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C.R.P. (PD)No.329 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.03.2024

C O R A M

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

C.R.P.(NPD)No.329 of 2022

and CMP.No.1709 of 2022

1.Muniyammal
2.Venkatachalam
3.Natesan @ ChinnasamyPetitioners

1.Periyasendrayan
2.Chinnasendrayan
3.Nanjan
4.Kullaiyan @ Chinnasamy
5.Madhu
6.Selvi
7.Sundaram ... Respondents

PRAYER: Civil Revision Petition is filed under Article 227 of Constitution of India praying to set aside the order and decree passed in I.A.No.92 of 2019 in A.S.No.27 of 2018 dated 25.08.2021 by the Principal Sub Ordinate Judge, Dharmapuri.

For Petitioner : Mr.R.Thanigai Arasu

For RR1 : died
For RR2 to 6 : No appearance
For RR7 : unclaimed

Page NO:1



WEB COPY



C.R.P. (PD)No.329 of 2022

ORDER

This Civil Revision Petition has been filed by the petitioners challenging the order passed by the Learned Principal Subordinate Judge, Dharmapuri, in I.A.No.92/2019, rejecting the application seeking appointment of Advocate Commissioner.

2. The case of the petitioners is that one Sevathan who is the husband of the 1st petitioner and father of the petitioners 2 and 3 has filed a suit for permanent injunction restraining the respondents herein from interfering with his peaceful possession and enjoyment of the suit schedule properties in O.S.No.373/1997. The said suit was dismissed and exparte decree was passed. The respondents /defendants have violated the exparte order and interfered with his possession. Thereafter, the petitioners have filed a Suit for permanent and mandatory injunction and recovery of possession in O.S.No.154/2013, in which, the respondents have filed a written statement and remained ex-parte. In spite of respondents remained exparte, the said

Page NO:2



C.R.P. (PD)No.329 of 2022

Suit was dismissed by observing that the plaintiffs / petitioners herein have not proved the illegal possession of the suit schedule properties by the defendants / respondents herein. Aggrieved by the same, the petitioners preferred appeal before the learned Principal Subordinate Judge and also filed interlocutory application in I.A.No.92 of 2019, to appoint an advocate commissioner. Since the said application was dismissed on 25.08.2021, the present Civil Revision petition is filed.

3. The learned counsel appearing for the petitioners submitted that the petitioners had filed a suit in O.S.No.154/2013 seeking for recovery of possession in respect of entire A,B and C suit schedule property and to remove the constructions made by the respondents in the suit schedule properties. The said Suit was dismissed by the learned District Munsif Court, Dharmapuri on 16.11.2016. Against the same, the petitioner filed an appeal in A.S.No.27/2018 to set aside the judgment and decree passed in O.S.No.154/2013. Pending appeal, an interlocutory application was filed seeking appointment of Advocate Commissioner to measure the suit property with the help of VAO and surveyor and to file a report and plan to



C.R.P. (PD)No.329 of 2022

establish the encroachments made in A, B and C schedule property. Learned counsel further submitted that only if an Advocate Commissioner is appointed, the extent of encroachment made by the respondents would come to light. He further submitted that the learned trial Judge, without appreciating the said facts had dismissed the interlocutory application filed by the petitioners.

4. This Court has carefully considered the submissions of the learned counsel for the petitioner and also perused the materials available on record. The 1st respondent died. Though notices were served on the respondents 2 to 6, there is no appearance on behalf of them. Notices sent to the 7th respondent were returned unclaimed.

5. On perusal of the order passed by the learned Judge, it is seen that in the earlier litigations, already the trial Court held that the husband of the 1st petitioner and father of petitioners 2 and 3 were the owner of the suit property in O.S.No.373/1997/. Further, the petitioners filed a suit in O.S.No.154/2013 for permanent and mandatory injunction and recovery of



C.R.P. (PD)No.329 of 2022

possession pending the said Appeal, the petitioners have sought for appointment of an advocate commissioner. There is no proper reason stated by the Appellate Court for rejecting the claim of the petitioners for appointment of advocate commissioner to measure the land. Only if the land is measured, the Court will be able to know the extent of encroachment made by the respondents in the A, B and C schedule properties and the petitioners also can be able to prove their title over the property.

6. When the Court declines to appoint an Advocate Commissioner as asked for to make investigation, that would certainly dispossess the right claimed by the party to place the requisite evidence on their behalf. The Court cannot prevent a party from adducing the best evidence, if such evidence can be gathered with the help of an Advocate Commissioner. Refusal of the request of the party to appoint a Commissioner under Order 26, Rule 9, C. P. C. to make a local investigation in an appropriate case amounts to failure of exercise of jurisdiction vested in it. In such view of the matter, This Court is of the view that the order passed by the learned Subordinate Judge is liable to be set aside.

Page NO:5



WEB COPY



C.R.P. (PD)No.329 of 2022

J.NISHA BANU,J.

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7. For the reasons stated above, the Civil Revision is allowed. The order passed in I.A.No.92 of 2019 in A.S.No.27 of 2018 by the Principal Sub Ordinate Judge, Dharmapuri, dated 25.08.2021, is hereby set aside. The learned Principal Subordinate Judge, Dharmapuri, is directed to appoint an Advocate Commissioner as prayed for by the petitioners. No costs. Consequently connected miscellaneous petition is closed.

05.03.2024

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To

1.Principal Sub Ordinate Judge, Dharmapuri.

Page NO:6



WEB COPY



C.R.P. (PD)No.329 of 2022

C.R.P.(PD) No.329 of 2022