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C.R.P.(MD)No.682 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 13/03/2024

CORAM

The Hon'ble Mr.Justice **G.ILANGOVAN**

C.R.P(MD)No.682 of 2022

and

CMP(MD)No.2785 of 2022

M.K.G.Radhakrishnan : Petitioner/Petitioner/
Plaintiff

Vs.

1.Tmt.Anandhammal
2.M.S.Krishnajith : Respondents/Respondents/
Defendants

PRAYER:-Civil Revision Petition has been filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order, dated 15/02/2022 passed in IA No.2 of 2021 in OS No.119 of 2021 by the District Munsif, Rajapalayam and pass such further or other orders.

For Petitioner : Mr.N.Dilip Kumar

For Respondents : Mr.S.Rajesh Saravanan

O R D E R

This civil revision petition has been filed seeking to set aside the fair and decreetal, dated 15/02/2022 passed in IA No.2 of 2021 in OS No.119 of 2021 by the District Munsif, Rajapalayam.



2. The facts in brief:-

A suit in OS No.119 of 2021 was filed by the petitioner as plaintiff seeking the relief of permanent injunction restraining the respondents namely the defendants herein, from preventing the plaintiff to use the 2nd schedule property to maintain the wall mentioned in 'CD' in the sketch and for other consequential prayers for mandatory injunction, etc., and for costs. The defendants also appeared and filed the written statement.

3. Pending further process, a petition was taken out by the petitioner under Order 26 Rule 9 CPC to appoint a Commissioner to note down the physical features available in the schedule items 1 and 2 and to assess the damage caused to the disputed wall mentioned in 'CD' in the plaint.

4. That was resisted by the respondents.

5. After hearing both sides, the petition came to be dismissed by the trial court.

6. Against which, this civil revision petition is filed.



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7.Heard both sides.

8.As mentioned in the preamble portion of the order, the main prayer of the plaintiff/petitioner is in respect of 2nd item of the property. According to him, 'CD' wall belongs to him. They got every right to use the 2nd item to reach 'CD' wall and maintain the same.

9.It is also stated that the respondents have put up windows and other structures to block the air and light. They want those structures to be removed.

10.Now in the petition, it has been stated by the petitioner that the wall marked as 'CD' is the common wall of both parties. The respondents have put up a drinking water sump measuring 6 x 5 feet breath and 15 feet depth. It was intimated to the respondents that because of the construction, foundation of the building is affected. In spite of the request, they reused to close the sump. Apart from that, they have also put up another sump measuring about 20 x 6 x 5 feet. It has been done wantonly. Because of the above sump, 'CD' wall is now getting damaged. So, to note down the physical features and the damage caused to the 'CD' wall, this petition is filed.



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11. That came to be dismissed by the trial court stating that the above said things can be proved by oral evidence. Photographs has also been produced to state that the appointment of the Commissioner is necessary. So, the learned counsel appearing for the petitioner would submit that unless the Commissioner is appointed along with expert to assess the damage that is caused to the common wall, the issue between the parties cannot be resolved. If the Commissioner is filed his report, the oral evidence can be avoided.

12. Per contra, the learned counsel appearing for the respondents would submit that it is admitted by both sides that 'CD' wall is a common wall and they will not make any construction causing damage to the common wall. Because that is affected the stability. So, these things can be proved by way of oral and photographic evidence before the trial court.

13. No doubt that whether any damage is caused to 'CD' wall is a matter for consideration by the trial court on evidence. But the lie of the property may be helpful to the Court for giving a just conclusion. The distance between sump and 'CD' wall can be brought on record by way of making the measurement on the site by the Commissioner.



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14.So, I am of the considered view that no prejudice is caused to the respondents by appointment of Commissioner. But, on the other hand, as mentioned above, it will be helpful to the Court to resolve the issue in a proper manner. On the sole ground, this petition is liable to be allowed.

15.In the result, this civil revision petition is **allowed**. The impugned order, dated 25/08/2023 passed in IA No.2 of 2021 in OS No.119 of 2021 by the District Munsif, Rajapalayam, is set aside. There shall be a direction to the trial court to appoint a Commissioner along with the competent Engineer to visit the suit property and take out the measurement and assess the damage alleged to have been caused to the wall of the petitioner. The trial court may fix the fee for the Commissioner at its discretion. The trial court may also direct the Commissioner to file a report within a period of three months from the date of issuance of warrant. No costs. Consequently, connected Miscellaneous Petition is closed.

13/03/2024

Index:Yes/No
Internet:Yes/No
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To,

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- 1.The District Munsif,
Rajapalayam,
Virudhunagar district.
- 2.The Section Officer,
ER/VR Section,
Madurai Bench of Madras High Court,
Madurai.



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G.ILANGOVAN, J

er

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