

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 19.04.2021

Pronounced on : 26.04.2021

CORAM

**THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN**

C.R.P.(PD).No.107 of 2019

and

C.M.P.No.908 of 2019

1.G.Sethuram

...Petitioner / 5<sup>th</sup> Respondent / 5<sup>th</sup> Defendant

Vs.

1.M/s.Akeyem Sons,  
a partnership firm,  
rep. by it Authorised Signatory,  
M.K.Mohammed Sheriff,  
carrying on business,  
No.68, Sembudoss Street,  
Chennai – 600 001.

... 1<sup>st</sup> Respondent/Petitioner/Plaintiff

2.Kanagavalli

3.Mathavan

4.Muralidharan

5.Vijayalakshmi

... Respondents 2 to 5/Respondents 1 to 4/Defendants 1 to 4

(The respondents 2 to 5 given up  
in this Civil Revision Petition  
since they remained ex parte in the  
suit and application.)

Prayer:- This petition filed under Section 115 of the Code of Civil Procedure, 1908, to set aside the judgment and order dated 22.10.2018 made in I.A.No.4309 of 2018 in O.S.No.2718 of 2013 on the file of the XIII Assistant Judge, City Civil Court, (FAC) XII Assistant Court, Chennai.

For Petitioner : Mr.A.S.Narasimhan

For Respondent : Mr.D.Moorthy

**ORDER**

This Revision Petition has been filed by the 5<sup>th</sup> defendant in O.S.No.2718 of 2013 pending on the file of the XIII Assistant City Civil Court Chennai, questioning the order passed in I.A.No.4309 of 2018 in O.S.No.2718 of 2013.

2.O.S.No.2718 of 2013 had been filed by the plaintiff, Akeyam Sons, against five defendants seeking a judgment and decree in the nature of permanent injunction restraining the defendants from demolishing the compound wall of the suit property and thereby interfering with peaceful possession and also for costs of the suit.

3.The suit property had been described in the schedule as land and building together with compound wall at Plot No.10, Old Door No.16, New Door No.35, Giri Road, T.Nagar, Chennai - 600 017 measuring 1(one) ground and 1647 sq.ft.

4.In the plaint it had been stated that the plaintiff is a registered Partnership firm and had purchased the suit property by a registered Sale Deed dated 28.05.2010 registered as Doc.No.1171 of 2010 on the file of the Sub-Registrar, T.Nagar. The plaintiff claimed that they are in peaceful possession of the suit property. The plaintiff had leased out the property to RCM Infotech India Private Limited. When the plaintiff purchased the suit property there was a 4 feet compound wall existing around the suit property. They claim they raised the height of the wall from 4 feet to 10 feet. The defendants raised objections. The defendants threatened to demolish the compound wall. The plaintiff preferred a police complaint. The plaintiff claimed that they applied to the Taluk Surveyor to measure the property, but the defendants refused to co-operate. The plaintiff also claimed that the defendants forcibly removed the boundaries stone on the Southern Eastern side. It is under these circumstances that the suit had been filed seeking protection from

interference of possession and protection from demolition of the compound wall.

5.A written statement had been filed by the 5<sup>th</sup> defendants, G.Sethuraman. He stated that he was the absolute owner of house site bearing Plot No.12/part, Giri Road, T.Nagar, Chennai, measuring 2400 sq.ft., having purchased the same on 16.09.1988 by Sale Deed registered as Doc.No.4584 of 1988. He further stated that his wife is the owner of Plot No.12, Giri Road, T.Nagar, Chennai – 600 017 having purchased the same by Sale Deed dated 25.10.1999 registered as Doc.No.2317 of 1999 on the file of the Sub-Registrar, T.Nagar. It was claimed that the plaintiff was attempting to encroach the property of the defendants from North to South 5 feet on both side East to West 83 Feet on Northern side. The 5<sup>th</sup> defendant claimed that he had also given a police complaint. The 5<sup>th</sup> defendant denied the allegations in the plaint. The 5<sup>th</sup> defendant stated that the suit should be dismissed.

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6.On the filing of the written statement, issues have been framed and the parties have been invited to adduce evidence. The trial had commenced and had progressed. The 5<sup>th</sup> defendant had been examined as DW-1 and had also been cross-examined.

7. At that stage, the 5<sup>th</sup> defendant filed I.A.No.4309 of 2018 seeking appointment of an Advocate Commissioner to measure the properties of the plaintiff and the 5<sup>th</sup> defendant with the assistance of a Taluk Surveyor.

8. In the affidavit filed in support of the said application, it had been stated that the 5<sup>th</sup> defendant did not measure the property purchased by him and his wife. The entire extent was kept vacant due to another litigation pending with respect to the same property. It had been stated that to determine whether the plaintiff was putting up construction within his property or had entered into the property of the 5<sup>th</sup> defendant, it was necessary that a surveyor should be appointed.

9. A counter had been filed denying necessity for appointment of an Advocate Commissioner. It had been stated that the suit was only for injunction and it was with respect to possession of the plaint schedule property bearing Plot No.10, Old Door No.16, New Door No.35, Giri Road, T.Nagar, Chennai - 600 017 and it is to be adjudicated only with reference to the evidence adduced and available on record. It had been stated that an Advocate Commissioner cannot determine whether there

had been encroachment during the raising of the height of the compound wall. The 5<sup>th</sup> defendant cannot seek appointment of an Advocate Commissioner in a suit filed by the plaintiff. It was claimed that the Application should be dismissed.

10.This application came for consideration before the XIII Assistance City Civil Court, Chennai, on 22.10.2018. The said application was dismissed. Questioning that order the present Civil Revision Petition has been filed.

11.The learned Judge after extracting the relevant pleadings, had relied on *Chinnathambi and others Vs. Anjalai* reported in **2006 (5) CTC 494**, wherein it had been held that a disputed question of fact of possession can be adjudicated by the Court only after framing issues and recording evidence and an Advocate Commissioner cannot be appointed for collecting evidence.

12.Reliance was also placed in *Chandrasekaran Vs. 6 others Vs. V.Doss Naidu*, reported in **2006 2 LW 159**, where again it was stated that the power has been conferred to the Court only to appoint Commissioner to make local inspection and not to collect evidence.

13.Reference had also been made to ***Elango Vs. Kasthuri*** reported in **2009 (5) CTC 706**, where again it had been held with respect to the factum of possession that the Court alone could gather evidence and cannot entrust the said matter to the Advocate Commissioner to collect evidence.

14.It is seen that I.A.No.4309 of 2019 has been filed by the 5<sup>th</sup> defendant in the suit. The trial had commenced. The parties have grazed the witness box. The onus is on the plaintiff to first establish possession.

15.In this suit filed by the plaintiff, the 5<sup>th</sup> defendant had not filed any counter claim to seek as a matter of right, appointment of an Advocate Commissioner or Taluk Surveyor to measure both the property of the plaintiff and the property of the 5<sup>th</sup> defendant.

16.It is to be noted that in parallel proceedings in C.R.P.No.106 of 2019 which had arisen against the order passed in I.A.No.4308 of 2018 in O.S.No.2439 of 2013 which is also pending before the very same Court, this Court had directed appointment of an Advocate Commissioner to only examine and report whether there is a compound

wall in existence or not between the true properties. On the facts of this case, the plea for appointment of an Advocate Commissioner cannot be granted particularly since evidence had been recorded and also because it is the 5<sup>th</sup> defendant who seeks appointment of an Advocate Commissioner.

17.Filing of two separate applications for the same relief merely because two separate suits are pending cannot be appreciated. The order of the learned Judge is upheld and the Civil Revision Petition is dismissed. No order as to costs. Consequently, the connected Civil Miscellaneous Petition is closed.

26.04.2021

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Index : Yes / No

Internet : Yes / No

Speaking order : Yes / No

To,  
The XIII Assistant City Civil Court,  
Chennai.

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**C.V.KARTHIKEYAN, J.,**

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Pre-Delivery Order made in  
C.R.P.(PD).No.107 of 2019

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