



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 10.07.2018

CORAM:

THE HONOURABLE **MR. JUSTICE S.S.SUNDAR**

C.R.P. (NPD) (MD) No. 246 of 2013

WEB COPY

Naina Mohamed Ravuther

... Petitioner/Petitioner
Decree Holder/Plaintiff

Vs.

Mohammed Usuf Ravuther

... Respondent/Respondent
3rd Judgment Debtor/
3rd Defendant

PRAYER: Civil Revision Petition filed under Section 115 of Civil Procedure Code, to allow the civil revision petition by setting aside the fair order and decreetal order dated 17.12.2012 passed in E.P.No.13 of 2012 in O.S.No.36 of 2005 on the file of the District Munsif-cum-Judicial Magistrate, Orathanadu.

For Petitioner : Mr.N.Balakrishnan
For Respondent : Mr.M.Karunanithi

ORDER

This Civil Revision Petition is directed against the order passed by the learned District Munsif Court-cum-Judicial Magistrate Court, Orathanadu in E.P.No.13 of 2012 in O.S.No.36 of 2005, dated 17.12.2012.

2.The brief facts that are necessary to dispose of this civil revision petition, are as follows:-

2.1 The revision petitioner filed a suit in O.S.No.36 of 2005 on the file of the District Munsif-cum-Judicial Magistrate Court, Orathanadu. The suit is for a declaration of title and consequential permanent injunction restraining the defendants in the suit from interfering with the peaceful possession and enjoyment of the plaintiff. However, it is not in dispute that the suit filed by the plaintiff in O.S.No.36 of 2005 was decreed as prayed for by judgment and decree, dated 30.01.2009. It is also admitted that the decree for declaration of title and consequential permanent injunction restraining the defendants in the suit from interfering with the plaintiff's peaceful possession and enjoyment of the suit properties is not suspended. It is also admitted that the appeal in A.S.No.29 of 2009 filed by the defendants was dismissed and as against the judgment and decree of the lower Appellate Court, second appeal is filed and the same is pending in S.A.No.779 of 2010. Even though there is no stay or suspension of the decree for injunction, it is alleged that the third defendant, respondent herein, has put up a construction



encroaching into the property described as 4th item of the suit property. The 4th item is described as a property measuring an extent of 37 cents in Old Survey No.32 /2 and New Survey No.32/3A. The property is also described with reference to four boundaries. The northern boundary of the suit property is shown as road. On the ground that the third defendant in the suit has put up some construction in violation of the decree for injunction, the revision petitioner, who is the decree holder in the suit, filed a petition in E.P.No.13 of 2012 under Order 21 Rule 32 of Civil Procedure Code to arrest and detain the third defendant, namely, the respondent herein, in civil prison. During the pendency of the said petition, an Advocate Commissioner was appointed and he was directed to submit a report. Unfortunately, the Advocate Commissioner has not identified the suit property with reference to the measurements of the boundaries stated in the plaint. However, the Advocate Commissioner has mentioned out that the respondent has put up a construction just opposite to the house of the petitioner and there is no road on the northern side of the petitioner's house as per warrant. Since the report does not specifically states about encroachment made by the respondent, the Lower Court dismissed the petition on the ground that the revision petitioner has not proved by proper evidence that the respondent has encroached into the property and put up construction in violation of decree for injunction. Aggrieved by the findings of the Lower Court, as against the order of dismissal, the revision petitioner has preferred the above civil revision petition. *Prima facie* this Court fixed that the Commissioner's report is not helpful to the plaintiff. However, the petitioner has given evidence as P.W.1. It is also a fact that the respondent remained ex-party. In such circumstances, the evidence of P.W.1 assume importance and relevant to decide whether the respondent has encroached into the portion of 4th item of the suit property. Even if the Commissioner's report is not satisfactory, the Court can re-issue the warrant to the Commissioner with specific directions so that the question whether the respondent has encroached and put up construction in violation of decree for injunction or not can be ascertained.

3. In that view of the matter, this Court is inclined to pass the following order:-

"The order passed by the learned District Munsif-cum-Judicial Magistrate in E.P.No.13 of 2012 in O.S.No.36 of 2005, dated 17.12.2012 is set aside. The matter is remitted back to the District Munsif Court-cum-Judicial Magistrate Court, Orathanadu to consider and pass orders afresh in accordance with law. The lower Court is further directed to re-issue the warrant to the same Commissioner or appoint some other Advocate Commissioner and issue direction suitably to the Commissioner to inspect the property and submit report so as to enable



the Court to come to the conclusion whether the 4th item of the suit property is encroached upon by the respondent or the respondent has put up a construction is violation of decree. It is on the basis of evidence of P.W.1 and as per the Commissioner's report, the Court may decide the matter on merits and in accordance with law, within a period of three months from the date of receipt of a copy of this order.

4.It is also necessary in the interest of justice for the lower Court to consider the objection that may be filed by the respondent. An opportunity should be given to him to contest the matter on merits. It is also open to the respondent to examine himself as witness. This direction is issued keeping in mind the consequences that may follow, in case the respondent is not permitted to participate in the proceedings.

5.With the above direction, the Civil Revision Petition is disposed of. No costs.

Sd/-

Assistant Registrar (CS-III)

/True Copy/

Sub Assistant Registrar (CS-III)

To

The District Munsif-cum-Judicial Magistrate,
Orathanadu.

+1cc to Mr.N.Balakrishnan, Advocate Sr.No.72189
+1cc to Mr.M.Karunanithi, Advocate Sr.No.72169

RMK

VB/KAK/SAR3/07.08.2018/3P/4C

C.R.P. (NPD) (MD) No. 246 of 2013
10.06.2018