

In the Court of the II Additional District Munsif, Nagercoil

Present: Thiru.R.Sundara Kamesh Marthandan, M.L.,
II Additional District Munsif, Nagercoil

Wednesday, on this 21st day of February 2024

I.A. No.2 of 2022
in
Original Suit No.136 of 2022

1. P. Ansalam (Died)
2. Addl. Parimala
3. Addl. Tony Robin
(Additional Plaintiffs 2 & 3 are
impleaded as per Order
in I.A. No.4/2023 dated 20.07.2023)Petitioners/Addl. Plaintiffs 2,3

-vs-

T. BalakrishnanRespondent/Defendant

This Petition came up before this Court on 16.02.2024, in the presence of Thiru.N. Retnasamy Advocate for the Petitioners/Plaintiffs and Thiru. P. Linus Raj Advocate for the Respondent and Petitioners' side Advocate memo filed and Petitioner side arguments heard and upon perusing the case records and having stood over for consideration till this day, this Court delivers the following:

ORDER

1. The Petitioners have filed the above Petition under Order XXVI Rule 9 and Section 151 CPC seeking an order to appoint an Advocate Commissioner to note the following points:-

1. To note the physical features of the Plaintiff A and B Schedule properties.
2. To measure the Plaintiff A and B schedule properties as per title deeds and Resurvey Plan with the help of Taluk Surveyor.
3. To prepare the plan showing the encroachments made by the defendant.
4. Such other points which are brought to the notice at the time of visit to be noted and to file report.

2. The Petitioner had stated that he had filed the above suit for declaration of his title over the Plaintiff A & B schedule properties and recovery of the same from the defendant and for Mandatory Injunction against the defendant. The Plaintiff B schedule property measuring 250 feet length and 4 feet width along with the remaining portion of 8 feet private pathway, belongs to the Plaintiff. The Plaintiff B Schedule property is situated in R.S.No. 256/5-B of Dharmapuram Village, touching the Main Road on the southern side.

3. On the western side of Plaintiff B Schedule property, an area of 40 cents in R.S. No. 256/4, originally belonged to P. Thiliban Delver Ansalam, Mercline as per Sale Deed bearing Doc. Nos. 1328 of 1995 and 1315 of 1995. They have executed power of attorney bearing Doc. No. 806 of 2004, in favour of the Plaintiff herein. The Plaintiff had executed Sale Deed dated 04.02.2005 in favour of his wife Parimala. The Plaintiff schedule item No. 2 property, in the Sale Deed dated 04.02.2005 having 40 cents of land comprised in R.S. No.256/4 of Dharmapuram village was conveyed to Parimala. As such she became owner of 21.5 cents in R.S. No. 265/5 and 40 cents in R.S.No. 256/4.

On 26.05.2009, Parimala executed Sale Deed in favour of the defendant and thereby conveyed 40 cents of land comprised in R.S. No. 256/4.

4. On 16.11.2020, the Plaintiff executed Sale Deed in favour of Punitha in respect of the property acquired by him under Sale Deed bearing Doc.No. 2439 of 2000 and the settlement Deed bearing Doc. No. 4185 of 2010 and another Sale Deed bearing Doc. No. 1395 of 2000. Under the said Sale Deed, the Plaintiff had purchased the Eastern 34.5 cents out of 43 cents in R.S. No. 256/5 and eastern 34.5 cents out of 70.40 cents in R.S.No.256/6 Dharmapuram North Village, with well defined boundaries. After purchase the said Punitha subdivided the property as R.S. No. 256/5A and 5B.

5. The western 70 cents in R.S. No.256/5B is also having 250 feet length and 12 feet width pathway, situated in Plaintiffs western 70 cents which is the Plaintiff's private pathway, in his title land in R.S. No. 256/6, subsequently subdivided as R.S. No. 256/6A and 6B. The defendant had encroached 80 feet length and 8 feet width area in R.S. No.256/6B of property, of the Plaintiff's property. The defendant is liable to surrender, the A schedule property to the Plaintiff. For the purpose of elucidating the matter in dispute arisen between the parties, in the suit it is highly necessary to appoint the Advocate commissioner to make local investigation, of the Plaintiff schedule properties and also to note the points, as stated in the application filed along with the affidavit.

6. The respondent had filed written statement in the above suit, and filed adoption memo, adopting the written statement as counter in the above I.A..

The respondent had contented that the plaint A and B scheduled properties are not correct and they are misleading. Originally the Plaintiff his two brothers purchased 40 cents of land in R.S. No. 256/4 Dharmapuram village under Sale Deed bearing Doc. No.1315 of 1995 and 1328 of 1995 and they both executed Sale Deed bearing Doc. No.313 of 2005 in favour of the Plaintiff's wife namely, Parimala in respect of 40 cents in R.S. No. 256/4 and the Eastern 21.5 cents in R.S. No.256/5. Thereafter the said Parimala executed Sale Deed bearing Doc. No. 1558 of 2009 in favour of the defendant in respect of 40 cents in R.S. No. 256/4.

7. As such the defendant is the owner of the said property and got revenue records mutated in his name. The Plaintiff and his wife Parimala have demarcated the 40 cents of land and planted boundary stones in the four corner of property and sold the same to Plaintiff. The defendant is having only 39.889 cents of land, in his possession, over which the Plaintiff has no manner of right whatsoever. To the East of Defendant's property, the property comprised in R.S. No.256/5 is situated. The Plaintiff purchased the western 21.5 cents of land comprised in Re.Sy. No. 256/5 as per Sale Deed bearing Doc. No. 2439 of 2000.

8. The Plaintiff purchased 70.40 cents of land in R.S. No. 256/6 as per Sale Deed bearing Doc. No. 1395 of 2000. Thereafter, Parimala executed a Settlement Deed bearing Doc. No. 4185 of 2010, in respect of eastern 21.5 cents in R.S. No. 256/5 in favour of her husband, the Plaintiff herein.

Thereafter, the Plaintiff executed Sale Deed in favour of one Punitha, in respect of 34.5 cents of land in R.S. No. 256/6. The Plaintiff sold 34.5 cents to Punitha on the eastern side of R.S.No. 256/5. Thereafter, the Plaintiff was having only 8 feet width, on the western side of 34.5 cents, sold to Punitha in R.S.No.256/5. The Plaintiff formed that pathway for the ingress and egress of his property situated on the northern side of Defendant's property. The Plaintiff had formed the said 8 feet pathway inbetween the defendant's property comprised in R.S. No. 256/4 and 34.56 sold to Punitha in R.S.No. 256/5. The Plaintiff wanted to extend the width of the pathway. Hence the Plaintiff was attempting to encroach 4 feet width of land of defendant. The defendant's property is having well defined boundaries. There are bunds, on the the four sides of defendant's property. The Plaintiff has no manner of right to encroach the defendant's property. Since the Plaintiff had filed the above suit with intent to encroach the defendant's property, the suit must fail. The said Punitha is a necessary party to the above suit and the suit is bad for non necessary parties.

9. The point for consideration is whether the above petition has to be allowed or not ?.

10. The Petitioner had contented that the defendant is the purchaser under the Original Petitioner's wife, the 2nd Petitioner namely, Parimala. According to the Petitioner, the defendant had encroached the portion of the Petitioner's property, having width of 8 feet and length of 80 feet on 21.06.2021. On the other hand the respondent had contented that the pathway available with the

Petitioner is only 8 feet width and 80 feet length. The Petitioner had sought not for issuance of Commission, in order to elucidate the fact, as to the encroachment. Though the Petitioner had contended that he had filed a Plan disclosing the alleged encroachment, the Petitioner himself had come by way of the above Commission application, seeking measurement of the alleged A & B schedule properties with the help of Taluk Surveyor. Since the property of the respondent had passed on, to the respondent from the 2nd Petitioner herein and it is contented by the respondent that though 40 cents of land was purchased by the respondent, the actual extent available with the respondent is only 39.889 cents, this Court is of the considered view that measuring both A schedule property and B Schedule property, with the help of Taluk surveyor will give queitus to the lis between the parties and also elucidate the facts that would facilitate due adjudication of the above suit. Hence this Court is of the considered view that the Commission may be issued.

In the result the above Petition is allowed. Advocate Mr.T.V.S. Dhinesh Varma, Roll No. MS.2138/2019, (Cell No.9688180180), Junior of Mr. T.Shanmugam is appointed as Advocate Commissioner to inspect the Petition Schedule property to note down the points enlisted in the Petition namely,

1. To note the physical features of the Plaintiff A and B Schedule properties.
2. To measure the Plaintiff A and B schedule properties as per title deeds and Re-survey Plan with the help of Taluk Surveyor.
3. To prepare the plan showing the encroachments made by the defendant.

4. Such other points which are brought to the notice at the time of visit to be noted and to file Report

along with Plan, at the earliest. The remuneration of the Advocate Commissioner is fixed as Rs.8,000/- (Rupees Eight Thousand Only). The Petitioner shall directly pay the said remuneration to the Advocate Commissioner and file proof therefor.

Dictated to the Steno-typist, and typed by her, corrected and pronounced by me, in open Court this, the 21st day of February 2024.

II Additional District Munsif
Nagercoil.

Petitioners side witnesses and documents : Nil

Respondent side witnesses and documents : Nil

II Additional District Munsif
Nagercoil.

IIADM, Nagercoil.
I.A. No.2 of 2022
in
O.S. No.136 of 2012
Fair Order
Date: 21.02.2024