



C.R.P (MD) No. 967 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 08.07.2022

CORAM:

THE HONOURABLE MR.JUSTICE **B.PUGALENDHI**

C.R.P (MD) No. 967 of 2021

and

C.M.P (MD) No. 5441 of 2021

1.Chithirai Kumar

2.Ramalingam

3.Ponmaniammal

... Petitioners

Vs

Kumaresan

... Respondent

PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India, to call for the records relating to fair and decreetal order passed by the III Additional District Court, Tirunelveli in I.A.No.4 of 2021 in A.S.No.65 of 2019 dated 18.03.2021 and set aside the same and may appoint the commissioner to find out the physical features of the suit schedule property after measuring the entire extent in Sy.No.5/2 of Thisayanvilai.

For Petitioners : Mr.K.P.Narayanakumar

For Respondent : Mr.S.Palani Velayutham



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ORDER

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This Civil Revision Petition has been filed as against the fair and decreetal order passed in I.A.No.4 of 2002 in A.S.No.65 of 2019 dated 18.03.2021 on the file of the III Additional District Court, Tirunelveli.

2.The respondent/plaintiff has filed a suit in O.S.No.79 of 2011 for declaration and recovery of possession with regard to the suit property to an extent of 23.88 cents with a house in Survey No.5/2N. The suit was decreed in favour of the respondent/palintff. As against the judgment and decree passed by the trial Court in O.S.No.79 of 2011, the petitioners preferred an appeal before the III Additional District Court, Tirunelveli in A.S.No.65 of 2019 and the same is pending. The petitioners/appellants have filed an application in I.A.No.4 of 2021 for appointment of Advocate Commissioner to identify the suit schedule property and the application was dismissed by the appellate Court. Aggrieved over the same, the present civil revision petition is filed.



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3.The learned Counsel for the petitioners submits that the suit property originally belongs to one Gopal Nadar and he is having nine legal heirs. The first respondent plaintiff is said to have purchased 23.88 cents through third defendant/ the second wife of Gopal Nadar. The third defendant executed a sale deed that there was an oral settlement in favour of her to an extent of 23.88 cents and those property was executed by way of sale deed to the respondent/ plaintiff. The suit was decreed without identifying the property and the suit is filed for recovery of possession.

4.According to the learned Counsel for the petitioners, the petitioners and the other defendants are also having equal share in the property and whether an oral settlement as claimed by the third defendant is valid or not is a subject matter of appeal. However, in order to identify the property, the petitioners have filed the application for appointment of Advocate Commissioner.

5.According to the learned Counsel they have taken a specific plea that in reality there is no sub division in



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Survey No.5/2N, however, records have been created as if the third defendant is having right over the property with regard to the S.No.5/2N and based on the document, decree was also granted in favour of the plaintiff. He also placed his reliance in K.S.Palanisamy Vs.Ramasamy reported in [2017 2 MLJ 190] in support of his contention that the advocate commissioner can be appointed at the appeal stage.

6.The learned Counsel for the respondent submits that this application has been taken out by the petitioners at the appeal stage. The petitioner/plaintiff has not taken any such plea during the trial and in order to drag on the proceedings, the application has been filed. The suit was decreed based on the sale deed and the suit property is not stated in the schedule of property. Whether the plaintiff's vendor is having the title or not, is to be decided in the appeal. The recovery of possession would arise only at the stage of execution proceedings and the execution court has also executed the delivery of possession as mentioned in the suit property. Therefore, at this stage there is no confusion with regard to the identification of the



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property, which requires appointment of an advocate commissioner. The claim of the petitioners that there is a property by name in S.No. 5/2 is also not in existence. However these petitioners have taken out this application to identify the property from S.No.5/2 and it is only to drag on the proceeding. Therefore, there is no reason to interfere with the orders of the trial Court.

7.This Court considered the rival submissions made and perused the materials placed on record.

8.The respondent / plaintiff has filed a suit in O.S.No.79 of 2011 for declaration and recovery of possession and the trial Court decreed the suit in favour of the plaintiff. The petitioners/ defendants have filed an appeal in A.S.No.65 of 2019 and the same is pending. The suit schedule property is mentioned as S.No.5/2N. A specific plea has been taken by the defendants that there is no such property in the name S.No.5/2N. The learned Counsel for the respondent has also claimed that there is no such property called S.No.5/2 and the property has already been sub divided with several sub divisions.



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9. Since the petitioners had taken specific stand that there is no such property as S.No.5/2N, at least to identify the property and whether does any property as S.No.5/2N exist, appointment of advocate commissioner is required. Though this application has been filed at the appeal stage, for just adjudication of the appeal, the court may appoint an Advocate Commissioner and proceed further.

10. In view of the above, this civil revision petition is allowed. The impugned order is set aside. The matter is remitted back to the first appellate court for appointment of advocate commissioner within a period of two weeks from the date of receipt of a copy of this order and the advocate commissioner shall file his report within a period of four weeks therefrom and the appeal shall be disposed of within a period of four months therefrom. No costs. Consequently, connected miscellaneous petition stands closed.

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To

III Additional District Judge,
Tirunelveli.



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B. PUGALENDHI, J.

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