



CRP(PD)(MD).No.1862 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 10.08.2023

DELIVERVED ON : 21.12.2023

CORAM

THE HONOURABLE MRS JUSTICE K. GOVINDARAJAN THILAKAVADI

C.R.P(PD)(MD)No.1862 of 2023 and
CMP(MD).No.9350 of 2023

1.Chinnammal
2.Kuppusamy
3.Selvi

: Revision Petitioners

Vs.

1.Senkottarayan
2.Subiramanian

Respondents

PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order, dated 06.06.2023 made in I.A.No.83 of 2022 in A.S.No.17 of 2022 on the file of the Sub Court, Ottachathiram.

For Petitioners :Mr.G. Sridharan

Fro respondents : Mr.C. Asaithambi



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ORDER

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The above Civil Revision Petition is preferred against the order, dated 06.06.2023 made in I.A.No.83 of 2022 in A.S.No.17 of 2022 on the file of the Sub Court, Ottachathiram.

2. According to the revision petitioners, the respondents / plaintiffs have filed a suit in O.S.No.722 of 2004, on the file of the District Munsif Court, Palani, for declaration of right in the suit pathway as a common pathway and for consequential permanent injunction restraining the petitioners / defendants from interfering with their usage in the said common pathway by obliterating or destroying the same. During the pendency of the suit, the father of the petitioners died and the petitioners were impleaded as legal heirs and subsequently, the suit was dismissed. Against which the respondents / plaintiffs preferred A.S.No.17 of 2022 on the file of the the Sub Court, Ottanchathiram. During the pendency of the appeal, the respondents / plaintiffs filed I.A.No.83 of 2022 for appointment of Advocate Commissioner and the same was allowed. Challenging the same, the present revision has been filed by the revision petitioners / respondents.



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3. The learned counsel appearing for the revision petitioners

would submit that the respondents / plaintiffs have filed a suit against the father of the petitioners to declare that their right in common pathway across the northern extremity of S.Nos. 9,10, 13/1, 13/2 and 13/3 from Maragapatti – Karur main road and reaches the property of the plaintiffs in S.Nos.4/1 and 4/2. He would further submit that the plaintiffs father purchasing the properties in S.Nos.4/2, 4/1 and an un-divided $\frac{1}{2}$ share in S.No.13/3 from Suthan Rowther and others through a registered sale deed, dated 29.02.1996 in which reference was made to the common pathway. He would further submit that the petitioners father purchased the un divided share $\frac{1}{2}$ share in S.No.13/3 from the father of the plaintiffs and the remaining undivided $\frac{1}{2}$ share in S.No.13/3 from S.Ahamathullah and others under a common sale deed, dated 11.06.1997. The above suit is filed stating that the petitioners' father is attempting to get the pathway. He would further submit that the same is resisted by the petitioners stating that the plaint plan does not include S.Nos.4/1, 4/2, 9, 10, 13/1, 13/2 and 13/3 and even as per the plaint plan, there is no pathway on the northern extremity of S.No.9. He would further submit that father of the respondents / plaintiffs purchased undivided $\frac{1}{2}$ share in S.Nos.13/3, 41/2 and 4/2 from the then owners by a registered sale deed, dated 29.02.1996



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and their father purchased the un divided $\frac{1}{2}$ share in S.No.13/3 from the vendor of the father of the plaintiffs and the remaining $\frac{1}{2}$ share from the father of the plaintiffs under the registered sale deed and thereby, they have become owner of the property. Since they have purchased the entire rights in S.No.13/3, the easementary rights if any over the ABC portion also gets extinguished, that the description of common pathway in the sale deed, dated 29.02.1996 is out of the contest and dismissed the suit. Aggrieved over the same, the respondents have filed an appeal in A.S.No. 17 of 2022 on the file of the Sub Court, Ottanchathiram. He would further submit that pending appeal suit, the respondents / plaintiffs have filed an application in I.A.No.83 of 2022 for appointment of Advocate Commissioner to inspect the common pathway with the assistance of VAO and to file a report. He would further submit that already the respondents filed I.A.No.261 of 2004 in the suit for appointment of an Advocate Commissioner and in the said application, they have conceded the existence of common track and so the said petition was dismissed. Thereafter, they have filed another application in I.A.No.162 of 2009 and the same was also dismissed on merits and therefore, the said order has become final. In such circumstances, the lower appellate Court by an order, dated 06.06.2023 allowed the petition in I.A.No.83 of 2022 and



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appointed the Advocate Commissioner to survey the suit lands with the help of Surveyor and Village Administrative Officer and to file a report.

Challenging the same, the petitioners have filed the present revision.

4. The learned counsel appearing for the respondents / plaintiffs would submit that the said I.A.No.83 of 2022 has been filed for appointment of an Advocate Commissioner to visit the suit property as mentioned in schedule in O.S.No.199 of 2022 to inspect the common cart track with the assistance of Village Administrative Officer and file a report regarding the physical features of the lands on either side of the common cart track and the same is not reaching the lands of the petitioners in S.Nos. 4/1. 4/2, through S.Nos. 9, 10, 13/1. 13/2 and 13/3 and the same was allowed. He would further submit that the suit has been filed only to declare that the 10 Ft., width portion is a common cart track, but the 2nd petitioner took different stand and hence, the suit was dismissed by the trial Court. The total extent of 4.26 acres are cultivating land in S.No.13/3 originally which was an undivided property in which half share belonged to Fathima Beebi family members and the remaining half share property belonged to Amanullah family members. He would further submit that the father of the 1st respondent / plaintiff purchased the property which is a



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cultivating land in S.Nos.4/1 and 4/2 and he was allotted 10 ft common cart track through S.Nos.9, 10, 13/1, 13/2 and 13/3. The second petitioner's father also purchased property in S.Nos.13/1, 13/2 and in the said sale deed schedule the east-west common cart-track right which comes from the main road was clearly mentioned in S.Nos.13/1 and 13/2 on the northern side, to reach the said respective properties, which is in S.Nos.9, 10, 13/1, 13/2 and 13/3. In the same way, the 2nd petitioner's father had jointly purchased the half un-divided share together with 2nd plaintiff's father in S.No.13/3. The 1st plaintiff's father after retaining and reserving that part of common cart track along the side of S.Nos.4/1 and 4/2 sold his property in the sale deed, dated 11.06.1997 to give access in S.No.13/3, the usual earmarked common cart track of 10 Ft., width went through S.Nos. 9,10,13/1, 13/2 and 13/3. When the second petitioner's father has got every right of common cart track in S.Nos.9, 10 to reach his land S.Nos. 13/1, 13/2 and 13/3, the plaintiffs have also got a right in the common cart track to access as per the sale deed, dated 29.02.1996 which is the mother document to said sale deed, dated 11.06.1997. The 2nd petitioner has no right to erase the surface of common cart track, desist and cannot prevent them from entering through the common cart track to reach their S.Nos.4/1 and 4/2 lands. He would further submit that in the common



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cart-track of 10 Ft., width right in S.Nos.9, 10, 13/1, 13/2 and 13/3 there cannot be any individual right and no one can claim independent right in the common cart track. Particularly, the second petitioner cannot claim individual right on the common cart track. In the 2nd petitioner's sale deed his father had clearly mentioned the 10ft width portion as common cart-track, in S.Nos.13/1, 13/2 and 13/3 and that he cannot circumvent and go beyond his document and let in contrary evidence. He would further submit that the application in I.A.No. 162 of 2009 for appointment of Advocate Commissioner was dismissed by the trial Court on the ground that the existing pathway was admitted by petitioners. Hence, he filed an application in I.A.No.83 of 2022, for appointment of Advocate Commissioner pending Appeal. He would further submit that the appointment of Advocate Commissioner cannot be resisted by the petitioners to note down the physical features of lands on either side of the common cart-track which passes through S.Nos.9, 10, 13/1, 13/2 and 13/3 to reach the respective lands. It is necessary to appoint an Advocate Commissioner to know the reality which could be done by a spot inspection to find out which allegations are true. He further contended that once the dispute is arisen on common cart-track except to appointment the Advocate Commissioner no other remedy is available to cure the said



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defects and hence, prayed for dismissal of this revision.

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5. In support of his contention, the learned counsel appearing for the respondents / plaintiffs relied on the Judgment of this Court reported in **2019(2) MWN (Civil) 610 in the case of Annamalai and other Vs. Chinnasamy** in which it is held that existence of Cart -track admitted by parties. Usage of cart track as to whether it leads to both sides can be seen only physically. Therefore, the report of commissioner noting down the physical features of the property would enable the Court to arrive at a correct conclusion and to decide the lis between the parties and the order of trial Court dismissing the application is unjustified. His further contention is that no prejudice will be caused to the other side by appointing the Advocate Commissioner and it would only be helpful for the Court to decide the issue in dispute. Even in the appellate side, the above petition is maintainable. The parties are entitled to file an application for appointment of Advocate Commissioner to resolve the issue.

6. Heard the learned counsel appearing on either side and perused the materials available on record.



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7. The trial Court has rejected the application holding that the appointment of Advocate Commissioner is not required for the reason that the existence of Cart-track admitted by the parties. But, in the appeal the Advocate Commissioner has become necessitated for the reasons stated in the counter affidavit filed by the respondents / plaintiffs.

8. When the Commissioner goes to the suit property to note down the physical features, it would be helpful for the trial Court to sort out the issue in dispute and to know about the real dispute between the parties. Though the application was filed in the appeal stage it is absolutely maintainable and that the Court has to know about the actualities in the suit property. Moreover, no prejudice will be caused to the other side by allowing the application. On the other hand, it would be helpful for the trial Court to sort out the issue in dispute. Therefore, this Court does not find any infirmity in the order passed by the Court below.

9. In the result, this Civil Revision Petition is dismissed confirming the order passed, dated 06.06.2023 made in I.A.No.83 of 2022 in A.S.No.17 of 2022 on the file of the Sub Court, Ottachathiram. No



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costs. Consequently, the connected Miscellaneous Petition is closed.

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10. Based on the report of the Advocate Commissioner, the first appellate Court is directed to dispose the appeal within a period of three months from the date of filing of the report by the Advocate Commissioner, after giving an opportunity to both parties for filing an objection if any. Both the parties are directed to co-operate for early disposal of the appeal suit.

21.12.2023

Index : Yes / No
Internet : Yes/ No
trp

To

The Sub Court, Ottanchathiram.



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K. GOVINDARAJAN THILAKAVADI, J.,

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Pre-Delivery order made in
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