



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 30.11.2021

CORAM:

THE HONOURABLE MS.JUSTICE P.T.ASHA

C.R.P. (PD) (MD) No.1876 of 2021

and

C.M.P. (MD) No.10057 of 2021

WEB COPY

1.G.Renuka

2.S.Chennakrishnan

.. Petitioners/Petitioners/
Plaintiffs

-vs-

O.Ramasamy @ Raja

.. Respondent/Respondent/
Defendant

Prayer :- Petition filed under Article 227 of the Constitution of India to call for the records relating to the order dated 20.10.2021 made in I.A.No.1 of 2021 in O.S.No.35 of 2011 on the file of the District Munsif Court, Periyakulam and set aside the same.

For Petitioners : Mr.P.Shanmugam

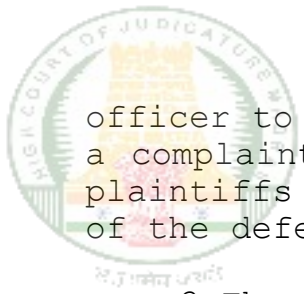
ORDER

The plaintiffs, in a suit for a declaration, a consequential permanent injunction and a mandatory injunction, are the revision petitioners before this Court challenging the order dated 20.10.2021, passed by the learned District Munsif, Periyakulam, dismissing their application seeking appointment of a second Commissioner to note down the changes that had occurred to the suit property after the initial report of the Commissioner.

2.The facts in brief, which have given rise to the above revision, are as follows:-

2.1.The petitioners had filed the suit in O.S.No.35 of 2011 on the file of the District Munsif, Periyakulam for the relief stated hereinabove contending that the suit "B" Schedule I and II Items of property belonged to them and the "A" Schedule property is described as the pathway measuring 13½ feet in width which is the access to the properties described in the "B" Schedule properties. The plaintiffs would contend that it is only "A" Schedule pathway, which is the access to their property and also for the owners of the property on either side of the pathway.

2.2.It is the case of the plaintiffs that the defendant, who had no right to "A" Schedule pathway, obstructed the use of the pathway by putting up a fence in the common pathway on 30.07.2010. The complaint to the police was also of no use. Thereafter, the plaintiffs had approached this Court for a direction to the police

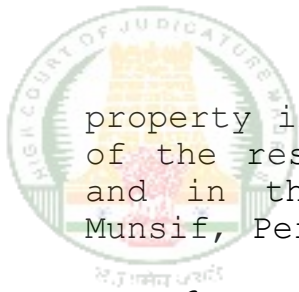


officer to register a case and pursuant to the orders of this Court, a complaint has been registered in Crime No.15 of 2011. Since the plaintiffs were not able to prevent the high-handed illegal action of the defendant, they had come forward with the above suit.

3.The defendant had filed a written statement *inter alia* denying the very existence of "A" Schedule pathway. It is his specific case that in none of the documents, under which, the plaintiffs claimed a right to their property, the common pathway has been described. The pathway, which has been laid in S.Nos.103 and 104, was meant exclusively for the use of the parties, who approach the plots in the said survey numbers and it is not a public/common pathway. He had also stated that the plaintiffs already have an access through the East-West pathway comprised in S.No.106, which is much broader than the pathway, which the plaintiffs now claim a right to. The Court Commissioner, who had inspected the property, had put forth the true facts in her report. It appears that the Advocate Commissioner had been appointed by the District Munsif, Periyakulam in I.A.No.88 of 2011. The said Commissioner had noted down the existence of a North-South unplastered wall built with bricks and a portion with tin-sheet at which point the pathway ended. The Advocate Commissioner has also noted a pathway on the southern side at the back of the plaintiffs' property, with a well trodden path from this approved pathway, which proceeds northwards. The Commissioner had also observed that the East-West pathway, which is now shown in the "A" Schedule is not an approved pathway and has been used only by the land owners on the either side for their convenience. The Commissioner had also submitted a plan.

4.The plaintiff had, thereafter, filed I.A.No.1 of 2021, which is the application now impugned before this Court, contending that after the inspection by the earlier Advocate Commissioner, the wall which has been described as CH in the earlier plan had been removed and the pathway has been restored and this change had to be noted for which purpose, a Commissioner had to be appointed. The respondent had filed a rather vague counter only denying the averments contained in the application. The learned Judge proceeded to dismiss the application. He had observed that the plaintiffs had already filed a petition to amend the plaint to delete the relief of mandatory injunction on the ground that the CH wall had been brought down by the defendant himself and therefore, the relief of mandatory injunction having been given up, there was no necessity to once again note down the existence or the non-existence of the wall. Challenging the same, the revision petitioners are before this Court.

5.Learned counsel appearing for the petitioners would vehemently contend that the appointment of the Advocate Commissioner to note down the change is vital for an effective adjudication of the dispute between the parties. The Commissioner would help the



property in question. Further, there was no objection on the side of the respondent to the appointment of the Advocate Commissioner and in these circumstances, the order of the learned District Munsif, Periyakulam is erroneous.

6. Heard the learned counsel for the petitioners and perused the records.

7. The plaintiffs had filed the suit only for a declaration that the schedule property is a common pathway. Thereafter, the plaintiffs have amended the plaint to include the relief of injunction as well as a mandatory injunction to remove the illegal construction, viz., the brick wall described as CH in the Commissioner's sketch. It appears on the statement of the plaintiffs that pending the suit the wall described as CH in the Commissioner's plan had been brought down by the defendant. The plaintiffs, therefore, sought to have the relief of mandatory injunction strike off, for which purpose, an amendment petition was filed. Therefore, by the amendment, the plaintiffs had given up the claim for a mandatory injunction. The Advocate Commissioner had been appointed originally only to note down the alleged encroachment on the suit property. The petitioners have themselves admitted that the encroachment had been removed and had sought for the amendment of the prayer. Hence, there is no necessity to have a Commissioner appointed to note down the current status of the pathway, as it is immaterial as to whether or not there is an obstruction in the said pathway by reason of the amendment sought for by the plaintiffs. The learned District Munsif, Periyakulam has rightly dismissed the said application, as this is nothing, but an attempt to gather evidence.

8. In these circumstances, this Civil Revision Petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2021

Sub Assistant Registrar (CS)

abr

Note:-

In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the Advocate / litigant concerned.

<https://hcservices.ecourts.gov.in/hcservices/>



To

The District Munsif,
Periyakulam.

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+1 CC to M/s.P. SHANMUGAM, Advocate (SR-36564[F] dated 30/11/2021)
C.R.P. (PD) (MD) No.1876 of 2021
Dated: 30.11.2021

MA (CO)

RD(16.12.2021) 4P 3C