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C.R.P.No.5305 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **09.01.2025**

CORAM

**THE HONOURABLE MR JUSTICE V. LAKSHMINARAYANAN**

**C.R.P. No. 5305 of 2024**

**and C.M.P.No.29549 of 2024**

Sabirnisha

.... Petitioner

Vs

1. Rizwana Banu

2. Shabanayasmin

3. Shameena Banu

4. Allahbaksah

.... Respondents

**Prayer :** Civil Revision Petition under Article 227 of the Constitution of India praying to set aside the order dated 18.10.2024 passed in I.A.No.03 of 2024 in O.S.No.4685 of 2024 on the file of the Hon'ble XI Assistant City Civil Court at Chennai.

For Petitioner : Ms.G.Sumithra for  
Mr.Abdul Azeez

**ORDER**

This Civil Revision Petition challenges the order of the learned XI Assistant, City Civil Court, Chennai in IA No.3 of 2024 in OS No.4685 of 2024 dated 18.10.2024.



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2. The Civil Revision Petitioner is the 2<sup>nd</sup> defendant in the suit. OS No.4685 of 224 is a suit for the following reliefs.

(a) Granting an order of permanent injunction restraining the defendants, their men, agent, servant and/or any other third party acting on their behalf or under them, from in any manner interfering with the B Schedule property.

(b) Granting an order of Mandatory injunction directing the defendants to demolish the ramp / projection constructed in the C schedule property abutting the B schedule property within a time frame as may be fixed by this Court.

3. The case of the plaintiffs is that the A Schedule property belongs to him and the C schedule property belongs to the defendants. Abutting the A schedule property, there runs a lane depicted as B Schedule which they claims is an exclusive lane belong to M/s.Star Theater, the plaintiffs and Mansion Owners Association. The cause of action for the suit is that the defendants had constructed a ramp over the B schedule and thereby, affecting the rights of the plaintiffs. Pending the suit, they filed an application for appointment of an Advocate Commissioner to inspect, investigate and submit a report regarding the physical features of the schedule mentioned property.



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4. The plea of the plaintiffs is that by the report of the commissioner they wanted to demonstrate to the Court that the defendants have an access to the C schedule mentioned property independent of the B Schedule and therefore, they cannot have a claim over the B schedule property.

5. This application was resisted by the defendants by filing a detailed counter affidavit. According to them, there is no necessity for appointment of an Advocate Commissioner to measure the suit schedule mentioned properties. They asserted that the plaintiffs are not aware about the ownership over the B Schedule mentioned property and cannot seek for an application for injunction and thereby, prevent the defendants from using the B schedule mentioned property. They pleaded that they have every right to use the B Schedule mentioned property for ingress and egress like the plaintiffs and the other owners of the property abutting the lane. They deny that the plaintiffs have an exclusive right over the B schedule.

6. After considering the affidavit and counter, the learned Trial Judge allowed the application and hence, this Civil Revision Petition.

7. I heard Ms.Sumithra for Mr.Abdul Aziz. Ms.Sumithra pleads that



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an appointment of an Advocate Commissioner in this case is irrelevant.

According to her, she is the owner of two parcels of land and whatever construction she is carrying out is only within the four boundaries of her property. She also denies the exclusive right of the plaintiffs over the B Schedule property. She states that the plaintiffs are not sought for a declaration when the B schedule is a private lane and therefore, the question of appointment of an Advocate Commissioner does not arise.

8. I have carefully analyzed the submissions of Ms.B.Sumithra and have gone through the records.

9. The suit is one for permanent injunction and mandatory injunction. Three schedules have been clearly demarcated in the suit. The plaintiffs claim exclusive right over the A schedule property and concedes to the right of the defendants over the C Schedule property. The dispute is whether the defendant has a right to use the B Schedule mentioned property. While the plaintiffs claim that it is enjoyed by three entities mentioned in the B schedule, the defendants claim in addition to these three entities including the plaintiffs, they also have a right to use the B schedule mentioned property. Those are all matters which have to be gone into by the Trial Court, after evidence is taken, on the merits of the case.



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10. The plea of the plaintiffs is that though the defendants do not have a right over the B schedule property, they have constructed a ramp in such a manner that it prevents easy access to the A schedule mentioned property. Hence, the relief of mandatory injunction. If, as pointed out by Ms.Sumithra, the defendants have constructed a ramp within the four corners of their property, they have nothing to fear by the report of the Advocate Commissioner. The Advocate Commissioner after measuring the property is going to say that the constructions made by the defendants is not an encroachment on the B Schedule property. On the contrary, if the defendants have encroached upon the B schedule mentioned property while constructing on the C schedule property, then, the question of putting up a construction over a passage, as to what is the extent of the encroachment, if at all, would arise. The learned Trial Judge cannot come to a conclusion, by causing a personal visit. Hence, the learned Judge appointed an Advocate Commissioner. I do not find any error in the approach of the learned Judge. After all, an Advocate Commissioner is the eye and ear of the Court.

11. In any event, the learned Trial Judge has felt that the report of the Advocate Commissioner would assist and rendering a just judgment in the case. Being an exercise of discretion, I am not inclined to interfere with the order and hence, the revision is dismissed.



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12. At this stage, Ms.Sumithra points out that the learned Advocate Commissioner had sent notice to the parties and had not put the counsel on notice. Prior to the inspection of the property, a party and their counsel are entitled to know on the date of visit by the Advocate Commissioner so that they can co-operate to the Advocate Commissioner in the execution of the warrant. Further more, Ms.Sumithra points out that the 1<sup>st</sup> defendant had passed away and one of his legal heirs viz., his wife is the 2<sup>nd</sup> defendant. She pleads that the 2<sup>nd</sup> defendant had been admitted in a hospital in Chennai on the date fixed by the Advocate Commissioner for inspection.

13. When a party has informed that she is in a hospital, the learned Advocate Commissioner ought to have deferred the execution of the warrant. If a report is submitted without notice to the parties, there is a danger that the report will be set aside on the ground of lack of notice. Therefore, the learned Advocate Commissioner shall issue notice to the learned counsel, who appears for the defendant and thereafter, shall conduct an inspection in terms of the warrant. Needless to add, the counsel for both sides are entitled to give the memo of instructions to the Advocate Commissioner at the time of Inspection.



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14. With the above observations, the Civil Revision petition is dismissed. No costs. Consequently, the connected miscellaneous petition is closed.

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**V.LAKSHMINARAYANAN, J.**

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To

XI Assistant City Civil Court at Chennai.

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