



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 11.02.2019

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THE HON'BLE MRS.JUSTICE S.RAMATHILAGAM

C.R.P.(PD) (MD) No.2608 of 2018

and

C.M.P.(MD)No.11445 of 2018

1.Meenammal
2.M.Chandran
3.M.Singaravel
4.Nagavel
5.Kathirvel
6.Rathinavel
7.Prema @ Mala

:Petitioners/Respondents/
Defendants

Vs.

1.K.Subramani
2.S.Singaravelan

: Respondents/Petitioners/
Plaintiffs

PRAYER:- Civil Revision Petition is filed under Section 227 of the Civil Procedure Code to set aside the fair and decreetal order passed by the learned District Munsif (Full Additional In-Charge), Periyakulam, Theni District in I.A.No.206 of 2018 in O.S.No.36 of 2018, dated 26.04.2018 by allowing this revision petition with costs.

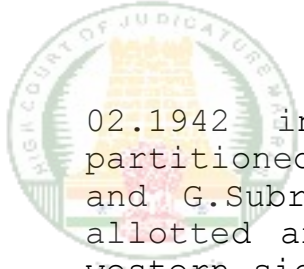
For Petitioners : Mr.S.Selvakumar

ORDER

The Civil revision petition has been preferred against the order passed in I.A.No.206 of 2018 in O.S.No.36 of 2018, dated 26.04.2018 on the file of the learned District Munsif, Periyakulam.

2. The respondents herein as plaintiffs filed the suit in O.S.No.32 of 2008 against the petitioners herein for the relief of recovery of possession of the suit II-schedule property, mandatory injunction to remove the encroachment in the II-schedule property, declaration of III-schedule property, to remove the encroachments in the III-schedule property, compensation for damages and permanent injunction.

3. The case of the plaintiffs is that the property in Survey Nos.2593/5 and 2593/6 are the single property for an extent of south-north 27-1/2 feet and east-west 45-1/2 feet purchased by one Ganapathiya Pillai from one Surulivelsamy Chettiyar in the year 26-



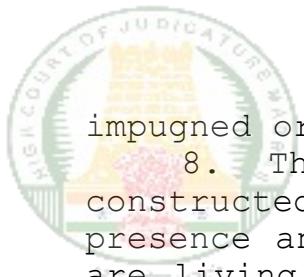
02.1942 in D.No.384/1942. The said Ganapathiya Pillai orally partitioned said property and given to his two sons viz., G.Muthuvel and G.Subramani (1st plaintiff), by which the said Muthuvel was allotted an extent of 14-1/2 East-West, 45-1/2 North-South on western side and the plaintiff was allotted to an extent that 13-1/2 East-West, 45-1/2 North-South and got separate patta also. While selling the above said property, the vendor of Ganapathiya Pillai viz., Surlivel Samy has executed a release deed in respect of a common lane. After partition, the plaintiffs and the defendants have been enjoying the said lane as common lane. While so, encroaching upon the said common lane and the property of the plaintiffs, the defendants have illegally put up their constructions. Hence, they filed the suit for the above reliefs.

4. During the pendency of the suit, the respondents / plaintiffs filed an interlocutory application in I.A.No.206 of 2018 under Order 26 Rule 9 of Cr.P.C seeking appointment of an Advocate Commissioner to measure the suit property with the help of the surveyor.

5. It is the case of the respondents/plaintiffs that the property comprised in Survey No.2593/5 belongs to him. It is the grievance of the respondents/plaintiffs that the petitioners / defendants have encroached upon certain portion of the land in the suit properties and demolished certain portion of the land and after demolition, they put up illegal constructions and hence, the plaintiffs filed the said petition for appointment of the Commissioner to note down the physical features and to file a report.

6. The trial Court, after hearing the grievance of the petitioner and also perusing the documents, has found that a Commissioner should be necessarily appointed to note down the physical features of the suit properties and accordingly, appointed a Commissioner on 26.04.2018. Aggrieved by that order, this petition has been preferred by the petitioners / defendants.

7. Heard the learned counsel for the petitioners. It is contended by the learned counsel for the petitioners that the suit property originally belonged to one Ganapathiyapaillai and then, the suit property was partitioned between his sons by name Muthuvel and Subramani (1st respondent / 1st plaintiff). The 2nd respondent / 2nd plaintiff is the son of the 1st petitioner / 1st plaintiff. The defendants are LR's of Muthuvel. After the demise of the said Muthuvel, his sons viz., the 2nd and 3rd petitioners / defendants 2 and 3 reconstructed the house in the property allotted to their father with the knowledge of the respondents and now they are residing in the newly built house and hence, the respondents / plaintiffs have no *locus standi* to file the suit. Further, the measurements stated in the plaint with regard to the partition deed are totally false. It is also contended that the Court below passed the impugned order of appointment of Advocate Commissioner without providing an opportunity to the petitioners / defendants and therefore, the impugned order is against law. Thus, the learned counsel for the petitioners / defendants prayed to set aside the



impugned order dated 26.04.2018.

8. The grievance of the petitioners is that they have constructed the building after demarcating the property in the presence and knowledge of the plaintiffs/respondents and now, they are living in the newly built house and therefore, the trial Court ought not to have passed the impugned order without providing an opportunity to them and hence, the impugned order is liable to be set aside.

9. It is seen from the records that Muthuvel is the elder brother of the first respondent / first plaintiff. The first petitioner / first defendant is the wife of the deceased Muthuvel and the other defendants are the sons and daughter of Muthuvel. It is observed that both the petitioners and the defendants are enjoying their properties after giving effect to the oral partition. The suit has been filed by the respondents for the relief of mandatory injunction to remove the encroachment in the second schedule property and for declaration of the suit third schedule property. The trial Court has appointed the Advocate Commissioner to inspect the suit property and measure the same with the help of firka surveyor by observing that in order to get a clear picture with regard to the suit properties, and in order to understand the case of the respondents properly, the appointment of the Advocate is necessary. Hence, the petitioners are no way affected by the said order.

10. When the suit is filed by the plaintiffs seeking the relief of recovery of possession and Mandatory injunction, the measurement of the suit property by way of Commissioner is very much essential. When the plaintiff has furnished the clear picture about the extent of his suit property with four boundaries and the relief is also sought by him is one for declaration injunction and mandatory injunction, the appointment of the Commissioner to measure the same with the help of firka surveyor is very much reasonable.

11. When there is a rival claim, the measurement of the properties can be done only after verifying the records available with the parties. The petitioner is no way affected by the *ex parte* order of the Court below, since the location of the property with four boundaries is given in the schedule and since the Commissioner is directed to inspect the suit property and measure the property by verifying the supporting documents which would be filed by either party at the time of inspection.

12. At this juncture, the learned counsel for the petitioner submitted that the Commissioner has not given any notice till date. Even if the Commissioner inspect the suit properties without giving any notice to the petitioners, it is open to the petitioners to explain their limit by way of supporting documents to the Commissioner. If the Commissioner inspected the suit property and filed his report without giving any notice to the petitioners, it is open to the petitioners to file their objections to the said report before the Court below.



13. With the above observation, this Civil Revision Petition is dismissed. No costs. Consequently, connected miscellaneous petition is also dismissed.

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Sd/-

Assistant Registrar (CO)

Sub Assistant Registrar (CS)

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To

The District Munsif,
Periyakulam, Theni District

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