

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.12.2020

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.R.P(PD)No. 2150 of 2018

and

C.M.P.No. 13380 of 2018

1.Padma @ Padmavathi
2.A.Balamurugan
3.Rathinam

...Petitioners

Vs.

Athanappan (died)
1.Thangavel
2.Karuppayal
3.Senthilkumar

...Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and decreetal order dated 07.07.2018 made in I.A.No. 442 of 2018 in I.A.No. 108 of 2013 in O.S.No. 41 of 2013 on the file of the Principal District Munsif Court, Erode.

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For Petitioners : Mr.A.Mukunth

For Respondents : Mr.N.Manokaran

ORDER

The defendants 2 to 4 in O.S.No. 41 of 2013 are on revision. Challenge in this revision is to the order of the Trial Court dismissing the application filed by the defendants 2 to 4 to reissue the warrant to the same Advocate Commissioner to measure the suit property shown as DP1 and find out the actual extent of encroachment made by the plaintiffs.

2. The suit was initiated by the plaintiffs seeking declaration of their easementary right over the suit pathway which is shown as ABCDEFGHIJ in the plaint. Even in the year 2013, a Commissioner was appointed and he had visited the property on 09.02.2013 and he has filed a report with reference to the suit pathway. Thereafter, the defendants entered apperance and filed a written statement making a counter claim contending that the plaintiffs have encroached upon a portion of their property shown as DP1 which is situate immediately on the East of the plaintiffs' property shown as PP1 in the plaint plan. The defendants also prayed for a decree for removal of encroachment. Soon thereafter the defendants filed an application for reissuing the warrant to the commissioner to measure the

portions marked as PP1 and DP1 in the plaint plan and find out the actual encroachment made by the plaintiffs. This application was opposed as belated. The Trial Court accepted the defence and dismissed the application.

3. I have heard Mr.A.Mukunth, learned counsel for the petitioners and Mr.N.Manokaran, learned counsel for the respondents.

4. I do not think the order of the Trial Court could be sustained. The application in I.A.No. 442 of 2018 has been filed seeking a specific relief to measure the portions shown as PP1 and DP1 and find out the exact extent of encroachment. The defendants laid the counter claim only in the year 2016. The first Commissioner visited the property in 2013 and his inspection was confined to the existence or otherwise and the measurement of the suit pathway shown as ABCDEFGHIJ in the plaint plan. The first Commissioner did not go into the question of encroachment by the plaintiffs over the portion shown as DP1 in the plaint plan. It is only after the filing of the counter claim, the additional issue was framed regarding the relief of

mandatory injunction sought for, in the counter claim, by the defendants. Therefore, the defendants/petitioners herein could not have had an opportunity to raise the issue regarding encroachment when the Commissioner visited the property in the year 2013. The ground on which the learned Trial Judge was dismissed the application is that it is belated.

5. No doubt, the evidence of P.W.1 was over but an additional issue relating to encroachment was framed only in the year 2018. Therefore, the defendants have filed an instant application at the earliest point of time. I do not think, the Trial Court was right in concluding that the application is belated.

6. Hence, the order of the Trial Court needs interference and hence this Civil Revision Petition is allowed, the order of the Trial Court is set aside, I.A.No. 442 of 2018 will stand allowed. The Trial Court is directed to reissue the warrant to the same Commissioner requiring him to measure the portions shown as PP1 and DP1 in the plaint plan and note down the exact nature of the alleged encroachments and file a report. The

Court shall proceed to dispose of the suit upon receipt of the report of the Commissioner. Consequently, connected miscellaneous petition is closed.

No costs.

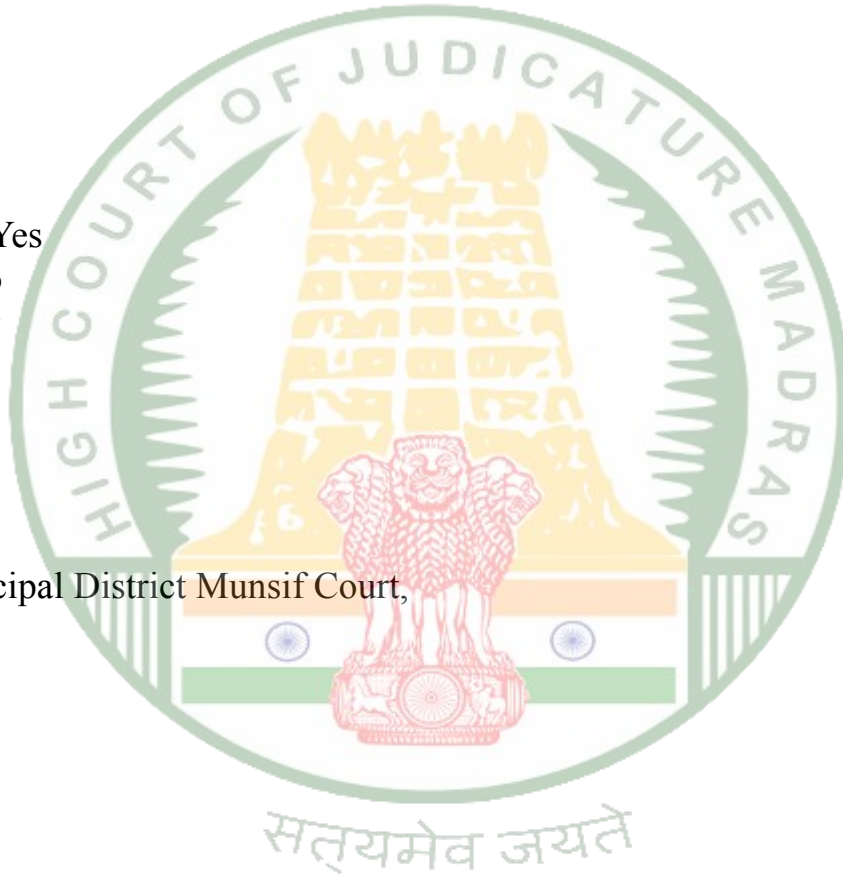
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Internet:Yes
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Speaking

To:

The Principal District Munsif Court,
Erode.

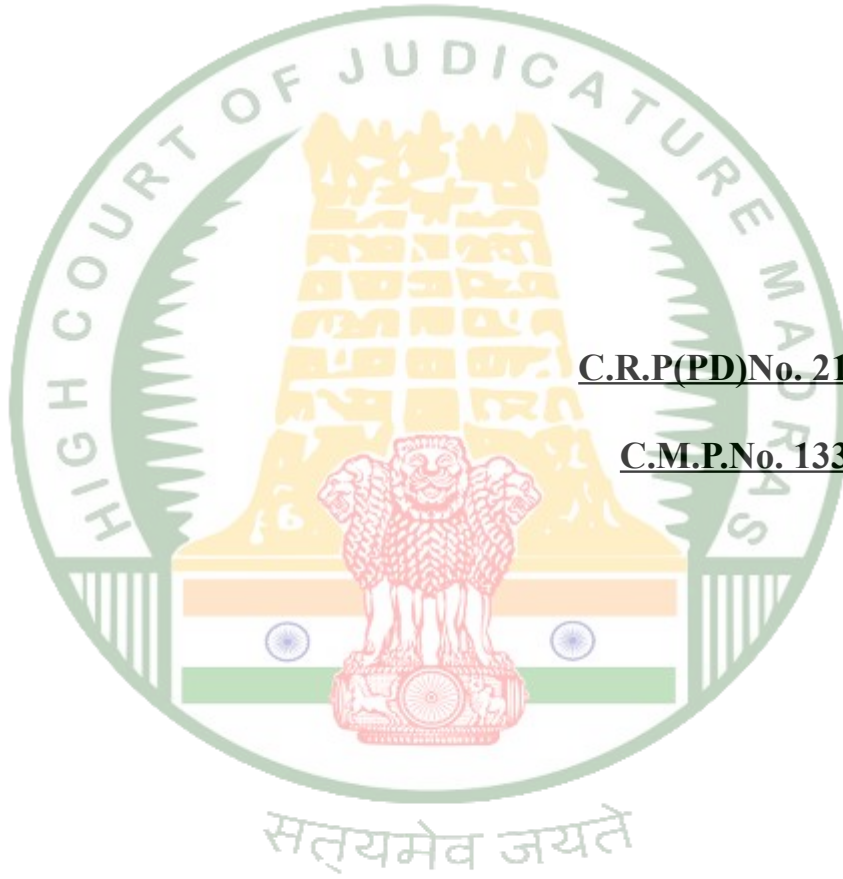


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R.SUBRAMANIAN, J.

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