



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 05.07.2024

Pronounced on: 12.07.2024

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A.No.2830 of 2024

in

C.S.No.275 of 2013

P.B.BALAJI, J.

This Application has been filed by the plaintiffs seeking appointment of an Advocate Commissioner to inspect Hotel Pandia's No.527, Thiruvottiyur High Road, Old Washermanpet, Chennai 600 021, in order to ascertain the income of the respondent/defendant from the books of accounts, for a period of 3 years prior to the filing of the above suit upto date.

2. I have heard Mr.B.Balachander, learned Counsel for the applicants, and Mr. R.N.Amarnath, learned counsel for the defendant.

3. Mr.B.Balachander, learned counsel would submit that the suit has been filed for declaration that the applicants as plaintiffs are entitled to 1/4th share each in the half share of their father late.S.S.Palanisamy in the properties described in the schedules 'A' to 'L', morefully described in the the plaint. According to the learned counsel for the Applicants, Hotel



Pandia's was started from and out of the family funds and not from the respondent's personal income, though the father, late.S.S.Palanisamy, continued the business along with the defendant jointly. Taking advantage of the account books being available with the respondent, the respondent even refused his father to inspect the same and deliberately, the respondent has not disclosed the monies earned from the said hotel business. He would therefore state that the present Application has become necessary to ascertain the income of the respondent/defendant.

4. The learned counsel for the applicant would also place reliance on the decision of Division Bench of the Andhra Pradesh High Court in *Devatha, Pullayya and another vs Jaldu, Manikyala, Rao and others* reported in, *AIR 1962 AP 425* where the Hon'ble Division Bench of the Andhra Pradesh High Court held that even though there is no specific provision in the Civil Procedure Code, a Commissioner can be appointed to take inventory of accounts books in the possession of the plaintiff, even when such Application was preferred by the plaintiff himself. Rejecting the argument that there is no specific provision in the Code of Civil Procedure where the plaintiff can approach the Court to seek inventory of account books in his own possession, held that language of Order 26 Rule 9 CPC is



of sufficient amplitude to take in a case of such nature.

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5. Mr.R.N.Amarnath, learned counsel for the respondent/defendant would submit that the suit has been filed for partition, separate possession and also for accounts and there is a connected suit in C.S. No.781 of 2012 also for partition and it is submitted that both the suits are being jointly tried and the evidence is being recorded in C.S. 275 of 2013.

6. Mr.R.N.Amarnath, learned counsel further submitted that it is the specific case of the respondent/defendant that the subject property viz., Hotel Pandia's is the exclusive property of the respondent/defendant and the hotel was not started out with family funds. He would further submit that the prayer sought for is hit by the principle of *res subjudice* and when the suits are pending and unless the rights of the parties are decided by way of a preliminary decree, the present Application is premature and question of sharing the monthly income of accruing from the hotel business does not arise. He would further submit that the Application has been filed only to protract the proceedings and therefore, he seeks dismissal of the Application.

7. I have carefully considered the rival submissions advanced by the



learned counsel on either side and I have also perused the decision placed on by the learned counsel for the Applicant.

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8. Admittedly, the suit has been filed for various reliefs including the relief of partition and separate possession of this subject Hotel Pandia's property and for rendition of accounts and also to appoint a Commissioner to ascertain the income as per the defendant's account books. One of the prayers sought for in the plaint is now sought for by way of the present Application. The said Application in my considered opinion is not maintainable.

9. The very same prayer has been sought for in the suit, unless the parties lead evidence and sufficient oral and documentary evidence is brought on record before the Court, it is not permissible to fish for evidence, that too, at the instance of the plaintiff. Having come to Court with a specific case that the property namely the Hotel Pandia's is a property which is available for partition and consequently the plaintiffs are entitled to a share in the income accruing there from, it is the primary and bounden duty of the plaintiffs to establish their case before the Court.



10. Admittedly, the suit is only in the trial stage. Therefore, the Applicants cannot use the Court process as a tool to gather evidence in support of their case. The burden of proof is on the plaintiffs to establish that the said property viz., Hotel Pandia's was purchased out of family income by letting in relevant and satisfactory oral and documentary evidence and they cannot adopt the present means of seeking an appointment of an Advocate Commissioner to achieve their objective and discharge the burden on them.

11. Further, with regard to the decision laid on by the learned counsel for the Applicants/Plaintiffs, the case before the Division Bench of the Andhra Pradesh High Court was on a totally different factual matrix. The suit was in respect of a mortgage/redemption and it was a peculiar case where the plaintiff himself sought for appointment of a Commissioner to take inventory of the account books which were in his own custody and addressing such facts, the Hon'ble Division Bench held that Order 26 Rule 9 CPC contemplated appointment of a Commissioner for such purpose. However, in the instant case, the facts are entirely different. The suit is for partition and according to the plaintiffs, the Hotel Pandia's property is a family property and not the absolute property of the defendant.



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12. The Court cannot dance to the tunes of the parties who try to gather evidence for the respective cases by using Court process like seeking appointment of an Advocate Commissioner etc. This is one classic case where the plaintiffs are exactly attempting to use the Court process to establish and discharge the burden of proof which is cast on them. This is clearly impermissible in law. Therefore, the present Application is clearly premature and not maintainable. Therefore, I do not find any merits in the said Application. It is made clear that this order does not preclude the applicant to move this Court after passing preliminary decree.

13. This Application is hereby dismissed with the above observations.

12.07.2024

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P.B.BALAJI,J.

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Pre-delivery Orders in
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