

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :29.07.2015

CORAM

THE HONOURABLE MR. JUSTICE M. DURAISWAMY

C.R.P.(PD)No.2715 of 2015 &

M.P.No.1 of 2015

D.Elayaperumal

... Petitioner

v.

1.D.Rajaram Chettiar

2.A.Kaliyaperumal

... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order dated 21.01.2014 made in I.A.No.254 of 2013 in O.S.No.97 of 2008 on the file of District Munsif cum Judicial Magistrate, Kattumannarkoil.

For Petitioner : Mr.A.Muthukumar

ORDER

Challenging the fair and final order passed in I.A.No.254 of 2013 in O.S.No.97 of 2008 on the file of District Munsif cum Judicial Magistrate Court, Kattumannarkoil, the 2nd defendant has filed the above Civil Revision Petition.

2. The plaintiff filed the suit in O.S.No.97 of 2008 for permanent injunction. The defendants filed their written statement and are contesting the suit. The suit was filed in the year 2008 and after the commencement of the trial, the 2nd defendant filed an application in I.A.No.254 of 2013 in the year 2013 seeking for appointment of an Advocate Commissioner to note down the physical features. In the affidavit filed in support of the application, the 2nd defendant has stated that the plaintiff has filed proof affidavit wherein he admitted that he is running a tea stall but, contended that the tea stall was in the corner of the highway and the Government had removed the encroachment in the Highway in March 2008. According to the 2nd defendant, the averment stated in the proof affidavit is totally false. In order to establish that the 2nd defendant is running the tea stall in the front portion and he is residing in the back portion, the 2nd defendant has sought for the appointment of the Advocate Commissioner to note down the physical features.

3. The learned counsel appearing for the revision petitioner submitted that the 1st respondent-plaintiff has not made any averment in the plaint that the 1st defendant was running a tea stall in the corner of the highway and the Government has removed the encroachment in the highway in March 2008. Even in the absence of any averment, the plaintiff filed the proof affidavit disputing the location of the tea stall. The plaintiff filed his counter and opposed the application.

4. The Trial Court, after taking into consideration the case of both the parties, dismissed the application.

5. It is pertinent to note that the present application has been filed after a lapse of 5 years from the institution of the suit. The 2nd defendant filed his written statement on 11.1.2009 and filed his proof affidavit along with the document on 2.2.2011.

6. It is settled position that the burden of proof lies on the plaintiff to establish his case by oral and documentary evidences. Even in the absence of any averment in the plaint, the plaintiff has disputed the location of the tea stall. The said averment stated in the proof affidavit has to be proved by the plaintiff by acceptable evidence before the Trial Court. It is also settled position that in the absence of pleadings, no amount of evidence can

be looked into. Further, the Advocate Commissioner cannot collect evidence on behalf of the parties. In these circumstances, when the burden of proof lies on the plaintiff to establish his case, the Trial Court has rightly allowed the application.

6. In view of the above, I do not find any reason to interfere with the order passed by the Trial Court. The Civil Revision Petition is devoid of merits and is liable to be dismissed. Accordingly, the Civil Revision Petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Index : No
Internet : Yes

29.07.2015

Rj

To

The District Munsif cum Judicial Magistrate,
Kattumannarkoil.

M. DURAISWAMY,J.,

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