



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 13/1/2015

C O R A M

THE HONOURABLE Ms.JUSTICE PUSHPA SATHYANARAYANA

C.R.P. NPD(MD) No.1533 of 2014

Soosairaj

...Petitioner

Vs.

1. Michael Udayar

2. Anthoni Udayar

...Respondents

Petition filed under Article 227 of the Constitution of India praying to set aside the order dated 28/4/2014 made in I.A.No.2 of 2014 in A.S.No.35 of 2012 on the file of the Subordinate Judge, Kulithalai.

For petitioner
For respondents

... Mr.J. Parekh Kumar
... Mr.K.Hemakarthiskeyan
for R.1.
No appearance for R.2.

- - - - -

Orders reserved on 6/1/2015

O R D E R

The second defendant has filed the revision against the appointment of Commissioner in the first appeal.

2. The plaintiff had filed the suit for bare injunction restraining the defendants from interfering with their possession of the plaintiffs of the suit 'A' and 'B' schedule properties. 'B' schedule property is claimed to be a cart track. The Sub-Judge, Kulithalai had allowed the application in I.A.No.2 of 2014, appointing the Commissioner to measure the suit property with the help of a surveyor and file a report. Aggrieved by the same, the above Civil Revision Petition has been filed by the petitioner.

3. Admittedly, the suit is one for permanent injunction restraining the defendants from interfering with the peaceful and enjoyment of the suit property by the plaintiff. The suit was dismissed by the District Munsif holding that the plaintiff had not established the possession of 'A' schedule property and the plaintiff also failed to establish that 'B' schedule property was a cart track. Hence the suit was dismissed.

4. In fact, the plaintiff had earlier filed a suit in O.S.No.263 of 2004 and withdrew the suit with a liberty to file a fresh suit on the same cause of action. The plaintiff is expected to establish his case by means of oral and documentary evidence about his possession of the suit properties. The Commissioner cannot be appointed to gather the evidence and find out the factum of possession. Having failed before the trial Court, the plaintiff is trying to gather the evidence to establish that the suit 'B' schedule property is a cart track by appointing a Commissioner and get a report with the help of the surveyor. When the suit is for bare injunction, there is no necessity for appointment of a Commissioner and to take the measurements. The plaintiff has filed the said application only to collect the evidence through the Commissioner at the appellate stage that too after a lapse of two years. Such a practice should be deprecated. The Subordinate Judge, Kulithalai had committed a serious error in appointing a Commissioner at the appellate stage in a suit for bare injunction which order is unsustainable.

<https://hcservices.ecourts.gov.in/hcservices/>

5. The learned counsel for the petitioner also relied on the citation reported in {2008 (3) CTC-597} K.M.A.WAHAB AND 5 OTHERS Vs.

ESWARAN AND ANOTHER, which is on the point that a Commissioner cannot be appointed to collect the evidence to find out the factum of possession.

6. Reliance was also placed on {2007 (5) CTC 867} MURUGESAN Vs. PARAMASIVAM AND OTHERS. The facts in the said case is also identical to the facts of the present case. It is useful to extract paragraph 5 in the judgment.

"While adverting to the facts of the present case, it is with regard to the finding out of existence of a pathway. The suit was filed in the year 1994 and the suit was dismissed and appeal was filed in the year 1997. In the written statement filed by the defendants before the District Munsif Court, the defence was taken that no alternative pathway is available and the existence of the pathway was disputed. The plaintiff had not taken any steps for appointment of Commissioner before the trial Court and even before the Appellate Court, the present petitioner was not ready in the application for appointment of Commissioner. The District Judge has observed that the physical features might have changed. This Court is quite agreeable with the reasonings assigned by the learned District Judge that the physical features are bound to get altered due to the passage of time and even if the Commissioner is appointed at this stage, it may not be possible for him to describe the features which were available at the time of filing of the suit and the appointment of Commissioner may not be useful for the proper and final adjudication of the rights of the parties. In these circumstances, there is no necessity to dislodge the findings of the learned District Judge and the Civil Revision Petition suffers dismissal."

7. In view of the above, I am unable to agree with the finding of the Subordinate Judge, Kulithalai, as the application filed by the respondents seeking for appointment of Commissioner ought to have been dismissed.

8. In fine, this Civil Revision Petition is allowed and the order of the learned Subordinate Judge is set aside. No costs. The Sub-Judge, Kulithalai is directed to dispose of the appeal within a period of three months from the date of receipt of the copy of this order. Consequently, the connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(RTI)

/True copy/

Sub Assistant Registrar

To

The Subordinate Judge, Kulithalai.

+1CC to M/s.K.Hemakarthyayan, Advocate in SR.1930

+1CC to M/s.J.Parekhkumar, Advocate in SR.1729