



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 09.08.2019

CORAM :

WEB COPY

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

C.R.P. (MD) (PD)No.1213 of 2011

and

M.P. (MD)No.1 of 2011

1.Rajarajeswari
2.Ganapathiraman
3.Balachandran
4.Subbarayalu
5.Muthiah
6.Kalyani
7.Sridevi

:Petitioners

vs.

Subbiah Naidu @ Chandra Bose

:Respondent

PRAYER: Civil Revision Petition filed under Article 227 of Constitution of India, to set aside the fair and decreetal order passed in I.A.No.151 of 2010 in O.S.No.173 of 2006, dated 09.03.2011 by the learned Principal District Munsif-cum-Judicial Magistrate, Nanguneri.

For Petitioners

:Mr.P.Senthurpandian

For Respondent

:Mr.C.Ramesh

ORDER

The plaintiffs in O.S.No.173 of 2006 on the file of the District Munsif Court, Nanguneri, are the revision petitioners herein. The suit in O.S.No.173 of 2006 was filed for declaration of title in respect of suit second schedule and to remove the encroachment made by the defendant in the suit fifth schedule, which forms part of the suit second schedule.

2.It is the case of the plaintiffs that the suit second schedule originally belonged to their father and that the plaintiffs inherited the same, after the death of their father, as legal heirs. It is the specific case of the plaintiffs that the defendant, who failed to abide by the judgment and decree in an earlier suit in O.S.No.163 of 1973, encroached a small portion, which is described as plaint fifth schedule.



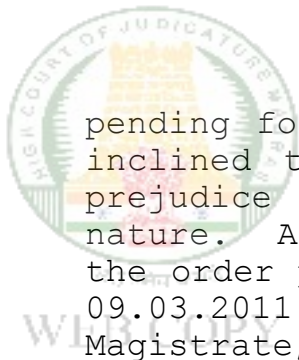
3.The suit was contested by the defendant by stating that the alleged encroached portion does not form part of the suit second schedule and that the defendant has not encroached the suit property.

4.The plaintiffs originally filed an interlocutory application for appointment of Advocate Commissioner to note down the physical features. That petition was allowed and accordingly, the Advocate Commissioner submitted a report and plan on 21.02.2007. It is also admitted that the revision petitioners did file any objection to the Commissioner's report. However, the revision petitioners filed an application in I.A.No.151 of 2010 in O.S.No.173 of 2006 under Order 26 Rule 9 of CPC, to re-issue the warrant to the same Advocate Commissioner, who had inspected the suit property earlier, to note down the encroachment made by the defendant in the suit property by filing a report and plan. This petition was opposed by the defendant and the lower Court has dismissed the petition. Aggrieved by the same, the above Civil Revision Petition is preferred by the plaintiffs.

5.The learned Counsel for the revision petitioners relied upon the plea raised by the plaintiffs in the plaint. Though the plaintiffs have specifically pleaded about the encroachment made by the defendant, it is stated that the Advocate Commissioner did not find any encroachment made by the defendant in his report.

6.From the reading of the papers, it can be seen that the Advocate Commissioner was appointed only for the purpose to note down the physical features, so as to identify the encroachment and the extent of property encroached by the defendants. Since the parties knew well about the issue that is to be resolved, the petitioners/plaintiffs are required to be vigilant atleast to file their memo of instructions to the Advocate Commissioner. In the present case, it is admitted that the petitioners have not filed any objection to the Advocate Commissioner's report. The Advocate Commissioner in his report, after referring to several physical features, has not mentioned about any encroachment. The specific case of the petitioners that the defendant has encroached the property of the plaintiffs, described as suit fifth schedule is not supported by the existing report of Advocate Commissioner. When the Advocate Commissioner has not specifically identified any encroachment in the suit property, it is improper to presume that there is an encroachment, which was not noticed in the earlier report.

7.The revision petitioners cannot contend that the Advocate Commissioner did not note down the existence of any buildings or encroachment by the defendant. The petition for re-issuance of warrant cannot be permitted, unless the petitioners have filed their valid objection. Having regard to the fact that the matter is



pending for nearly 9 years without any progress, this Court is not inclined to entertain this petition. The delay will cause more prejudice and irreparable injury to other side, in a case of this nature. As a result, this Civil Revision Petition is dismissed and the order passed in I.A.No.151 of 2010 in O.S.No.173 of 2006, dated 09.03.2011 by the learned Principal District Munsif-cum-Judicial Magistrate, Nanguneri, is confirmed. No costs.

8.The learned Counsel for the revision petitioner has made a request that the lower Court may be directed to dispose of the suit on merits uninfluenced by any of the observations made by this Court or by lower Court while considering the application for reissuing the warrant to the same Advocate Commissioner.

9.The request of the learned Counsel for the revision petitioner is accepted and the lower Court is directed to dispose of the suit in O.S.No.173 of 2006 purely on merits, uninfluenced by any of the observation of this Court or findings of the lower Court while considering the application for reissuing Warrant.

Sd/-

Assistant Registrar

// True Copy //

Sub Assistant Registrar(CS)

To

The Principal District Munsif-cum-Judicial Magistrate,
Nanguneri.

Copy To:

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

+1 CC to Mr.P.SENTHUR PANDIAN, Advocate SR-81038.

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