

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.11.2020

CORAM:

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM

C.R.P(PD).No.2156 of 2015

and

M.P.No.1 of 2015

Kuppusamy

.... Petitioner

Vs.

K.C.Kuttiappa Gounder (Died)

1.Kavundayee
2.Saraswathi
3.K.Muthusamy
4.Saradhambal

... Respondents

Prayer: Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order dated 09.04.2015 made in I.A.No.21 of 2015 in O.S.No.300 of 2011 on the file of the learned District Munsif-cum-Judicial Magistrate, Perundurai, by allowing this Civil Revision Petition.

For Petitioner : Mr.N.Manokaran

For Respondents : Mr.V.S.Kesavan

ORDER

This Civil Revision Petition has been filed by the petitioner/third defendant against the dismissal of his application in I.A.No.300 of 2011 on the file of the District Munsif-cum-Judicial Magistrate, Perundurai, dated 09.04.2015.

2. The petitioner herein, who is the third defendant had filed an application in I.A.No.21 of 2015 in O.S.No.300 of 2011 on the file of the District Munsif-cum-Judicial Magistrate, Perundurai, under Order 26 Rule 9 and Section 151 of CPC, to appoint a fresh Commissioner or re-issue the Commission warrant to the same Advocate Commissioner to measure the suit properties and neighbouring properties including his property with the assistance of a Taluk Surveyor and fix the boundaries for his property as per his sale deed dated 01.12.1998 and file a report and plan. The learned District Munsif-cum-Judicial Magistrate, Perundurai by the order dated 09.04.2015 has dismissed the said application. Feeling aggrieved, the petitioner/third defendant has filed the present Civil Revision Petition.

3. Heard Mr.N.Manokaran, the learned counsel for the petitioner and Mr.V.S.Kesavan, the learned counsel for the respondents.

4. The learned counsel for the petitioner has submitted that the respondents herein have filed a suit in O.S.No.300 of 2011 on the file of the District Munsif -cum-Judicial Magistrate, Perundurai, for the relief of permanent injunction restraining the defendants therein from disturbing their peaceful possession, usage and enjoyment of the suit pathway. He further submitted that the said suit was filed on 17.10.2011 and on the same date, the respondents have filed an application in I.A.No.1138 of 2011 to appoint an Advocate Commissioner and the learned District Munsif-cum-Judicial Magistrate also has appointed an Advocate Commissioner on the same date and directed the Advocate Commissioner to note down the physical features of the suit property and file a report with plan. He further submitted that the Advocate Commissioner has inspected the suit property in the absence of the petitioner and filed a report stating that there is a pathway of width about 12 feet.

5. He further submitted that at the time of inspection of the Advocate Commissioner, the petitioner's property was lying fallow and

without considering the said fact, the Advocate Commissioner has filed the report as if there is a pathway of width about 12 feet. He further submitted that as per the documents, the respondents are entitled for only footpath and not 12 feet width pathway and in order to prove the same, the petitioner/third defendant has filed an application in I.A.No.21 of 2015 to appoint a fresh Commissioner or re-issue the commission warrant to the same Commissioner to measure the properties and file a report. But, the learned District Munsif-cum-Judicial Magistrate, has erroneously dismissed the said petition. He further submitted that since the Advocate Commissioner has inspected the property in the absence of the petitioner, the trial Court ought to have re-issued the Commission warrant to inspect the property in the presence of both the parties and filed a report and therefore, he prayed to allow this Civil Revision Petition and set aside the order passed by the trial Court in I.A.No.21 of 2015 and allow the said application.

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6. Per contra, the learned counsel for the respondents has submitted that the Advocate Commissioner has filed his report on 29.10.2011. To the said report, the petitioner has not filed any objection. He further submitted that after four years, when the suit was posted for

trial, the petitioner, with a view to drag on the proceedings, has filed an application in I.A.No.21 of 2015 to appoint a fresh Commissioner or re-issue the commission warrant to the same Commissioner to measure the property with the help of a Surveyor. He further submitted that the petitioner cannot collect evidence in the suit filed by the respondents. He further submitted that in the report filed by the Advocate Commissioner, it is categorically stated that there is a pathway of width about 12 feet and that being so, it is not necessary to re-issue the commission warrant and taking into consideration of the said fact, the trial Court has rightly dismissed the application which was filed by the petitioner and with the said order, this Court need not to interfere and therefore, he prayed to dismiss the Civil Revision Petition.

7. A perusal of the typed set of papers filed by the petitioner shows that the Advocate Commissioner was appointed in I.A.No.1138 of 2011 in O.S.No.300 of 2011 in exparte and the Advocate Commissioner has inspected the suit property on 18.10.2011 itself. In the said report, he also stated that at the time of his inspection, the petitioner/ the third defendant was not there and hence, he could not serve notice to him. So, it is clear that he inspected the suit property in the absence of the

petitioner. Further, admittedly, the trial Court has not commenced trial in the suit. Under the said circumstances, if the Commission warrant is re-issued to the same Commissioner, that would not cause any prejudice to the respondents. But, without taking into consideration of the aforesaid facts, the trial Court has dismissed the application which was filed by the petitioner to re-issue the Commission warrant. Hence, this Court is of the view that the said order is liable to be set aside.

8. In the result, this Civil Revision Petition is allowed. The order passed by the learned District Munsif-cum-Judicial Magistrate, Perundurai, in I.A.No.21 of 2015 in O.S.No.300 of 2011 dated 09.04.2015 is set aside. The trial Court is directed to re-issue the commission warrant to the same Commissioner with a direction to the Commissioner to inspect the properties in the presence of both the parties and note down the physical features and measure the properties with the help of a qualified Surveyor by referring to the documents of both the parties and revenue records and file his report with plan. No Costs. Consequently, connected Miscellaneous Petition is also closed.

04.11.2020

Internet : Yes/No
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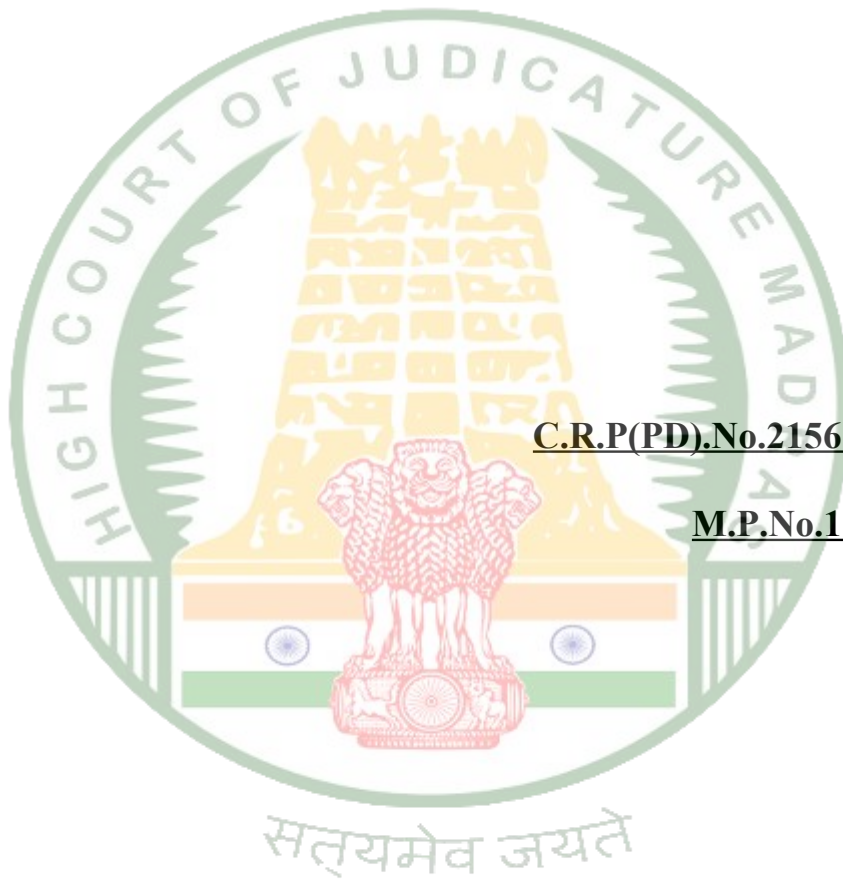
The District Munsif-cum-Judicial Magistrate,
Perundurai.



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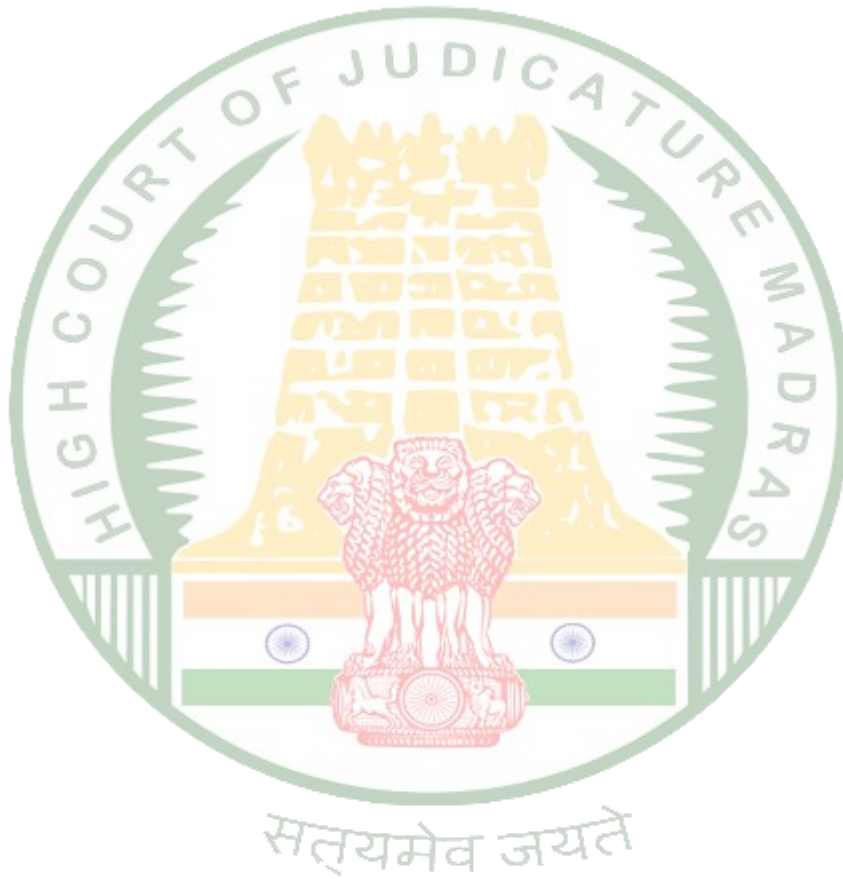
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