

**IN THE COURT OF ADDITIONAL DISTRICT JUDGE,
ADDITIONAL DISTRICT COURT, SIVAGANGAI.**

**Present: Tmt.R.Sathiathara,M.A.,M.L.,
Additional District Judge,
Additional District Court,
Sivagangai.**

Dated Monday, the 18th day of March 2024.

2055 Thiruvalluvarandu Sobakrith on Monday 05th day of Panguni Thingal

I.A No. 4/2024

in

OS. No.40/2015

K.S.Govindarajan

..Petitioner/Defendant

//Vs//

S.P.Nagendran

..Respondent/Plaintiff

This petition is coming on 11.03.2024 before me in the presence of Thiru.K.Alagappan, counsel for the petitioner/defendant and Thiru.L.Saravanan, counsel for the respondent/plaintiff and on perusal of records and documents and this court delivered the following:

ORDER

Petition filed under order 26 rule 9 and section 151 of CPC for appointment of Advocate Commissioner to measure the suit property and to submit report.

The averments in the petition in brief is as follows:

2. The petitioner is the defendant in the suit. The respondent is plaintiff in the suit filed for declaration and recovery of possession. The suit property as mentioned in the plaint schedule not actually exist in the ground. Further no measurement mentioned in the codicil in respect of suit property. But the respondent mentioned the extent in contrary to the physical features available. This petitioner is well known of extent and he also measured the same. The respondent without measuring the suit property with assistant of his brother's son working as Advocate Karthikraja, son of Varadharaj and with his wrong guidance and by influencing Tahsildhar obtained forged patta in the name of Advocate Karthikraja and as if he had sold claim amount from respondent/plaintiff. But while respondent/plaintiff came to know that the suit property is in the name and possession of this petitioner/defendant he refused to purchase and he had also repeatedly chased respondent/plaintiff and told that his father executed Will dated 07.01.2004 in favour of his sisters Kala and Meena and he would also make arrangement for execution of sale deed by them also. As respondent/plaintiff was in well acquaintance with this petitioner, he had knowledge that alleged Will was cancelled by petitioner's father Sundaram Chettiar and executed codicil on 03.03.2005 and accordingly the suit property is in possession and enjoyment of the petitioner/defendant and therefore the respondent/plaintiff refused to purchase the suit property from Karthikraja. However as respondent/plaintiff was in the habit of purchasing encumbrance property and to sell for higher price, he ignored the petitioner/defendant and got execution of sale deed on 26.11.2009 from

Karthikraja, Kala and Meena. The suit property was not entrusted to Karthikraja either by Will or codicil. Since the purchase by the respondent/plaintiff from the sisters of petitioner/defendant without enjoyment by them is forgery as they are residing in Virudhachalam got execution of sale deed from Karthikraja to grab the property from this petitioner/defendant. The suit property in survey no.557/19B cent 22, east west on both side 10 feet, south west 16 1/2 feet in total 165 sq.feet as noted in plaint schedule of property and in sale deed purchased by respondent/plaintiff. But no extent mentioned in Will dated 07.01.2004 executed by father Sundaram chettiar. Hence as extent of suit property mentioned in plaint is not available in ground it is necessary to measure the same with the assistance of qualified surveyor by appointment of Advocate commissioner and submit report and plan.

The averments in the counter filed by the respondent/plaintiff in brief is as follows:

3. The petition is not maintainable. There is no defence in the statement as property mentioned in plaint not available on ground. The petitioner/defendant not raised any defence as to identity in his statement. He had not objected the suit property purchased by respondent/plaintiff from Kala and Meena and for those Kala and Meena their father Sundaram chettiar executed Will dated 07.01.2004. But he had submitted that their father even executed Will in favour of them, he had altered Will and later executed codicil on 03.03.2005 in favour of petitioner/defendant. Further the petitioner admitted that suit property in his possession and enjoyment will establish identity of suit property by him. Hence commissioner cannot be appointed

to collect evidence. The averment by petitioner as if this respondent/plaintiff purchased at the instigation of Karthikraja is false. This petitioner also filed suit against Kala and Meena in respect of suit property 10 years back before purchase by this respondent/plaintiff. This petition filed to drag on respondent/plaintiff even after trial posted in the list and plaintiff examined to collect evidence and there is no suggestion petitioner/defendant raised during cross examination of this respondent/plaintiff. Hence petition to be dismissed.

4. Point to be decided:

Whether petition to be allowed for appointment of Advocate Commissioner to measure the suit property and to submit report as prayed for?

5. On the side of petitioner and respondent no oral and documentary evidence adduced.

Points for consideration:

6. The petitioner is the defendant in the suit. The respondent is plaintiff in the suit filed for declaration and recovery of possession. Originally the suit property belong to one Sundaram chettiar by virtue of sale deed dated 31.01.1976. Later the suit property is purchased by respondent/plaintiff from one Kala and Meena and the said vendor Kala and Meena's father Sudaram chettiar executed Will dated 07.01.2004 in favour of them. Subsequently the said vendor Kala and Meena's father executed codicil on 03.03.2005 in favour of petitioner/defendant. The respondent/plaintiff who is purchaser of suit property claim title through vendor Kala and Meena by virtue of Will dated 07.01.2004. The description of property

mentioned in Will and codicil remain the same. But in Will and codicil there is no averment with regard to GR survey no.557/19B and its extent of Roja lodge with sq.feet. In contrary in plaint and in this petition, the Roja lodge in patta GR survey no.557/19B with measurement and extent in sq.feet were mentioned. Further in plaint and in petition mentioned old survey no.5.1.126 with measurement was noted in Will and codicil. It is admitted by petitioner/defendant himself that the description of property noted in sale deed dated 31.01.1976 is not available on ground at present. Apart from the said sale deed, Will, codicil, the document available for measurement is family arrangement dated 20.06.1988 alleged to have executed among family members of Sundaram chettiar and the property mentioned in survey no.557/19B and Roja lodge was allotted to Sundaram chettiar in A schedule property. The four boundaries of suit property mentioned in plaint and in this petition also not tally with four boundaries mentioned in family arrangement. It is well established that possession cannot be established by collection of evidence by appointment of advocate commissioner to measure the disputed property. Further there is no dispute between parties with regard to identity of property. It is for the respondent/plaintiff to establish his title for the suit property in a suit for declaration and recovery of possession. Anyhow, the petitioner/defendant cannot claim for measurement of the suit property on the basis of enjoyment and possession on ground by him. For the reasons discussed above I answer the point as against the petitioner.

In the result, this petition is dismissed. No cost.

Dictated by me to the typist and typed and computerized by him, in my presence and corrected and pronounced by me in open court, this the 18th day of March 2024.

**Additional District Judge,
Sivagangai.**

List of witness and documents on the side of the petitioner and respondent: Nil

**Additional District Judge,
Sivagangai.**