

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :22.01.2016

CORAM :

THE HONOURABLE MS.JUSTICE R.MALA

C.R.P(PD).No.117 of 2016

and

C.M.P. No.667 of 2016

N.Annamalai

.. Petitioner/Defendant

Vs.

N.Kumaravelu

.. Respondent/Plaintiff

Prayer:- This Civil Revision Petition is filed under Article 227 of Constitution of India, against the fair and decreetal order dated 01.10.2015 in I.A.No.8005 of 2015 in O.S.No.5607 of 2014 on the file of the learned I Assistant Judge, City Civil Court, Chennai.

For Petitioner : Mr.R.G.Annamalai

ORDER

Civil Revision Petition is filed against the fair and decreetal order dated 01.10.2015 in I.A.No.8005 of 2015 in O.S.No.5607 of 2014 on the file of the learned I Assistant Judge, City Civil Court, Chennai.

2.At the time of admission, argument of the learned counsel for the revision petitioner is heard in length.

3.The respondent herein as a plaintiff filed a suit in O.S.No.5607 of 2014 for bare injunction. The defendant filed a written statement and contesting the same. Along with the suit, the plaintiff has also filed an application in I.A.No.15094 of 2014 for interim injunction, in which, the defendant/revision petitioner herein has filed a counter. During pendency of the same, the revision petitioner/defendant has filed an application in I.A.No.764 of 2015 under Order 26 Rule 9 C.P.C., for appointment of Advocate Commissioner. The trial Court has dismissed the application on the ground that description of suit schedule property was not furnished. Thereafter, the revision petitioner/defendant has filed the present application in I.A.No.8005 of 2015 under Order 26 Rule 9 C.P.C. For the same relief. The respondent/plaintiff has filed a detailed counter. The trial Court, after hearing both sides, dismissed the application, against which, the present revision has been preferred by the defendant.

4.Learned counsel for the revision petitioner/defendant submits that the Advocate Commissioner has to be appointed to visit the A, B, C and D suit schedule properties belonging to the plaintiff and the defendant and call for the reports regarding as to who made the encroachments into the C and D schedule passage properties by constructions put up by the revision petitioner/defendant. He further submits that to avoid examination of other witnesses, Commissioner has to be appointed and he will inspect the property and file a report, which will reduce the burden of the Court. That factum was not considered by the trial Court. Therefore, he prayed for allowing the revision.

5.On perusal of the typed set of papers, it reveals that the plaintiff and defendant are brothers. The suit properties have been purchased by the plaintiff and defendant on 02.09.1962. Thereafter, the plaintiff and defendant were in joint possession and enjoyment of the properties. The properties were partitioned between the plaintiff and defendant by means of a registered partition deed dated 21.03.1979. 'A' schedule property was allotted to the respondent/plaintiff and 'B' schedule property was allotted to the revision petitioner/defendant. 'C' and 'D' schedule properties

are shown as common passage. Since the revision petitioner/defendant herein attempted to raise a compound wall in the middle of 8 feet breadth common passage, the plaintiff was constrained to file the present suit for permanent injunction restraining the defendant from constructing any compound wall or any other construction obstructing the free access of the common passage and disturbing the peaceful possession and enjoyment of the plaint schedule property of the plaintiff.

6.The defendant/revision petitioner has filed a written statement stating that C schedule common passage is in T.S.No.12/6. The D schedule common passage is in T.S.No.12/4. The separate passage belonging to the defendant in T.S.No.12/10 and the B schedule site and house property are situate in T.S.Nos.12/5 and 12/8. Earlier, the defendant/revision petitioner has filed an application in I.A.No.764 of 2015 for appointment of Advocate Commissioner and the same was dismissed by the trial Court by holding that he has not furnished description of the properties. But the order of the trial Court was not filed in the typed set of papers. Thereafter, the defendant/revision petitioner

has filed the present application in I.A.No.8005 of 2015 for the following relief:

“to appoint an Advocate Commissioner to visit the suit A, B, C and D schedule properties belonging to the plaintiff and the defendant and call for the reports regarding as to who made the encroachments into the C and D schedule passage properties by constructions put up by the revision petitioner/defendant.”

7.It is well settled dictum of the Honourable Apex Court that no Advocate Commissioner can be appointed to collect the material evidence to prove the possession. In the case on hand, in the prayer itself, it is mentioned as “call for the reports regarding as to who made the encroachments into the C and D schedule passage properties by constructions put up by the revision petitioner/defendant.” Once the suit is for permanent injunction, it is the duty of the plaintiff/respondent to prove that he is having right over the suit properties and it is not the duty of the defendant to disprove the case. In such circumstances, the defendant/revision petitioner only with a view to collect the material evidence for future litigation, has filed the present application for appointment

of Advocate Commissioner. The trial Court has held that the present application is barred under Section 11 of C.P.C., since the earlier order was dismissed and as the revision petitioner has not challenged the same. Even though the present application is not hit by res judicata, the revision petitioner is not entitled to collect material evidence by way of appointing Advocate Commissioner. So the revision is dismissed as devoid of merits.

8.In the result, the Civil Revision Petition stands dismissed.
No costs. Consequently, connected Miscellaneous Petition is closed.

22.01.2016

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Index:Yes/No

To

I Assistant Judge, City Civil Court, Chennai.

R.MALA,J.

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