IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 10.02.2015

CORAM:

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

Second Appeal No.711 of 2014 and M.P.No.1 of 2014

1. Sundari
2. Kumar
3. Sridar
4. Perumal
5. Nagavalli .. Appellants/Defendants 1to5

-Vs-

1. Saravanamuthu
2. Kaliavardan .. Respondents/Plaintiff & 6th Defendant

SECOND APPEAL filed under Section 100 of Code of Civil Procedure against the judgment and decree dated 22.04.2014 made in A.S.No.47 of 2011 on the file of the II Additional District Judge, Pondicherry confirming the judgment and decree dated 23.09.2011 made in O.S.No.450 of 2000 on the file of the Principal Sub-Judge, Pondicherry and to set aside the same.

For Appellants : Mr.R.Thirugnanam

For 1st Respondent : Mr.AR.L.Sundaresan, Senior Counsel for Mr.B.Manoharan

For 2nd respondent : Set exparte

J U D G M E N T

The defendants 1 to 5 in O.S.No.450 of 2000 on the file of the learned Principal Subordinate Judge, Pondicherry are the appellants herein. The 1st respondent in this appeal is the plaintiff and the 2nd respondent is the 6th defendant in the suit. The 1st respondent had filed the suit for declaration of title and for permanent injunction to restrain the defendants from in any manner interfering with his peaceful possession and enjoyment of the suit property. The trial court decreed the suit by decree and judgment dated 23.09.2011. As against the same, the appellants filed an appeal in A.S.No.47 of 2011 on the file of the learned II Additional District Judge, Pondicherry. The said appeal was dismissed by decree and judgment dated 22.04.2014 thereby confirming the decree and judgment of the trial court. That is how the appellants are before this Court with this Second Appeal.

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2. The case of the plaintiff is as follows:

The suit property was originally owned by Mr.Rathna Naicker, S/o.Sinna Sabapathy. He sold away the suit property (''A'' schedule property) under Ex.A.1 Sale Deed dated 16.05.1945. From the date of purchase, Mr.Rathnavelu was in possession of the entire extent of ''A'' Schedule property as the absolute owner. Rathnavelu had two wives by name Krishnammal and Kannammal. Through Krishnammal, Rathnavelu had 2 children by name Saravanamuthu and Kalaivani. Through his second wife, he had two children by name Sankaramuthu and Sabarimuthu. The ''A'' Schedule property and other joint family properties left behind by Mr.Rathnavelu, who died intestate, were all partitioned by Krishnammal, Kannammal, Saravanamuthu, Kalaivani, Sankaramuthu and Sabarimuthu on 15.06.1994. It was an oral partition. In the said oral partition, the northern half portion of the ''A'' schedule property was allotted to Kalaivani and southern half portion of the ''A'' schedule property was allotted to Saravanamuthu which is the ''B'' schedule property. Saravanamuthu is the plaintiff herein. According to the plaintiff, he is in possession and enjoyment of the ''B'' schedule property as he is the absolute owner. The defendants have no right whatsoever over the same. Now, at the instigation of the 6th defendant, according to the plaintiff, the defendants 1 to 5, namely, the appellants herein, attempted to disturb his possession. Therefore, the above suit was filed for declaration of title in respect of the ''B'' schedule property and for permanent injunction to restrain the defendants from in any manner interfering with his peaceful possession and enjoyment of the suit ''B'' schedule property.

3. The 6th defendant did not claim any right over the suit property. In his written statement, he simply denied the allegations made against him. He did not file any appeal also against the decree and judgment of the trial court. Though he was one of the respondents in the First Appeal, he remained ex-parte therein also. In this appeal also, notice sent to him has not been received and the same was returned as refused which shows that the 6th defendant has got no interest in the Second Appeal.

4. So far as the defendants 1 to 5 who are the appellants 1 to 5 herein are concerned, the story goes as follows:

The suit ''A'' schedule property was not at all purchased by Rathnavel Naicker under Ex.A.1. Ex.A.1 refers to a different property and not the suit property at all and therefore, under the so called partition dated 15.06.1994, the plaintiff could not have title for the ''B'' schedule property. It is the further case of the defendants 1 to 5 that the suit property was owned by Sambasiva Gounder. He died leaving behind his son by name Natesan. Natesan also died intestate leaving behind his wife Kamalam. Kamalam executed a Settlement Deed Ex.B.5 on 11.09.2000 in favour of the 4th defendant Perumal. Thus, the 4th defendant/4th appellant is the

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absolute owner of the property and he has been in possession and enjoyment of the same. Thus, according to the appellants, the suit should be dismissed.

5. The trial court framed appropriate issues on the above pleadings. On the side of the plaintiff, as many as 5 witnesses were examined and 31 documents were exhibited. On the side of the defendants, 3 witnesses were examined and as many as 37 documents were exhibited. Ex.X.1 to Ex.X6 were marked as witness documents because they are all Government documents. Having considered all the above, the trial court decreed the suit which is confirmed by the lower appellate court. That is how, the appellants are before this Court with this Second Appeal.

6. When this Second Appeal was admitted, this Court framed the following substantial questions of law:

a. Whether the courts below have committed an error of law in decreeing the suit when the plaintiff has not proved his title to the suit property when the Sale Deed dated 16.05.1945 under Ex.A.1 refers the different Cadastre Number in respect of the Schedule ''A'' property?

b. Whether the courts below have committed an error of law in holding that the boundaries prevail over the Survey Number also viz. in this Cadastre Number? and

c. Whether the courts below were right in shifting the burden of proof upon the defendants admittedly when the plaintiff has filed the suit for declaration of his title to the suit property?

7. I have heard the learned Counsel for the appellants and the learned Senior Counsel appearing for the 1st respondent. The 2nd respondent is set ex-parte as notice sent to him has been refused by him. I have also perused the records carefully.

8. The learned Counsel for the appellants would submit that Ex.A.1 dated 16.05.1945 does not relate to the suit property, but the courts below on an erroneous approach have held that Ex.A.1 covered the suit property and thus, the plaintiff has got title over the same. The learned Counsel for the appellants would further submit that so far as the suit property is concerned, it is comprised in Cadastre Number 805/1 whereas Ex.A.1 relates to the property comprised in Cadastre Number 805/5/1. The learned Counsel would also rely on a judgment of this Court in State of Tamil Nadu rep. by its District Collector, Tirunelveli v. Mohamed Nagib and others reported in (2002) 2 MLJ 612 wherein in paragraph 4.1, the learned Single Judge has held as follows:

> ''4.1. In my considered opinion, it is well settled in law that the boundaries will prevail over the extent alone, but, not the Survey Number also. That apart, the said principle is applicable only in a transaction agreed

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and entered between the parties, but no in a case of unilateral approach."

Relying on the same, the learned Counsel for the appellants would submit that in this case, the courts below ought not to have gone by the four boundaries mentioned in Ex.A.5, instead, the courts below ought to have gone by the Cadastre Number since the Cadastre Number shall prevail upon the four boundaries.

9. The learned Senior Counsel appearing for the 1st respondent would vehemently oppose the said contention. According to him, it is a question of fact as to whether Ex.A.1 relates to the suit property or not. He would further submit that Ex.B.28 dated 10.07.1923 is the photocopies of the mutations recorded. In that document, so far as the Field Cadastre No.805 is concerned, there are only two sub-divisions, namely, 805/1 and 805/2. The learned Senior Counsel would further submit that so far as Cadastre No.805/1 is concerned, it stands in the name of Rathnanaicker who is the vendor of Rathnavelu under Ex.A.1. The learned Senior Counsel for the 1st respondent would also submit that the four boundaries mentioned in Ex.A.1 precisely and exactly identifies the suit property. He would further submit that according to the description made in the said document, the western boundary is the road and the northern boundary is the Canal. These properties are in the corner between these two boundaries. The learned Senior Counsel for the 1st respondent would further submit that subsequent document produced relating to the boundary properties would go to show that the suit property is owned only by the plaintiff. The learned Senior Counsel for the 1st respondent would also submit that all the revenue records also stand correctly to show that Ex.A.1 refers only to the suit property.

10. I have considered the above submissions.

11. There can be no doubt that a property can be described either by means of four boundaries or by means of survey number or by means of both. When there is some discrepancy in the description, it is the settled law that it is always the four boundaries which prevail upon the extent. But when there is discrepancy between survey number and the four boundaries, it is the burden of the parties who claim title under the said document to prove positively without any doubt that the property covered under the particular document refers only to the property in dispute. In other words, in the instant case, the burden is heavily upon the plaintiff to prove that the property for which the title was conveyed under Ex.A.1 is nothing but the ''A'' schedule property. This is essentially a question of fact. Two courts below have considered Ex.B.28 which is a Government document of the year 1929 wherein Cadastre Number 805/1 has been mentioned to have been owned by Rathnanaicker, namely, the vendor of Rathinavelu under Ex.A.1.

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12. A perusal of the said document would go to show that there is no such Cadastre Number as 805/5/1. This has been clearly considered by the two courts below. Apart from that, the courts below have correlated Ex.A.1 with the suit property based on the four boundaries also. Thus, the two courts below, on appreciating the facts, have come to the conclusion that the ''A'' schedule property is precisely the property for which title was conveyed to Rathnavelu by Rathnanaicker under Ex.A.1. It is essentially a question of fact and though there is a trace of question of law, I do not find the same as substantial.

13. Assuming that it is a substantial question of law, as I have already pointed out, the same is to be answered only in favour of the plaintiff as I do not find any infirmity in the conclusion arrived at by the courts below.

14. Nextly, the learned Counsel for the appellants would submit that the courts below have erroneously burdened the defendants to prove their title. It is the contention of the learned Counsel for the appellants that when the 1st respondent has prayed for decree and judgment for declaration of title, as per the Evidence Act, it is the burden only upon the 1st respondent/plaintiff to prove that he has got clear title over the suit property.

15. In my considered opinion, there is some force in the argument of the learned Counsel for the appellants.

16. But this impression will be displaced, if one understands the difference between ''burden to prove'' and ''burden to disprove''. Of course, it is true that the burden is heavily upon the plaintiff to prove that he has got title for the ''B'' schedule property. Here in this case, the plaintiff has proved the same by producing all the revenue records and claiming title under Ex.A.1 by correlating the same with Ex.B.28. Thus, in my considered opinion, the plaintiff has surely discharged his initial burden of proving that he has got title for ''B'' schedule property. The moment such proof comes, the onus shifts on the appellants herein to disprove the same.

17. In my considered opinion, such a disproof can be made either by proving that Ex.A.1 does not relate to the suit property or by proving that the vendor himself had no title and all along, the defendants have got title for the suit property. When the defendants have set up the plea that they have got title over the suit property so as to disprove the case of the plaintiff, then, the burden to prove their title lies upon the defendants.

18. In this case, in my considered opinion, the defendants have failed to do the same. As I have already pointed out, the defendants

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claim that the suit property was originally owned by one Sambasiva Gounder. Absolutely, there is no document to prove that Samabsiva Gounder had title or right over the suit property. Sambasiva Gounder died leaving behind his only son Natesa Gounder. Again, there is no document to show that Natesa Gounder ever had title over the property and he had in possession of the same. Natesa Gounder died leaving behind his wife Kamalam. It is stated that Kamalam executed a Settlement Deed Ex.B.5 dated 11.09.2000 in favour of the 4th defendant. Except this document, there are no other documents which have to be appreciated to hold that the 4th defendant has got title over the suit property. Ex.B.5 is of the very recent origin. It is not supported by any parent document to prove that either Natesa Gounder or Kamalam or her father-in-law Sambasiva Gounder had title for the suit property. Thus, in my considered opinion, the defendants have failed to prove their title. It cannot be construed that the courts below have burdened the defendants to prove their title. The courts below have only said that the defendants have failed to prove their title in order to disprove the title of the plaintiff which the plaintiff has proved. Thus, in my considered opinion, this question of law also is to be answered in favour of the plaintiff.

19. The learned Counsel for the appellants would submit that patta stood in the name of Natesa Gounder, S/o.Sambasiva Gounder. Thus, according to the learned Counsel for the appellants the defendants have proved that Kamalam had title to convey the suit property under Ex.B.5. In my considered opinion, patta cannot be treated as a monument of title. Therefore, this argument of the learned Counsel for the appellants is rejected.

20. Going by the facts of the case also, I find that there is no infirmity at all in the findings of the courts below. Two courts below have rightly held on appreciating the evidence that the plaintiff is the absolute owner of the ''B'' schedule property and he is in possession of the same. Thus, I do not find any reason to interfere with the well considered decree and judgment of the trial court which was confirmed by the lower appellate court. Therefore, I answer all the substantial questions of law framed in this Second Appeal only in favour of the 1st respondent.

21. In the result, the Second Appeal fails and the same is accordingly dismissed. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-
Assistant Registrar
Dated:25.2.15

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Sub Assistant Registrar

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To

1.The Principal Subordinate Judge, Pondicherry.
2. The II Additional District Judge, Pondicherry.

+1 cc to Mr.B.Manokaran, Advocate,SR.7217

+1 cc to Mr.R.Thirugnanam, Advocate,sR.7104.

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