



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 09.12.2021

CORAM:

THE HONOURABLE MS.JUSTICE P.T.ASHA

C.R.P. (PD) (MD) No.2530 of 2014

and

M.P. (MD) No.1 of 2014

Philomin Jesintha

.. Petitioner/Respondent

-vs-

Muthumohamadu,
Rep. By his Power Agent,
I.Ziavudeen

.. Respondent/Respondent

Prayer :- Petition filed under Article 227 of the Constitution of India to set aside the order dated 01.09.2014 passed by the I Additional District Court (PCR), Thanjavur in I.A.No.08 of 2013 in O.S.No.48 of 2011

For Petitioner : Mr.P.Sesubalan Raja

For Respondent : Mr.G.Karnan

ORDER

The defendant is the revision petitioner before this Court. The petitioner seeks to challenge the order dated 01.09.2014 of the learned I Additional District Judge (PCR), Thanjavur, in allowing I.A.No.8 of 2013 in O.S.No.48 of 2011 in and by which, an Advocate Commissioner had been appointed to take the assistance of a Surveyor to note down the measurements after considering the documents relating to the land acquisition proceedings, the documents of the title of the petitioner as well as the sale deed and submit a report.

2.The brief facts are as follows:-

2.1. The plaintiff had filed the suit for a specific performance of an agreement dated 15.10.2010.



3. The defendant had filed a written statement contending that the agreement of sale is time bound and has to be completed within a period of 45 days from the execution of sale. Despite several requests being made by the defendant, the plaintiff had not come forward to complete the transaction and ultimately, the defendant had sent a registered letter cancelling the agreement. In fact, the 45 day window was given to enable the plaintiff to measure the property after excluding the area acquired by the Land Acquisition Authorities. However, since the said exercise could not be done, the parties had decided that the measurement shall be done after the date of the sale. The defendant had cancelled the agreement and had also returned the advance received by her. However, the Power Agent of the plaintiff had returned the said registered post. Thereafter, a public notice had been issued by the plaintiff along with a caveat petition. The defendant had also denied the fact that she was venturing to alienate the property to third parties, as she would contend that she has no necessity for the same. The defendant, therefore, sought for dismissal of the suit on the ground that the agreement had already been terminated.

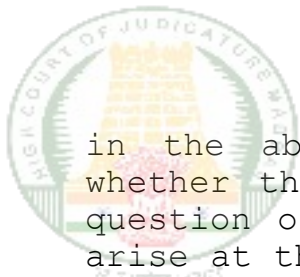
4. Pending the suit, the plaintiff had come forward with the impugned application to appoint an Advocate Commissioner to carve out the property, that is, to be sold after deducting the extent of land that had been acquired.

5. The defendant had resisted this application *inter alia* contending that the application had initially been dismissed for default on 21.06.2013 and thereafter, it has been restored to file. She would submit that in a suit for specific performance, there is no necessity to appoint an Advocate Commissioner. Further, the suit is filed on the basis of the agreement, which had already been cancelled. Therefore, she sought for dismissal of the above application.

6. The learned I Additional District Judge (PCR), Thanjavur, by his order dated 01.09.2014, was pleased to allow the said application stating that as per the agreement, the plaintiff was only entitled to the property that remained after the lands had been acquired by the Land Acquisition Authorities and for this purpose, there was a necessity to have the Advocate Commissioner appointed in order to arrive at a full decision. Challenging the same, the defendant is before this Court.

7. Heard the learned counsel on both sides.

8. The suit in question is one for specific performance of an agreement of sale dated 15.10.2010. The defendant has contended that the sale has been terminated whereas, the plaintiff would submit that the same is still subsisting. The issue to be decided



in the above suit is whether the agreement was subsisting and whether the plaintiff was entitled to enforce the agreement. The question of inspecting the property or measuring the same does not arise at this stage. Even as per the agreement entered into between the parties, the measurement of the property had to be taken to arrive at the sale consideration payable. This Court is of the opinion that the plaintiff cannot use the court to have the lands measured. Further, the question of measuring the properties would arise only if the Court finds that the plaintiff is entitled to a decree of specific performance. It is only after the decree is passed, the question of measuring the property would arise to arrive at the sale consideration. This is an exercise that has to be done by the parties and a litigant cannot be permitted to use the service of an Officer of Court for the said function. Under the terms of the agreement of sale, this exercise has to be done by the vendor/respondent herein.

9. In the result, this Civil Revision Petition is allowed and the order dated 01.09.2014 passed in I.A.No.8 of 2013 in O.S.No.48 of 2011 passed by the learned I Additional District Judge (PCR), Thanjavur, is set aside. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

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Sub Assistant Registrar(CS)

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Note:-In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the Advocate / litigant concerned.

To

The Judge,
I Additional District Court (PCR),
Thanjavur.

C.R.P. (PD) (MD) No.2530 of 2014

Dated: 09.12.2021

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