

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.02.2015

CORAM

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

Second Appeal No.918 of 2014 and
M.P.No.1 of 2014

Mr.T.Pandirangan

... Appellant/Defendant

Vs.

SriKannabiran Temple
Represented by its Hereditary Trustee,
M.Jayaram,
No.25-A, Chinna Kulandai Street,
Maduma Nagar,
Sembium, Perambur,
Chennai - 600 011.

... Respondent/Plaintiff

Prayer:- This second appeal has been filed under Section 100 C.P.C., against the judgement and decree dated 06.08.2014 passed in A.S.No.291 of 2010 by the First Additional District Judge, City Civil Court, Chennai which confirmed the judgement and decree in O.S.No.1513 of 2001 dated 31.01.2008 passed by the V Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.C.Umashankar
For Respondent : Mr.R.Manickavel

JUDGEMENT

The sole defendant in O.S.No.1513 of 2001 on the file of the learned V Assistant Judge, City Civil Court, Chennai is the appellant herein. The respondent is the sole plaintiff in the suit. The said suit was filed for recovery of vacant possession of "B" schedule property after removing the superstructure and for recovery of a sum of Rs.2,100/- towards rental arrears and for damages to the tune of Rs.100/- per month for use and occupation. The trial Court by decree and judgement dated 31.01.2008 decreed the suit in part thereby granting a decree for recovery of possession and restricting the claim for damages @ Rs.35/- per month instead of Rs.100/- as claimed in the plaint. As against the same, the appellant/ defendant filed an appeal in A.S.No.291 of 2010 on the file of the learned I Additional City Civil Judge, Chennai. When the said appeal was pending, the appellant/defendant filed two miscellaneous petitions in C.M.P.No.830 of 2012 and C.M.P.No.1305 of 2013 in A.S.No.291 of 2010. C.M.P.No.830 of 2012 was filed for marking of some documents as additional evidence. C.M.P.No.1305 of 2013 was filed for appointment of Advocate Commissioner. The First Appellate Court by decree and judgement dated 06.08.2014 while dismissing the appeal has also dismissed C.M.P.No.830 of 2012 and C.M.P.No.1305 of 2013. Challenging

the same, the appellant is before this Court with this second appeal.

2.This second appeal has already been admitted on the following substantial questions of law:-

" a) Whether the Courts below failed to see at the first instance suit is not maintainable as filed by the plaintiff since it is well admitted by them that the temple is under the control of H.R & C.E. and if so without the permission of HR & CE and proper resolution, the suit is defective and liable to be dismissed in limine?

b) Whether the lower appellate Court is right in confirming the judgment of the trial Court without appreciating the additional documents which was dated 11.4.2008 i.e., after the judgment of the trial Court?

c) Whether the Courts below are right in decreeing the suit in favour of the plaintiff adjacent to the land in S.No.16, Sembium village when the appellant herein is not having possession of the suit land?

d) Whether the Courts below are right in decreeing the suit filed by the plaintiff relying upon Ex.A3 which is not at all pleaded in the plaint and thus it is contrary to law and pleadings especially Order 6 of C.P.C?"

3.This second appeal has been listed today for final hearing. At request of the learned counsel on either side, I have heard the learned counsel either side and I have also perused the records carefully.

4.The plaintiff is a Temple. The case of the plaintiff is that, the suit "A" schedule property absolutely, belong to the plaintiff temple. The property belong to the Temple is comprised in S.No.16. A portion of the property in "A" schedule property has been described as "B" schedule property. Thus, "B" schedule property also lies in S.No.16. The further case of the plaintiff is that "B" schedule property was let out on rent to the defendant and the monthly rent was Rs.35/-. While enjoying the "B" schedule property, as tenant, the defendant made further encroachment. Therefore, proceedings were initiated and finally, the tenancy was terminated by means of a notice. Though notice of termination was sent, the defendant did not take any further action to hand over vacant possession of the property to the plaintiff Temple. Thus, according to the plaintiff, the plaintiff was forced to file the present suit for the relief as narrated above.

<https://hcservices.ecourts.gov.in/hcservices/>

5.The defendant has a different story to say by way of written statement. According to the defendant, he is in occupation of the

land comprised in S.Nos.17 & 18. According to him, the land comprised in S.Nos.17 & 18, lies on the south of S.No.16. The land comprised in S.Nos.17 & 18 according to the defendant is a poromboke land. He would further submit that he is in occupation of the land comprised only in S.Nos.17 & 18 and not in S.No.16 at all. Therefore, according to him, the plaintiff is not entitled for recovery of possession from the defendant, because, the defendant is not in occupation of any portion in S.No.16.

6. Based on the above materials, the trial Court framed appropriate issues and called upon the parties to let in evidence. On the side of the plaintiff two witnesses were examined and 6 documents were exhibited. On the side of the defendant, one witness was examined and 2 documents were exhibited. Having considered the above, the trial Court decreed the suit as narrated herein above.

7. Before the First Appellate Court, it was again contended by the defendant that he is not in occupation of the property in S.No.16. In order to prove that he is not in occupation of S.No.16 and that he is in occupation of S.Nos.17 & 18, he filed a Miscellaneous Petition in C.M.P.No.1305 of 2013 for appointment of Advocate Commissioner. It was opposed and later on, the same was dismissed.

8. The learned counsel for the respondent/plaintiff now, across the Bar would submit that he has got no objection for appointment of Advocate Commissioner so as to ascertain the portion of the property in occupation of the defendant in S.No.16.

9. In my considered opinion, the burden is upon the plaintiff to prove that the defendant is in occupation of "B" schedule property which is comprised in S.No.16. But unfortunately, though there is no proof, that the defendant is in occupation of the land comprised only in S.No.16. In order to locate the property, the appellant filed C.M.P.No.1305 of 2013 seeking appointment of Advocate Commissioner to measure the suit property with the aid of a qualified Surveyor.

10. Similarly, in C.M.P.No.830 of 2012, the defendant wanted to file certain revenue records to show his occupation. The First Appellate Court ought to have allowed the above petitions and ought to have received those documents so as to come to a conclusion as to whether the defendant is in occupation of a portion of the property in S.No.16. Unfortunately, that petition was also dismissed without assigning any reason.

11. Now, coming to the second appeal, the same deserves to be allowed for the simple reason that the plaintiff has not discharged his burden that the defendant is in occupation of a portion of the property in S.No.16 which is the "B" schedule property. For that matter, this Court cannot simply allow the appeal and leave the plaintiff in lurch. The plaintiff should also have effectively contested in the matter. Therefore, in my considered opinion, it would be appropriate for this Court to remand the matter back to the First Appellate Court by allowing the appeal and also allowing C.M.P.No.830

of 2012 and C.M.P.No.1305 of 2013. It is for the First Appellate Court to appoint an experienced Advocate Commissioner to measure the suit property and the adjacent properties with the assistance of a Surveyor and correlate the documents of both parties with the State on ground to find properties. As to whether the defendant is in possession of any portion of the property comprised in S.No.16.

12.A statement was made across the Bar by the learned counsel for the defendant during the course of his submissions, that if it is found on appreciating the facts that the defendant is in possession of any portion in S.No.16, the defendant shall have no objection for passing a decree in respect of S.No.16 in which case, the defendant shall vacate the portion which is in his occupation in S.No.16.

13.Similarly, the learned counsel for the plaintiff would also make a statement that if, the defendant is found to be in possession of S.Nos.17 & 18, which are poromboke lands, the plaintiff will have no objection for the defendant to continue to occupy the same because, it is for the panchayat or Government to remove the encroachment. The said statements are recorded.

14.In view of all the above, I answer the substantial questions of law B & C alone in favour of the appellant herein. In so far as the substantial questions of law A & D are concerned, the same are left open for the First Appellate Court to decide.

15.In the result, the second appeal is allowed in the following terms:-

(i)The decree and judgement of the First Appellate Court in A.S.No.291 of 2010 dated 06.08.2014 is hereby set aside and the same is remanded back to the First Appellate Court for fresh disposal in accordance with law;

(ii)The orders dismissing C.M.P.No.830 of 2012 and C.M.P.No.1305 of 2013 in A.S.No.291 of 2010 dated 06.08.2014 are hereby set aside and both the Civil Miscellaneous Petitions are allowed;

(iii)The trial Court shall appoint an Advocate Commissioner in C.M.P.No.1305 of 2013 with a direction to the Advocate Commissioner to measure the suit property and the adjacent properties with the help of Surveyor and to submit a report as to whether the defendant is in occupation of any portion of the property in S.No.16 or, if not, whether he is in occupation of S.Nos.17 & 18;

(iv)The Advocate Commissioner shall verify whether there is a change in S.No.16 and new survey number has been assigned for the land and that will also be taken into account while measuring the properties;

(v)While disposing of the appeal, the First Appellate Court shall admit the Advocate Commissioner's report in evidence and then, decide the same;

(vi)The trial Court shall receive documents mentioned in C.M.P.No.830 of 2012 as additional evidence subject to proof and its admissibility and

(vii)At any rate, the trial Court shall dispose of the appeal within a period of six months from today.

There shall be no order as to cost. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

jbm

To

1.The First Additional District Judge,
City Civil Court,
Chennai.

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

Copy to:The Section Officer, V.R.Section, High Court, Madras

1 cc to Mr.Manickavel ,Advocate, SR.No.7698

1 cc to Mr.C.Uma Shankar ,Advocate, SR.No.7611

Second Appeal No.918 of 2014

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