



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 16.03.2016

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P (MD) No.511 of 2016 (PD)

and

C.M.P. (MD) .No.2194 of 2016

S.Jenkins Selva Rajan

.. Petitioner

Vs.

1.T.Suseelabai

2.Paulretnam

3.T.Hebsibai

4.T.Bhulajasbin

5.T.Samuelraj

.. Respondents

Prayer : This Civil Revision Petition is filed under Article 227 of the Constitution of India, against the fair and decretal order dated 21.12.2015, made in I.A.No.318 of 2015 in O.S.No.91 of 2013 on the file of the District Judge, Kanniyakumari Division at Nagercoil.

For Petitioner : Mr.C.Dhanaseelan

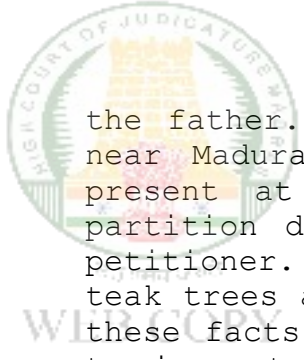
For Respondents : Mr.P.Arun Jayatram

For R1.

ORDER

This memorandum of Civil Revision Petition has been filed, against the fair and decretal order dated 21.12.2015, made in I.A.No.318 of 2015 in O.S.No.91 of 2013 on the file of the District Judge, Kanniyakumari Division at Nagercoil.

2. The petitioner is the fifth defendant in the Suit in O.S.No.91 of 2013. The first respondent/plaintiff filed suit for partition. According to the first respondent, all the properties belonged to her father, deceased Dharmaraj and after his death as per Indian Succession Act, the second respondent has 1/3rd share in all the properties and the petitioner and the first respondent/plaintiff and respondents 3 to 5 have 2/3rd share. While so, the respondents 3 to 5 created one document alleged to be a partition deed without the knowledge of the first respondent. The first respondent is not a party to the said alleged partition deed. Based on the said partition deed three cents were sold to the petitioner/fifth defendant. The wife of the fifth respondent/fourth defendant along with six persons trespassed into the third item of the property and cut and removed the valuable teak trees and caused heavy loss to the first respondent/plaintiff. Therefore she filed an application for the appointment of an Advocate Commissioner to note down the physical features of the suit schedule property. The fifth respondent filed counter and opposed the same on the ground that vendors have right to sell the property to him and he has not cut any tree and put up construction. As per the oral arrangement made in a documentary form a family partition deed was executed on 26.10.2012 and as per the wish of



the father. The first respondent is working as a teacher at Aundipatti, near Madurai. Due to her pre-occupation in the school, she was not present at the time of registration of partition deed. As per the partition deed, the fifth respondent sold the property to the revision petitioner. The fifth respondent denied that his wife cut and removed the teak trees and put up the construction. The learned Judge considering all these facts and materials on record, appointed the Advocate Commissioner to inspect the suit property. Against that the present Civil Revision Petition has been filed.

3. The learned counsel for the petitioner made various contention on merits of his rights in the suit. As far as appointment of the Advocate Commissioner is concerned, the learned counsel for the petitioner contended that the learned Judge erred in appointing the Advocate Commissioner on the very same day of impleading the petitioner as the fifth defendant. The learned Judge erred in appointing the Advocate Commissioner in the partition suit before passing the preliminary decree. The learned Judge ought to have given opportunity to file counter in the application for appointment of Advocate Commissioner. The Advocate Commissioner appointed and inspected the suit property and filed his report without giving notice to the parties.

4. The learned counsel for the petitioner relied on the judgement in **S.Anthonidoss and another vs. Sabesthiyan and another** reported in **1996 (1) CTC 472** wherein in paragraph No.7 it has been held as follows;

"7.The other submission of the learned counsel that the other side will not be prejudiced by the appointment of an Advocate-Commissioner and that it will help to ensure that no construction is made to the detriment of the rights of the plaintiffs, is not a tenable one. The question of appointment of a Commissioner does not depend upon merely whether any prejudice will be caused to the other side or not. Instead, there should be sufficient basis and justification as also an effective need and an appointment of Commissioner cannot be sought for or obtained as a matter of course and that too to achieve an ulterior object or motive."

5. The learned counsel for the first respondent contended that the wife of the fourth defendant trespassed into the suit property and cut valuable teak trees and put up new construction. In the circumstances, the learned Judge has rightly appointed an Advocate Commissioner. The Advocate Commissioner has also inspected the property on 23.01.2016 and filed his report on 03.02.2016.

6. The learned counsel for the first respondent relied on the judgment in **Thangammal vs. K.Kumarasamy and another** reported in **2015(3) CTC689** wherein in paragraph Nos.17 and 20 it has been held as follows;

"17.In the above said facts, it is correct to state that the Plaintiffs were seeking for ascertaining the materials available in the Suit site. But in the present case, it is the trees which are permanently fixed to the land that are to be counted which if removed by cutting the same pending the Suit, the same cannot be detected at a later point of time. Besides it will be difficult for the Plaintiff to assess the damage also.



20. As stated earlier, the Trial Court has got discretion to Order a Commission or not and such discretion should be exercised judicially. As stated earlier, the Report of the Commissioner is only a piece of evidence and not necessary it is not binding on the Court. The Trial Court being one of the fact findings Courts should give an opportunity to the parties to establish their case. In the present case, the First Plaintiff, is the wife of the First defendant who alleges to have been defrauded. Therefore, the appointment of Commissioner at this stage is an effective need which would go to the adjudication of the Suit."

7. Heard the learned counsel for the petitioner as well as the learned counsel appearing for the first respondent and perused the materials available on record.

8. The first respondent filed an application for appointment of Advocate Commissioner on the ground that the wife of the fourth defendant trespassed and cut all the valuable Teak trees and removed the same. These allegations were denied by the fourth defendant in his counter. In the circumstances, the learned judge has given valid reasons for appointment of Advocate Commissioner, and appointed the Advocate Commissioner. As admitted by both counsel for petitioner and the first respondent, the Advocate Commissioner inspected the property and filed his report.

9. In the circumstances, without expressing any opinion on merits this Civil Revision Petition is **dismissed**. However, it is open to the petitioner, if aggrieved by the Advocate Commissioner's report, file objection to the Advocate Commissioner's report and cross examine the Advocate commissioner at the time of trial. No Costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(P&A)

/True copy/

Sub Assistant Registrar

To
The District Judge,
Kanniyakumari District at Nagercoil.

+1cc to M/s.C.Dhanaseelan, Advocate in SR.No.15167

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