



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 10.11.2021

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THE HONOURABLE MS.JUSTICE P.T.ASHA

C.R.P(MD)Nos.865 of 2020 and 1374 of 2021

and

C.M.P(MD) No.5718 and 7827 of 2021

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C.R.P(MD)No.865 of 2020

S.Natarajan

... Petitioner/Respondent/
Defendant

Vs.

1.O.Kasimayan

2.K.Kamala

... Respondents/Petitioners/
Plaintiffs

PRAYER:- Civil Revision Petition filed under Article 227 of Constitution of India, to set aside the fair and decretal order dated 14.02.2020 passed in I.A.No.1 of 2019 in O.S.No.114 of 2015 on the file of the District Munsif Court, Theni and allow the present Civil Revision Petition.

For Petitioner

: Mr.R.J.Karthick

For Respondents

: Mr.M.Senthilkumar

C.R.P(MD)No.1374 of 2021

1.O.Kasimayan

2.K.Kamala

... Petitioner/Petitioners/
Plaintiffs

Vs.

S.Natarajan

... Respondents/Respondent/
Defendant

PRAYER:- Civil Revision Petition filed under Article 227 of Constitution of India, to set aside the fair and decretal order dated 16.04.2021 passed in I.A.No.3 of 2021 in O.S.No.114 of 2015 on the file of the District Munsif Court, Theni and allow the present Civil Revision Petition.

For Petitioners

: Mr.M.Senthilkumar

For Respondent

: Mr.R.J.Karthick



ORDER

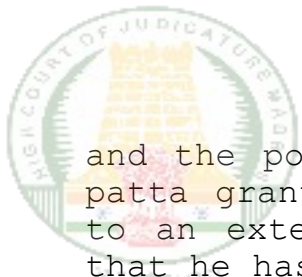
The defendant is the revision petitioner before this Court in C.R.P(MD)No.865 of 2020. This revision petition has been filed challenging the order dated 14.02.2020 of the learned District Munsif, Theni, in I.A.No.1 of 2019 in O.S.No.114 of 2015. C.R.P(MD) No.1374 of 2021 is filed by the plaintiffs challenging the order passed in I.A.No.3 of 2021 in the suit in O.S.No.114 of 2015. The suit in O.S.No.114 of 2015 has been filed by the respondents/plaintiffs seeking mandatory injunction directing the petitioner/defendant to remove the compound wall put up by him in the plaintiffs' property, to declare the plaintiffs title to the suit property and also for recovery of possession from the defendant.

2. The parties are referred in the same rank as in the suit.

3.It is the case of the plaintiffs that the lands, covered in the survey number in which the suit property is comprised, originally belonged to the Government. The Government had formed house-sites and allotted the said property to the landless people. Under this scheme, the property described as plot No.112 and its adjoining site was allotted to the husband of Mahalingammal and father of the Agniveeran in the year 1984. On his death, the property devolved on the aforesaid persons, who by sale deed dated 21.01.2009, sold the suit property to the plaintiffs. The plaintiffs were enjoying the suit property as vacant site.

4.The defendant is the owner of the Plot No.111 which is situated to the west of the suit property. They have put up the construction in the said property. While the plaintiffs were away from the suit property in the month May 2014, the defendant had illegally trespassed into the suit property and put up a compound wall. When the plaintiffs returned, they had questioned the defendant. The defendant had replied that the compound wall had been put up only within his property in Plot No.111. The defendant and the plaintiffs had referred the dispute to be resolved by well-wishers and the persons, who were commonly known to both the parties. These mediators had directed that the properties had to be measured in order to arrive at an amicable settlement. When the properties were measured, it was found that the compound wall had been put up within the plaintiffs' property in Plot No.112. The defendant refused to remove the illegal construction. Therefore, the plaintiffs had come forwarded with the suit in question.

5.The defendant had filed the written statement *inter-alia* refuting the plaintiffs' claims. The defendant would submit that the portion described as ABEF in the suit plan measured 1200 sq.ft



and the portion described as EFCD measured 180 sq.ft. As per the patta granted to the plaintiffs, the plaintiffs were only entitled to an extent of 1200 sq.ft. The defendant would further contend that he has not encroached into the portion described as ABEF in the plan. The portion which is shown as EFCD does not belong to the plaintiffs and therefore, the suit is filed without any basis. The defendant has also questioned the valuation of the property by the plaintiffs and consequently, the Court fee paid thereunder. While so, the plaintiffs had filed I.A.No.1 of 2019 to amend the plaint to bring it in tune with the Commissioner's Report.

6.In the affidavit filed in support of the petition, the plaintiffs would submit that originally when the parties had independently measured the property, they were under the impression that the road on the east measured 20 feet. It was only, when the Commissioner had inspected the properties with the surveyor, the plaintiffs had come to know that the road on the east measured about 30 feet. Further, when the Plot No.112 was measured, it was found that there was a north-south pathway on the east and out of 30 feet measuring east-west on the south, the plaintiffs were in enjoyment of 15.7 feet and east-west on the north the plaintiffs were in enjoyment of 17.6 feet. The report of the Advocate Commissioner showing the remaining extent of 14.3 feet on the south and 12.4 feet on the north, would clearly show that the defendant had encroached into an extent of 40 feet. The Commissioner has also noted that portion and also clearly noted the measurement of the encroachments and therefore, the plaintiffs sought to amend the plaint schedule with these measurements.

7.The defendant would counter the same by contending that much prior to the purchase by the plaintiffs, their predecessor in title have identified the boundaries and constructed the house. The defendant would further submit that he is in possession and enjoyment of his property and not the property of the plaintiffs. The report of the Advocate Commissioner does not reflect the ground reality. He would therefore state that the amendment based upon this flawed Advocate Commissioner report, cannot be permitted to be allowed.

8.The plaintiffs have also taken out another application. They have once again sought for the appointment of an Advocate Commissioner to take the help of the surveyor and measure the suit property and submit the report thereto.

9.In the affidavit filed in support of this petition, the plaintiffs would submit that the defendant's property in Plot No.111 was also measured and earlier the Commissioner has not measured the plaintiffs' property and therefore, they were not able to pin-point the encroachment made by the defendant. The Advocate Commissioner



has also not noticed the encroachment in the suit property, when the defendant had constructed his house. In these circumstances, they would seek to have a new Commissioner appointed for measuring the suit property and for submitting his report with the plan.

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10.The learned District Munsif, Theni, after hearing the parties, had rejected the application for appointment of Advocate Commissioner, but however had allowed the petition filed for amending the plaint. The learned District Munsif opined that since the amendment was only to incorporate the measurements found by the Advocate Commissioner, no prejudice would be caused to the defendant and accordingly, allowed the application.

11.As regards, the petition filed by the plaintiffs seeking appointment of an Advocate Commissioner to revisit the property so as to measure the property and submit the report, the learned District Munsif dismissed the application stating that the plaintiffs have moved the single application seeking to scrap the report of the earlier Commissioner and appoint a new one. Such relief cannot be granted in a single petition. The learned District Munsif also took into account the fact that the plaintiffs have filed an application to amend the plaint only on the basis of the report filed by the Advocate Commissioner. Therefore, the learned District Munsif observed that the plaintiffs were taking contradictory stand. While on the one hand they would rely on the report to amend the plaint on the other hand they are seeking to scrap the very same report and therefore, that application deserves to be dismissed. The plaintiffs have challenged the order dismissing their application seeking to scrap the earlier report and appoint an Advocate Commissioner and the defendant had filed the revision petition challenging the order of allowing the amendment application.

12.Heard the learned counsel appearing on either side and perused the materials placed on records.

13.From arguments, it appears that the Commissioner has not measured the property of both the plaintiffs and the defendant. It is the contention of the learned counsel for the defendant that both properties measured 1200 sq ft and on the east of the plaintiffs' property pathway/road was available and therefore, the measurement of the properties could start from that point.

14.The learned counsel for the petitioners/plaintiffs was also agreeable to appointment of the Advocate Commissioner to measure the suit property as well the property of the defendant. The counsel also requested this Court to observe that the trial Court be pleased to appoint a new Advocate Commissioner who should be directed to measure both the properties on the basis of the sale deeds and the



patta granted to the parties.

15.As regards the amendment petition, the same has been filed only on the basis of the earlier Commissioner's report. Since the parties have consented for the appointment of new Commissioner, the amendment on the basis of the earlier Commissioner's report may not be in tune with the Commissioner's report that is to be filed. The respondent has no objection to the petition filing an amendment, if required, based on the report that is to be filed by the Advocate Commissioner, who is to be appointed.

16.In these circumstances, this Court is of the opinion that the order passed in I.A.No.1 of 2019 appointing an Advocate Commissioner be allowed and the plaintiffs be given a liberty to amend the plaint to keep it in sync with the report that the New Commissioner is to file. Accordingly, the petition filed by the revision petitioner challenging the order of dismissing the application for appointment of an advocate commissioner is allowed and the learned District Munsif, Theni, is directed to appoint an Advocate Commissioner in I.A.No.3 of 2021, who shall be directed to inspect the suit property as well as the adjoining property of the defendant and measure the said properties with the help of the Surveyor and submit the report along the sketch. The Advocate Commissioner shall measure the properties as per the respective sale deeds and patta. The remuneration of the Commissioner shall be fixed by the Trial Court.

17.The revision petition challenging the order of allowing the amendment application in I.A.No.1 of 2019 is allowed. However, the plaintiffs are given liberty to seek an amendment if so warranted on going through the report and plan to be submitted by the Advocate Commissioner who is now to be appointed.

18.In the result, these Civil Revision petitions are allowed and ordered on the lines above. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

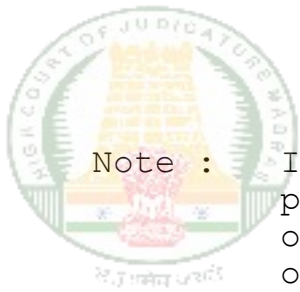
Assistant Registrar (CS-I)

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/ /2021

Sub Assistant Registrar(CS)

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Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

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To:-

The District Munsif,
Theni.

+1 CC to M/s.M.SENTHIL KUMAR, Advocate (SR-34066[F] dated 11/11/2021)

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