

IN THE COURT OF THE II ADDITIONAL DISTRICT COURT, SALEM.

**Present: Tmt. L.Kalaivani, BA.,B.L.,
II Additional District Judge, Salem.**

Wednesday, the 11th day of September, 2024.

I.A.No.3/2024

in

A.S.No.51/2020

in

O.S.No.214/2014

C.Rajan

... Petitioner/Appellant

/Vs/

1. M/s Arulmighu Sugavaneswaran

Swamy Temple by its

Present Assistant Commissioner/Executive Officer

S.Marimuthu

2. Joint Commissioner

H.R. & C.E., Salem

3. District Revenue Officer,

Salem.

4. Zonal Deputy Tasildar,

Salem

5. The Joint No.1 Sub Registrar,

Salem West.

... Respondents/Respondents

This petition is coming on 28.08.2024 before me for final hearing in the presence of Thiru.D.M.Senthil Kumar learned counsel for the Petitioner, Thiru.G.Narasimhan learned counsel for the 1st Respondent and Thiru.A.Madhanmohan Government Pleader for the 2nd to 5th Respondents, upon hearing both their arguments and having stood for consideration till date this court delivered the following:-

ORDER

The petitioner has come forward with the present petition under order 26 Rule 9 of CPC to appoint a commissioner to note down the physical features of the suit property with the help of qualified surveyor.

1. Gist of the petition is as follows:-

The petitioner herein is the appellant in appeal suit in A.S.No.51/2020. The suit property originally belonged to then minors one Venkatraman and Narayanan by virtue of a sale deed dated 14.10.1963. The said Narayanan died intestate leaving behind his mother as his legal heir and she inherited his $\frac{1}{2}$ share in the suit property by succession. The mother of Narayanan also died intestate leaving behind the Venkataraman as her sole legal heir and thereby he inherited the $\frac{1}{2}$ share. Subsequently, the said Venkataraman became absolute owner of entire property and he has been in exclusive possession and enjoyment over the same. While so, the said Venkataraman and his minor children have jointly sold the portion of property measuring 273 sq ft of land in old S.No.1287 to the petitioner on 25.08.1982 and ever since from the purchase the petitioner is in absolute possession and enjoyment over the suit property. While so, in the 1st week of May 2014, the officials from H.R.& C.E came to the suit property and proclaimed that the suit property belong to Sugavaneswarar temple and the petitioner is unlawfully enjoying the same. Therefore, the petitioner has filed suit for declaration of title and permanent injunction which was dismissed by the trial court. The trial court has held that as per the evidence of PW3 the old Survey Number and new T.S.No are not connected with the plaint Survey number. Hence, the identification of the suit property is very necessity to decide the property. But, the plaintiff has not taken any steps to appoint an Advocate Commissioner.

While such being so, it has become just and necessary to file a petition to appoint an Advocate Commissioner to identify the suit property with reference to the sale deed dated 25.08.1962.

2. Nutshell of the counter filed by the 1st Respondent and Adopted by the 2nd to 5th Respondents is as follows:-

The respondents have denied the averments stated in the petition except that those are specifically admitted by them. The petitioner has already filed a suit in O.S.No.141/2014 before this court with other person for the relief of declaration and permanent injunction and the same was dismissed for default on 04.12.2018. The petitioner has not taken steps to restore the suit in O.S.No.141/2014. The Ex.X1 and X2 marked in the trial court would clearly prove that the suit property belongs to the temple. The petitioner cannot seek appointment of Advocate Commissioner to collect the evidence and there are no merits in this petition. The suit was disposed on the two grounds. Firstly, the suit in O.S.No.141/2014 is relating to same subject matter and the same was dismissed and secondly, **this** appeal has been filed in the year 2020. But, the petitioner has not taken any steps to file a petition for the appointment of Advocate Commissioner **at the earliest point of time. Moreover, the** respondents already completed their arguments. While so, the petitioner has come forward with the present petition to drag the case. Hence, it is prayed for dismissal.

3. Now the point for consideration is:-

Whether this petition is liable to be allowed or not?

4. Answer to the Point:

The present petition has been filed under Order 26 Rule 9 CPC seeking the appointment of Advocate Commissioner to identify the suit property. The petitioner would contend that the suit property belonged to him by virtue of sale deed dated 25.08.1982 and he has been in possession

over the same from the date of the above sale deed. However, in the 1st week of May 2014 the officials of H.R.&C.E., Department came to the suit property and proclaimed that the suit property belonged to Sugavaneswarar temple. Hence, the petitioner has filed the suit in O.S.No.214/2014 on the file of II Additional Subordinate Judge, Salem and the same was dismissed by the trial court on the ground that the identification of suit property is very necessity to decide the case. But, the petitioner has not taken steps to appointment of Advocate Commissioner. Consequently, the petitioner has come forward with a present petition.

5. Per contra, the respondents would contend that the earlier suit filed by the petitioner in O.S.No.141/2014 on the file of this court for the same property was dismissed for default on 04.12.2018 and Ex.X1 and Ex.X2 marked before the trial court clearly prove that the suit property belongs to the temple. Moreover, commissioner cannot be appointed for collecting the evidence. There are no merits in the case for the petitioner. Therefore, he has come forward with the present petition to drag the proceedings. In support of their contention the respondents relied the following Judgments. **(2005) 3MLJ 473 – Chandrasekaran Vs.V.Doss Naidu**, wherein it has been observed that

“22. Upon consideration of the facts and circumstances of the case, learned District Munsif has rightly declined to appoint Advocate Commissioner to note down the physical features and thereby elucidating the factum of possession. The impugned order does not suffer from any material irregularity. This Revision Petition has no merits and is bound to fail”.

6. In another Judgment in **Elango Vs Kasthuri delivered on 10.09.2009**, it has been held that

“12. As far as the factum of possession is concerned, the court alone could gather evidence through the parties and it cannot entrust the said matter to the

Advocate Commissioner to collect evidence. Likewise, disconnection of electricity service connection can be proved by other means and evidence and it is not necessary to appoint an Advocate Commissioner for the said purpose. The Judgment relied by the respondent rendered in the case of Karthikeyan Vs.Kannan @ Rajendran (2008-2 TLNJ-93- Civil) has no application to the case on hand, as the said suit was filed for specific performance and appointment of Advocate Commissioner was made to note down features of the suit property.

13. Taking into consideration the facts and circumstances involved in this case and also the decisions relied on by the learned counsel for the petitioner, this court is of the considered view that the impugned order appointing an Advocate Commissioner is unsustainable in law and hence, the same is liable to be set aside and accordingly, it is set aside.”

7. This court has given its anxious consideration to the rival submissions of both parties. It is seen from the records that the petitioner herein has filed in suit in O.S.214/2014 on the file of II Additional Subordinate Judge, Salem for the relief of declaration of title and permanent injunction and the same was dismissed by the trial court on 27.01.2020. Being aggrieved over the Judgment and decree passed by the trial court, the petitioner has preferred an appeal in A.S.No.51/2020 and during the pendency of the appeal, the present petition has been filed by the petitioner for the appointment of Advocate Commissioner.

8. As stated by the petitioner herein the trial court has held in the issue No.2 that the sale deed stands in the name of the petitioner dated 25.08.1982 is valid and acted upon and it is further held by the trial court Ex.B6 is different from the suit property and the suit property is not belonged to the Arulmigu Sugavaneswarar Swamy temple. However, the trial court while

discussing the issue No.2 and 3 has given a finding that the old survey number and T.S.Number are not connected with the plaint survey number and thus, the identification of suit property is very necessary to decide the case. But, the plaintiff has not taken any steps to appointment of an Advocate Commissioner.

9. Moreover, it is further held by the trial court in Issue No.5 that the petitioner has filed two suits for same cause of action and the same ground also the suit is failed. Nevertheless, it is apparent the finding given by the trial court in respect to the earlier suit filed by the petitioner in O.S.No.141/2014 on the file of this court which has been dismissed for default will be adjudicated in the final verdict of the appeal judgment. However, the trial court has given categorical finding in the judgment that due to the non identification of the suit property through the Advocate Commissioner the petitioner is not entitled to the relief.

10. At this juncture, it is apt to excerpt the Judgment reported in **2000(7) SC 379 – Shreepat Vs.Rajendra Prasad** and others, wherein it has held that:

“In our opinion, this contention is correct. Since, there was a serious dispute with regard to the area and boundaries of the land in question, especially with regard to its identify, the courts below, before decreeing the suit should have got the identify established by issuing a survey commission to locate the plot in dispute and find out whether it formed part of Khasra No.257/3 or Khasra No.257/1. This having not been done has resulted in serious miscarriage of justice. We consequently allow the appeal, set aside the order passed by the courts below as affirmed by the High Court and remand the case to the trial court to dispose of the suit afresh in the light of the observations made above and in accordance with law.”

11. Upon considering the said facts and circumstances, it is clear that there is a dispute in identify the suit property. This Court observed the above said proposition of law enlighten in the Judgment cited supra and deems to be that the report of advocate commissioner is required for eliciting the subject matter. Further, the report is required to establish the lie and location of the suit property with its measurements. Hence, the court is of the view that the present petition is to be allowed so as to ascertain the area, measurements and lie and location of the suit property and no prejudice will be caused to the respondents by allowing the present petition.

12. In the result the petition is allowed and Mr.S.Manikandan M/s.3436/21 Advocate is appointed as advocate commissioner to inspect the suit property based on the sale deed dated 25.08.1962 and also sale deed dated 25.08.1982 and note down the physical features of the suit property with the help of qualified surveyor. The commissioner shall file detail report along with scale plan on or before 18.10.2014. The petitioner is directed to pay a sum of Rs.12,000/- to the advocate commissioner and the advocate commissioner shall inspect the suit property after giving notice to the parties concerned.

Dictated to the Steno Typist directly, computerized by her corrected and pronounced by me in the open court on 11th day of September 2024

II Additional District Judge,
Salem.