



WEB COPY

C.R.P(MD)No.2028 of 2



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 16.08.2023

CORAM

**THE HONOURABLE MRS JUSTICE K. GOVINDARAJAN
THILAKAVADI**

C.R.P(MD)No.2028 of 2023

Thannier Pandhal Dharmam Paramparai
Arangavalar S.Ramesh Vastad,
S/o.Late Santhana Krishnan, Age 66,
Hindhu, Residential No.964, Merkku Karai,
Saamanthan Kulam, Keelarajaveethi
Thanjavur Down,
Thanjavur Taluk.

... Petitioner/Petitioner/Petitioner/
Plaintiff

Vs.

1.N.Suresh
2.L.Maniraja
3.S.Pakkirisamy Chettiar
4.P.Senthilkumar

... Respondents/Respondents/
Respondents/Defendants

Civil Revision Petition is filed under Article 227 of the Constitution of India, to call for the records of the fair and decreetal order dated 20.01.2023 passed by the Sub-Court, Thanjavur in I.A.No.662 of 2022 in I.A.NO.431 of 2017 in O.S.No.211 of 2017 and set aside the same.

For Petitioners

:Mr.K.Azhageson



ORDER

This civil revision petition is filed against the fair and decreetal order dated 20.01.2023 passed in I.A.No.662 of 2022 in I.A.No.431 of 2017 in O.S.No.211 of 2017 by the Sub-Court, Thanjavur.

2.According to the revision petitioner, the revision petitioner is the trustee of Dhamodara Krishna Jetty Vastad Water Pandhal Charities and the suit land in S.NO.292/1U to an extent of 11.50 of ares 28.4 cents of total 12,373 cents belong to the Trust and for approaching the said land from Thanjavur Soorakottai main road, a path containing 10 feet width is in existence and the said path lies between the property of the respondent 1 and 3. the suit property lies on the back side of the property belonging to the first and fourth respondents.

3.It is further submitted that the land in S.No.292 IV-1 of 1 ares originally belonged to one Govindarajan. While so, the first respondent without executing any registered sale deed, transferred the property in his name. He then executed a sale deed in favour of the second defendant on 30.06.2017 in which, the southern boundary was erroneously mentioned as the property of the third respondent in stead of pathway, belonging to the petitioner herein. Therefore, the first respondent has encroached the



approaching pathway of petitioner's property. Now, the second respondent is putting up construction and planned to built the toilet and bathroom by laying foundation in the encroached portion. Hence, the petitioner filed the suit in O.S.No.211 of 2017 before the Sub-Court, Thanjavur to declare the sale deed executed by the first respondent in favour of the second respondent in respect of the suit property as null and avoid and for possession. He further sought for the relief of injunction restraining the fifth and sixth respondents from providing electricity connection to the house under construction. The petitioner took out an application in I.A.No.431 of 2017 in O.S.No.211 of 2017 for appointment of Advocate Commissioner the same was allowed. Though the Advocate Commissioner fee was paid by the petitioner, the Advocate commissioner was unable to inspect the suit property, since she was married and was in the family way. This fact was brought to the knowledge of the petitioner only after lapse of one year and because of Covid Pandemic situation the petitioner was unable to pursue the Advocate Commissioner petition. Thereafter, the petition was closed by the trial court on 28.07.2022. Again the petitioner filed another application in I.A.No.662 of 2022 for reopening the I.A.No.431 of 2017 and the same was dismissed by the trial Court. Further, since the suit for declaration and injunction, appointment of Advocate Commissioner is necessary to find out the encroachment. If the Advocate Commissioner is not appointed, the



petitioner will be seriously prejudiced. Hence, he prays for setting aside the order passed by the trial Court.

WEB COPY

4.The learned counsel appearing for the petitioner would submit that, the trial Court instead of appointing another Advocate commissioner erroneously closed the petition in I.A.No. 431 of 2017 and also erroneously dismissed the application filed by the petitioner in I.A.No.622 of 2022 without taking into consideration that there is no fault on the part of the petitioner herein and only due to the non availability of the advocate commissioner, the petitioner was unable to follow the advocate commissioner for inspecting the suit property.

5.Heard the learned counsel appearing for the petitioner and perused the records.

6.The object of Order 26 Rule 9 of C.P.C., is to elucidate any matter in dispute. Admittedly, the advocate commissioner should not be appointed to gather evidence to prove the case of the parties. In this case, the petitioner has sought for appointment of advocate commissioner to inspect the suit property measure the same and file his report. Since the said advocate commissioner was married and was in the family way, she was unable to



visit the suit property and file her report. The contention of the revision petitioner is that, because of Covid pandemic situation he was unable to follow the advocate commissioner. Hence, the above petition was closed by the trial court for non filing of the report by the advocate commissioner. The trial Court ought to have recalled the warrant and appointed another advocate commissioner to exercise the above tasks. When the contention of the revision petitioner is that the respondent has encroached his property, it is expedient for the purpose of ascertaining the above facts and to throw light upon the matter in issue, the trial Court ought to have reopened the advocate commissioner petition and should have appointed a fresh commissioner for the purpose for which the said petition is filed. It would assist the court decide the real controversy between the parties and minimize the evidence at the time of trial.

7.Considering the facts and circumstances of the case, the report and plan of the Advocate Commissioner only could decide the issue, which cannot be elucidated by oral and documentary evidence. Therefore, the matter is remitted back to the trial Court to reopen the above application in I.A.No.431 of 2017 and issue warrant to a fresh Advocate Commissioner for conducting local inspection by measuring the suit property with the aid of the Surveyor and to file a report and plan.



8.Since the application is of the year 2017, this Court directs the trial Court to dispose the I.A.No.431 of 2017 by directing the Advocate Commissioner to file his report and plan, within a period of one month from the date of receipt of a copy of this order.

9.With the above observation, this Civil Revision Petition is allowed.

No costs.

16.08.2023

NCC:Yes/No
Index:Yes/No
Internet:Yes/No
To

1.The Sub-Court,
Thanjavur

5.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY

C.R.P(MD)No.2028 of 2



K.GOVINDARAJAN THILAKAVADI, J.

Ns

C.R.P(MD)No.2028 of 2023

16.08.2023