

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :27.04.2016

CORAM

THE HONOURABLE MR. JUSTICE D.KRISHNAKUMAR

C.R.P.(NPD) No.3992 of 2008
and
M.P.No.1 of 2008

Chinnamuthu

... Petitioner

vs.

Palaniappan

... Respondent

Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decretal order dated 16.9.2008 made in I.A.No.62 of 2008 in A.S.No.17 of 2007 on the file of the Additional District Court/Fast Track Court No.IV, Bhavani.

For Petitioner : Mr.N.Manokaran

For Respondent : No appearance

ORDER

This Civil Revision Petition arises against the fair and decretal order dated 16.9.2008 made in I.A.No.62 of 2008 in A.S.No.17 of 2007 on the file of the Additional District Court/Fast Track Court No.IV, Bhavani.

2. The respondent/plaintiff filed a suit in O.S.No.40 of 2006 before the District Munsif Court, Bhavani praying for the relief of permanent injunction with respect to a cart-track. The revision petitioner/defendant filed a Written Statement denying the allegations made in the plaint. Upon considering the arguments advanced by the learned counsel appearing for the parties and considering the oral and documentary evidence adduced in the case, the Trial Court decreed the suit by Judgment dated 10.1.2007.

3. The revision petitioner/defendant filed an Appeal in A.S.No.62 of 2008 against the Judgment and Decree passed by the Trial Court in O.S.No.40 of 2006, dated 10.1.2007 before the Appellate Court. Pending Appeal, the revision petitioner/defendant filed an Interlocutory Application in I.A.No.62 of 2008 on the file of the Additional District Court/Fast Track Court No.IV, Bhavani, praying to re-issue warrant of commission to the same commissioner appointed in I.A.No.155 of 2006 directing him to visit the petition mentioned property and to file his report along with a plan with specific reference to its existing physical features in and around and the availability of separate cart-track to reach the property of the plaintiff. After hearing the arguments of the learned counsel appearing for the parties and perusing the materials on record, the lower Appellate Court dismissed the Interlocutory Application by order dated 16.09.2008. Against this order, the present Civil Revision Petition has been filed by the defendant/revision petitioner.

4. Mr.N.Manokaran, learned counsel appearing for the revision petitioner would submit that the lower Appellate Court has failed to note that the appointment of advocate commissioner is very much necessary to elucidate the dispute in the suit. Rule 9 of Order XXVI of CPC clearly contemplates such appointment for effective adjudication of the suit. Hence, the lower Appellate Court ought to have allowed the petition to enable the parties and the Court to have first hand knowledge about the physical features of the suit property. He would further submit that lower Appellate Court pre-determined the issue and dismissed the Application without knowing the purpose of the petition. The lower Appellate Court being the final Court of fact is entrusted with the power to go into the factual aspects of a case and therefore, there is no legal impediment to get a fresh report and plan by appointing an advocate commissioner. As such, he would submit that the impugned order is liable to be dismissed and the Civil Revision Petition has to be allowed.

5. Though notice was served on the respondent, there is no representation for the respondent.

6. Heard the learned counsel appearing for the revision petitioner and perused the materials on record.

7. In order to have better appreciation of the facts, the Trial Court appointed an Advocate Commissioner in an Interlocutory Application in I.A.No.155 of 2006 in O.S.No.40 of 2006 and he filed his report. During trial, the respondent/plaintiff examined two witnesses and marked two exhibits and the defendant/revision petitioner also examined two witnesses and marked five exhibits. The Advocate Commissioner's Report was marked as Ex.C.1 and his Plan was marked as Ex.C.2. Based on the evidence and taking into consideration the submissions made in the case, the trial Court decreed the suit. Aggrieved against the judgment and decree passed by the Trial Court, the defendant preferred an Appeal in A.S.No.17 of 2007 before the Appellate Court. Pending the Appeal, the appellant/defendant preferred the instant Interlocutory Application for the relief stated above. After hearing the arguments advanced by the learned counsel on either side and after considering the oral and documentary evidence available on record, the lower Appellate Court dismissed the Interlocutory Application in I.A.No.62 of 2008 holding that property's nature at the time of filing the case cannot be ascertained by appointing an advocate commissioner and on his inspection over the property, and that an alternative path said to be existing is a path located in the forest area whereupon the parties cannot have any right and therefore, the Appellate Court was of the view that appointment of advocate commissioner again is unnecessary and has rightly dismissed the instant Interlocutory Application. This Court finds no infirmity or irregularity in the order passed by the lower Appellate Court warranting its interference.

8. Hence, the Civil Revision Petition is dismissed. The connected Miscellaneous Petition is closed. No costs.

27.04.2016

Index : yes / no

Internet :yes / no

asvm

To

- 1.The Additional District Judge,
Fast Track Court No.IV,
Bhavani, Erode District.
- 2.The Principal District Munsif,
Bhavani, Erode District.

D.KRISHNAKUMAR, J.

(asvm)

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