



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 04.10.2018

DELIVERED ON : 02.11.2018

CORAM

THE HONOURABLE MRS. JUSTICE R. THARANI

C.R.P. (NPD) (MD) No.1586 of 2015

Arulmery (Died)
Iype George (Died)
1. Edward
2. Unnis
3. Kennady
4. Bethaliks
5. Victoria
Elisabath (Died)
6. G. Willam
7. Rani

.. Petitioners / Respondents 3 to 7, 9 and 10/
/ Proposed Defendants

Vs.

1. K. Raju .. Respondent / Petitioner / Plaintiff
2. Selvi .. 2nd Respondent / 11th Respondent / Proposed Defendant

Prayer : This Civil revision petition is filed under Section 115 of Civil Procedure Code, to set aside the fair and decreetal order dated 08.06.2015 in E.P.No.40 of 2008 in O.S.No.92 of 1986 on the file of the Principal Sub Judge, Dindigul.

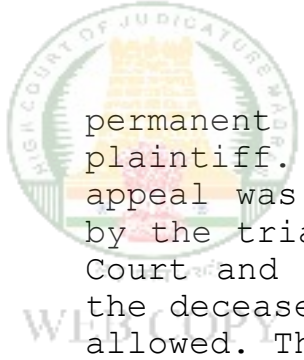
For Petitioners : Mr.K.Baalasundharam
For Respondent No.1 : Mrs.Krishnaveni, Senior Counsel
For Mr.G.Gomathi Shankar
For Respondent No.2 : No Appearance

ORDER

Heard Mr.K.Baalasundharam, learned counsel appearing for the petitioners and Mrs.Krishnaveni, learned senior counsel for Mr.G.Gomathi Shankar, learned counsel appearing for the first respondent.

2. This petition has been filed against the fair and decreetal order dated 08.06.2015 in E.P.No.40 of 2008 in O.S.No.92 of 1986 on the file of the Principal Sub Judge, Dindigul.

3. The petitioners herein are the proposed defendants and the first respondent herein is the plaintiff and the second respondent herein is the defendant in the suit. The first respondent filed a suit in O.S.No.92 of 1986 for a prayer of declaration and for



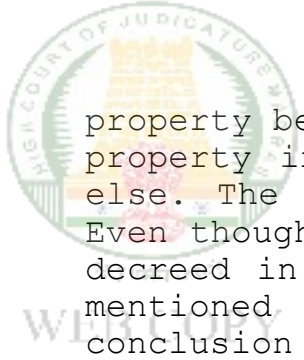
permanent injunction. The suit was decreed in favour of the plaintiff. The defendants Arulmery and George filed an appeal. The appeal was allowed by setting aside the Judgment and decree passed by the trial Court. The plaintiff filed a second appeal before this Court and the petitioners are brought on record as legal heirs of the deceased Iype George. The second appeal in S.A.No.169 of 1991 is allowed. The plaintiff filed a petition in E.P.No.94 of 2003 against the defendants under Order 21 Rule 31 of CPC for arrest of the defendants. Again in the year 2008, the plaintiff has filed another petition in E.P.No.40 of 2008 under Order 21 Rule 38 of C.P.C., for the same prayer. In E.P.No.40 of 2008, the petitioner herein has filed an application in E.A.No.497 of 2008 for appointment of an Advocate Commissioner to measure the property with the help of a Surveyor. The Commissioner has filed a report that the four boundaries in Survey No.1721 were not tallying with the survey map. The trial Court ordered the petitioners to remove the buildings within a period of two months. Against that order, the petitioner has come forward with this revision petition.

4.On the side of the petitioners, it is stated that a portion in the suit property belonged to one Arokiya who is the father of the first defendant. It is stated that the Execution Court failed to see that the property wherein the petitioners' house is situated is not the property mentioned in O.S.NO.92 of 1986. The petitioners have not constructed any building within the four boundaries in Survey number mentioned in the decree. The Commissioner has clearly stated that the property stated in the E.P. Could not be located. The Execution Court failed to follow the procedure contemplated under Order 21 Rule 22 of C.P.C. The Execution Court failed to see that the application is bared by law.

5.On the side of the petitioners, it is stated that the only point to be considered is whether the petitioners have violated the Court order. The respondents have not taken any steps to appoint the Commissioner and these Petitioners have taken steps for appointment of a Commissioner. The Commissioner has visited the suit property and the Commissioner gave a finding that the property stated in the Execution petition could not be co-related with the property on the ground. The respondents have not filed any statement of objection to the Commissioner report. No application for appointment of second Commissioner was filed by the respondents. The four boundaries stated in the E.P. are not available in the survey plan. The report of the Commissioner is that Survey No.1712 could not be located. In Survey no.2922/2A, both the plaintiffs and the defendants were having the thatched house and Survey No.2922/2A is in the name of the defendants. Only a person who violated the decree under Order 21 Rule 22 of C.P.C., can be arrested. The Execution Court cannot pass an order of eviction when no such prayer is sought for in the petition. There is no encroachment within boundaries of the suit property.

<https://hcservices.ecourts.gov.in/hcservices/>

6.On the side of the respondents, it is stated that the suit



property belonged to the father of the defendants and he divided the property into two halves and western portion was sold to somebody else. The only dispute is regarding the eastern side vacant land. Even though the petitioners claimed adverse possession, the suit was decreed in favour of the first respondent. The eastern boundary is mentioned as a vacant land. The trial Court has come to the conclusion that Survey No.1721 is the old survey number, for survey no.2922. The town survey record is marked as Ex.A18 and A19 in the suit itself and the same was admitted by the defendants also. In the document of the year 1954, only survey number was mentioned. The identification of the property is not at all disputed. The first respondent who is the defendant has admitted that survey no.2922/2A is the new Survey No.1721. The petitioner is now claiming as if the suit property is different. In the Commissioner's report, the Surveyor has identified the survey No.1721 as old survey number which was divided into survey nos.2922, 2922/1 and 2922/3. The survey number is 1721 could not be located as the Surveyor has not brought those records. It is further stated that just because the old survey plan is not with the Surveyor at the time of his visit, it does not mean that the suit property is different.

The defendants put up a thatched hut in the property and the hut is to be removed. There is no dispute regarding the identification of the property. The property is divided from new survey No.2922/2 into survey No.2922/2A and the same is admitted by the respondents also. The Execution Court gave directions to the petitioners to remove the encroachment within a period of two months, failing which ordered to arrest the petitioners. The petitioners have not availed the opportunity also.

7.On the side of the respondent, it is stated that when there is a decree for injunction granted to the plaintiff, there is no need for mandatory injunction against the defendants and the application under Order 21 Rule 32(5) of C.P.C.,

8.The learned counsel appearing for the respondent relied on the Judgment passed by this Court in the case of Kalliammal And Another vs D.C. Arunachalam And 6 Others reported in 2000 (II) CTC 136, which reads as follows:

"21. Even if it is accepted that Rule 32(5) applies only for a decree of mandatory nature, that does not follow that the principles therein cannot be followed in cases where there had been utter violation of a decree for declaration and injunction when interest of justice so requires. As I said earlier, what plaintiffs want is only to make use of the pathway as it existed before obstruction and they want that obstruction to be cleared by taking out commission at their expense. Even though defendants are not asked to remove the obstruction by mandatory decree, there is no prohibition in plaintiffs getting the same removed when the decree declares their right



to make use of the cart track without any obstruction. The execution petition is filed only to see that while clearing the obstruction, the defendants do not cause any further obstruction."

9. A perusal of the records reveals that the first respondent obtained a decree against the petitioners and the decree was confirmed in the second appeal in S.A.No.169 of 1991. The respondents filed an execution petition to arrest the petitioners. It seems that the petitioners herein filed a petition for appointment of Commissioner and the Commissioner was appointed and he has filed a report. The contention of the petitioners is that in the Commissioner's report it is stated that he could not locate survey no.1721 as the survey number is not in the records available with him at that time. The interpretation of the petitioners is that both the survey numbers are different and the survey No.1721 could not be identified by the Commissioner and the survey No.2922/2A is in the name of the petitioners and the petitioners have not violated the decree.

11. A perusal of the records reveals that old survey no.2922 was sub divided into survey No.2922/2A. The property was purchased by the first respondent from the father of the first defendant in the year 1982. The first respondent is fighting for his right from the year 1986 onwards. The Commissioner was not able to locate the old survey no.1721 as the surveyor has not brought the old records with him at the time of his visit. The identification of the suit property was not raised by the petitioners herein in the written statement filed by the defendants. The trial Court has not passed an order beyond its limit. The trial Court has ordered only for the arrest of the petitioners but has given an opportunity for the petitioners to vacate the premises so that they can avoid arrest. A perusal of the records shows that the petitioners and his predecessors in title are continuously disturbing the respondents who purchased the property for a valuable consideration.

12. In the above circumstances, there is no sufficient reason to interfere in the order passed by the trial Court. The petitioners are hereby directed to vacate the premises within a period of two months from the date of receipt of copy of this order and to hand over the key before the trial Court, failing which, they are liable for civil arrest as prayed for by the respondents herein. This Civil Revision Petition is dismissed with the above direction. No Costs.

Sd/-

Assistant Registrar (WRITS)

/True Copy/



To

The Principal Sub Judge, Dindigul.

- 1 CC TO Mr.K.BALASUNDARAM , ADVOCATE IN SR No. 94134.
- + 1 CC TO Mr.G.GOMATHISHANKAR , ADVOCATE IN SR No.94120.

Copy To:

The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai. **(2 copies)**

MRN

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