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C.R.P(PD)(MD).Nos.468 and 469 of 2019

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 06.06.2023

Pronounced on : 10.07.2023

CORAM:

THE HONOURABLE MR.JUSTICE P.VADAMALAI

C.R.P(PD)(MD).Nos.468 and 469 of 2019

and

C.M.P(MD)No.2398 of 2019

1.Parvathiammal
2.Arumugam
3.Chellappa
4.Sundaram
5.Muthukumar

...Petitioners/Plaintiffs
in both CRPs

Vs.

1.Subbiah Konar
2.Palani
3.Shanmugavel

... Respondent/Defendant
in both CRPs

PRAYER in C.R.P(PD)(MD).No.468 of 2019: Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order dated 18.02.2019 passed in I.A.No.1 of 2019 in O.S.No.150 of 2016 on the file of the I Additional District Munsif, Tirunelveli.

PRAYER in C.R.P(PD)(MD).No.469 of 2019: Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the fair



C.R.P(PD)(MD).Nos.468 and 469 of 2019

and decreetal order dated 18.02.2019 passed in I.A.No.2 of 2019 in O.S.No.150 of 2016 on the file of the I Additional District Munsif, Tirunelveli.

For Petitioners : Mr.M.P.Senthil in both CRPs

For Respondents : Mr.D.Venkatesh in both CRPs.

COMMON ORDER

These Civil Revision Petitions are filed against the fair order and decreetal order passed in I.A.Nos.1 of 2019 and 2 of 2019 in O.S.No.150 of 2016 on the file of the I Additional District Munsif Court, Tirunelveli.

2. The brief facts of the case:

The revision petitioners are the plaintiffs in O.S.No.150 of 2016 on the file of the I Additional District Munsif Court, Tirunelveli against the revision respondents/defendants for permanent injunction. The defendants filed their written statement. On the side of the plaintiffs P.W.1 was examined. At this stage, the plaintiffs filed petitions in I.A.Nos.1 of 2019 and 2 of 2019 to reopen the case and to appoint an advocate/commissioner to note down the physical features of the suit property. After hearing both, the Trial Court dismissed both the petitions in I.A.Nos.1 of 2019 and 2 of 2019 in O.S.No.150 of 2016 by passing common order. Aggrieved by the common order of the Trial Court, the



petitioners/plaintiffs moved this Court by way of these Civil Revision Petitions.

3. Heard both side and perused the records in these Civil Revision Petitions.

4. The learned counsel appearing for the revision petitioners has submitted that the plaintiffs' property situated in S.No.641/8. On the southern side of the suit property S.No.641/9 is situated, in which the defendants have no rights. However, the plaintiffs wanted to construct a wall on the southern side leaving 7 feet in his land for maintaining the wall. But, the defendants raised an objection and hence, the suit came to be filed. The suit is pending for evidence of plaintiffs side and P.W.1 was examined. The defendants states that the plaintiffs encroached the property. At this stage, in order to facilitate the evidence, the petitioners filed the petitions to reopen the suit and to appoint an advocate commissioner to note down the physical features of the suit property. Since the main dispute between the parties is regarding the wall, the appointment of advocate commissioner's report would be convenient for easy disposal of the case. The appointment of an advocate commissioner is not collecting evidence and it is only to note down the physical



features. By adducing oral evidence, the physical features of the suit property cannot be decided. Therefore, the impugned order may be set aside and these Civil Revision Petitions may be allowed. In support of his arguments, the learned counsel for the petitioners has relied on the following citations:

- 1) 2016 (3) MWN (Civil) 614 (B.Amutha Vs. Anandhi Sankara Narayanan)**
- 2) 2017 (2) CTC 353 (Shanmugathai Vs. Kamalammal)**
- 3) 2014(5) CTC 85 (Anwar Batcha and Anr. Vs. S.Mahuedoom)**

5. Per contra, the learned counsel for the respondents vehemently argued that the petitioners have filed the main suit seeking bare injunction and on the side of the plaintiff, P.W.1 was fully examined. At this stage, the appointment of the advocate commissioner would set the clock back and the advocate commissioner is not an authorised person to give a finding upon encroachment. In order to prolong the suit, the petitioners have filed the petitions to reopen the case for appointment of the advocate commissioner, to collect evidence on their side. The respondents/defendants have also filed rough sketch along with their written statement. In a suit for bare injunction appointment of the



commissioner is not necessary. The Trial Court has correctly dismissed the petitions and therefore, these Civil Revision Petitions may be dismissed. In support of his arguments, the learned counsel for the respondent has relied on the judgments of this Court as follows:-

1.C.R.P(PD)No.1004 of 2021 (Shanmugam Vs. Mathialagan)

2.C.R.P(PD)No.4118 of 2022 (Elumalai Vs. Pnchaiyaappan and Anr.)

3.C.R.P(PD)No.511 of 2021 (P.Madhurajan Vs. A.Rajendran)

6. On hearing both and on perusal of records, it is clear that the revision petitioners have filed the main suit for permanent injunction restraining the defendants from interfering with the construction of wall with windows in the suit property. There is no dispute that the suit property is situated in S.No.641/8 and the defendants claim right over the property in S.No.641/9, which is southern side of S.No.641/8. The plaintiffs submit that after leaving 7 feet on the southern side of this land, he wants to construct the wall in the southern side. The defendants state that the plaintiff is trying to encroach on their land. There is no bar to seek appointment of advocate commissioner in bare injunction suit. In this case, there is a vital dispute only regarding a wall to be constructed



in the suit property, whether it is within the suit property in S.No.641/8 or within the property in S.No.641/9. From oral evidence of parties it could not be decided, in which portion the suit wall is constructed. If an advocate/commissioner is appointed to note down the physical features of the suit property with assistance of revenue officials, the dispute could easily be solved much less decided. Further, in case of encroachment, appointment of advocate/commissioner is necessary to have clear picture of the property to decide encroachment and to arrive at a fair decision as rightly held by this Court in **2017(2) CTC 353**. There would not be any prejudice caused to the other side in case of appointment of advocate/commissioner. In the above facts and circumstances, the impugned common orders warrant interference and thereby these Civil Revision Petitions are to be allowed.

7. In the result, these Civil Revision Petitions are allowed. The impugned common orders dated 18.02.2019 passed in I.A.Nos.1 of 2019 and 2 of 2019 in O.S.No.150 of 2016 on the file of the I Additional District Munsif Court, Tirunelveli, is set aside and the said petitions are allowed. The learned I Additional District Munsif, Tirunelveli is directed to appoint an advocate/commissioner within a period of two weeks from the date of receipt of a copy of this order for the petition mentioned



C.R.P(PD)(MD).Nos.468 and 469 of 2019

purpose in I.A.No.2 of 2019. No costs. Consequently, connected
Miscellaneous Petition is closed.

10.07.2023

NCC : Yes/No
Index : Yes/No
Internet : Yes/No
vsd

To

- 1.The I Additional District Munsif,
Tirunelveli.
- 2.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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Pre - Delivery Order made in
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