

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.02.2017

CORAM

THE HON'BLE MRS.JUSTICE **PUSHPA SATHYANARAYANA**

CRP PD No.272 of 2015

and

M.P.No.1 of 2015

1. Kannaiyar

2. Alwar Iyer

.. Petitioners

vs

1. Selvi

2. Pachiammal

.. Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decretal orders dated 11.10.2014 passed in I.A.No.230 of 2014 in O.S.No.226 of 2010 on the file of the District Munsif Court, Mettur.

For Petitioners : Mr.P.Mani

For Respondent-1 : Mr.V.Sekar

For Respondent-2 : Served - No Appearance.

ORDER

This revision petition is filed by the plaintiffs in the suit challenging the order, dismissing the application to appoint Advocate Commissioner to measure the suit property.

2. The suit is filed for declaration and for consequential permanent injunction. According to the plaintiffs, the property was purchased by their father in Survey No.41/1 of an extent of 1 acre, on 15.06.1972, out of larger extent with specific boundaries. The sale deed is also marked along with the plaint. Out of the said 1 acre, it is stated that the plaintiffs had sold 0.62 cents of land on 12.03.1990 with specific boundaries. The said purchaser Periasamy also had sold the same to one Alamelu. The balance 0.38 cents of land continued to remain in the possession of the plaintiffs.

3. While so, the first defendant has filed written statement stating that it is jointly owned by few others along with the plaintiffs and the defendants. Subsequently, revenue records were changed in the name of the defendants and they are in possession of the property. According to the defendants, there is no such survey number as 41/1, as the said survey number was sub-divided long back. Therefore, the plaintiffs decided to file an application to appoint a Commissioner to measure the suit property as per the sale deeds dated 15.06.1972 and also 12.03.1990, and to note down the physical features of the suit property with the help of a qualified surveyor.

4. The said application was resisted by the defendants stating that though the written statement was filed in the year 2011, the present application has been filed only in the year 2014, when the suit is posted for trial. According to the defendants, even the FMB and other revenue records, disclose only the sub-divided survey numbers. Therefore, it would be difficult for the Advocate Commissioner to locate and identify the suit property as prayed for by the plaintiffs and sought for dismissal of the application.

5. The trial Court, after consideration of averments and the arguments of the respective parties, had dismissed the application on the ground that it is only an exercise of procrastination.

6. Now, the question that arises for consideration is as to whether the Commissioner has to be appointed in the given circumstances.

7. First of all, the petitioners have not stated the reason for appointing a Commissioner. The title of the plaintiffs has to be decided only based on the two sale deeds, one under which he had purchased the same, and another under which he had sold the portion of the suit

property. The defendants have specifically stated that the Survey No.41 was sub-divided subsequently and the physical features that was available in 1972 is not the same after re-survey. Therefore, it will be difficult for the Commissioner to furnish the report under plan, even if he takes the assistance of the Surveyor.

8. The learned counsel for the respondents had vehemently contended that the description of the property is not given in the petition and appointment of Commissioner cannot be made for locating or identifying the property.

9. However, the learned counsel for the revision petitioners submitted that when there is dispute between the parties with respect to identity and location, it is just and necessary that the Commissioner be directed to measure the property with the help of a qualified Surveyor and also find out the area of dispute, so that much of oral evidence can be reduced.

10. In such circumstances, the Court has only to see whether any prejudice would be caused to the respondents by appointing a Commissioner. Admittedly, the case is now posted for trial. The

application has been filed by the plaintiffs at that point of time. The object of Order 26 Rule 9 is not to collect the evidence which can be taken in Court, but only to obtain evidence which is peculiar in nature and which cannot be proved in Court and the same can be obtained only on a spot inspection. Therefore, it becomes discretion of the Court to order a local investigation or not. The said discretion has to be exercised in a judicious and sound manner. Where the controversy of possession between the parties relates to area of land or identification of location of an object or land, local investigation is essential, requisite and necessary. Even the report of a Commissioner once available, the same can be used only for the limited purpose of appreciating the evidence. The report is not in any way binding on the Court and the Court can arrive at its own conclusion even at variance of such report. When in the written statement, the defendants had specifically stated that there is no such survey number as mentioned in the plaint, and when the plaintiffs have laid their suit only based on two documents of sale, in which survey No.41/1 alone is mentioned, that becomes the main controversy in this case. Therefore, the plaintiffs have a right to place evidence, which they could require to substantiate their case before the Court, and it is the duty of the Court to receive such evidence, unless there are justifiable factors in law to

decline to receive it. The refusal of the request of the party to appoint a Commissioner under Order 26 Rule 9 C.P.C to measure the suit property with the help of the Surveyor in this case may amount to failure to exercise of jurisdiction vested in it. As stated earlier, when the suit itself has to be decided only based on the existence of Survey number, which is admittedly sub-divided, the best way to find out the possession is by way of local investigation, by appointing an Advocate Commissioner to measure the suit property with the help of a land Surveyor.

11. The only reason given by the trial Judge is delay. When the suit itself is filed by the plaintiffs, the question of them delaying the suit, does not arise. The suit is only listed for trial and the same has not actually commenced. Therefore, the learned trial Judge has failed to exercise the jurisdiction vested in him on misconception of facts. Therefore, the same is liable to be set aside.

12. Accordingly, the Civil Revision Petition is allowed. The learned District Munsif, Mettur is directed to appoint an Advocate Commissioner as prayed for at the expenses of the plaintiffs, who shall conduct local investigation of the suit property and measure the suit

property with the help of a qualified surveyor as per the sale deed dated 15.06.1972 and 12.03.1990 and note down the physical features of the property and the Advocate Commissioner shall file his report and plan before the Court below. No costs. Consequently, connected miscellaneous petition is closed.

20.02.2017

srn

Index: yes/No

Internet: yes

To

The District Munsif Court,
Mettur

PUSHPA SATHYANARAYANA,J.,

srn

CRP PD No.272 of 2015
and
M.P.No.1 of 2015

20.02.2017

<http://www.judis.nic.in>