



C.R.P.(MD).No.1486 of 2019

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 02.04.2024

CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.R.P.(PD)(MD).No.1486 of 2019

and

C.M.P.(MD).No.7858 of 2019

1.Kulanthaivel
2.Sundaravel
3.Manickavel
4.Nagarathinavel
5.Packialakshmi
6.Muthulakshmi
7.Vanthana

... Petitioners

Vs.

Chithambararajan

... Respondent

Prayer: Civil Revision Petition is filed under Article 227 of the Constitution of India, against the fair and executable order dated 04.07.2019 passed in the application in I.A.No.261 of 2016 (1251 of 2013) in I.A.No.446 of 2013 in O.S.No.168 of 2013 on the file of the Additional District Munsif Court, Aruppukottai.

For Petitioners : Mr.J.Barathan

For Respondent : Mr.D.Rajkumar

for Mr.B.Muneesvaran



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ORDER

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The present revision petition has been filed by the defendants in a suit for declaration that the suit lane is a common lane and for permanent injunction restraining the defendants from putting up any construction in the said common lane.

2. Pending suit, the plaintiff has filed an application in I.A.No.446 of 2013 for appointment of Advocate Commissioner to note down the physical features of the property and the measurements and to file a report along with the sketch. The Advocate Commissioner had submitted his preliminary report on 21.06.2013. When the report was filed, the trial Court had directed the Advocate Commissioner to file a final report with the help of the Surveyor and adjourned the matter to 01.07.2013. However, the said Advocate Commissioner had returned the warrant expressing his inability to execute the warrant.

3. The trial Court had appointed another Advocate Commissioner and he had filed a report on 30.07.2013. The defendants have not filed any objection to the said Commissioner report.



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4. The plaintiff had filed I.A.No.260 of 2016 for condoning the delay in filing objection to the said Commissioner report. In the said application, he has also prayed for re-issuance of warrant to the second Advocate Commissioner to note down certain other features viz., alleged encroachments made by the defendants pending suit. The plaintiff had also filed I.A.No.261 of 2016 seeking re-issuance of warrant to the same Advocate Commissioner for the purpose of identifying some alleged encroachments said to have been made by the defendants pending suit. The trial Court had rejected the I.A.No.260 of 2016 and had refused to entertain the objection filed by the plaintiff. However, the trial Court proceeded to allow the I.A.No.261 of 2016 and directed to re-issue warrant to the same Advocate Commissioner to note down certain features. The order passed in I.A.No.261 of 2016 is under challenge in the present revision petition.

5. According to the learned counsel for the appellants/defendants, no proper reasons have been assigned for re-issuance of warrant to the Advocate Commissioner. No allegations have been made as against the Advocate Commissioner. In such circumstances, for the same purpose, the warrant should not have been re-issued to the said Advocate Commissioner.



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6. Per contra, the learned counsel appearing for the respondent/plaintiff had contended that two reports have been filed by two Advocate Commissioners, which are in contradiction with one another. Unless the said issue is resolved by re-issuing warrant to the second Advocate Commissioner, the trial Court is not in a position to adjudicate the issue. He further contended that some constructions have been made by the defendants in the common lane pending suit. Unless the Commissioner is appointed the said fact cannot be brought to the notice of the Court. Hence, he prayed for re-issuance of warrant to the second Advocate Commissioner is essential to bring these facts before the trial Court.

7. I have carefully considered the submissions made on either side and perused the materials available on record.

8. A perusal of the affidavit filed in support of an application for re-issuance of warrant reveals that the plaintiff questioned the mode or manner of taking measurements by the second Advocate Commissioner. He has also pointed out that the Surveyor had acted in a biased manner. Therefore, he had made a request to measure the property with the help of Taluk Head Surveyor



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after re-issuance of warrant to the same Commissioner. A perusal of the prayer in the suit reveals that the plaintiff has prayed for a declaration that ABCD suit lane is a common lane. The help of the Advocate Commissioner or Surveyor is not necessary. Once the Court comes to the conclusion that the lane in dispute is a common lane, the granting of injunction not to put up construction is consequential. However, a reading of the affidavit in support of I.A.No.261 of 2016 reveals that he has challenged the measurement taken by the Taluk Surveyor and he has prayed for re-issuance of the warrant.

9. A perusal of the written statement clearly indicates that the defendants admitted that there is a two feet gap between the property of the plaintiff and the defendants. However, the defendants claimed that two feet gap is their absolute property. Therefore, there is no dispute with regard to the width of the alleged suit lane. Hence, the question of re-issuing warrant to the Advocate Commissioner for measuring the width of the lane may not arise at this length of time.

10. The plaintiff had filed I.A.No.260 of 2016 seeking to condone the delay and to receive objection for the second Commissioner report. However, the said application has been dismissed by the trial Court. Though the said



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order has not been put to challenge before this Court, this Court, in exercise of power under Article 227 of the Constitution of India, directs the trial Court to take up the objection filed by the plaintiff to the Commissioner report on record. The same shall form part of the record of the trial Court. The trial Court is directed to consider the said objection at the time of trial. However, as far as I.A.No.261 of 2016 is concerned, the trial Court has not properly appreciated the facts and had re-issued the warrant.

11. In view of the above said facts, the order passed by the trial Court in I.A.No.261/2016 is hereby set aside and the Civil Revision Petition stands allowed with the observation that the objection of the plaintiff in I.A.No.260 of 2016 shall be form part of the record. No costs. Consequently, the connected Miscellaneous Petition is closed.

02.04.2024

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

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To

- 1.The Additional District Munsif Court,
Aruppukottai.
- 2.The Record Keeper,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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R.VIJAYAKUMAR,J.,

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