

IN THE COURT OF DISTRICT MUNSIF, KATPADI, VELLORE DISTRICT
PRESENT: THIRU. K.VENKATESAN, B.A.,B.L.,
DISTRICT MUNSIF, KATPADI

Wednesday, this the 05th Day of June – 2024

I.A.No. 345 of 2021
In
O.S.No. 48 of 2015
(CNR.No.TNVL23-000140-2015)

Munusamy

.....Petitioner/Plaintiff

-Vs-

1. Komathi
2. Chinnapaiyan
3. Mari

.....Respondents/Defendants

This petition has come up today before this Court for orders, upon hearing the arguments of Thiru. S.Lalith Kumar, the Counsel for Petitioner, and Thiru. S.Gunasekaran and Thiru. G.Vijayabaskar, the Counsels for Respondents, and upon perusing the petition, counter and the case records, and having stood for consideration till this date, this Court delivers the following:-

ORDER

This petition has been filed by the Petitioner/Plaintiff under Order 26 Rule 9 and Section 151 of Code of Civil Procedure, seeking for appoint of an Advocate

Commissioner to measure the Suit property, Battai and the 1st defendant's lands and other adjacent land owner's lands who are using Battai, and to file the report with plan.

1. **Brief averments of the affidavit filed by the petitioner is as follows:-**

The petitioner is the plaintiff in the above Suit filed for easementary right and for permanent injunction, and the defendants have filed the written statement, and stated that the 1st defendant has purchased 10 cents in S.No.781, and the property purchased by the defendant has been sub-divided as 781/1A1 and granted Patta in Patta No.105. The petitioner further states that eventhough the 1st defendant has purchased only 10 cents, she is claiming more than 10 cents including the battai which is being used by the petitioner, and he states that adjacent to the Suit property, there are more land owners who have purchased properties from the same owner, and all of them have been using the battai adjacent to the 1st defendant's land. The defendants are denying the existence of Battai to reach the Suit property and other battai users lands. It becomes necessary to identify and measure the battai, and the Suit property and adjacent properties who are using battai. Otherwise, the petitioner will find very difficult to enjoy the Suit property, and prayed to allowed the petition.

2. **Brief averments of the counter filed by the 1st respondent is as follows:-**

(Adopted by the 2nd & 3rd Respondents)

2.1 The petition filed by the petitioner is devoid of merits, lacks in bonafide and the same is liable to be dismissed in-limini, and the respondent does not admit any of the

averments stated in the affidavit and put the petitioner to strict proof of the same, and states that the petitioner has given the wrong description of the Suit properties and the he have wantonly and deliberately given wrong description and boundaries of the Suit properties, and with a fraudulent intention has given a wrong plaint plan contrary to the Sale Deed stands in his name.

2.2 Further, the respondent states that there is no existence of the Survey No.781 on the date of filing of the plaint as the said Survey number were sub-divided into Survey No.781/1A1, 781/1A2, 781/1B, 781/2, 781/3, 781/4, 781/5, 781/6 and the Joint Patta No.105 of Katpadi village were given in the name of this respondent, and others for Survey No.781/1A1, and the petitioner's name do not feature in the same, and by burking the same, the petitioner has given false particulars in his affidavit.

2.3 The petitioner has not filed any revenue records to show the existence of the alleged Battai on the date of filing of the plaint or prior to the filing of the plaint. The Respondent is filing the Certified Copy of the FMB Plan of Survey No.781, and the Patta No.105 for Survey No.781/1A1, and the same will prove that there is no Battai situate in the said Survey Number.

2.4 The Suit was posted on the special list on 11.04.2019, and on the same day, the Suit was dismissed for default, and the Suit was restored on 19.08.2019, and the Suit was again dismissed for default on 29.11.2019, and again the Suit was restored on 03.03.2021, and the above case was again posted in the special list on 02.11.2021, and

instead of commencing the trial, the petitioner has filed the above petition shows that the intention of the petitioner is only to fish out evidence by way of seeking appointment of an Advocate Commissioner.

2.5 The petitioner want to measure the Suit property, the alleged Battai, the 1st defendant's land and the adjacent owner's lands who are using Battai which is totally wrong as the 1st defendant's property and the adjacent owner's lands who are using Battai were not given by the petitioner in the Suit Schedule of property, and there are no merits or bonafide in the petition, and prayed to dismiss the petition with costs.

3. Neither the petitioner nor the respondents have placed any oral or documentary evidence before this Court.

4. **Point for Consideration:-**

a) Whether this petition is entitled to be allowed or not?

5. **Answering to the Point:-**

Both sides has been heard. Records Perused. Upon careful analysis of the records, it is found that the petitioner has filed this petition with a plea for appointment of an Advocate Commissioner to measure the Suit property, Battai, the 1st defendant's lands and other adjacent and owner's lands who are using Battai, and to file the report with plan.

5.1 The provisions of Order 26 Rule 9 of the CPC are very clear and for the ready reference the same is reproduced below:-

“9. Commissions to make local investigations.-

In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profit or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.”

5.2 It is clear from the above that during pendency of the trial and before the judgment if the Court finds that any issue requires clarification or elucidation, the Court may suo-motu appoint commissioner to submit the report for which no application is required. Further, the scope of Order 26 Rule 9 of the CPC is very limited. The Court in any suit in which a local investigation is required or proper for purpose of elucidating any matter of dispute may appoint a Commissioner.

5.3 It is true that Order 26 Rule 9 of CPC empowers the Court to appointment advocate commissioner to make local investigation as it finds fit and proper based on the facts and circumstances of the case. It is apposite to mention that it is not the aim of Order 26 Rule 9 of CPC to assist a litigant to collect evidence, where the litigant can get evidence himself. The parties cannot use the Court proceedings to collect the evidence.

It is settled law that the parties are required to prove their own case by way of evidence, therefore, it is the duty of the plaintiff/defendant to first give evidence in support of their case. After the evidence of parties, if Court deems it proper that an issue requires clarification then the Court may appoint a Commissioner. The report of Commissioner is merely a piece of evidence and not binding on the Court. It can be used for the purpose of appreciating the evidence came on record.

6. It is seen from records that the present petitioner is the plaintiff in the Suit, and he has filed the above Suit for the relief of declaring his easementary right over the 'B' Schedule described as 'ABCD' Battai for his exgress and ingress to use the 'A' Schedule property, and for Permanent Injunction restraining the defendants, their agents, servants, etc., from in any manner interfering with his easementary right of using the 'B' Schedule described Battai described as 'ABCD' in the plaint plan, and for costs.

7. The plaintiff has filed the present petition to appoint an Advocate Commissioner. After appearance on receipt of Summons, the defendants have filed their Written Statement on 21.04.2015. Issues were framed on 28.07.2015, and posted for trial. On 11.04.2019, the Suit was dismissed for default. On 16.08.2019, the Suit was restored as per order in I.A.No.258/2019. Again, the Suit was posted in the list and on 29.11.2019, again the Suit was dismissed for default. On 03.03.2021, the Suit was restored as per order in I.A.No.40/2020 and posted for trial. At this juncture, the petitioner has filed this present petition to appoint an Advocate Commissioner.

8. In affidavit, the petitioner/plaintiff has alleged that eventhough the 1st defendant has purchased only 10 cents in S.No.781, and the property purchased by her had been sub-divided as 781/1A1 and she has been granted Patta in Patta No.105 in her favour, but she is claiming more than 10 cents including the battai, which is being used by the petitioner, and further he states that adjacent to the Suit property, there are more land owners who have purchased properties from the same owner, and all of them have been using the battai adjacent to the 1st defendant's land, and the defendants are denying the existence of Battai to reach the Suit property and other battai users lands, and therefore, it becomes necessary to identify and measure the battai, and the Suit property and adjacent properties who are using battai, and he has been filed this petition.

9. On contra, the respondents/defendants have stated that the the petitioner has given the wrong description of the Suit properties, and filed a wrong plaint plan which is contrary to the Sale Deed stands in his name, and mainly countered that there is no existence of the Survey No.781 on the date of filing of the plaint as the said Survey number were sub-divided into Survey No.781/1A1, 781/1A2, 781/1B, 781/2, 781/3, 781/4, 781/5, 781/6 and the Joint Patta No.105 of Katpadi village were given in the name of 1st respondent, and others for Survey No.781/1A1, and the petitioner's name do not feature in the same, and the petitioner has not filed any revenue records to show the existence of the alleged Battai on the date of filing of the plaint or prior to the filing of the plaint, and has filed this petition with intention only to fish out evidence by way of

seeking appointment of an Advocate Commissioner, and moreover, the petitioner want to measure the Suit property, the alleged Battai, the 1st defendant's land and the adjacent owner's lands who are using Battai which is totally wrong as the 1st defendant's property and the adjacent owner's lands who are using Battai were not given by the petitioner in the Suit Schedule of property, and there are no merits or bonafide in this petition.

10. From the above averments & the pleading, it is found that the Originally, the Suit itself is filed by the plaintiff for the relief of Declaration of his easementary right over the 'B' Scheduled described as 'ABCD' Battai for his exgress and ingress to use the 'A' Schedule property, and for permanent injunction. According to the plaintiff, his mother Padma has settled the Suit 'A' Schedule property in his favour under the Registered Settlement Deed dated 01.04.2013, and the said Suit 'A' Schedule property is situate on the Southern side of the Battai which is described in Plaint as Suit 'B' Schedule and shown as 'ABCD' in the rough plan attached with the Plaint, and he is enjoying the Suit 'A' Schedule property by passing through the Suit 'B' Schedule property 'Battai' to reach 'A' Schedule and VIT Road which ends in the Katpadi to Ranipet Road, and he constructed a house in the 'A' Schedule property, and there is no other or alternative way available to him to use the 'A' Schedule property, and the 'B' Schedule property is the only easement of necessity for him to use the 'A' Schedule property on the west and north of the 'A' Schedule property, and his brother Ramesh Lands in S.No.781 is shown in plaint rough plan, and one Ramasamy and Govindaraj

had purchased the lands on the northern side of the 'B' Schedule property under the Registered Sale Deed dated 14.06.2004, and one Chellakutti also purchased land on the northern side of the 'B' Schedule property under the Registered Sale Deed dated 15.12.1997, and one Elumalai also has purchased lands on the southern side of the 'ABCD' Battai under the Registered Sale Deed dated 02.11.2005, and the battai has been described in the said Sale Deed, and his Settlement Deed dated 01.04.2003 also mentioned the Battai as the southern boundary. The 1st defendant has purchased 0.10 Acres in S.No.781 on the Southern side of the 'ABCD' Battai, but the defendants claim title to 0.13 Acres including the part of the land in 'ABCD' Battai, which is adjoining the 0.10 Acres of land purchased by the 1st defendant, but all the defendants colluding together are denying the right of the plaintiff to use the Battai 'B' Schedule property, and on 24.12.2014, all the defendants have attempted to obstruct him to use the Battai to reach the 'A' Schedule property, and they have no right to deny his easementary right over the 'B' Schedule property, and thus he filed this Suit for the declaration of his easementary right over the 'B' Schedule described 'ABCD' Battai and for permanent injunction.

11. It is not disputed by the defendants either in the Written Statement & in the Counter filed by them in this petition that the purchase of land i.e., 10 cents in S.No.781 by the 1st defendant, but they specifically denied that there is no Battai as described by the plaintiff in the plaint and rough plan.

12. From the above, it is just and necessary to this Court to elucidate the matter in dispute, and to find out that whether the 'B' Schedule of Suit property is available for grant of easementary right. In such case, mere oral evidence will not suffice in deciding the issue unless a local investigation is conducted. This Court is of the view that if the local investigation is conducted, it will help the Court to understand that what is the real description of the 'A' & 'B' Suit properties, and its physical features, and its sub-division numbers.

13. Further, it is rightly contended by the respondents/defendants that the 1st defendant's property and the adjacent owner's lands who are using the alleged Battai were not given by the petitioner/plaintiff in the Suit Schedule of property, and moreover the adjacent land owners' were not impleaded as party to the Suit, and therefore, measuring the lands of adjacent land owners and the 1st defendant does not arise in this petition.

14. From the above discussions, this Court is of the view that the best evidence could be obtained only by the Appointment of Advocate Commissioner, and therefore, no pre-judice will be caused to the respondents by Appointing the Advocate Commissioner to visit the 'A' and 'B' Schedule Suit properties along with the qualified Taluk Surveyor, and to note down the physical features, and in fact, the above Advocate Commissioner's report and plan would enable the Court for the purpose of throwing more enlighten to arrive at a fair decision, and thus, the appointment of an Advocate

Commissioner is necessary to elucidate the ground realities. Accordingly, this point is answered.

15. **Result:-**

In fine, in the interest of justice, this petition prayer is partly allowed. An Advocate **Thiru. M.Chandramouli (Enrollment No. Ms.852/2007)** is appointed as Advocate Commissioner, and he is directed to inspect the petition Schedule properties ('A' and 'B') after giving notice to both parties, and to note down its physical features, and to measure the same with the help of Taluk Surveyor, Katpadi Taluk and VAO, Katpadi Village, and to take photographs if necessary, and to file his report with plan thereof on or before 26.07.2024. The Advocate Commissioner's remuneration is fixed at Rs.7,000/-. The petitioner is hereby directed to deposit the said remuneration amount in the Court within 5 days from the date of this Order. The said sum will be paid to the Advocate Commissioner only after filing of his report. For Commissioner Report & Plan by 26.07.2024.

-//Dictated by me to the Steno-typist, who directly typed the same, corrected and pronounced by me in the Open Court, on this the 05th Day of June – 2024.//-

(Sd/-).. K.Venkatesan
DISTRICT MUNSIF
KATPADI

Both side documents and witnesses: Nil

(Sd/-).. K.Venkatesan
DISTRICT MUNSIF
KATPADI