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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 02.08.2018

DELIVERED ON : 11.12.2018

CORAM

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

C.R.P. (MD) (PD) No.1069 of 2018
and
CMP(MD)No.4644 of 2018

Chandrasekaran

.. Petitioner/Petitioner/1st Respondent

vs

1.Sumathi
2.Karthigaiselvi
3.Packiyalakshmi

.. Respondents/Respondents/Plaintiffs

Civil Revision Petition filed under Article 227 of Constitution of India, against the order dated 02.03.2018 made in I.A.No.45 of 2018 in O.S.No.395 of 2009 on the file of the I Additional Sub-Court, Melur Camp.

For Petitioner : Mr.T.R.Jeyapalam

For Respondents : Mr.T.K.Gopalan

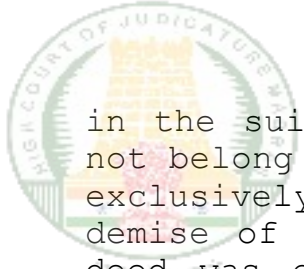
ORDER

This revision is filed under Article 227 of the Constitution of India challenging the fair and executable order dated 2.3.2018 passed in I.A.No.45 of 2018 in O.S.No.395 of 2009 on the file of the learned I Additional Subordinate Court, Melur Camp.

2. The facts in a nutshell are as under: The respondents herein are the plaintiffs in the suit, being O.S.No.395 of 2009, on the file of the I Additional Subordinate Court, Melur Camp, filed seeking a decree of partition and separate possession of their 1/5th share in the suit properties. Respondents 1 and 2 are daughters of petitioner's elder brother, viz., Dhanasekaran. The third respondent is the wife of his elder brother.

<https://hcservices.ecourts.gov.in/hcservices/>

3. The petitioner herein filed a detailed written statement



in the suit, inter alia, pleading that all the suit properties do not belong to his late father (Subbiah); that some of the properties exclusively belonged to his mother (Kamatchi Ammal); that after the demise of his elder brother (Dhanasekaran), a registered partition deed was effected between the respondents and other sharers; and that the third respondent herein had subscribed her signature to the partition deed dated 4.7.1986; that a north to south partition wall was erected in Item No.7 of the suit properties dividing the same into eastern and western portion and that the eastern portion of Item No.7 and the entire Item No.9 of the suit properties were allotted to the share of the respondents.

4. In the said suit, the third respondent was examined as P.W.1 and when a specific question was put to her about the erection of the partition wall, she blatantly denied the same. However, to the query as to whether she would consent for appointment of a Commissioner to physically verify the erection of the partition wall, she consented for the same.

5. On this premise, the petitioner alleges to have filed an application, being I.A.No.45 of 2018, under Order XXVI Rule 9 of the Civil Procedure Code. The respondents opposed the said interlocutory application by filing a counter affidavit.

6. The Court below, by order dated 2.3.2018 which is under challenge, dismissed the interlocutory application holding that the petitioner by way of this application is proceeding to collect evidence.

7. Calling in question the said order dated 2.3.2018, the present revision is filed.

8. The learned counsel appearing on behalf of the petitioner submitted that the Court below erred in not considering the vital fact that vide a registered partition deed dated 4.7.1986, the eastern portion of Item No.7 of the suit properties measuring about 1000 sq. ft. and Item No.9 of the suit properties had been allotted to the share of the respondents and, therefore, partition had already been given effect to. He added that when the effectuation of the said partition is itself disputed by the respondents or rather concealed by the respondents, it is for the petitioner to prove the same.

9. The learned counsel for the petitioner further submitted that if the existence of north to south wall dividing Item No.7 of the suit properties into eastern and western half is established, the factum of effecting of partition will be proved. Moreover, he submitted that the respondents have constructed five small houses in the eastern portion of the Item No.7 of the suit properties allotted to them under the partition deed dated 4.7.1986.

10. Lastly, he submitted that when the third respondent



herself, when examined as P.W.1, being the signatory to the partition deed dated 4.7.1986, had consented for appointment of a Commissioner, the Court below ought to have allowed the petition and the same would never amount to collection of evidence.

11. Per contra, the learned counsel appearing for the respondents reiterated the reasons that weighed with the Court below in dismissing the interlocutory application and prayed for dismissal of this revision.

12. I heard Mr.T.R.Jeyapalam, learned counsel appearing for the petitioner and Mr.T.K.Gopalan, learned counsel appearing for the respondents and perused the documents available on record.

13. According to the petitioner in order to prove that there exists a dividing wall in item No.7 of the suit property, it is necessary to appoint an advocate commissioner to note down the physical features of item No.7 of the suit property.

14. On the other hand, it is the say of the respondents that the petitioner has come up with the petition seeking appointment of advocate commissioner only to collect the evidence and the advocate commissioner cannot be appointed for the said purpose.

15. The suit in question is filed for partition by the respondents and the suit has been defended by the petitioner contending that the respondents were in possession of eastern portion and the petitioner was in possession of western portion of suit item No.7.

16. Admittedly, in the present suit the trial has begun and third plaintiff was examined as P.W.1 and during her cross-examination, the third plaintiff denied the existence of dividing wall in suit item No.7. In her evidence, P.W.1 admits that she has no objection for appointing the advocate commissioner to note down the existence of the dividing wall in item No.7 of the suit property.

17. Under Order 26, Rule 9 of CPC, the Court has the discretion to order local investigation. The object of the local investigation is not so much to collect evidence which can be taken in Court but to obtain evidence which from its pecuniary nature can only be had on the spot. The cases of boundary disputes and disputes about the identity of lands are instances, when a Court should order a local investigation under Order 26, Rule 9 of CPC.

18. In order of determine whether there exists a wall in item No.7 of the suit property, it is always desirable to note down the physical features of suit item No.7 by an expert i.e., advocate commissioner, and particularly find out the existence of dividing wall. If the advocate commissioner inspected the suit item No.7 and note down the physical features of the same, particularly, the



existence of wall, if any, much oral evidence would be reduced and also it will be very useful to the trial Court to decide the controversy between the parties qua item No.7.

19. It is apposite to mention that the object of the local investigation under Order 26, Rule 9 of CPC is to obtain evidence which from its peculiar nature can best be had from the spot itself, as it enables the Court to properly and correctly understand and assess the evidence on record when controversy relates to identification, location and measurement of the land or premises or object local investigation should be done so that the parties may be aware of the report of the commission and go to the trial prepared.

20. The object of appointment of an advocate commissioner is not to collect evidence but for elucidating matters, which are local in character and which can be done only by local investigation, at the place concerned. A commissioner cannot decide the dispute between the parties to the suit. However, his report would help the Court in deciding the dispute. The appointment of advocate commissioner can be made, especially, when no prejudice would be caused to the opposite party, by such appointment.

21. Only because trial has commenced, appointment of advocate commissioner cannot be denied in the present case, as the existence of dividing wall in suit item No.7 was denied by the respondents. Moreover, in her cross-examination, P.W.1 admitted that she has no objection in appointing the advocate commissioner to note down the features of suit item No.7 particularly whether there exists dividing wall in item No.7 of the suit property. While dismissing the petition, the trial Court has not looked into the said aspect in proper perspective. As stated supra, no prejudice would be caused to the plaintiffs, if the advocate commissioner is appointed to note down the physical features of item No.7 of the suit property.

22. In view of the above discussion, this Court is of the view that the trial Court erred in dismissing the petition filed by the petitioner seeking to appoint an advocate commissioner and the same is liable to be set aside.

23. In the result,

(a) The Civil Revision Petition is allowed by setting aside the order passed in I.A.No.45 of 2018 in O.S.No.395 of 2009 dated 02.03.2018 on the file of the learned I Additional Subordinate Court, Melur Camp.

(b) The learned I Additional Subordinate Judge, Melur Camp is directed to appoint an Advocate Commissioner within a period of two weeks from the date of receipt of a copy of this order by directing the advocate commissioner to inspect the suit schedule item No.7 and note down the physical features of the same and file a report along with rough sketch within a period of four weeks thereafter.



(c) No costs. Consequently, connected miscellaneous petition is closed.

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Sd/-

Assistant Registrar (CS I)

Sub Assistant Registrar (CS)

To

The I Additional Sub Judge,
Melur Camp.

+1cc to Mr.T.R.JEYAPALAM, Advocate, SR.No. 99362

C.R.P. (MD) (PD) No.1069 of 2018 and
CMP (MD) No.4644 of 2018
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VSV

KK/SAR/15.05.2019/ 5P-3C