

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.09.2020

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD).No.1527 of 2017

and

C.M.P.No.7106 of 2017

1.Pachiyappa Mooppan
2.Vijaya
3.Venkatesan
4.Kumaresan

.. Petitioners

Vs.

Sengottaiyan @ Sengodan

.. Respondent

Prayer: This Civil Revision Petition is filed under Article 227 of Constitution of India praying to set aside the petition and order dated 17.03.2017 made in I.A.No.417 of 2016 in O.S.No.230 of 2016 on the file of the Principal District Munsiff Court, Salem.

For Petitioners : Mr.S.Siva Shanmugam

For Respondent : Ms.J.Prithivi
for Mr.Kaithamalai Kumaran

ORDER

The matter is heard through Video Conferencing.

2.This Civil Revision Petition is filed to set aside the petition and order

dated 17.03.2017 made in I.A.No.417 of 2016 in O.S.No.230 of 2016 on the file of the Principal District Munsiff Court, Salem.

3.The petitioners are the defendants and respondent is the plaintiff in O.S.No.230 of 2016 on the file of the Principal District Munsiff Court, Salem. The respondent filed the said suit for declaration of right of pathway as detailed in the suit schedule (1) of the property, mandatory injunction directing the petitioner to restore the pathway in the Schedule (1) of the property and for permanent injunction. Along with the suit, the respondent filed I.A.No.417 of 2016 for appointment of an Advocate Commissioner to measure the suit schedule property with the help of qualified surveyor and file his report with plan. The petitioners filed counter affidavit and opposed the same. The learned Judge, by the order dated 17.03.2017 allowed the I.A. and appointed the Advocate Commissioner.

4.Against the said order dated 17.03.2017 made in I.A.No.417 of 2016, the petitioners have come out with the present Civil Revision Petition.

5.The learned counsel appearing for the petitioners submitted that the learned Judge failed to see that petition filed by the respondent is only to

gather the evidence. Even according to the respondent, the pathway was obliterated in Purattasi 2015 (September - October 2015) and suit was filed on 30.03.2016 and it is for the respondent to prove the existence of pathway prior to the date of filing of the suit. Even as per the pleadings in the plaint, no pathway is in existence. Hence, the prayer now sought for to measure the foot pathway with the help of Surveyor is unsustainable and question of measuring non existence of foot pathway does not arise. The respondent has to prove his case by letting in evidence instead of gathering evidence by way of appointing Advocate Commissioner and prayed for setting aside the order of the learned Judge passed in I.A.No.417 of 2016 and for allowing the present Civil Revision Petition.

6.Per contra, the learned counsel appearing for the respondent contended that the respondent has right of pathway and he was enjoying the same for long time. Suddenly the petitioners obliterated the pathway and are preventing the respondent from using the said pathway. The appointment of Advocate Commissioner is to measure the said pathway with the help of Surveyor and note down the physical features and minimize the oral evidence. The learned Judge has given valid reason for allowing the I.A. and appointing the Advocate Commissioner and prayed for dismissal of the Civil

Revision Petition.

7. Heard the learned counsel appearing for the petitioners as well as the learned counsel appearing for the respondent and perused the entire materials on record.

8. The respondent has filed the suit for declaration that he has right of pathway and for mandatory injunction and for permanent injunction. According to the respondent, even though his mother purchased 40 cents in larger extent, she was allotted specific 40 cents from and out of the larger extent. The respondent inherited the said property and in occupation of the Government land by paying B memo. The petitioner denied existence of pathway as well as the claim of the respondent that they have obliterated the said pathway. The learned Judge considering the materials on record, has held that whether the respondent is enjoying the specific 40 cents or whether he has right of pathway can be decided only by appreciating the evidence let in by the parties. In spite of such finding, the learned Judge has appointed an Advocate Commissioner as prayed for. When the respondent is claiming declaration of pathway and the petitioners have obliterated the pathway, it is for the respondent to prove his claim by letting in acceptable oral and

documentary evidence during trial.

9. It is well settled that Advocate Commissioner cannot be appointed to collect evidence on behalf of the parties. In the present case, the appointment of Advocate Commissioner amounts to only gathering evidence on behalf of the respondent. Therefore, the order of the learned Judge is erroneous and the learned Judge has committed an error by allowing the I.A. For the above reasons, the order of the learned Judge is liable to be set aside and it is hereby set aside.

10. In the result, the Civil Revision Petition is allowed. Consequently, the connected Miscellaneous Petition is closed. No costs.

18.09.2020

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Index : Yes / No

Internet : Yes / No

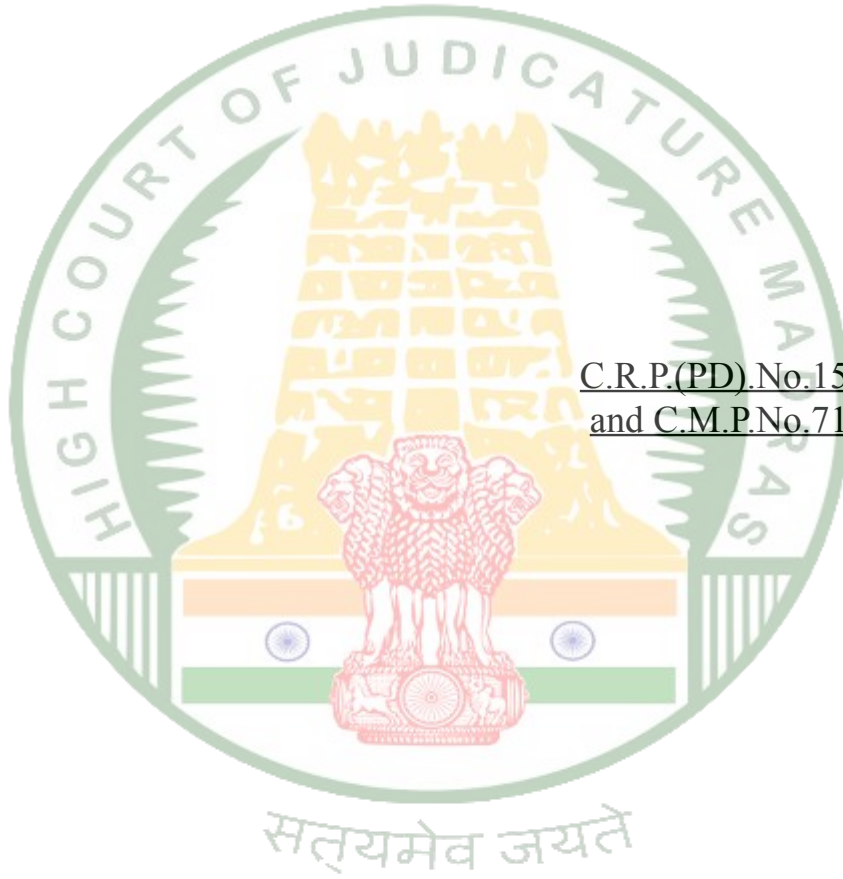
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To

The Principal District Munsif,
Salem.

V.M.VELUMANI, J.

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