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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 24.07.2018

DELIVERED ON : 16.11.2018

CORAM

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

C.R.P. (MD) (PD) No.2305 of 2017

and

CMP(MD)No.11164 of 2017

A.S.Kandiban

.. Petitioner

vs

1. S.Ayyakkan

2. T.Valli

.. Respondents

Civil Revision Petition filed under Article 227 of Constitution of India against the fair and decretal order dated 30.10.2017 passed in I.A.No.311 of 2017 in A.S.No.9 of 2017 on the file of the II Additional Subordinate Court, Nagercoil, Kanyakumari District.

For Petitioner : Mr.N.Pragalathan

For Respondents : Mr.S.C.Herold Singh

ORDER

This Civil Revision Petition has been filed against the fair and decretal order dated 30.10.2017 passed in I.A.No.311 of 2017 in A.S.No.9 of 2017 on the file of the learned II Additional Subordinate Court, Nagercoil, Kanyakumari District.

2. The facts in a nutshell are as under: The respondents herein have filed a suit in O.S.No.40 of 2013 on the file of the learned I Additional District Munsif Court, Nagercoil, for permanent injunction restraining the petitioner herein from disturbing the peaceful possession and enjoyment over the plaint schedule property and from dismantling the compound wall alleged to be situated on the western side of the plaint schedule property.

3. It is the case of the petitioner that the respondent plaintiffs have no title, possession over plaint schedule properties and the suit property was subjected to re-survey and the said factor was not considered by the trial Court while decreeing the suit on 20.12.2016.



4. Assailing the said decree passed in the suit, the petitioner preferred an appeal, being A.S.No.9 of 2017, on the file of the learned II Additional Sub Court, Nagercoil.

5. Pending appeal, the petitioner filed an interlocutory application, being I.A.No.311 of 2017, seeking appointment of Commissioner, inter alia, to note down the physical features and to measure the suit property with the help of Taluk Surveyor.

6. The Court below, by order dated 30.10.2017 passed in I.A.No.311 of 2017 in A.S.No.9 of 2017, dismissed the interlocutory application filed by the petitioner.

7. Calling in question the said order dated 30.10.2017, the present revision is filed.

8. The learned counsel appearing on behalf of the petitioner submitted that when the portion of the suit schedule properties was acquired for the purpose of laying road even before purchasing the land by the first respondent and the same was accepted by the first respondent, the trial Court ought to have allowed the petition for appointment of Commissioner to survey the land with the help of Taluk Surveyor.

9. The learned counsel further contended that the first respondent has clear knowledge about the extent of each share, i.e., 4 cents, through the deed dated 2.2.1994, but the trial Court failed to note the same and erred in dismissing the interlocutory application seeking appointment of Advocate Commissioner.

10. Per contra, the learned counsel appearing on behalf of the respondents reiterated the reasons that weighed with the Court below and prayed for dismissal of this revision petition.

11. I heard Mr.N.Pragalathan, learned counsel for the petitioner and Mr.S.C.Herold Singh, learned counsel for the respondents and perused the documents available on record.

12. In the case on hand, it is the specific case of the petitioner that in the year 1994, the first respondent and his brothers executed a registered partition deed and in that partition, the property bearing R.S.No.582/10 of an extent of 4 cents was given to the petitioner's father, one Selva Perumal. It is stated thus he got exclusive possession of 12 cents. It is seen that P.W.1 had also admitted the transaction with regard to 4 cents, but none of the parties know the measurement of the plaint schedule property. It is also seen from the records that on 1.10.2012, the father of the petitioner's father had lodged a complaint before the Superintendent of Police and it was



transferred to the Land Grabbing Wing and on enquiry, the respondents herein gave an undertaking that they have no objection to measure and fix the boundaries and the said aspect also was not considered by the trial Court. It is the further case of the petitioner that during the pendency of the appeal, on 18.4.2017, the respondents and few others constructed and altered the suit schedule property and, therefore, appointment of Advocate Commissioner is necessary.

13. Order XXVI Rule 9 of the Civil Procedure Code reads thus:

"Commissions to make local investigations :

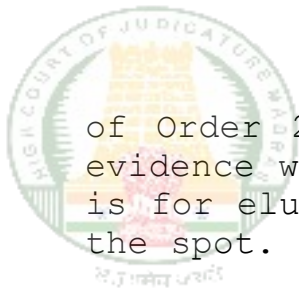
In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules."

14. A reading of the above rule makes it clear that the Court, if it deems fit that a local investigation is requisite or proper for the purpose of elucidating any matter in dispute, may issue Commission. This rule is applicable on all fours to the appellate Court dealing with the appeal also.

15. It is trite that the appellate Court, while considering the application for appointment of commissioner, should not order the application for the sake of asking and there should be proper application of mind to the facts of the case. While the question of identity of the property is pleaded, it would be only proper for the Court to first collect the materials as to the identity of the property by way of a report from the Commissioner to adjudicate the dispute at the time of hearing of the appeal.

16. Where the Court is satisfied on the materials available on the record that a party is not able to produce the desired evidence for reasonable circumstances, it may assist the party to appoint a Commissioner to get the evidence. However, such evidence is not binding on the Court, which is to appreciate the same along with other evidence. The party can countermand the evidence in the Commissioner's report by giving any other evidence, as the object



of Order 26 Rule 9 of CPC, is not to assist a party to collect evidence where it can get the evidence itself, but the real object is for elucidating any matter in dispute by local investigation at the spot.

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17. It is trite that the Court cannot prevent a party from adducing the best evidence, if such evidence can be gathered with the help of a Commissioner. Refusal of the request of the party to appoint a Commissioner under Order 26 Rule 9 of C.P.C., to make a local investigation in an appropriate case amounts to failure of exercise of jurisdiction vested in it.

18. A Commissioner for local investigation is deputed under Order 26 Rule 9 of CPC when the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute or for ascertaining any other matter mentioned in the said rule. The object of local investigation under the above provision is to obtain evidence which from its peculiar nature can best be had from the spot itself. Such evidence enables the Court to properly and correctly understand and assess the evidence on record already recorded. It clarifies or explains any point which is left doubtful on the evidence on record.

19. In the instant case, it is the specific plea of the petitioner that the first respondent and his brothers executed a registered partition deed and in that partition, the property of an extent of 4 cents has been allotted to him and P.W.1 had admitted that he does not know the measurement of the plaint schedule property. That apart, it is the specific plea of the petitioner that a portion of the suit schedule properties was acquired for the purpose of laying road, that too, admittedly, before the land was purchased by the first respondent, and therefore, the suit property needs to be surveyed. Moreover, the plaintiff's themselves have sought appointment of the Commissioner and this shows that something more than what is available on record needs to be brought in as evidence by way of local investigation by a Commissioner. Therefore, Commissioner's report of local investigation is absolutely necessary in this case and the Appellate Court, in my considered view, was not justified in rejecting the prayer of the petitioner for issue of commission.

20. In this view of the matter, this Court is of the firm view that the impugned order cannot be sustained and the action on the part of Appellate court, rejecting the prayer of the petitioner for issue of commission most probably will produce ~~adverse effect~~ in the decision of the case on merits. Therefore, the impugned order dated 30.10.2017 passed in I.A.No.311 of 2017 in A.S.No.9 of 2017 on the file of the learned II Additional



Subordinate Court, Nagercoil, Kanyakumari District is liable to be set aside.

21. For the foregoing reasons, the revision is allowed. The order dated 30.10.2017 passed in I.A.No.311 of 2017 in A.S.No.9 of 2017 on the file of the learned II Additional Subordinate Court, Nagercoil, Kanyakumari District is set aside and the Appellate Court is directed to appoint a Commissioner in the matter in issue and after obtaining his report, dispose of the appeal expeditiously, of course, after giving an opportunity to the respondents to countermand the same. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (WRITS)

// True Copy //

Sub Assistant Registrar(CS-IV)

To

The II Additional Subordinate Judge,
Nagercoil.

+1cc to Mr.N.Pragalathan, Advocate, Sr.No.95657.

+1cc to Mr.S.C.Herod Singh, Advocate, Sr.No.96145.

order made in
C.R.P. (MD) (PD) No.2305 of 2017
and
CMP (MD) No.11164 of 2017
16.11.2018

VSV

RAM-KK/RSK/SAR 4/24.12.2018/5P/4C