

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.01.2015

CORAM

THE HON'BLE MR.JUSTICE S.NAGAMUTHU

Second Appeal No.1196 of 2014
and M.P.No.1 of 2014

G.Natarajan . .. Appellant/1st Defendant.

-Versus-

1.Venkatesan .. 1st Respondent/Plaintiff.

2.The Commissioner,
Corporation of Chennai,
Having Office at Ripon Buildings,
Chennai 600 003.

3.The Zonal Officer,
Zone IV,
Corporation of Chennai,
Having Office at Ayanavaram,
Chennai 600 023.

.. Respondents 2 & 3/Defendants 2 & 3

This second appeal is filed against the judgment and decree dated 07.01.2014 passed in A.S.No.468 of 2011 by the learned VI Additional Judge, City Civil court, Chennai, reversing the judgement and decree dated 23.12.2010 passed in O.S.No.6611 of 2005 by the learned IV Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.P.Sidharthan

For Respondent (s) : Mr.C.P.Sivamohan for R1

JUDGMENT

The 1st defendant in O.S.No.6611 of 2005 on the file of the learned IV Assistant Judge, City Civil Court, Chennai, is the appellant herein. The plaintiff in the said suit is the 1st respondent herein. The other defendants in the said suit are the respondents 2 and 3 herein. The said suit was filed by the 1st respondent/plaintiff for mandatory injunction directing the 1st defendant to remove the unauthorized constructions of a wall measuring an extent of 2 feet x 6 feet in the common pathway on the eastern side of the plaintiff's property leading to Brick Kiln Road described as B-schedule property and to remove the illegal and

unauthorized construction to an extent of 2 feet x 25 feet constructed on the eastern side of the plaintiff's property described as C-schedule and to close the illegal opening made on the northern side of the 1st defendant's building described in A-schedule and for other reliefs.

2. The trial court dismissed the said suit by a decree and judgement dated 23.12.2010. As against the same, the 1st respondent/plaintiff filed an appeal in A.S.No.468 of 2011 before the learned VI Additional Judge, City Civil Court, Chennai. The first appellate court by a decree and judgement dated 07.01.2014 allowed the appeal, set aside the decree and judgement of the trial court and decreed the suit as prayed for. As against the same, the 1st defendant is now before this court with this second appeal.

3. This second appeal has come up today for admission. By consent of the learned counsel for the appellant and the learned counsel for the 1st respondent, the second appeal itself was taken up for final hearing. The respondents 2 and 3 remained ex parte even before the trial court and therefore, I have not ordered notice to them as they are only formal parties.

4. I have heard the learned counsel for the appellant and the learned counsel for the 1st respondent and also perused the records carefully.

5. The case of the 1st respondent/plaintiff is as follows:- There are three schedule of properties. The A-schedule property is admittedly a ground and a house situated thereon bearing Door No.161, Brick Kiln Road, Otteri, Chennai 600 012. This property, admittedly, belongs to the 1st defendant. On the north of the A-schedule property there is a lane, which has been described as B-schedule property measuring North to South 2 feet and East to West 6 feet. This lane, admittedly, belongs to the Chennai Corporation.

6. The C-schedule property is the entrance of the house of the 1st defendant on the northern wall measuring an extent of 2 feet x 25 feet so as to enter from the lane.

7. According to the plaintiff, though the 1st defendant is the owner of the ground and house bearing Door No.161, Brick Kiln Road, Otteri, Chennai-600 012, he has made encroachment on the B-schedule property viz., the lane and he has also made a small unauthorized construction measuring to an extent 2 feet x 25 feet on the western portion of A-schedule property, which also lies on the B-schedule property viz., the lane. According to the plaintiff his house is situated on the west of the house of the defendant and the lane and the plaintiff has got right to use the said lane. Now because of the unauthorized construction made as described in B-schedule property his right of way to reach his house is disturbed. With these

allegations, the plaintiff filed the said suit for the reliefs as referred to above.

8. The 1st defendant viz., the appellant herein, in his written statement had admitted that he is the owner of the house bearing Door No.161, Brick Kiln Road, Otteri, Chennai, which is the A-schedule property. He also admits the existence of the lane, which belongs to the municipal corporation, situated on the north of his house. But, his contention is that he has not made any encroachment on the said lane. The constructions described as B-schedule and C-schedule property fall well within the property of the defendant. Thus, according to him, he has not encroached upon the lane and therefore, there is no question of removal of B and C schedule properties.

9. The trial court framed appropriate issues on the above said pleadings. The parties were allowed to let in both oral as well as documentary evidence. An Advocate Commissioner was also appointed to measure the properties concerned and to submit a report. But, unfortunately, neither the Advocate Commissioner was examined, nor the report was proved in evidence. The report submitted by the Municipal Engineer to the Advocate Commissioner in respect of the measurement made by him assisting the Advocate Commissioner was also not exhibited in evidence. The trial court considered the oral as well as the documentary evidence and the report of the Advocate Commissioner as well as the report of the Engineer in a different suit and finally held that the plaintiff had failed to prove by means of proper description of properties that there was encroachment on the lane. It is on this factual finding the trial court dismissed the suit. But the first appellate court has reversed the said judgement and decree of the trial court by holding that it is of course true that the measurement of the encroached portion has not been properly given in the plaint and there is also no precise evidence for the same. However, the first appellate court has held that the executing court will make a proper measurement and remove the encroachment, if any, and therefore, decree and judgement of the trial court is liable to be reversed. It was on this finding, the first appellate court mainly reversed the judgement and decree of the trial court.

10. The learned counsel for the appellant would submit that the executing court cannot travel beyond the decree and therefore, the first appellate court was not right in decreeing the suit by reversing the decree and judgement of the trial court by leaving it open for the executing court to find portion of the lane encroached upon and then to remove the same. This, according to the learned counsel is an erroneous approach made by the first appellate court. The learned counsel would further submit that it is mandatory that the suit property should be described in the plaint in an identifiable manner. He would further submit that in this case though there is no dispute that there is a lane situated on the north of the house of the 1st defendant, it has not been proved that there is any

encroachment on the lane and to what extent such encroachment has been made.

11. From the above submissions, I am sure that the following substantial questions of law have emerged for consideration of this court:-

(1) Whether the first appellate court was right in reversing the decree and judgement of the trial court by holding that the extent of the encroachment could be ascertained by the executing court and then such encroachment can be removed in execution of the decree?

(2) Whether the first appellate court was right in reversing the judgement and decree of the trial court though the suit property has not been described as required under Order VII, Rule 3 of CPC?

12. The learned counsel for the 1st respondent would submit that the procedure is only a hand maid of justice and, therefore, the procedure should not be given preference over substantial justice. In this regard, the learned counsel in a very eloquent manner submitted that in Salem Advocates Bar Association, Tamil Nadu v. Union of India, [2005 (6) SCC 344], the Hon'ble Supreme Court has reiterated that the courts of law should not give much importance to the procedure, but instead, the courts should endeavour to do justice.

13. The learned counsel for the 1st respondent would further submit that the Advocate Commissioner's report would go to prove the encroachment made by the defendant. Therefore, according to him, the first appellate court was right in reversing the decree and judgement of the trial court.

14. I have considered the above submissions carefully.

15. At the out set, I should say that both the substantial questions of law framed herein-above are to be answered in favour of the appellant herein. The reasons are many. A perusal of the trial court's judgement would go to show that the trial court had admitted few documents which are either inadmissible in evidence or not proved properly. On the side of the defendants, the Advocate Commissioner's report in I.A.No.21360 of 2002 in O.S.No.7646 of 1999 was marked as Ex.B.1. This Advocate Commissioner's report has nothing to do with the present suit. That Advocate Commissioner was also not examined in the present suit. When that be so, I do not understand as to how the trial court was convinced that Ex.B.1 Report of the Advocate Commissioner in I.A.No.21360 of 2002 in O.S.No.7646 of 1999 was admitted in evidence without examining the said Commissioner. On the side of the plaintiff, the objections filed by the plaintiff to the

above said Advocate Commissioner's report has been marked as Ex.A.12. Here again, I have to state as to how this document was marked when there was no proof in the absence of examination of the Commissioner himself. The trial court as well as the first appellate court have extensively referred to the report submitted by the Municipal Engineer to resolve the issues. It is not understood as to how the said report, which has not been proved in evidence at all by examining the Advocate Commissioner and the Municipal Engineer, was referred to by the courts below. This, in my considered opinion, is illegal. If at all any one of the parties had wanted to use the said document in his favour, he should have done well by examining the Advocate Commissioner and the Municipal Engineer as witnesses so as to prove the said report thereby giving liberty to the adverse party. In a civil suit, the courts are called upon to give a judgement on the issues on considering the pleadings and the evidence available and not any other extraneous matter. Here, in this case, the Engineer's report was relied on, which in my considered opinion in the absence of proper proof, it is only extraneous. Similarly, the Advocate Commissioner's report in the present suit, which has not been marked at all in evidence has been taken into consideration. The earlier Advocate Commissioner's report filed in the suit in O.S.No.7646 of 1999 has also been relied on by both the courts below. This is also illegal. Apart from that, now precisely coming to the question of law involved, Order VII, Rule 3 of CPC makes it mandatory that the suit property should be described in identifiable manner. Such Identity could be established either by describing the property by means of survey number or by means of four boundaries with extent or by both. Here, in the instant case, the suit property viz., the lane in question has not been identified by survey number. The property in question has not been described by four boundaries also. The extent of the property has also not been given. Even from the Commissioner's report, which has been referred to by the courts below and from the judgments of the courts below, I am able to see that there is no mention about the survey number. There is also nothing given by the first appellate court as to what is the extent of the property which is stated to have been encroached upon by the appellant herein on the lane. The approach of the lower appellate court that the actual measurement of the encroached portion would be decided by the executing court would amount to allowing the executing court to reopen the issue again and pass a fresh decree. It is too well settled that an executing court cannot travel beyond the decree and executing court is bound by the decree. Any decree passed by the civil court should be workable. A decree passed by Court which is unworkable for want of proper description of property so as to identify the property and to execute the decree is almost non-est in the eye of law. In the instant case, mandatory injunction has been granted against the appellant herein to remove the encroachment. When the appellant states that there is no encroachment, how could it be possible for the executing court to verify whether there is any encroachment or not without traveling beyond the decree. When all

these infirmities were pointed out the learned counsel for the 1st respondent would submit that the suit may be remanded back to the trial court giving liberty to the 1st respondent / plaintiff to amend the suit property and also to lead further evidence, if any including to examine the Advocate Commissioner and the Municipal Engineer, etc., so that the trial court could decide the issues, the learned counsel for the appellant has got serious objection for the same. He would submit that the request of the 1st respondent would amount to seeking permission to fill up the lacuna in the case of the plaintiff. He would further submit that amendment, if any, is allowed to be made in the plaint at this length of time, the same may change the very basic character of the suit and therefore, that cannot be allowed.

16. So far as the request for amendment of the plaint is concerned, it is left open for the 1st respondent to approach the trial court, if this matter is remanded back and it is for the trial court to decide whether to permit the 1st respondent / plaintiff to amend the suit or not. In this second appeal, this court cannot issue any positive direction to the trial court to permit the 1st respondent/plaintiff to amend the suit because it falls within the judicial domain of the trial court. So far as leading of additional evidence is concerned, I am of the view that the trial court shall permit the parties to lead additional evidence including examination of the Advocate Commissioner, and the Municipal Engineer and to mark the documents. In my considered opinion, if the trial court finds that allowing the 1st respondent/plaintiff to amend the suit property would help the court to resolve the issues between the parties effectively, the trial court may take such a view also.

17. In view of the above discussions, I find that the decree and judgement of the first appellate court as well as the decree and judgement of the trial court are liable to be set aside and the matter needs to be remitted back to the trial court for fresh disposal after affording sufficient opportunity to both parties to lead additional evidence, if any. Regarding the request to amend the suit, it is for the trial court to decide, if any request is made.

18. In the result, this second appeal is allowed; the judgment and decree dated 07.01.2014 passed in A.S.No.468 of 2011 by the learned VI Additional Judge, City Civil court, Chennai and the judgement and decree dated 23.12.2010 passed in O.S.No.6611 of 2005 by the learned IV Assistant Judge, City Civil Court, Chennai are hereby set aside, and the suit in O.S.No.6611 of 2005 is hereby remitted back to the learned IV Assistant Judge, City Civil Court, Chennai, with liberty to the plaintiff to approach the trial court for amending the suit and with a direction to the trial court to allow the parties to lead additional evidence, if any, including examination of the Advocate Commissioner and the Municipal Engineer. At any rate, the trial court shall dispose of the suit within a

period of six months from the date of receipt of a copy of this judgement. Consequently, connected MP is closed.

kmk

-s/d-
Deputy Registrar(J)
Dt:20/3/2015

True Copy

Sub-Assistant Registrar

To

1.The VI Additional Judge, City Civil court, Chennai.

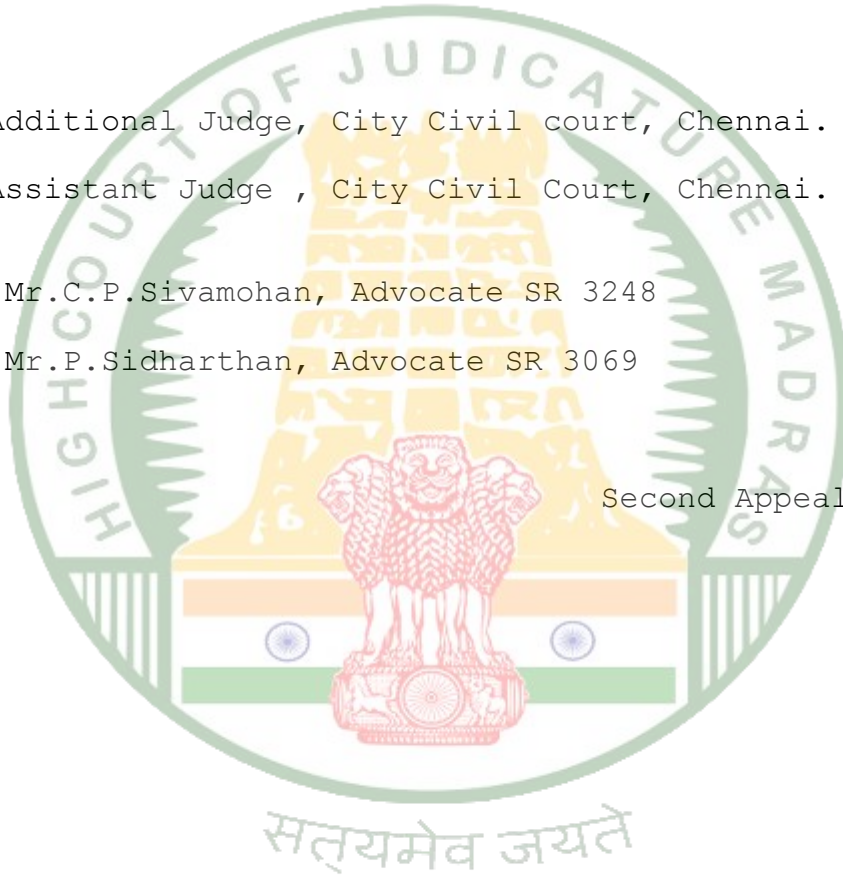
2.The IV Assistant Judge , City Civil Court, Chennai.

+ 1 cc to Mr.C.P.Sivamohan, Advocate SR 3248

+ 1 cc to Mr.P.Sidharthan, Advocate SR 3069

su(co)
prk25/3

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