

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :03.04.2019

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

C.R.P(PD) No.1140 of 2019

and

CMP.No.7385 of 2019

B. R. Dorairaj

... Petitioner

-VS-

1. B. R. Halan
2. B. R. Devaraj
3. B. R. Dharuman
4. B. R. Bhojan
5. B. R. Bhirman
6. J. M. Ravi
7. Mrs. Vasantha
8. Mrs. S. Nirmala
- Smt B.R.Lakshmi (died)
9. Mrs. Vijaya
10. Mrs. D. Revathi
11. Mrs. D. Bhuvaneshwari
12. Mrs. Leelavathy Halan
13. Smt. Maasi
14. Mrs. Savitha
15. Mrs. Sangeeta
16. T.M.Mohammed Sali
17. R. Chandran
18. R. Vimala
19. R. Shanmugam

सत्यमेव जयते

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... Respondents

Prayer: Petitions under Article 227 of the Constitution of India praying to set aside the fair and decreetal order made in I.A.No.193 of 2018 in O.S.No.58 of 2010 on 12.11.2018 by the Subordinate Court at Udhagamandalam.

For Petitioner : Mr. A. Palaniappan

ORDER

The above Civil Revision Petition is filed challenging the order passed by the learned Subordinate Judge, Udhagamandalam in I.A.No.193 of 2018 in O.S.No.58 of 2010 rejecting the request of the plaintiff/revision petitioner to appoint an Advocate Commissioner for the following purpose:

1. *To survey the schedule mentioned property as per the F&B sketch.*
2. *To find out whether the 17th defendant had encroached on the western boundary over the suit schedule property? if so, what is the extent of encroachment made.*
3. *To find out the nature and thickness of wall of the 17th defendant's building situated on the western boundary of the suit schedule property.*
4. *To file a detailed report along with the sketch in the interest of justice*

2. The facts in brief are as follows:

The plaintiff has filed a suit for declaring various documents like the settlement deed, sale deeds, etc. as null and void and for a direction to the 17th defendant to remove the encroachment which he has put

up on the western portion of the property described as items 1 and 2 failing which permitting the plaintiff to remove the encroachment. It is the case of the plaintiff that the property in question originally belonged to his father B.K.Rama Gowder, who became absolute owner of an extent of 27 cents by virtue of a settlement deed. The further case of the plaintiff is that his father died intestate on 29.12.1962 leaving behind his wife, seven sons and two daughters who have been arrayed as defendants in the suit and the plaintiff is one of the sons. The mother had also died on 16.01.2005 intestate and therefore the property was to be shared equally by all the defendants and the plaintiff. The plaintiff has put forward the case of an original partition in which the properties has been divided amongst the various legal heirs on 05.04.1987 which was subsequently reduced in writing on the very same day in which properties have been partitioned partially.

3. The plaintiff would contend that despite such a partition he came to learn that the defendants were creating fictitious documents and trying to disposses the plaintiff by abuse of process of law and therefore he was constrained to filed the present suit. In fact, 17th defendant had encroached into the property which have been allotted to the share of the plaintiff.

4. The defendants have refuted the allegations made by the

plaintiff in the suit and they would also deny the original partition and they would claim an equal share in the entire suit property. This appears to be the tenor of the written statement by all the defendants. The 17th defendant on the other hand would contend that admittedly as per the partition deed and sale deed the plaintiff is entitled to the building in the green field area but he had no right of the first item of the property. He has further contended the second item of the property does remain common and for the above reasons defendant sought for dismissal of the suit.

5. Thereafter, when the matter was posted in the list eight years after the filing of the suit, the plaintiff has come forward with a case that the 17th defendant had encroached into the property and on that ground filed the present Petition to appoint an Advocate Commissioner for the purposes which have been narrated supra.

6. The respondent/17th defendant had resisted the above application inter alia contending that the application is nothing but an abuse of process of law. The petitioner/plaintiff is not moving forward with the trial despite the matter being posted for trial many times. Further it is contended that the Petition itself is highly belated and was an attempt to gather evidence and therefore he sought for dismissal of

the said Petition.

7. The learned Subordinate Judge, Uthagamandalam, after hearing both the parties, dismissed the said Petition on the ground that this application is nothing but an attempt to collect evidence through the appointment of Advocate Commissioner. Challenging the said order, the revision petitioner is before this Court.

8. Mr. Palaniappan appearing on behalf of the defendant would submit that the defendants are enjoying more than what they were entitled to the various sale deeds and the settlements. The 17th defendant had encroached into the plaintiff's property and this can be noted down only if the Advocate Commissioner visit the suit property and note down the physical features and measuring the property with the help of the surveyor. This Court is unable to accept the arguments of the learned counsel for the petitioner. The very Petition is nothing but an attempt of evidence gathering. The revision petitioner/plaintiff has come forward with the categoric contention that the 17th defendant has encroached into the property of the plaintiff. This is a fact which can easy to establish by the revision petitioner in the form of documents and there was no necessity to appoint an Advocate Commissioner to go over there and assess the property.

P.T. ASHA, J.,

mrn

The petitioner could make use of the revenue records to prove the same as rightly pointed out by the learned counsel for the respondent. The Petition is nothing but an attempt to gather evidence and the same cannot be permitted. Since the Advocate Commissioner cannot be used as a substitute for evidence. The learned Subordinate Judge, Uthagamandalam has rightly dismissed the said application. Accordingly, the Civil Revision Petition stands dismissed. No costs. Consequently, connected Miscellaneous Petitions is closed.

03.04.2019

Index : Yes/No
Internet : Yes/No
Speaking/non-speaking order

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To,
The Subordinate Court,
Udhagamandalam.

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