



C.R.P(MD)No.1595 of 2024

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 01.08.2024

CORAM:

THE HONOURABLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

C.R.P(MD)No.1595 of 2024

and

C.M.P.(MD)No.9436 of 2024

Mohammed Saleem

... Petitioner/Petitioner/Plaintiff

VS.

1.Mohammed Basheer

2.S.Saitha Banu

3.Fathima Jasmine

4.Renosa

5.Mubeena

6.Haja Mohideen

Mytheen Beevi

7.Shahul Hameed

8.Haja

9.Fathima Beevi

10.Jainaba

11.Jennath

12.A.Salaludeen

13.Rujaina Fathima

... Respondents/Respondents 1 to 6 & 8 to 14

/Defendants 1 to 6 & 8 to 14

Prayer:- Civil Revision Petition filed under Article 227 of the Constitution of India, to call for the records relating to the Fair and Decreetal order passed by the learned Sub Court (Forest Cases), Nagercoil in I.A.No.16 of 2024 in O.S.No.244 of 2012 dated 24.05.2024 and set aside the same.



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For Petitioner : Mr.K.P.Narayanakumar

For Respondents : Mr.R.Narayanan for R1

No Appearance for R2 to R13

ORDER

The Civil Revision Petition is directed against the order dated 24.05.2024 in I.A.No.16 of 2024 in O.S.No.244 of 2012 on the file of the Sub Court (Forest Cases), Nagercoil.

2.By the said order, the prayer of the petitioner, to appoint an Advocate Commissioner, was rejected by the trial Court. The petitioner is the plaintiff in the suit. The suit is filed for partition. It is the case of the plaintiff that the suit A and B schedule properties originally belonged to one Meliapillai and thereafter, were inherited by his son Sheik Mohammed. After the death of Sheik Mohammed, the plaintiff and the defendants were in enjoyment of the properties and therefore, the suit for partition was filed. The suit is resisted by the 1st defendant by originally stating that A schedule property was given to him by the said Sheik Mohammed by way of a sale deed. In the additional written statement, though it is filed with reference to the schedule B property, a stand is now



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taken as if the entire properties are Jamath properties and no partition can be granted. In this background, the application is filed stating that D.W.2, in its evidence, has denied even the cattle shed and the other structures, which are there in their Schedule B property. The very nature of the properties are being wrongly projected before the trial Court. Therefore, it becomes just and necessary for the plaintiff to establish what are the structures existing in Schedule A property and what are the structures existing in Schedule B property and therefore, for the said purpose, the Commissioner is directed to be appointed.

3.The trial Court dismissed the application on the ground that the plaintiff cannot collect evidence through the commissioner.

4.Heard *Mr.K.P.Narayanakumar*, learned counsel appearing on behalf of the petitioner and *Mr.R.Narayanan*, learned counsel appearing on behalf of the first respondent.

5.The learned counsel for the petitioner, bringing to the notice of the Court of the original written statement and the additional written statement filed by the parties, would submit that it can be seen



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diametrically opposite stands are being taken. He would further submit that given the nature of the dispute which is raised in the suit for partition, it is essential to prove the possession of the plaintiff. The plaintiff has claimed that he has put up his superstructure in A schedule property and schedule B property is also enjoyed by him by putting up cattle shed etc. Eventhough the plaintiff is filing his own documents to prove his possession, the Advocate Commissioner is sought to be appointed only to note down the physical features and to draw a rough sketch. Therefore, the trial Court erred in reasoning as if the plaintiff is seeking appointment of an Advocate Commissioner only to collect evidence. The trial Court gives an erroneous reason as if the appointment of Advocate Commissioner cannot be made for noting down the physical features. The said reasoning is legally unsustainable.

6.Per contra, the learned counsel appearing on behalf of the first respondent would submit that what is involved in the suit is the question of title. If the petitioner, *prima facie* proves that he has a share in the property, then the question of the nature of enjoyment, the physical features etc, would all become relevant only in the final decree proceedings.



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7.I have considered the rival submissions made on either side and perused the material records of the case.

8.As rightly pointed out by the learned counsel for the first respondent, on a consideration of the original plaint and the amended plaint and the original written statement and the amended written statement, the *lis* between the parties is with reference to the entitlement of the plaintiff for a share in this suit A and B schedule properties. It is the contention of the plaintiff that both A and B schedule properties were being inherited by him from Sheik Mohammed. It is the contention of the defendants that as far as A schedule property, a sale deed is executed by Sheik Mohammed and when B schedule property was thereafter, amended and included, they are now taking a stand that both A and B schedule property belong to the Jamath and the suit itself is not maintainable in view of the judgment of the Hon'ble Supreme Court of India in ***Rashid Wali Beg vs Farid Pindari*** reported in (2022) 4 SCC 414.

9.In view thereof, it can be seen that presently neither the boundaries, nor the physical features are directly and substantially in issue. In that view thereof, eventhough the reasoning of the trial Court that



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Advocate Commissioner cannot be appointed for the purpose of noting down the physical feature is erroneous, I am of the view, still at this stage, there is no necessity for appointment of the Commissioner, in as much as the parties have gone into trial on the basis of their pleadings as stated above and the matter revolves around the decision of the trial Court with reference to the title. With reference to the possession of the plaintiff and also the nature of enjoyment etc, if the petitioner succeeds in obtaining the preliminary decree, the same can be taken care of by the Advocate Commissioner, who will be appointed during the final decree proceedings.

10. In view thereof, finding no merits, the Civil Revision Petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

01.08.2024

NCC : Yes
sji

To

The Sub Court (Forest Cases), Nagercoil.



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D.BHARATHA CHAKRAVARTHY, J.

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