

(2009) 02 MAD CK 0023

In the Madras High Court

Case No : C.R.P. (PD) No. 2792 of 2008 and M.P. No. 2 of 2008

K. Sivachalam

APPELLANT

Vs

Subbanna Gounder, Murugasamy and Palanisamy

RESPONDENT

Date of Decision : 26-02-2009

Acts Referred:

Citation : (2009) 02 MAD CK 0023

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Advocate : C. Prakasam, for the Appellant; No appearance, for the Respondent

Final Decision : Allowed

Judgement

G. Rajasuria, J.—Inveighing the order dated 11.10.2007, passed by the learned District Munsif, Palladam, Coimbatore District in I.A. No.

435 of 2005 in O.S. No. 54 of 1998, this civil revision petition is focussed.

2. Heard the learned Counsel for the petitioner. Despite printing the names, there is no representation for the respondents.

3. A summation and summarisation of the relevant facts which are absolutely necessary and germane for the disposal of this revision petition would

run thus:

(i) The revision petitioner/plaintiff filed the suit O.S. No. 54 of 1998 seeking the following relief:

a) Declaration that the plaintiff is the absolute owner of the suit property as per partition deed dated 10.03.1997;

b) consequentially a permanent injunction restraining the defendants in the enjoyment of the suit property by the plaintiff;

c) granting permanent injunction restraining the defendants their men, agents,

servants, relatives etc., from any way interfering in the enjoyment of the north-south 52 palm trees at the east of suit property and Raja Vaikkal in the suit property of S.F. No. 533 of Samalapuram village by the plaintiff; and

d) awarding the plaintiff's cost of this suit

e) pass such other and further relief as this Hon'ble Court may deem fit and proper under the circumstances of this case and render justice.

(ii) While so, during the pendency of the suit, Advocate Commissioner was got appointed, who measured the suit property and submitted his

report with sketch. Whereupon, I.A. No. 435 of 2005 was filed by the defendants for scrapping the Advocate Commissioner's report and for re-

issuing of the Commissioner warrant with a direction to the Commissioner to visit the property concerned and submit an additional report with

sketch. Being disconcerted and aggrieved by the order of the lower Court, this revision has been filed on various grounds, inter alia thus:

The lower Court committed serious error in ordering re-issuance of the Commissioner warrant to measure the property and there is no clear

finding by the lower Court also in this regard.

4. A poring and perusal of the records would reveal and convey that the lower Court without au fait with law relating to issuance of second

Commissioner, simply directed the Commissioner to revisit and measure the property. In paragraph 16 of the certified copy of the order of the

lower Court, the learned trial Judge unambiguously and categorically pointed out that the suit property is only bearing Survey No. 533 and in

respect of that alone reliefs are sought in the plaint. However, in the I.A. No. 435 of 2005 the defendants would come forward with the grievance

as though the plaintiff encroached a portion of the Survey No. 536 which belongs to the defendants. If at all the defendants are aggrieved by he

encroachment of their property in Survey No. 536, it is open for them to file a suit for removal of encroachment irrespective of any remark passed

or opinion given by any of the witnesses in this case.

5. In the said I.A. on the petitioner's side, the Surveyor Shanmuga Sundaram was examined as P.W.1 and the Advocate Commissioner

Balasubramaniam was examined as P.W.2. In paragraph 18 of the order it is found recorded that P.W.1 deposed as though in S. No. 536 on the

south eastern side, the plaintiff made encroachment. However, P.W.2, the Commissioner in his deposition had set forth that there was no encroachment either in the plaintiff's land or the defendants' land. The crucial and significant point to be noted is that the suit property is not S. No. 536 which belongs to the defendants as found set out in the order of the lower Court and in such a case, I am at a loss to understand as to how the lower Court could re-issue the Commissioner warrant so as to find out whether there is any encroachment. The plaintiff himself has not sought remedy to find out as to whether S. No. 533 which happens to be the suit property is under any encroachment. The plaintiff being the dominus litis should prove before the trial Court that the suit property bearing S. No. 533 is under his exclusive possession and enjoyment and whereupon alone the Court would be able to decide the lis in favour of the plaintiff. Here the plaintiff being the revision petitioner objects for the re-issuance of the commissioner warrant and in such a case, it is for the revision petitioner/plaintiff to prove the case before the lower Court and it is not for the defendants to pray for re-issuance of the warrant. The order of the lower Court also is vague at paragraph 21 of it. Hence for all these reasons, I am of the considered opinion that the order of the lower Court to re-issue the warrant is bad in law, accordingly it is set aside by allowing this civil revision petition. Consequently, the I.A shall stand dismissed. No costs. Consequently, connected miscellaneous petition is closed.