

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.08.2020

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.R.P.(PD).No.3912 of 2018
and
C.M.P.No.21713 of 2018

Dhanapal

...Petitioner

Vs.

Chinnasamy

...Respondent

Prayer: Civil Revision Petition filed under Article 227 of Indian Constitution, to set aside the fair and decreetal order dated 04.10.2018 passed in I.A.No.108 of 2018 in O.S.No.5 of 2018 by the learned District Munsif-cum-Judicial Magistrate, Pennagaram.

For Petitioner : Mr.Arun Anbumani
For Respondent : Mr.M.Senthamizh Selvan.

ORDER

This Civil Revision Petition has been filed to set aside the fair and decreetal order dated 04.10.2018 in I.A.No.108 of 2018 in O.S.No.5 of 2018 passed by the learned District Munsif-cum-Judicial Magistrate, Pennagaram.

2. The defendant in the suit in O.S.No.5 of 2018 has come up with this Civil Revision Petition questioning the order of appointment of a Commissioner to inspect the suit properties and to file a report on the physical features, in I.A.No.108 of 2018. The suit is for a declaration of easementary right of way on the basis of necessity. The parties are brothers and there was partition between them on 11.09.2013. According to the plaintiff, he is entitled to certain right over the property allotted to the defendant under the partition deed. He would also claim that there is no alternative pathway to reach those properties. This application was resisted by the defendant contending that the plaintiff has got a right of way to each one of the properties that were allotted to him under the partition deed through a different road in existence, therefore, he cannot claim a right of easement of necessity over the land belonging to the defendant. It is also contended that the plaintiff had sold certain properties and by including

those properties in the suit, he cannot claim right of way for those properties also.

3. The Trial Court upon consideration of the facts and circumstances of the case concluded that, considering the nature of the suit, a Commissioner's report would be very helpful in deciding the dispute between the parties as it would avoid the need for voluminous oral evidence regarding the existence of the pathway, the right of the plaintiff and the availability of alternative pathway or otherwise. On the said conclusion, the learned Trial Judge appointed a Commissioner to inspect the property and to file a report. Aggrieved, the petitioner has come up this petition.

4. Heard, Mr.Arun Anbumani,, learned counsel appearing for the petitioner and Mr.M.Senthamizhselvan, learned counsel appearing for the respondent.

5. Mr.Arun Anbumani, learned counsel appearing for the petitioner would vehemently contend that the partition deed dated 11.09.2013 entered into between the parties would itself show the availability of alternative access to the plaintiff's properties and therefore, appointing of a Commissioner is absolutely unnecessary to demonstrate the existence of the pathway. He would also further contend that the plaintiff had sold certain properties, therefore he cannot seek a right of way for those properties also.

6. Contending contra, Mr.M.Senthamizhselvan, learned counsel appearing for the respondent/plaintiff would submit that the suit being one for a right of way on the basis of easement of necessity, the plaintiff has to prove that the suit pathway is the only access to his land and he has no other alternative pathway. This could be demonstrated only by seeking an appointment of Commissioner, which would reduce voluminous oral evidence. He would also point out that the appointment of a Commissioner would be helpful for both the parties, in as much as, the defendant can also

show the existence of the alternative pathway to the Commissioner.

7. I have considered the rival submissions.

8. The suit is one for a right of way on the basis of easement of necessity. It is for the plaintiff to establish that he has no alternative right of way except the suit property over which he claims the right. The Trial Court taking into account the nature of the suit, the relief sought for, the burden of proof regarding the existence or otherwise of the pathway and regarding the availability of alternative pathway has concluded that Commissioner's report is absolutely necessary in the case on hand. I do not see any reason to take a different view. Of course, in the partition deed certain boundaries are shown as Road or existing pathways. All that will have to be tested only at the time of trial.

9. Mr.Arun Anbumani would attempt to take me through the boundary description in the partition deed to show that all the properties have right of access from the existing road. I do not think I can look in to

the recitals in the documents and pronounce upon the same at this stage that too in a Revision Petition. The question whether such access is available at all and the question whether the plaintiff has got a easementary right of necessity over the defendant's property will have to be decided only at the time of the trial of the suit. I am convinced that the Commissioner's report in the case on hand would be a handful evidence, which will enable the Court to adjudicate upon the rights of the parties in an effective manner. I therefore find no reason to interfere with the order of the Trial Court.

Hence this Civil Revision Petition is dismissed. No costs.
Consequently, connected Miscellaneous Petition is also closed.

13.08.2020

Internet: Yes

Index : Yes/No

Speaking/Non Speaking order

dna

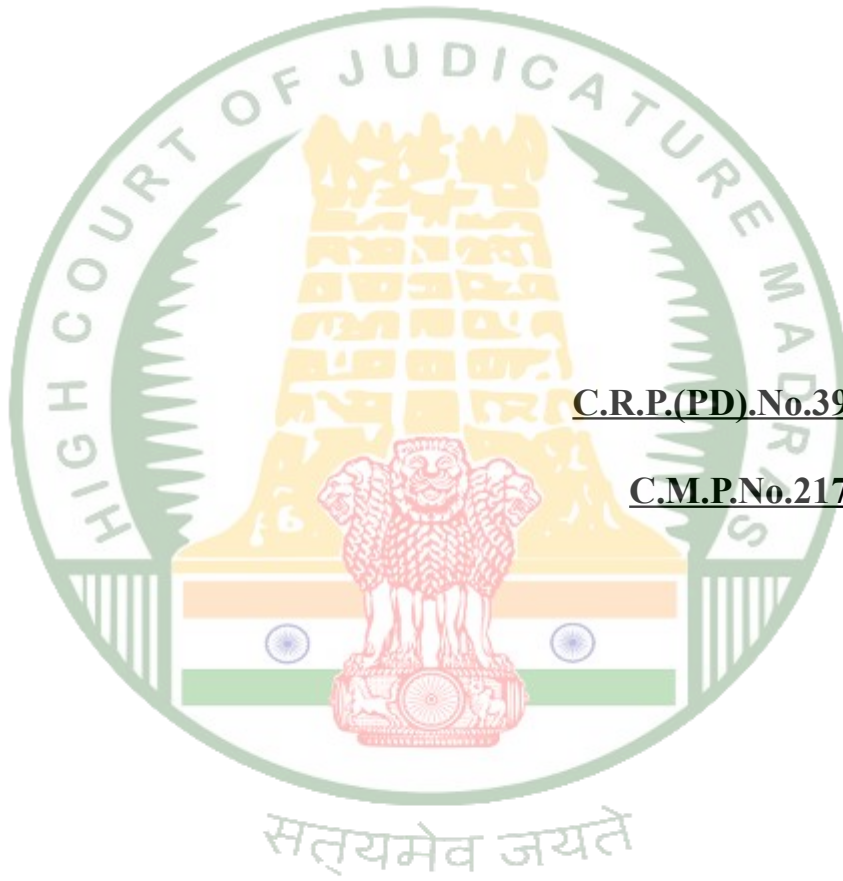
To

The District Munsif-Cum-Judicial Magistrate, Pennagaram.

R.SUBRAMANIAN, J.

dna

CRP.(PD).No.3912 of 2018
and
CMP.No.21713 of 2018



C.R.P.(PD).No.3912 of 2018
and
C.M.P.No.21713 of 2018

WEB COPY

13-08-2020