

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.08.2021

CORAM:

THE HONOURABLE MR.JUSTICE G.CHANDRASEKHARAN

C.R.P. (PD) No.1583 of 2021
and C.M.P.No.12344 of 2021

D.Karuppayee

...

Petitioner /
Defendant

versus

B.Anand

...

Respondent /
Plaintiff

PRAYER: Civil Revision Petition has been filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order dated 21.04.2021 made in I.A.No.3 of 2019 in O.S.No.168 of 2020 on the file of the District Munsif Court, Komarapalayam, by allowing this Civil Revision Petition.

For Petitioner : Mr.R.Marudhachalamurthy

ORDER

This Civil Revision Petition is filed to set aside the order dated 21.04.2021 made in I.A.No.3 of 2019 in O.S.No.168 of 2020 passed by the learned District Munsif, Komarapalayam.

2. I.A.No.3 of 2019 was filed under Order 26 Rule 9 and under Section 151 of C.P.C., for appointing an Advocate Commissioner, to measure the suit property with the help of Taluk Surveyor to find out the encroachment made by the petitioner, which is shown as C,D,E,F, in the yellow colour in rough sketch and file the report along with the plan.

3. The case of the respondent is that, he is the owner of the suit property by purchase on 04.02.2011. On the west of his property, the property of petitioner's husband Duraisamy situate. The respondent is working as a driver. Taking advantage of his absence, the petitioner encroached an extent of 7 feet East-West and $45\frac{1}{4}$ feet North-South on 13.06.2018. The encroached portion is shown as C,D,E,F, in yellow colour in rough sketch. In spite of repeated requests, the petitioner has not chosen to remove the encroachment. Therefore, he filed the petition. It is absolutely necessary to establish the encroachment by way of appointing the Advocate Commissioner with Taluk Surveyor.

4. This petition was resisted by the respondent alleging that the petitioner had not encroached the respondent's property. This is a suit for mandatory injunction and it is not necessary to appoint an Advocate Commissioner. Therefore, the petitioner has sought dismissal of the petition.

5. The learned trial Judge in his order dated 21.04.2021 found that, in view of the specific averments made in the plaint that the petitioner encroached the respondent's land, it is necessary to appoint an Advocate Commissioner along with the Taluk Surveyor to note down the physical features and also to identify the encroached portion. The appointment of the Advocate Commissioner along with Taluk Surveyor will help the Court in resolving the issue conclusively. In such view of the matter, the learned trial Judge allowed the petition.

6. The learned counsel for the petitioner submitted that, it is for the respondent to prove through oral and documentary evidence with regard to the alleged encroachment made by the petitioner. He cannot seek appointment of Advocate Commissioner with the help of Surveyor and then

seek to fix the portion alleged to have been encroached by the petitioner. The respondent alone has to prove his case by independent evidence and not through to the aid of the Advocate Commissioner with Taluk Surveyor. Therefore, he seeks to set aside the order of the learned District Munsif, Komarapalayam.

7. Considered the submissions made by the learned counsel for the petitioner.

8. The plaint averments shows that the suit property in Survey No.274/1 within the specified boundary omitted by the respondent by purchase on 04.02.2011. It is specifically alleged that the petitioner, who is the neighbour, had encroached to an extent of 7 feet East-West and 45¹/₄ feet North-South of the suit property. The encroached portion is shown as C,D,E,F, in yellow colour in rough sketch. Even in the description of the property, it is mentioned that the encroached portion is shown as C,D,E,F, in yellow colour in rough sketch.

9. The petitioner totally deny that there is encroachment. Therefore, the lis involved in this case, is whether there is an encroachment made by the petitioner in the suit property belongs to the respondent. If so, what is the extent, whether it is 7 feet East-West and 45¹/₄ feet North-South on the west of the suit property as claimed by the respondent. This is highly technical aspect. In a suit for mandatory injunction, it is absolutely necessary to find out the exact measurement of alleged encroachment for proper adjudication. It is said in the plaint that the petitioner raised a wall in the encroached portion and the wall was sought to be removed by way of mandatory injunction. To determine as to whether there is any encroachment and wall is put up in the encroached portion, it is essential and necessary that the Advocate Commissioner has to be appointed with the help of Taluk Surveyor to measure the property of both the parties, find out if there is any encroachment and if there is any encroachment, submit a report to the Court along with the report and plan. The learned trial Judge has rightly considered the issue and allowed the petition. This Court finds no reason to interfere with the order of the learned District Munsif, Komarapalayam.

10. In such view of the matter, the order passed by the learned District Munsif, Komarapalayam, in I.A.No.3 of 2019 in O.S.No.168 of 2020 dated 21.04.2021, is hereby confirmed, this Civil Revision Petition is dismissed. Consequently, connected Miscellaneous Petition is closed. However, there is no order as to costs.

10.08.2021

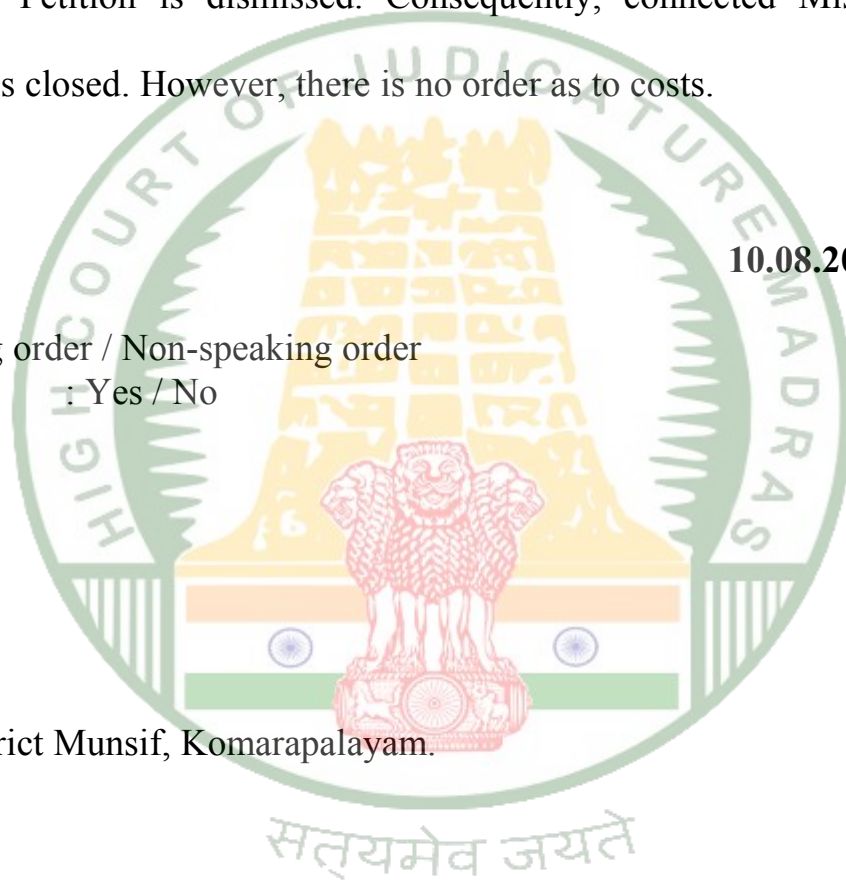
Speaking order / Non-speaking order

Index : Yes / No

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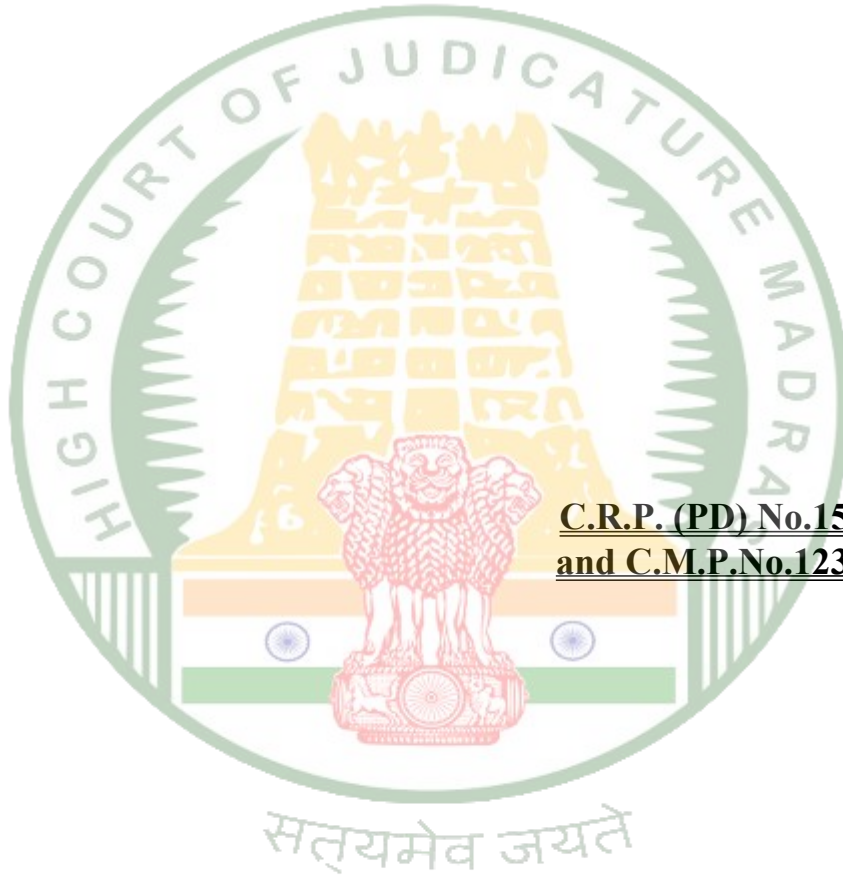
The District Munsif, Komarapalayam.



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G.CHANDRASEKHARAN, J.

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