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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 22.02.2019

DELIVERED ON : 11.03.2019

CORAM

THE HONOURABLE MRS. JUSTICE R. THARANI

C.R.P. (PD) (MD) No. 2090 of 2015

and

M.P. (MD) No. 1 of 2015

Ponthirupathi .. Petitioner/Ist Respondent/Ist Defendant

Vs.

1. Jeyaraj
2. Bala Jothi ... Respondents/Petitioners/Plaintiffs
3. Palthai
4. Thangathirupathi
5. Rajalakshmi .. Respondents/2nd to 4th respondents/
2nd to 4th Defendants

(As no relief is claimed against 3rd to 4th respondents, notice to them is given up)

Prayer : This Civil revision petition is filed under Article 227 of Indian Constitution, to set aside the fair and ex-order dated 10.08.2015 in I.A.No.439 of 2015 in O.S.No.81 of 2014 on the file of the District Munsif Court, Kovilpatti.

For Petitioner : Mr.B.Rajesh Saravanan
For Respondents 1 and 2 : No Appearance
For Respondents 3 to 5 : Mr.M.M.Manivel Pandian

ORDER

Heard Mr.B.Rajesh Saravanan, learned counsel appearing for the petitioner and Mr.M.M.Manivel Pandian, learned counsel appearing for the respondents 3 to 5.

2.This petition has been filed against the order passed in I.A.No.439 of 2015 in O.S.No.81 of 2014 dated 10.08.2015 on the file of the District Munsif Court, Kovilpatti.

3.The petitioner is the first defendant, the respondents 1 and 2 are the plaintiffs and the respondents 3 to 5 are the defendants 2 to 4 in the suit. The respondents 1 and 2 herein have filed a suit in O.S.No.81 of 2014 before the learned District Munsif, Kovilpatti. In the suit, the respondents 1 and 2 have filed a petition in I.A.No.439 of 2015 under Order 26 Rule 9 of C.P.C.,



for the appointment of Commissioner to inspect the suit properties and to note down the physical features. The petition was allowed by the trial Court. Against the order, the petitioner has come forward with this revision petition.

4. On the side of the petitioner, it is stated that the claim of the respondents 1 and 2 is that the father of petitioner, Kanaga Sabapathi Nadar had borrowed a sum of Rs.63,000/- (Rupees Sixty Three Thousand only) from the mother of the first plaintiff and has entrusted the house property in the possession of the plaintiffs and the suit was filed for injunction. The respondents 1 and 2 have filed a petition for appointment of a Court Commissioner, stating that the petitioner is altering the structure of the suit property. The plaintiffs are only tenants and there was a willful default on the payment of rent. The petitioner filed a petition to evict the respondents 1 and 2 in R.C.O.P.No.233 of 2016 and the proceedings was decided in favour of the petitioner and the appointment of a Court Commissioner is not at all necessary as the plaintiffs were already ordered to be evicted from the premises.

5. The learned counsel appearing for the petitioner relied on the Judgment passed by this Court in the case of **Meenakshi v. Vennila and Another** reported in (2009) 1 MLJ 516, which reads as follows:

"At this stage, it is pertinent to point out that it is not the aim of Order 26 Rule 9 of C.P.C., to assist a litigant to collect evidence, where the litigant can get evidence himself. In the instant case, the suit has been filed only for permanent injunction and as such in regard to the factum of possession, this Court opines that the lower Court alone can gather evidence through the parties to the litigation and therefore, the same cannot be entrusted to the Advocate Commissioner to gather evidence and in that view of the matter, the Civil Revision Petition fails and the same is hereby dismissed in the interest of justice."

6. On the side of the respondents 3 to 5, it is stated that one Rajalakshmi is the owner of 'C' schedule property. Ambikapathi Nadar executed a general power deed in favour of the Thangathirupathi who in turn sold the property to his wife Rajalakshmi. 'B' schedule property belonged to Kanaga Sabapathi Nadar and the legal heir of Kanaga Sabapathi Nadar is not impleaded and all these facts are suppressed in the plaint. The suit property is different and construction is shown in some other property and the Commissioner report is necessary and B schedule property belonged to respondents 3 to 5. It is stated that the plaintiffs and the first defendant colluded together and deprived the rights of the respondents 3 to 5.

7. On the side of the petitioner, it is stated that there is only one schedule property given in the suit. The suit is not filed



for declaration of title and the respondents 3 to 5 are no way connected with the Commissioner petition. The Commissioner petition was filed by the respondents 1 and 2.

8. It is seen that the one Kanaga Sabapathi Nadar and his brothers, namely Kulanthaivel Nadar and Ambikapathi Nadar partitioned the property in the year 1985. Though the respondents 1 and 2 have filed a petition for appointment of Commissioner, there was no representation on the side of the respondents 1 and 2 before this Court. The respondents 3 to 5 claim that the property belong to them. If there is a dispute regarding the title over the property, the respondents 3 to 5 are at liberty to file a suit claiming their right.

9. On the side of the petitioner, it is stated that the respondents 1 and 2 are only a tenant and the petitioner has obtained an order in R.C.O.P.No.233 of 2016 dated 28.01.2019 to evict the respondents 1 and 2. The respondents 1 and 2 are the plaintiffs and it is the duty of the plaintiffs to prove their case. The suit is for bare injunction and it is the duty of the plaintiffs to prove their legal possession. The plaintiffs cannot gather evidence by the appointment of Commissioner. Already an order of eviction was passed against the respondents 1 and 2. Moreover, the person who seek for the appointment of Commissioner is absent before this Court.

10. In view of the above, this Court deems it fit to set aside the order passed in I.A.No.439 of 2015 in O.S.No.81 of 2014 dated 10.08.2015 on the file of the District Munsif Court, Kovilpatti. This Civil Revision Petition is allowed. No Costs. Consequently, M.P.(MD)No.1 of 2015 is closed.

Sd/-

Assistant Registrar (CS III)

// True Copy //

Sub Assistant Registrar

Mrn

To

The District Munsif, Kovilpatti.

+1 CC to M/s.B.RAJESH SARAVANAN, Advocate (SR-53199[F] dated 12/03/2019)

+1 CC to M/s.M.M.MANIVEL PANDIAN, Advocate (SR-53482[F] dated 13/03/2019)

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