

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.06.2021

CORAM :

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

CRP(PD)Nos.1203 and 1204 of 2016
and CMP No.6596 of 2016

1. Chinnappa Gounder
[Chennippa Gounder (died)
2. Ramasamy Gounder
3.Velumani
4.Eswaramoorthy
5.Prakash
6.Srinivasan ... petitioners in both cases

Vs.

1.K.Thangayammal
2.A.Duraisamy
3.D.Dhakshinamoorthy ... Respondents in both cases

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the fair and decretal order dated 28.03.2016 in IA.Nos.175 and 176 of 2016 respectively in OS.No.92 of 2007 on the file of the II Additional District Munsif, Erode.

For Petitioners	:	Mr.I.C.Vasudevan
For Respondents	:	Mr.A.Sundaravadhanan for R1. No appearance for R2 and R3.

COMMON ORDER

(This case has been heard through video conference)

The petitioners herein are the defendants 3 to 9 in OS.No.92 of 2007.

2. The respondent/plaintiff filed the suit in OS.No.92 of 2007 praying for mandatory injunction directing the defendants 1 and 2 to remove the foundation wall constructed in the suit lane admeasuring 2½ feet breadth and 95feet length given in violet colour in the plaint plan within the time specified by the Court and to grant permanent injunction restraining the defendants 1 and 2 and their men from putting up any construction.

3. After commencement of trial, on the side of the plaintiff, the plaintiff was examined as PW1 and certain documents were marked. On the side of the defendants, defendants 1 and 2 were examined as DW1 and DW2 and cross examination was over. DW3 has also let in evidence in chief by way of proof affidavit, at that stage, the plaintiff had filed IA.No.99 of 2016 under Order 6 Rule 17 seeking for amendment of

plaint and the defendants had filed counter. Whereas, the plaintiff had withdrawn the said IA.No.99 of 2016 and subsequently, the plaintiff had also filed IA.No.111 of 2016 claiming easement of necessity alone in the suit pathway and after contest, the said application was dismissed on 15.03.2016. The plaintiff has not filed any revision as against the dismissal of IA.No.111 of 2016.

4. The petitioners/defendants finding that it was necessary to cross examine the plaintiff with regard to the right of title over the suit property on the basis of the representation made by the subsequent petition filed by the plaintiff in IA.No.99 of 2016 and IA.No.111 of 2016 and filed petitions in IA.Nos.175 and 176 of 2016 in OS.No.92 of 2007 seeking to reopen the plaintiff's evidence and to recall PW1 for further cross examination.

5. The trial Court finding that the petition and orders in IA.Nos.99 and 111 of 2016 are on record and also observing that the matter can be agitated at the time of final hearing and no revision has been preferred as against the said orders had dismissed the petitions in

IA.Nos.175 and 176 of 2016 against which the present revision has been filed.

6. The learned counsel for the petitioner would submit that originally suit was filed for mandatory injunction to direct the defendants 1 and 2 to remove the foundation wall constructed in the suit lane. Subsequently, after the evidence was let in on behalf of the defendants 1 and 2, the evidence in respect of defendants 1 and 2 was closed and after filing proof affidavit of 3rd defendant, IA.Nos.99 and 111 of 2016 came to be filed by the plaintiff. The pleadings made in IA.Nos.99 and 111 of 2016 are relevant for deciding the issues in the suit, since, these pleas and claim of amendment of plaint and easement of necessity have been taken by the plaintiff after the plaintiff's evidence was closed. Though, the IAs were dismissed and formed part of the Court records, since, the plaintiff has pleaded easement of necessity, which was totally a different relief, there is every need for the defendants to cross examine the plaintiff in respect of the aspect and thereby the petitions were filed. Moreover, the petitioners/defendants are entitled to bring the different claim made by the plaintiff on record by subjecting her to cross examine

and eliciting the evidence from her. Whereas, the trial Court had erroneously dismissed the petition stating that petitions and the dismissal orders formed part of the record and it could be agitated during final hearing. The petitioners/defendants are entitled to let in additional evidence with regard to the same and only by examining the plaintiff, the different stand taken by the plaintiff can be brought on record and thereby would seek to set aside the order of dismissal in IA.Nos.99 and 111 of 2016 and direct the trial Court to permit the petitioners to reopen the plaintiff's evidence and to recall PW1 for further cross examination.

7. The learned counsel for the petitioners would further submit that on principle the orders passed in I.A. cannot be taken on record without the same being marked by way of evidence.

8. Mr.A.Sundaravadhanan, learned counsel appearing for the respondent/plaintiff would submit that the petitions in IA.Nos.99 and 111 of 2016 are available on record and the trial Court finding that it could be agitated at the time of final hearing of the suit did not find it necessary to

reopen and recall PW1. He would further submit that there is no error or infirmity in the orders passed by the trial Court and he would submit that the order of the trial Court needs no interference.

9. Heard the counsels and perused the materials on record.

10. The petitioners in this case are arrayed as defendants 3 to 9 in OS.No.92 of 2007, originally the suit was filed for mandatory injunction. After commencement of trial and after recording the evidence on the side of the plaintiff and after the evidence of defendants 1 and 2 were over, the plaintiff had filed IA.No.99 of 2016 seeking for amendment of plaint and subsequently, another IA.No.111 of 2016 had been filed for amendment of plaint claiming easement of necessity in the suit pathway and both petitions have been dismissed. These petitions have been filed after commencement of trial and after examination of PW1, DW1 and DW2.

11. Though, the trial Court has stated that the documents are part of the Court records, the issue can be decided at the time of deciding

the suit, this Court is of the opinion the plaintiff has to be recalled and the evidence has to be reopened and the plaintiff has to be examined with to the pleadings made in the petitions, since, the plaintiff has taken different pleas.

12. In view of the same, both the civil revision petitions are allowed and the orders made in IA.Nos.175 and 176 of 2016 in OS.No.92 of 2007 dated 28.03.2016 on the file of II Additional District Munsif, Erode are hereby set aside. The trial Court shall reopen the plaintiff's evidence and recall PW1 for further cross examination.

13. It is submitted by the counsel for the respondent/plaintiff that the plaintiff is aged about 75years and suitable directions may be issued to the trial Court to fix a date for appearance of PW1 and the cross examination of PW1 may be completed on the same day itself.

14. In view of the above, the trial Court shall fix a date for appearance of PW1 and it is made clear and taking into consideration the age of the plaintiff, the counsel for the defendant shall cross examine her

on the same day of her appearance and if they fail to cross examine her, they will loose the chance of cross examination in future. Consequently, connected Miscellaneous petition is closed. No costs.

15.06.2021.

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To
The II Additional District Munsif, Erode.



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A.D. JAGADISH CHANDIRA, J.,

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