



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 10.08.2018

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

C.R.P.(PD) (MD)No.953 of 2018

and

C.M.P.(MD)No.4215 of 2018

1.Ahamed Mydeen

2.Lathiff Khan

... Petitioners/Petitioners/Defendants 1 and 2

-vs-

1.Hanifa @ Chellappa

2.Ayubkhan

3.Rahmathulla

4.Tajnishu Banu

... Respondents 1 to 4 /Respondents 1 to 4  
/Plaintiffs

5.Mohamed Kasim

... 5<sup>th</sup> Respondent/5<sup>th</sup> Respondent/3<sup>rd</sup> Defendant

Prayer: Civil Revision Petition filed under Article 227 of Constitution of India praying to reverse and set aside the fair and decreetal order dated 08.12.2017 in I.A.No.589 of 2017 in O.S.No.135 of 2015, on the file of the Sub-Court, Paramakudi.

For Petitioners : Mr.S.Ramesh

For R1, R3 to R5 : No Appearance

For R2 : Mr.J.Bharathan

For Mr.T.R.Jayapalam

ORDER

The second revision petitioner herein filed O.S.No.99 of 2011 on the file of the learned District Munsif, Paramakudi, for declaration that the suit property is common pathway and that the defendants therein should be restrained from putting up any construction. The suit was decreed on 13.06.2014. Aggrieved by the same, the defendants therein filed A.S.No.49 of 2014 before the Sub Court, Paramakudi. The appeal is still pending.

2.During the pendency of the appeal, the defendants in O.S.No.99 of 2011 instituted O.S.No.135 of 2015 on the file of the Sub Court, Paramakudi, claiming the relief of declaration and mandatory injunction. The revision petitioners herein filed I.A.No.589 of 2017 in O.S.No.135 of 2015 under Section 10 of C.P.C.



The said I.A.No.589 of 2017 was dismissed by the Court below by order dated 08.12.2017. Questioning the same, this Civil Revision Petition has been filed.

3.The learned counsel appearing for the revision petitioners submitted that the Court below was not correct in holding that the suit property in both suits are different. It is true that there is a discrepancy in the matter of survey numbers. But then, on a closer reading of the four boundaries, one can come to a clear conclusion that the suit properties in both the suits are identical. He would also point out that the appeal is a continuation of the original suit proceeding and that therefore, the present application filed by the revision petitioners under Section 10 C.P.C., is quite maintainable.

4.This Court would agree with the contention of the learned counsel for the revision petitioners that the suit properties are identical, but then as rightly pointed out by the learned counsel for the respondents, filing of the suit became necessary, because, the revision petitioners had allegedly committed encroachment on the suit pathway. Therefore, to remove the same the subsequent suit came to be instituted.

5.Section 10 C.P.C., can be invoked only when the matter in issue in the subsequent suits is / was also directly and substantially, the issue in the previously instituted suit between the same parties or between the parties under whom they or any of them claim litigating under the same title. In the present case, no doubt, the earlier suit is also pending ofcourse at the first appellate stage. The issue in the second suit is whether the revision petitioners herein had committed encroachment on the suit pathway and that whether the same is liable to be removed by a decree of mandatory injunction.

6.Admittedly, this was not an issue in the previously instituted suit in O.S.No.99 of 2011 on the file of the District Munsif Court, Paramakudi. Therefore, this application filed under Section 10 C.P.C., was clearly not maintainable. One can also see that the suit for mandatory injunction simpliciter will not lie. That is why the respondents herein have sought the relief of declaration also. In fact, it appears that the revision petitioners as well as the contesting respondents herein are one in saying the suit pathway comprised in Survey No.277 of 2010 is common. In the earlier suit, the revision petitioners sought relief against the respondents herein. In the subsequent suit, the respondents are seeking relief against the revision petitioners.

7.Since the issue raised in the subsequent suit was not directly and substantially raised in the previously instituted suit, this Court is of the view that the Court below was right in dismissing I.A.No.589 of 2011 filed by the revision petitioners herein.



8. Therefore, this Civil Revision petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(AS)

WEB COPY /True Copy/

Sub Assistant Registrar(CS-IV)

To

1. The Subordinate Judge, Paramakudi.

2. The Record Keeper, V.R. Section,  
Madurai Bench of Madras High Court,  
Madurai. **(Two Copies)**

+1cc to M/S.V.Raghavachari, Advocate SR.No. 78200

+1cc to M/S.T.R.Jayapalam, Advocate SR.No. 78143

C.R.P. (PD) (MD) No. 953 of 2018  
10.08.2018

myr

JM/SKN RSK/SAR 4/05.09.2018/3P/6C