

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 19.04.2021

Pronounced on : 26.04.2021

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

C.R.P.(PD).No.106 of 2019

and

C.M.P.No.902 of 2019

1.G.Sethuram

2.Uma Sethuram

...Petitioners / Petitioners / Plaintiffs

Vs.

1.K.Aziz

2.Akeyem Sons

A Partnership Firm,

rep.by its Authorised Signatory,

M.K.Mohammed Sheriff,

carrying on business

No.68, Sembudoss Street,

Chennai – 600 001.

... Respondents / Respondents/Defendants

Prayer:- This petition filed under Section 115 of the Code of Civil Procedure, 1908, to set aside the judgment and order dated 04.10.2018 made in I.A.No.4308 of 2018 in O.S.No.2439 of 2013 on the file of the XIII Assistant Judge, City Civil Court, (FAC) XII Assistant Court, Chennai.

For Petitioners : Mr.A.S.Narasimhan

For Respondents : Mr.D.Moorthy

ORDER

This Revision Petition has been filed by the plaintiffs in O.S.No.2439 of 2013 now pending on the file of the XIII Assistant City Civil Court Chennai, questioning the order passed in I.A.No.4308 of 2018 which application had been filed under Order XXVI Rule 9 of the Code of Civil Procedure, 1908, seeking appointment of Advocate Commissioner to measure the suit property with the assistance of a Government Surveyor attached to Guindy Taluk.

2.The suit in O.S.No.2439 of 2013 had been filed by the plaintiffs G.Sethuram and Tmt.Uma Sethuram against the defendants K.Aziz and M/s.Akeyam Sons, a Partnership firm, seeking a judgment and decree in the nature of permanent injunction restraining the defendants from encroaching or raising the compound wall of the plaintiffs' B-Schedule property namely, North to South 5 feet on both sides East to West 83 feet on the Northern side totally to an extent of 415 sq.ft in A-Schedule property and also for costs of the suit.

3.The A-schedule property had been given as a building site in Plot No.12/part and Plot No.12 in Giri Road, T.Nagar, Chennai – 600 017 measuring 7,200 Sq.ft., and Schedule -B had been given as North to South 5 feet on both sides, East to West 83 feet on the Northern side in all to an extent of 415 sq.ft., or thereabouts in A-Schedule property.

4.It is the claim of the plaintiffs that the 1st plaintiff was the absolute owner of Plot No.12/part, Giri Road, T.Nagar, Chennai measuring 2400 sq.ft., and that he had purchased it on 16.09.1988 by Doc.No.4584 of 1988 on the file of the Sub-Registrar, T.Nagar. The 2nd plaintiff was the absolute owner of Plot No.12, Giri Road, T.Nagar, Chennai – 600 017 measuring about 4800 sq.ft., which had been purchased on 25.10.1999 by Doc.No.2317 of 1999 on the file of the Sub-Registrar, T.Nagar. The plaintiffs claimed to be in peaceful possession and enjoyment of their respective plots. They also claimed that Joint Patta had also been given to them. They also claimed that the defendant had purchased Plot No.10 on the Northern side and on 22.04.2013 attempted to encroach into the plaintiffs property from North to South by 5 feet on both sides, East to West 83 feet on the Northern side. The plaintiffs raised objection. They had also given a complaint to the

jurisdictional police. It was claimed that the defendants were attempting to put up a compound wall, which had been given as B-Schedule property in the plaint. It is on that ground that the suit had been filed seeking permanent injunction.

5.The defendants filed their written statement. They claimed that the 2nd defendant was the lawful owner of the land and building bearing Plot No.10 to an total extent of 4047 sq.ft., having purchased it by Sale Deed registered as Doc.No.1171 of 2010 dated 28.05.2010 on the file of the Sub-Registrar, T.Nagar. The defendants claimed that there was a 4 feet height compound wall existing in and around of the building of the defendants' firm building at the time of purchase and it was facing East. The defendants have access on the Eastern side. They raised the wall from 4 to 10 feet. At that time, the plaintiffs interfered on 18.05.2013. The defendants filed O.S.No.2718 of 2013 for the relief of interim injunction and interim injunction was also granted and later made absolute. It was stated that the trial had also commenced. They denied encroachment to the B-Schedule property. They claimed that the suit should be dismissed.

6.In the said suit, the plaintiff filed I.A.No.4308 of 2018 seeking appointment of an Advocate Commissioner to measure the suit property with the assistance of the Government Surveyor. In the affidavit filed they stated the same averments as stated in the plaint. It was also stated that the plaintiffs had filed a similar application for appointment of an Advocate Commissioner in O.S.No.2718 of 2013, where evidence had been recorded and is posted for examination of further witness.

7.A counter was filed by the defendants to the said application claiming that the petition was not maintainable. It was stated that the plaintiffs will have to prove their possession and it cannot be decided on the basis of a report of an Advocate Commissioner who cannot collect or gather evidence. It was stated that the application should be dismissed.

8.This application came up for consideration before the XIII Assistant City Civil Court, Chennai, on 04.10.2018. The said application was dismissed.

9.Questioning that order the present Civil Revision Petition has been filed.

10. In the order the learned Judge had stated that the suit had been filed only for bare injunction and if there had been any encroachment, the plaintiffs should have amended the plaint seeking the relief for mandatory injunction and also seek declaratory relief of removal of the encroachment.

11. The learned Judge relied on *Chinnathambi and others Vs. Anjalai* reported in *2006 (5) CTC 494*, wherein it had been held that a disputed question of fact of possession can be adjudicated by the Court only after framing issues and recording evidence and an Advocate Commissioner cannot be appointed for collecting evidence.

12. Reliance was also placed in *Chandrasekaran Vs. 6 others Vs. V. Doss Naidu*, reported in *2006 2 LW 159*, where again it was stated that the power has been conferred to the Court only to appoint a Commissioner to make local inspection and not to collect evidence.

13. Reference had also been made to *Elango Vs. Kasthuri* reported in *2009 (5) CTC 706*, where again with respect to the factum of possession, it had been held that the Court alone could gather evidence

and cannot entrust the said matter to the Advocate Commissioner to collect evidence.

14.The learned Judge finally held that the issue which has to be decided in the suit is whether the plaintiffs held possession and whether the defendants had attempted to interfere with possession. It was stated that the burden was on the plaintiffs to adduce the necessary evidence. The learned Judge therefore dismissed the application.

15.Heard arguments advanced by Mr.A.S.Narasimhan, learned counsel for the revision petitioners / plaintiffs and Mr.D.Murthy, learned counsel for the respondents / defendants.

16.The suit had been filed seeking protection from interference with peaceful possession. The 1st and 2nd plaintiffs claimed to have purchased A-Schedule suit property by way of registered documents. The defendants had purchased the property in the northern side of the plaintiffs' property. There was a wall. The wall was about 4 feet in height. The defendants in their written statement have stated that they had increased the wall to 10 feet. At that time, the plaintiffs objected

claiming that the defendants had encroached into the suit property. The defendants have denied such encroachment. The issue therefore surrounds whether there is a wall dividing the properties between the plaintiffs and the defendants. Both the plaintiffs and the defendants have purchased their respective properties through registered documents. The boundaries of the respective properties would naturally have been given in the two documents. It is not a case that there is no dividing wall between the properties. If there is a wall, then the plaintiffs will have to establish possession of the lands to their side of the wall. Primarily, the Court will have to first establish the existence of the wall. Thereafter, the Court can examine whether the plaintiffs had proved possession and whether there has been any encroachment or interference with possession. Those are issues which have to be decided only on the basis of the evidence already recorded.

17. To determine whether there is a wall, it would only be appropriate that an Advocate Commissioner is appointed. In the petition filed in support of the application seeking appointment of an Advocate Commissioner, the plaintiffs have stated that the Advocate Commissioner should measure the suit property with the assistance of the

Government Surveyor. That relief cannot be granted. It is the burden of the plaintiffs to come to Court showing the area which they had purchased. That burden cannot be shifted by appointment of an Advocate Commissioner or cannot be determined by appointment of an Advocate Commissioner. To that extent, the reasoning of the learned Judge is correct. The burden is on the plaintiffs to establish possession.

18. But the peculiar circumstances of the present case indicate that there is a dispute for which local inspection is required.

19. In ***Sarawathy & Another Vs. Viswanathan S/o Muthusamy*** reported in **2002 (2) CTC 199**, a learned Single Judge of this Court had, no doubt in a suit relating to easementary right, an occasion to set aside the order of a learned Subordinate Judge who dismissed an application seeking appointment of an Advocate Commissioner and in the course of the reasoning, had held as follows:

“9. In my view, the reasoning of the learned Judge cannot be accepted. Merely because there is no dispute with regard to the identity of the property, it does not mean that no case is made out for the appointment of an Advocate Commissioner. The question is whether the

defendant is putting up the construction in his property as per the plan sanctioned by the Municipality. Equally, the further question would be as to whether the plaintiffs themselves have put up construction as per any sanctioned plan in their property, for which purpose a visit by the Advocate Commissioner to note down the physical features and take measurements on the basis of the rival documents would be necessary and it would eliminate any detailed oral evidence.

10. In *Pillaiyar v. Ganesan and another*, 1999 MLJ (Supp.) 432 I had occasion to consider the grounds for invoking Order 26 Rule 9 of the Code of Civil Procedure for the appointment of an Advocate Commissioner. No doubt, there can be no appointment of Commissioner for collecting evidence or gathering materials. However, the object of a Commission under Order 26 Rule 9 of the Code of Civil Procedure is not to collect evidence, which has to be done only by the Court, but for elucidating matters which are local in character, which can be done only by local investigation at the spot.

11. In my view, a local investigation is requisite and proper and the lower Court was in error in declining to appoint an Advocate Commissioner. Absolutely no

prejudice would be caused by the appointment of an Advocate Commissioner.

12. In Ponnusamy v. Salem Vaiyappamalai Jangamar Sangam, 1985 (1) MLJ 380: AIR 1986 Mad. 33, *the appointment of an Advocate commissioner was sought for by the defendant in a suit for injunction to restrain him from digging foundation in the plaintiff's land. The defendant contended that the land belonged to him. The Court refused to issue Commission. Nainar Sundaram, J. (as the learned Judge then was) interfered with in revision and granted the prayer on the following reasoning:*

“A controversy, as we would see from the pleadings, has arisen as to whether the constructions put up by the third defendant are within his land or whether they have encroached into the lands of the plaintiff. A local investigation is the best way to find out the position and the party, viz., the third defendant coveting the evidence to place before the Court through local investigation by the Commissioner cannot be shut out of their right.”

13. In Appu v. A. Fatima Zohra and another, 1983 (96) LW 369: 1982 TLNJ 482 *it has been held by this Court that,*

“there may be very many circumstances in which only a Commissioner inspecting the property promptly and recording timely assessment of what obtains relating to the building, could alone assist Courts to decide correctly. If

such prompt actions are not taken, it may destroy the valuable right of the parties. It may so happen, when a landlord highhandedly starts pulling down a portion of the main building, the tenant would be greatly interested in securing a Commissioner appointed forthwith. If the right of the tenant to have access to stair-case is constructed, he is most interested in seeking appointment of the Commissioner and secure immediate relief for restoring amenities, which is assured to him under the Act.”

14. As already pointed out, absolutely no prejudice would be caused by the appointment of an Advocate Commissioner for the purpose of inspecting the property and submitting his report on the physical features, measurements etc. Though the Commissioner cannot decide the dispute, his inspection and report would help the Court in deciding the dispute.

20. In **Sivagurunathan Vs. Ramalingam and Others** reported in (2005) 3 MLJ 525, it had been held as follows:

12. When the controversy between the parties is about the area of the land or the identification or the location of the land, local investigation by a commissioner is necessary. It would clarify the location and extent in which the plaintiff is in possession and would explain any doubtful points on the evidence on record. When there is a dispute over the extent,

measuring of the suit property with the help of surveyor and the plan thereon would considerably reduce the oral evidence. The object of local investigation is to obtain evidence which could be based on only from the spot and the inspection. Report of the advocate Commissioner would enable the Court to properly and correctly understand and assess the evidence on record in resolving the contentious points.”

Thus, it is seen that the Advocate Commissioner is only an officer of the Court. He is an extended arm of the Court. The Advocate Commissioner is certainly not appointed to collect the evidence but only for elucidating matters in dispute. The local investigation is the best way to find out whether there is a wall between the properties. Though the Commissioner cannot decide that dispute, his inspection and report would help the Court in deciding that dispute.

21.I would fall back to the ratio given in the above judgments and it would only be appropriate that a Commissioner is appointed to determine whether the wall exists between the property of the plaintiffs and the property of the defendants. If there is a wall the Advocate Commissioner may note down the said fact and report back to the Court.

22.To that limited extent, the order of the learned Judge is interfered with and modified and a direction is given for appointment of

Advocate Commissioner to determine whether a wall exists between the property of the plaintiffs and the property of the defendants. A Taluk Surveyor is not required for that purpose. Measurement of the property of the plaintiffs are not required.

23.A simple finding with respect to determination of existence or otherwise of the wall alone can be given by the Advocate Commissioner without mentioning about possession or without mentioning about the ownership of the wall. They are issues which have to be established only by the parties to the suit.

24.The Revision Petition is accordingly allowed to that particular extent and the order in I.A.No.4308 of 2018 is set aside but relief is granted to the limited extent as indicated above. No order as to costs. Consequently, the connected Civil Miscellaneous Petition is closed.

26.04.2021

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Index : Yes / No

Internet : Yes / No

Speaking order : Yes / No

To,
The XIII Assistant City Civil Court, Chennai.

C.V.KARTHIKEYAN, J.,

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Pre-Delivery Order made in
C.R.P.(PD).No.106 of 2019

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