



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 23 - 02 - 2015

CORAM:

THE HON'BLE SMT. JUSTICE PUSHPA SATHYANARAYANA

CRP (NPD) (MD) No. 1819 of 2014 and

M.P. No. 1 of 2014

1. Philomina
2. Rajadurai
3. Silvans
4. Samraj
5. Mary
6. Arul Jose
7. Anish .. Petitioner/Respondents/Respondents

Vs.

1. K. Moni
2. Thanka Balu
3. M. Paul Raj .. Respondents/Petitioners/Appellants

PRAYER: Petition filed under Article 227 of the Constitution of India against the order dated 10.7.2014 passed in I.A. No. 46 of 2014 in A.S. No.7 of 2013 on the file of the Subordinate Court, Kuzhithurai.

For Petitioner : Mr. V.M. Balamohan Thampi

For Respondents : Mr. K. Sreekumaran Nair

ORDER

Instant Civil Revision Petition under Section 115 of the Code of Civil Procedure has been filed by the defendants in the suit O.S. No. 85 of 2003, for setting aside the order dated 10.7.2014 passed by the Subordinate Judge, Kuzhithurai, in I.A. No. 46 of 2014 in A.S. No. 7 of 2013 whereby application moved by the plaintiffs / appellants under Order XXVI Rule 9 and Section 151 CPC for appointment of Advocate Commissioner

to note down the physical features of the suit property and boundaries and to draw a plan with property description, has been allowed.

2. From the materials available on record, it is seen that suit O.S. No. 85 of 2003 for partition filed by the plaintiffs on the file of the Principal District Munsif, Kuzhithurai, was dismissed on 16.10.2002 and an appeal was preferred by them in A.S. No. 7 of 2013 on the file of the Sub-Court, Kuzhithurai. Pending appeal, I.A. No. 46 of 2014 was filed by the very same plaintiffs / appellants for appointing a Commissioner to identify the suit property and note down the physical features, etc. It is seen that despite resistance from the defendants, the said application was allowed by the Lower Appellate Court by order dated 10.7.2014 by appointing a Commissioner. Being aggrieved and dissatisfied with the said order, the present Revision Petition has been focused by the defendants.

3. Heard the learned counsel appearing for the parties and perused the records.

4. The only question that has to be decided before this Court is whether there is any perversity or illegality in the order passed by the Lower Appellate Court in I.A. No. 46 of 2014 in allowing the application for appointment of Advocate Commissioner.

5. Admittedly, the suit is filed for declaration of title of 6 Cents and 625 Square links and for consequential injunction and also for partition of the said property. The plaintiffs had claimed right over the suit property exclusively based on the sale deeds. According to the plaintiffs, the suit property is lying in one separate plot of 17 Cents in which the plaintiffs claim 6 Cents and 625 Square links. The plaintiffs have based their claim as per sale deed dated 27.02.1968 and 05.11.1981. However, on merits, the trial Court had dismissed the suit. While dismissing the suit, in paragraph 11 of the judgment, the learned trial Judge had given a finding that though the defendants had disputed the identity of the property, the plaintiffs have not taken any steps regarding the identity of and location of the property by appointing a Commissioner to show the exact location and extent of the suit property. Taking strength on the above finding, the respondents / plaintiffs have filed an application before the Lower Appellate Court to appoint a Commissioner and the same was allowed.

6. It is trite law that the plaintiff has to fall or succeed on his own case. Secondly, the Commissioner cannot be appointed to gather evidence. It is not in dispute that the plaintiffs are basing their claim on two sale deeds. While that is so, there is no need to appoint a Commissioner to note down the physical features of the suit property, that too, at the appellate stage. It is for the plaintiff to



establish his right over the suit property. Once he establishes his right, then he can ask for partition of his entitlement.

7. In the case on hand, since the plaintiffs have not established their title, the suit was dismissed. While so, they cannot fill up the lacuna and gather evidence to establish their case at the appellate stage by getting the Advocate Commissioner appointed without going into the real merits in the appeal. Moreover, the report of the Commissioner can only be a piece of evidence which is not binding on the Court. It is only rarity to appoint a Commissioner at the appellate stage. Unless the Court feels that without the report of the Commissioner, the question in controversy between the parties cannot be decided, the Commissioner cannot be appointed. In the given case, the plaintiffs only emboldened by the finding of the trial Judge have filed the application for appointment of Advocate Commissioner, which is not warranted. As such, the order of the Lower Appellate allowing the petition for appointment of Advocate Commissioner is not in accordance with the principles of law and the same is liable to be set aside.

In view of the above finding of the trial Court and the settled legal position, the impugned order is set aside and the Civil Revision Petition is allowed but without costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(AE)

\\True copy\\

Sub Assistant Registrar

To

1.The Subordinate Judge, Kuzhithuria

+1 CC TO M/S.V.M.BALAMOHAN THAMBI, ADVOCATES SR.NO.8055

+1 CC TO M/S.K.SREE KUMARAN NAIR, ADVOCATE SR.NO.8047

C.R.P. (NPD) (MD) No. 1819 of 2014

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