

IN THE COURT OF THE PRINCIPAL DISTRICT MUNSIF, ATTUR

PRESENT : THIRU. G. YUVARAJ, M.A., M.L.,
PRINCIPAL DISTRICT MUNSIF, ATTUR.

Wednesday, 5th day of February 2020.

I.A. No. 907 of 2019 in O.S. No. 169 of 2002

Kathirvel .. Petitioner / Plaintiff

Vs.

1. Chitra
2. Duraisamy .. Respondents / Defendants

This petition came up before me for final hearing on 23.01.2020 in the presence of Thiru. V.R. Rajindra Magajan, Advocate for the Petitioner / Plaintiff and Thiru. R. Arumugam, Advocate for the Respondents / Defendants, and upon hearing the arguments on either side, and upon perusing the materials records, and having stood over till this day for consideration, this date, this court delivers the following,

ORDER

The Petitioner / Plaintiff has filed this petition u/o. 26, Rule 9 and Section 151 of CPC for appointment of Advocate Commissioner to inspect the petition mentioned properties and to note down the existing physical features which are all relevant and necessary at the time of visit and to file his report with drawn to scale with help of qualified surveyor.

2. Brief averments made in the petition and affidavit: The Petitioner herein is the Plaintiff in the suit. The Petitioner / Plaintiff is the owner of the suit property and the same was assigned in his favour on 25.06.1996 and he continued to be in actual possession and enjoyment of the same for several decades and after

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filing the suit, he has constructed a terraced building in the suit property by leaving 9 x 36 feet which was unlawfully encroached by the Respondents / Defendants and one Muthu Udayar purchased house site property from one Kolandaivel Udayar through a registered sale deed dt. 04.12.1932 with a width about 36 leg feet (fhyo) towards East West and 42 leg feet (fhyo) towards North South and thereafter, on 23.02.1948, he has purchased another property vide registered sale deed dt. 23.02.1948 with a width about leg feet 20 (fhyo) towards East West and 39 leg feet (fhyo) towards towards North South and the said property was purchased by the said Muthu Udayar from one Visalachi and her son Subramani and the said leg feet was calculated as per custom in village and hence the said Muthu Udayar purchased the above said property through the above said two sale deeds with an extent of 42 feet on the East to West side. Further the said Muthu Udayar was having five sons viz., 1) Muthusamy, 2) Koothappa Udayar, 3) Ramalingam, 4) Kulandaivel Udayar and 5) Duraisamy Udayar and the said Kulandaivel Udayar and Duraisamy Udayar were allotted the above said properties and then they were orally partitioned the above said property into two portion with an extent of 24 feet on the East West and 18 feet on the East West and the eastern side of house 24 feet on the East West was taken by the said Kulandaivel Udayar and Duraisamy Udayar was taken western side 18 feet East West of the above said property and the first son Muthusamy was allotted house property in some other place at East Rajapalayam Village and similarly, the said Koothappa Udayar was allotted house site property at East Rajapalayam Village which is situated opposite to the suit property, i.e., on the northern side of Raja Veethi and at the same time, the said Ramalingam was allotted lands and house situated at Punalvasal village and the said Muthusamy, Koothappa Udayar, Kolandaivel and Duraisamy Udayar lands are situated at East Rajapalayam and the said Duraisamy was allotted only house of 18 feet on the East West towards his share, but the first respondent alleged to have purchased her property from the above said Duraisamy Udayar with an extent of

27 feet on the East West on the northern side and the said Duraisamy Udayar and his son Alaguvel had no manner of right to execute the sale deed dt. 23.08.1999 in favour of the 1st respondent with an extent of 27 feet on the East West northern side and 23½ feet on the southern side and hence the 1st respondent has no manner of right to purchase the properties mentioned in the sale deed dt. 23.08.1999 and the said Duraisamy Udayar was in possession and enjoyment of second item of the petition mentioned properties mentioned in the said sale deed dt. 23.08.1999 and similarly at the time of purchase of the above said property by the 1st respondent from the said Duraisamy Udayar as per sale deed dt. 23.08.1999 was not in possession and enjoyment over her entire property mentioned in the above said sale deed and the said Duraisamy Udayar never handed over the entire properties mentioned in the sale deed dt. 23.08.1999 to the first respondent and hence the alleged extent mentioned in the sale deed dt. 23.08.1999 is completely wrong and incorrect and the said sale deed was created one with an intention of swallowing the 1st item of property and hence said deed is invalid in law and not binding on the petitioner and all of a sudden, on 08.05.2002, the respondents encroached his property measuring 9 feet East West and 36 feet North South of the first item of petition mentioned properties and he has reported the same to the local Veeraganur Police on 08.05.2002 and on enquiry, the respondents replied that they will get relief from the competent civil court of law and inspite of his several objections, the family members of respondents raised foundation by encroaching the 1st item of petition mentioned property to construct building for their residential purpose and therefore, he has filed the above suit for the relief of mandatory injunction and permanent injunction regarding the first item of petition mentioned properties against the respondents and thereafter, filed an application in I.A. No. 748/2002 for appointment of the Advocate Commissioner to note down the physical features of the sp and other relevant physical features in and around the suit properties and the Commissioner has visited the property and filed his report

with plan and the Commissioner has also clearly noted in his report and plan that the Respondents have encroached the first item of the petition mentioned property, which would clearly reveal that the respondents have unlawfully encroached the 1st item of petition mentioned property, but at the same time, the 1st item and second item of the petition mentioned properties were not measured by the Commissioner with help of the qualified surveyor and hence he has filed the present petition for appointment of the Advocate Commissioner to note down the physical features of the petition mentioned properties with help of qualified surveyor and to file his report and plan.

3. Brief averments made in the counter filed by the 2nd Respondent / 2nd Defendant and adopted by the 1st Respondent / 1st Defendant : The Respondents / Defendants have filed their counter by stating that, all the averments made in the affidavit are false and the petitioner has filed the suit in the year 2002 and pending for more than 16 years and the Petitioner / Plaintiff was examined as his side witness in the year 2008 itself and in his evidence, he has admitted that, he has given the East West northern side extent was given 46-1/2 feet and East West southern side 52 feet in the Caveat petition filed by him in C.O.P. No. 151/2002 and the Advocate Commissioner has already inspected the suit property and filed his report and plan by stating the measurement as East West northern side 35 feet and southern side 49.1 feet and the Petitioner / Plaintiff has filed fabricated and forged assignment order of patta with larger extent and the trial was commenced on 03.04.2008 and without examining further witness for the past 11 years, in order to drag on the proceedings, the petitioner is filing the petition by petition and filed the present petition for appointment of second commissioner and since the suit property is house property, its measurement to be proved on the basis of the document and there is no any need or necessity to appoint the second Advocate Commissioner to prove the measurement and particularly, since the present petition is filed after 17 years with an intention of drag on the proceedings, the petition is not maintainable and hence prayed to dismiss the petition.

4. *Now the point for consideration is, whether the petition filed by the Petitioner / Plaintiff to appoint an Advocate Commissioner to inspect the suit property and to note down the physical features with help of the surveyor is to be allowed or not?*

5. No oral evidence was adduced on the side of the Petitioner / Plaintiff. Ex. P1 to P3 marked on the side of the Petitioner / Plaintiff.

6. No oral and documentary evidence adduced on the side of the Respondents / Defendants.

7. Both side arguments heard. Both side learned counsels have contended by reiterating the averments made in the petition, affidavit and counter.

8. On perusal of the records, it comes to know that, on 06.06.2002, the Petitioner / Plaintiff has filed the above suit against the Respondents / Defendants for the relief of mandatory injunction and for permanent injunction. On the date of filing of the suit itself, the Petitioner / Plaintiff has also filed an application in I.A. No. 748 of 2002 for the relief of appointment of an Advocate Commissioner to inspect the suit property and to note down the physical features of the same. On 20.06.2002, this court appointed Advocate Mr. A.S. Matheswaran as Advocate Commissioner and directed him to inspect the suit property and measure the same and to file his report with plan. As such, on 23.06.2002, the learned Advocate Commissioner has inspected the suit property and the property of the Respondents / Defendants situated on the eastern side of the suit property and on 05.07.2002, the learned Advocate Commissioner has filed his report and plan. On 17.09.2002, the said petition was closed with a liberty to file the objections if any in 10 days. Thereafter, till date, neither parties have filed their objections to the report and plan filed by the Advocate Commissioner.

9. The records of the case would further disclose that, in the meantime, the Defendants have filed thier written statement on 20.08.2002 and after framing necessary issues, the suit was posted for trial. On 18.03.2008, the Plaintiff was examined himself as P.W.1 and he was cross examined on 15.04.2008. Subsequently, witness summons was sent to the Tahsildar and on behalf of the Tahsildar, one C. Rajendiran, Assistant of the Taluk Office, Gengavalli Taluk was examined in chief on 11.08.2008 and he was cross examined on 13.08.2008.

10. The records of hte case would further disclose that, when the suit was posted for Plaintiff side further witness examination, the Petitioner / Plaintiff has filed an amendment petition in I.A. No. 142/2012 to amend the plaint rouhg plan and the said petition was dismissed on 12.03.2012. As against the said dismissal, the Petiitoner / Plaintiff has preferred a revision before the Hon'ble High Court, Madras in C.R.P. (PD) No. 2409/2012 and the same was allowed on 13.04.2017. The order copy was received by this court on 18.02.2019. In the meantime, the suit was pending. Since the amendment petition filed in I.A. No. 142/2012 was allowed as per the order passed by the Hon'ble High Court in C.R.P. (PD) No. 2409/2012, the plaint was amended accordingly. After filing the reply statement by the Plaintiff and additional written statement by the Defendants, when the suit was posted for additional evidence of the Plaintiff regarding additional issues, the Petitioner / Plaintiff has filed this present petition for appointment of the Advocate Commissioner for second time to inspect the petition mentioned properties.

11. According to the Petitioner / Plaintiff, the first item of this petition mentioned property is the suit property and the 2nd item of the petition mentioned property is the property belonged to the Respondents / Defendants, which is situated on the eastern side of the suit property.

12. During the arguments of this petition, the learned counsel for the Respondents / Defendants contended by stating that, already an Advocate Commissioner was appointed in the year 2002 itself and the present petition for appointment of second commissioner is filed after 17 years of filing the suit and as the petition is filed at the part heard stage of the suit and belatedly, prayed to dismiss the petition. Per contra, the learned counsel for the Petitioner / Plaintiff has contended that, as there was no time limit for filing the commissioner application, the petition is deserved to be allowed and accordingly, prayed to allow the petition. In the considered opinion of this court, there is no any substance and merits in the arguments of the learned counsel for the Petitioner / Plaintiff. A perusal of the entire bundles would clearly discloses that, the Petitioner / Plaintiff wants to drag on the proceedings of the case for some more years.

13. The learned counsel for the Petitioner / Plaintiff has drawn the attention of this court to the Ex. P1 to P3, which are the parent documents of the property of the Respondents / Defendants and the measurement in the Ex. P1 to P3 are lesser, whereas, the Respondents / Defendants have purchased larger extent and thereby claiming some fictitious rights over the properties of the Petitioner / Plaintiff. On the other hand, the learned counsel for the Respondents / Defendants has contended that the Ex. P1 to P3 documents are not related to the Respondent's properties and it has to established only during the trial. The Petitioner / Plaintiff having filed the suit for the relief of permanent injunction and mandatory injunction, he has to prove his own case on the basis of his own documents and he cannot rely upon the documents stated to have been belonged to the Respondents / Defendants' vendors. Therefore, the Ex. P1 to P3 have no any relevance to this petition.

14. As far as the merits of this petition for appointment of Advocate Commissioner is concerned, already an Advocate Commissioner was appointed in I.A. No. 748/2002 and the learned Advocate Commissioner has also filed his report and plan. The Commissioner report and plan would clearly disclose that, the suit property and the property of the Respondents / Defendants situated on the eastern side of the suit property, i.e., this petition mentioned properties were clearly inspected, measured and the physical features have also been noted. In the report and plan submitted by the learned Advocate Commissioner, inch-by-inch measurement for the suit property and the property of the Respondents / Defendants were clearly given. Now by way of this petition, the Petitioner / Plaintiff wants once again to inspect the same properties for the second time. The prayer in the earlier petition filed in I.A. No. 748/2002 and in this petition are one and the same and there is no any difference. The report and plan filed by the learned Advocate Commissioner is not a vague one, on the other hand, it discloses the clear picture of the properties of the Petitioner / Plaintiff and the Respondents / Defendants. Therefore, this court is fully satisfied with the earlier report and plan filed in I.A. No. 748/2002.

15. As the Petitioner / Plaintiff has not chosen to file his objections to the earlier commissioner report and plan, and without scrapping the earlier report for any uncertainty or ambiguous, the appointment of second commissioner for the similar relief is not maintainable. On this aspect, this court wants to rely upon the judgment of the Hon'ble Madras High Court, reported in **2019 (1) M.W.N., Page No. 269, Ganesan and others Vs. Vijayalakshmi**. By referring the earlier three judgments of the Hon'ble Madras High Court, reported in **R. Viswanathan Vs. P. Shanmugham, 1985 (1) MLJ, Page No. 254** and **K. Kandaswamy Vs. K.C. Ramaswami, 1998 (2) L.W., Page No. 440**, and **Sivasubramanian R. Vs. S. Balamurugan, 2006 (2) CTC, Page No. 54**, the Hon'ble Madras High Court has clearly in para No. 36 as follows;

“36. A perusal of the above, leaves no doubt in the mind of this Court that the course adopted by the First Appellate Court, ie., the course of appointing a second Advocate Commissioner without scrapping the report and sketch filed by the earlier Advocate Commissioner in the Trial Court and without recording any reason whatsoever, as to why the earlier Commissioner's report is unsatisfactory or that what is the need for appointment of a second Advocate Commissioner is unacceptable. It runs contrary to the well settled principle that has been laid down by this Court, particularly in R.Sivasubramanian's case extracted supra”.

In para 34 of the aforesaid *Ganesan and others case*, the Hon'ble Madras High Court has extracted para Nos. 4, 5 and 6 of *R. Sivasubramanian's* case supra, which reads as follows;

“4. The trial court in the impugned order has not discussed the earlier Commissioner's Report and has not expressed its opinion before appointing the second Commissioner. S.NAINAR SUNDARAM, J. [As he then was] in the first decision referred above has considered the similar question and has held as follows:

"It is well settled proposition that until the Court is dissatisfied with the proceedings and report of the Commissioner earlier appointed, it will not be proper to ignore the same and direct even further enquiry, much less the scrapping of the earlier report as a whole and appoint a fresh Commission.

The power in this behalf is circumscribed by the principles under Order 26 Rule 10(3) of the Civil Procedure Code, hereinafter referred to as the Code.

The power has to be exercised only after the Court below renders a finding that the proceedings and the report of the earlier Commissioner are not satisfactory and there is need for a further enquiry. In the present case, the order of the Court below does not express an opinion that the proceedings and the report of the earlier Commissioner are not satisfactory. The court below has opined that the truth or otherwise of the allegations thrown against the Commissioner's report need not be gone into and it is better to change the Commissioner. It has proceeded on the basis that allegations are thrown against the earlier Commissioner and hence, it is not fair to accept his report. This is not the proper method of dealing with an application of the present nature."

5. Following the above decision, Sathiadev, J. in the second decision referred above, considered the necessity for appointment of the second Commissioner based on the objections filed by the parties to the earlier Commissioner's Report and held as follows:

"Merely because certain objections have been filed, it would not result in a second Commissioner being appointed, on that day itself. Learned counsel for the petitioner relies on the decision in VISWANATHAN v.. SHANMUGHAM AND ANOTHER [1985-1-MLJ 254], to show as to when exactly the report of a previous Commissioner could be scrapped. It is obligatory on the part of the Court to give convincing reasons as to why the previous report filed cannot be acted upon."

6. I am in respectful agreement with the views expressed by the learned Judge in the above decisions. In the present case merely, because objection were filed by the respondent herein to the earlier report, the Trial Court cannot appoint a second Commissioner unless it renders a finding that the earlier commissioner's report is

unsatisfactory. No such finding of dissatisfaction has been made in the impugned order and hence it is liable to be set aside.'

16. Further, in para No. 10 and 11 of the judgment reported in **CDJ 2018, MHC 4972, B. Vijayakumari Versus S. Jeyaraman & Others**, the Hon'ble Madurai Bench of the Madras High Court has clearly held as follows;

"10. This Court is of the view that the first respondent / petitioner / plaintiff cannot be permitted to file a fresh application for the re-issuance of Commissioner warrant, when he has not chosen to file even an objection to the earlier report filed by the Advocate Commissioner. This attitude of the first respondent / petitioner / plaintiff shows that he has not interested in prosecuting the suit, but instead, he wants to drag on the suit".

11. When this Court perused the affidavit filed in support of the application seeking for re-issuance of warrant, this Court finds that no specific reasons are made by the petitioner to seek re-issuance of warrant to the Commissioner. If at all he is aggrieved, it is for him to file his objection to the Commissioner's report, before the Court below. It is for the Court below to either accept the report or reject the same based on the objections raised by the petitioner. The petitioner without filing any objection and nullify the Advocate Commissioner's report, has filed I.A.No.732 of 2010 to re-issue the Commissioner's warrant. When that being the factual position, seeking re-issue of warrant to the Commissioner does not arise at this stage, without nullifying the report of the Advocate Commissioner filed in I.A. No.732 of 2010. Hence, the order passed by the Court below is liable to be set aside.

Therefore, as per the dictum laid down in the aforesaid judgments of the Hon'ble Madras High Court, without scrapping the first Advocate Commissioner report and plan and without disbelieving the earlier Advocate Commissioner's report and plan, appointment of the second Advocate Commissioner report is not maintainable. As discussed above, neither parties to the I.A. No. 748/2002 have filed their objections to the Commissioner's report and plan. Whilesso, the question of scrapping the said report and plan does not arise. Further, this court unable to find any reason to disbelieve the first Advocate Commissioner report and plan. The Petitioner / Plaintiff has also failed to give proper reasons for filing this petition for appointment of the second Advocate Commissioner. Therefore, viewing in all angles, the present petition is filed only with an intention of dragging on the proceedings to further years. The petition is also nothing but an clear abuse of process of the court. Therefore, the petition filed by the Petitioner / Plaintiff is liable to be dismissed with cost of the Respondents / Defendants.

IN THE RESULT, the petition filed by the Petitioner / Plaintiff for appointment of the second Advocate Commissioner to inspect the petition mentioned properties to note down the physical features and measure the same with help of the surveyor is dismissed as devoid of merits with cost of the Respondents / Defendants.

This order is typed by me in my Laptop, corrected and pronounced by me in the open court on this the 5th day of February 2020.

Sd/- G. Yuvaraj

Principal District Munsif,

Attur.

Annexure :

Exhibits marked on the side of the Petitioner / Plaintiff :

Ex. P1 Certified copy of the registered sale deed dt. 04.12.1932.

: 13 :

Ex. P2 Certified copy of the registered sale deed dt. 23.02.1948.

Ex. P3 Certified copy of the registered sale deed dt. 23.08.1999.

Exhibits marked on the side of the Respondents / Defendants : Nil

Sd/- G. Yuvaraj
Principal District Munsif,
Attur.

P.D.M. Court, Attur.
DRAFT / FAIR ORDER
in I.A. No. 907/2019 in O.S. No. 169/2002
Dated : 05.02.2020

I.A. No. 907 of 2019

in

O.S. No. 169 of 2002

DATE : 05.02.2020 : Orders pronounced. In the result, the petition filed by the Petitioner / Plaintiff for appointment of the second Advocate Commissioner to inspect the petition mentioned properties to note down the physical features and measure the same with help of the surveyor is dismissed as devoid of merits with cost of the Respondents / Defendants.

Sd/- G. Yuvaraj

Principal District Munsif,
Attur.