

IN THE COURT OF THE SUB JUDGE, MELUR

Present: Thiru. S. Ganesan, B.Sc., M.A., B.L.,

Sub Judge, Melur.

Thursday, the 6th day of April 2023

I.A.No.2/2022

in

O.S.No.201/2022

Tmt.R.Selvi

.....

Petitioner/ defendant

Vs.

1. Rajee

.....

Respondents/plaintiffs

2. R.Selvaraj

This petition came for final hearing before me on 05.04.2023 in the presence of Thiru.N.Chandran, Advocate for the petitioner / defendant and Thiru.KR.Sudharsan prabhu, Advocate for the respondents / plaintiffs and upon hearing the arguments on both sides, on perusal of the records and having stood over for consideration till this day, this court delivers the following:-

ORDER.

1. This petition is filed under Order 26 Rule 9 and section 151 of CPC to pass an order appointing the advocate / commissioner to note down the physical features of the petition mentioned schedule property with the help of qualified surveyor and to file a report with rough sketch.

2. **The petition averments are that** the petitioner herein and the plaintiff in the suit.

3. The respondents/plaintiffs filed suit against the petitioner/defendant for declaration and consequential relief of permanent injunction along with mandatory injunction.

4. The respondents/plaintiffs are not entitled to any relief in the suit property. This respondents/plaintiffs are infringed the right of the respondent in the suit property illegally. The respondents/plaintiffs are not entitled to the 1st item property in full description. Because the schedule of property is mentioned as 17-1/2 feets, but the respondents/plaintiffs mentioned 14-1/4 sq feet on the southern side was encroached to the extent of 5 feet. Thereby, the respondents/plaintiffs has got only 14-1/4 sq feet was belonged to them as per the sale deed the south north 5 feet was encroached by the respondents/plaintiffs. Thereby, the commissioner has to be appointed for the purpose of noting down the physical features to the court for the just decision of this case, otherwise the petition is put into heavy and irreparable loss and hardship. The petition is to ready to pay the commissioner fees as directed by the court.

5. Hence, prayed to allow this petition by appointing advocate commissioner to the physical features on the basis of the survey records and also the measuring the nearby properties to elucidate the measurement of the property to the court. Hence, prayed to appoint advocate commissioner.

6. The respondents / plaintiffs filed counter statement refuting the averments of the petition affidavit :-

7. The petition is false, frivolous, vexatious and not maintainable according to the law and on facts. The respondent admitted averments hereunder, all the other averments are denied and the petitioner put to strict proof of the same.

8. Neither, the 1st respondent nor the 2nd respondent have infringed the possession and enjoyment of the defendant at any point of time. Actually, the 1st plaintiff purchased in their property in 1989 as per the measurement mentioned in the sale deed and enjoying the property. As per the sale deed, the plaintiffs has got 875 sq feet having east west 45.5 sq feet and south north 14.5 sq feet. Thereby, the total extent of 660 sq feet Construction belonged to the plaintiffs possession and enjoyment. The plaintiffs never encroached the portion of the defendant at any point of time.

9. The averments that 888 sq feet in the property of the defendant, said to have been encroached by the plaintiffs by constructing superstructures are totally false. If so, the property extent of the possession of the plaintiff would be $875 + 288 = 1163$ sq feet in the field. But only as per the sale deed, the plaintiffs are in possession and enjoyment of 875 sq feet only. Actually, the defendant purchased the property extent without any extent in the field and searching for the extent as per the sale deed is totally false and illegal one. Further, the respondent is not entitled to measure the adjacent owners properties which is against the principles of settle the position.

10. Hence, if the petitioner wants to measure the adjacent properties he must add the parties along with the other properties and also the total extent of the survey numbers to the suit. Without which the petition is not maintainable one and liable to be dismissed as per the I.A.No.1/22 the petitioners has got 475 sq feets in his possession and enjoyment and without seeking any claim from the predecessor in title as to the deficit extent and the plaintiffs has purchased the property more than 30 years ago, objecting the sale deed and the right of the plaintiffs in the suit properties and their possession is totally illegal and against the principles of law. There is no

dispute regarding identity of the property based upon the same the appointment of commission is not maintainable law and fact. Hence, this petition has to be dismissed with costs.

11. The point for consideration aroused is that
Whether the petition has to be allowed or not?

12. Point.

13. The learned the commission for the petitioner orally argued the case based upon the citations.

1.	2017 (3) LW 521 Hon'ble Madras High Court
2.	2017 (2) LW 939 Hon'ble Madras High Court
3.	Baini Prasad (D) Thr. LRs...vs.. Durgadevi dated 02.02.2023 Hon'ble Supreme Court of India
4.	2017(2) CTC 404
5.	2017(1) TNCJ.689 (MAD) (MB) Hon'ble Madras High Court
6.	2017(1) TNCJ 876 (MAD) (MB)
7.	2017(2) CTC 404

14. Heard. Perused records. Upon perusal of records, Admittedly the suit is filed for declaration and consequential relief of permanent injunction along with mandatory injunction.

15. The plaintiffs are said to have been infringed the right of the respondent in the suit property illegally.

16. The petitioner/defendant has alleged that the plaintiff is not entitled to the 1st item property in full description. Further, the schedule of property is mentioned as 17-1/2 feets, but the respondents/plaintiffs mentioned 14-1/4 sq feet on the southern side was encroached to the extent of 5 feets.

17. By which, the petitioner alleged that the respondents/plaintiffs has got only 14-1/4 sq feet was belonged to them as per the sale deed the south north 5 feet was said to have been encroached by the respondents/plaintiffs.

18. On the other hand, the respondent/plaintiff has alleged that the 1st plaintiff purchased in their property in 1989 as per the measurement mentioned in the sale deed and enjoying the property. As per the sale deed, the plaintiffs has got 875 sq feet having east west 45.5 sq feet and south north 14.5 sq feet. Thereby, alleged that the total extent of 660 sq feet Construction belonged to the plaintiffs possession and enjoyment. It is also alleged that the plaintiffs never encroached the portion of the defendant at any point of time.

19. Considering the rival contentions, in a suit for mandatory injunction based upon declaration is based upon the area of encroachment and the extent of the properties of the both parties.

20. Hence, commission report along with measurement is an important role in assessing the area of encroachment, which will proportionally affect the decision of the suit or the fact in issue. Therefore, without fixing the boundary as per boundaries and surveys act, the extent and boundary cannot be fixed. Without which the area encroachment cannot be resolved. Hence, the commissioner report and plan will be just a necessary one. Hence, the contention of the petitioner is perfectly holds good.

21. Hence in the interest of justice the commissioner has to be appointed. Accordingly, commissioner has to be appointed to meet the ends of justice. Hence the point is answered accordingly.

22. ***In the result, this petition is hereby allowed. No costs. In fine, Mr.V.Palani, Advocate is hereby appointed as an Advocate***

commissioner to inspect the suit property item 1 and 2 and also the property of the defendant as per the sale deed 06.06.2016 by giving notice to both the parties in advance and to measure the S.No.54/2 with reference to the property in description in the plaint with help of the surveyor and file with separate and individual plan and report drawn to scale correlating the same. The commissioner remuneration is fixed as Rs.6000/- to be paid directly by the petitioner. The Commission is returnable by 26.04.2023.

Directly typed by me in my laptop, corrected and pronounced in open court on this 6th day of April 2023.

Sd/-
Sub Judge,
Melur.

Petitioner/ defendant side Exhibits and witnesses :- Nil

Respondents/ plaintiffs side Exhibits and witnesses :- Nil

Sd/-
Sub Judge,
Melur.

Fair/Draft Order
I.A.No.2/2022
in
O.S.No.201/2022
Dt : 06,04.2023
SJ, Melur.