



CRP.(PD).No.2399/2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.01.2022

CORAM:

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

CRP.(PD).No.2399/2019 and CMP.No.15690/2019

[Video Conferencing]

1.A.Shivashankar
2.A.Kalidoss
3.Sujatha

.. Petitioners/Defendants

Vs.

1.R.Tharani
2.R.Ranganathan
3.Uma Maheswari
4.Bhavani
5.Rani

.. Respondents/Plaintiffs

Prayer:- Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the order dated 28.11.2018 made in I.A.No.265/2018 in O.S.No.161/2010 on the file of the learned Subordinate Judge at Poonamallee, by dismissing the I.A.No.265/2018 in O.S.No.161/2010.

For Petitioners : Mr.S.Sai Shankar
For Respondents : No appearance

ORDER

(1) This Civil Revision Petition is preferred against the order dated 28.11.2018 allowing an application in I.A.No.265/2018 in O.S.No.161/2010 for appointment of an Advocate Commissioner to inspect the Suit property and to note down the physical features.



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(2) Brief facts that are necessary for disposal of this Civil Revision Petition are as follows:

- (3) The revision petitioners are the defendants in the Suit in O.S.No.161/2010 filed by the respondents/plaintiffs for partition of their half share in the Suit property.
- (4) The Suit was contested by the revision petitioners on the ground that the plaintiffs and the defendants are not in joint possession of the Suit property as the Suit property was already divided by metes and bounds as per Koorachit dated 04.07.1975. Since the Suit property had been already divided among the parties, it is contended by the defendants that the Suit for partition was not maintainable.
- (5) It is further stated that the plaintiffs and defendants are separately enjoying the Suit property from the year 1975. The Written Statement also refers to the Sale Deed executed by the plaintiffs referring to the partition in respect of a property which was allotted to the plaintiffs.
- (6) It is in this factual background, the plaintiffs filed an application for appointment of an Advocate Commissioner for local inspection to



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note down the length and breadth of the Suit plot and boundaries and to note down the measurements of the old house and the portion occupied by the plaintiffs and defendants.

- (7) From the affidavit filed in support of the petition, the plaintiffs want to establish that the partition which was alleged in the Written Statement was unequal and that therefore, the claim for partition on the ground that there was an earlier partition effected cannot be accepted. The purpose of filing an application for appointment of the Advocate Commissioner is also reflected from para 7 of the affidavit filed in support of the petition is as follows:

7.It is therefore necessary to appoint an Advocate Commissioner for local inspection to measure the plot on four sides, note down the boundaries and depict the house in the eastern half of the plot and note down the portions under the occupation of the plaintiff and defendants and the said house constructed by the defendants."

- (8) The Suit is for partition of the property which is admittedly belongs to the parties. The defence taken by the revision petitioners is that the properties were divided by metes and bounds by virtue of a Koorchit dated 04.07.1975. The purpose of application for



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appointment of an Advocate Commissioner appears to be to find out whether the plaintiffs have been allotted with a larger extent nearly three time more than that of the defendants.

- (9) The Lower Court after recording the contention of the plaintiffs has allowed the application on the ground that the Commissioner's report/plan will be certainly helpful to find out whether the plaintiffs before the Lower Court have been allotted with a larger extent. It is always risky to appoint an Advocate Commissioner to note down one's physical possession.
- (10) The issue that arise for consideration before the Trial Court is whether a prior partition as contended by the defendants in the Written Statement was in fact effected among the parties.
- (11) The question is about whether the partition stated to have been effected earlier was complete. The Advocate Commissioner cannot be appointed for the purpose of knowing which party is in possession or in which portion of the property the plaintiff is in enjoyment. The manner of division in the prior partition cannot be an issue in a subsequent Suit for partition, the maintainability of which depends upon proof of prior partition. Hence, the *bona fides*



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of the application has to be seen.

(12) It is not the case pleaded by the plaintiffs that an earlier partition among the parties is not valid and it was unfair and unequal. It was also contended by the plaintiffs that more extent was allotted to the plaintiffs in the partition. If that is so, why a Suit was filed by the plaintiffs for partition of their half share in the Suit property.

(13) This Court is unable to countenance the arguments advanced by the respondents/plaintiffs before the Lower Court for the appointment of an Advocate Commissioner. The Advocate Commissioner in the present case, is unwarranted and a local inspection of the property in respect of which the commissioner was directed to execute the warrant is not necessary to decide and resolve any issue that arise for consideration based on the pleadings available on record. The Lower Court has failed to consider the pleadings and the issues. In the said circumstances, the Civil Revision Petition is allowed and the order of Lower Court is set aside. No costs. Consequently, connected Civil Miscellaneous Petition is closed.

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S.S.SUNDAR, J.,

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To

The Subordinate Court, Poonamallee.

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