

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.02.2018

CORAM:

**THE HONOURABLE MS.JUSTICE V.M.VELUMANI**

C.R.P.(PD)No.2978 of 2013  
& M.P.No.1 of 2013  
& C.M.P.No.13513 of 2017

1.M.Mani  
2.M.Babu  
3.Vedam @ Vedammal

.. Petitioners

Vs.

1.E.Munusamy (Deceased)  
2.Sarasa  
3.Dinesh Kumar  
4.Ram Kumar

.. Respondents

(R2 to R4 brought on record as Lrs  
of deceased R1 vide Court order dated  
01.02.2013 made in C.M.P.No.13511 to  
13513/2017 in C.R.P.No.2978/2013)

**PRAYER:** Civil Revision filed under Article 227 of the Constitution of India to set aside the fair and decretal order dated 16.07.2013 made in I.A.No.26 of 2013 in O.S.No.7 of 2013 on the file of the District Munsif Cum Judicial Magistrate, Uthiramerur.

For Petitioners : Mr.Kumar

For R1 : Died

For R2 to R4 : Not ready in notice

**ORDER**

This Civil Revision Petition is filed to set aside the fair and decretal order dated 16.07.2013 made in I.A.No.26 of 2013 in O.S.No.7 of 2013 on the file of the District Munsif Cum Judicial Magistrate, Uthiramerur.

2.The petitioners are the plaintiffs and deceased first respondent is the defendant and respondents 2 to 4 are the legal heirs of the deceased first respondent in O.S.No.7 of 2013 on the file of the District Munsif Cum Judicial Magistrate, Uthiramerur. The petitioners filed the said suit for mandatory injunction directing the first respondent to demolish and remove the super structure put up by him in the common pathway in gramamatham S.No.93/7, measuring an extent of 100 sq.mts. According to the petitioners, they are the owners of house site in S.Nos.93/4, 93/5 and 93/6, which is gramamatham, S.No.93/13 is the road and S.No.93/7 is common pathway used by the petitioners for their ingress and egress to reach their properties. The first respondent taking advantage of the absence of the petitioners, encroached the portion of the property in S.No.93/7, which is common pathway. In such circumstances, the petitioners vide application I.A.No.26 of 2012, prayed for appointment of an Advocate Commissioner to inspect the

property with the help of Taluk Surveyor of Uthiramerur Taluk Office to identify the suit property with reference to revenue records.

3.The first respondent filed counter affidavit and denied all the averments made in the affidavit filed in support of the above application. He also contended that the S.No.93/13 is a road and one Dhanapal has put up a thatched shed in S.No.93/4 abutting the road. The land in S.No.93/5 is vacant and there is space in front of the land in S.No.93/7. The first respondent has not encroached the common pathway. Even if he had encroached, it is for the authority to remove the same and prayed for removal of the said application.

4.The learned Judge considering the averments in the affidavit, counter affidavit and all the materials available on record and the judgment relied on by the counsel for the first respondent, dismissed the application, holding that a party cannot be permitted to collect evidence through the Advocate Commissioner to prove their possession.

5.Against the said order of dismissal dated 16.07.2013 made in I.A.No.26 of 2013 in O.S.No.7 of 2013, the present Civil Revision Petition is filed by the petitioners.

6. Heard the learned counsel for the petitioners and perused the materials available on record. Though Ms.Valliammal, the learned counsel for the respondents 2 to 4 took time to get instructions from the respondents 2 to 4 and though notice was served on the respondents 2 to 4 and their names are printed in the cause list, there is no representation for them either in person or through counsel.

7. From the materials available on record, it is seen that the parties have admitted that S.No.93/7 is a common pathway. According to the petitioners, the first respondent has encroached and put up superstructure in the common pathway. The first respondent denied the same and also contended that the petitioners are not residing in the property in S.Nos.93/4, 93/5 and 93/6 and they are not using the said common pathway in S.No.93/7. The allegation by the petitioners is that, the first respondent has encroached the common pathway and prayed for mandatory injunction to remove the said encroachment to use the said pathway to reach their property. In view of the allegation that a common pathway is encroached by the first respondent preventing the petitioners from using the said common pathway to reach their land,

appointment of the Advocate Commissioner to inspect the suit property, measure the same with the help of Taluk Surveyor and file his report will assist the Court in deciding the issue. The petitioners are not seeking appointment of the Advocate Commissioner to prove their title. In view of the same, the reasoning of the learned Judge for dismissing the application that Advocate Commissioner cannot be appointed to collect evidence is erroneous. For the above reasons, the impugned order of the learned Judge dated 16.07.2013 made in I.A.No.26 of 2013 in O.S.No.7 of 2013 is set aside and the learned Judge is directed to appoint an Advocate Commissioner with a direction to inspect and measure the suit pathway with the help of Taluk Surveyor.

8. With the above direction, this Civil Revision Petition is allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

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15.02.2018

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

**Note: Issue order copy by 19.02.2018**

**V.M.VELUMANI, J.**

gsa

To

The District Munsif Cum Judicial Magistrate,  
Uthiramerur.



C.R.P.(PD)No.2978 of 2013  
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