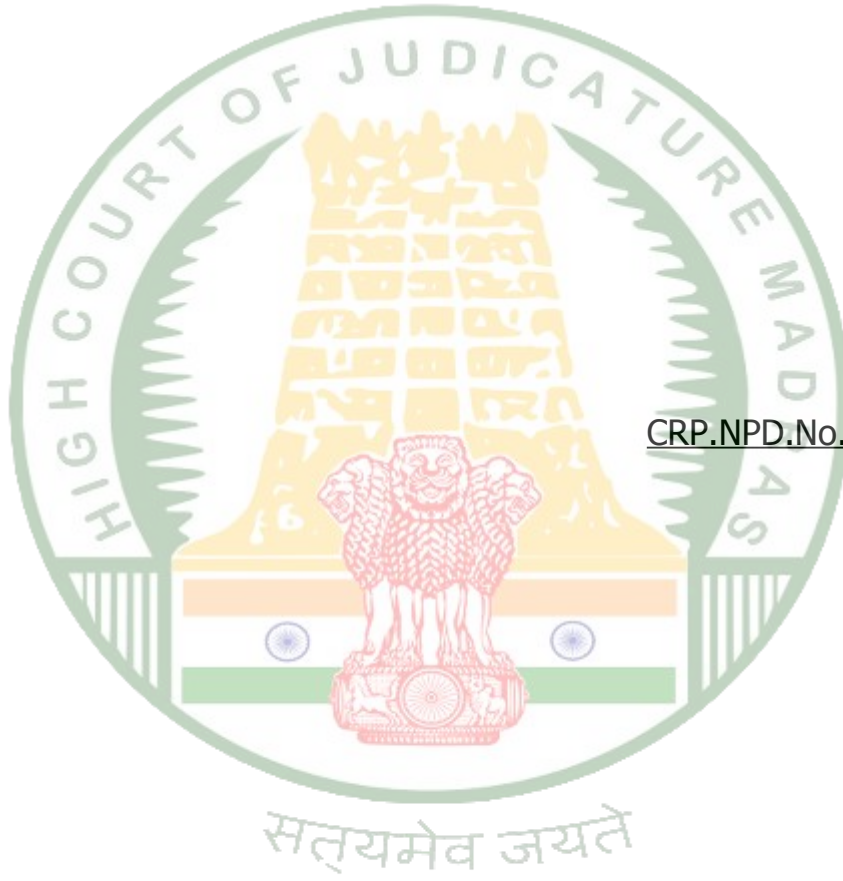
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To

The II Additional Subordinate Judge
Salem.

M.SATHYANARAYANAN, J.,



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