

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.01.2016

CORAM :

THE HONOURABLE MS. JUSTICE R.MALA

C.R.P.(PD).No.4767 of 2015
& M.P.No.1 of 2015

1. Kalaimani
2. Sugunalatha

... Petitioners

Vs.

1.Saraswathi
2.Vijayalakshmi
3.Lakshminarayanan
4.Thenmozhi

... Respondents

Prayer:- Petition filed under Article 227 of the Constitution of India, against the fair order and decreetal order dated 17.8.2015 passed in I.A.No.584 of 2015 in O.S.No.181 of 2010 on the file of the Subordinate Judge, Dharmapuri.

For Petitioners : Mr.S.Subramanian

ORDER

The petitioner has come forward with the above Civil Revision Petition challenging the order dated 17.8.2015 passed in I.A.No.584 of 2015 in O.S.No.181 of 2010 on the file of the Subordinate Judge, Dharmapuri, for dismissing the application filed

under Order 26 Rule 9 of the Code of Civil Procedure.

2. At the time of admission, the arguments of the learned counsel for the petitioners are heard in length. Considering the nature of order passed herein, notice to respondents is dispensed with.

3. The revision petitioners are the defendants in O.S.No.181 of 2010. The respondents are the plaintiffs and they filed suit for partition and separate possession in respect of 1/7th share in the suit property stating that the properties are originally owned by Manikka Gounder and Ammakannu Ammal. After the death of Manikka Gounder, except suit property, other properties were divided between wife and children of Manikka Gounder and Amma Kannu Ammal. Amma Kannu Ammal has executed a sale deed dated 23.07.1982 in favour of Sugunalatha, 2nd revision petitioner, her 1/7th share. Since the 1st plaintiff-Saraswathi is the widow of Anandan, who was the son of Manikka Gounder filed the suit stating that she and her children are entitled for 1/7th share in the suit property.

4. The first defendant has filed the written statement and the same was adopted by the 2nd defendant. In that, settlement deed executed by Ammakannu Ammal in favour of the 2nd defendant was accepted, however, disputed the plaint averments that plaintiffs who are the heirs of Anandhan are entitled to 1/7th share of Late Anandan. In paragraph 23 of the written statement, it is averred as under:-

“23. The husband of the 1st plaintiff and the father of the plaintiffs 2 to 4 namely M.Anandan has alienated his share by way of two settlement deeds and four sale deeds, vide Doc.Nos.153/1985; 190/1985; 191/1985; 351/1987; 620/1987; 623/1987; i.e., the registered settlement deeds in favour of his 1st wife Nagammal and her son Mariappan.”

5. Learned counsel appearing for the revision petitioners submitted that in the description of the property, existence of well has been mentioned, whereas in the written statement, there is no averment that the description of property is not correct. It is also seen that during trial, witnesses has stated that there is no well in

the property and as such to find out whether there is any well in the suit property, appointment of Advocate Commissioner is necessary, however, without considering the said aspect, the application in I.A.No.584 of 2015 was dismissed.

6. The object of Order 26 Rule 9 C.P.C., is not to assist the parties to collect evidence and this Court has repeatedly held that Advocate Commissioner cannot be appointed to collect evidence. Further it is the duty of the party to the proceedings to prove their case by way of either letting in oral evidence or by documentary evidence.

7. Since the suit has been filed for partition and separate possession stating that Anandan is having 1/7th share in the suit property and his legal heirs viz., the plaintiffs are entitled to the said 1/7th share of late Anandan. The only point to be decided in the case is whether there is any well situated in the suit property. Even though in the plaint, in the description of property, the existence of well and pathway has been mentioned, it was not disputed in the written statement. Since the suit is for partition, appointment of Advocate Commissioner is not necessary and the existence of well

or not could be decided at the time of passing final decree and as such, there is no necessity for Advocate Commissioner to inspect the property and file report. In such circumstances, I do not find any reason to interfere with the findings of the trial court, dismissing the application for appointment of Advocate Commissioner. Accordingly, the Revision Petition deserves to be dismissed and the same is dismissed. No costs. Consequently, connected M.P., is closed.

05.01.2016

nvsri

To

1. The Subordinate Judge, Dharmapuri.

R.MALA,J.

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