

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:29.07.2015

CORAM

THE HONOURABLE MS. JUSTICE R. MALA

S.A.No.1278 of 1999
and C.M.P.No.13143 of 1999

Judgment reserved on 27.07.2015	Judgment pronounced on 29.07.2015
------------------------------------	--------------------------------------

Kanniah Naidu ... Appellant/Defendant

Vs

J.Radhakrishnan ... Respondent/Plaintiff

Prayer: Second appeal filed under Section 100 of CPC against the judgment and decree dated 01.02.1999 in A.S.No.55 of 1998 on the file of the Additional District Court, Tiruvannamalai, in reversing the judgment and decree dated 02.01.1998 in O.S.No.222 of 1993 on the file of the Additional District Munsif Court, Tiruvannamalai.

For Appellant : Mr.V.Raghavachari

For Respondent : Mr.S.Udayakumar

JUDGMENT

The second appeal arises out of the judgment and decree dated 01.02.1999 in A.S.No.55 of 1998 on the file of the Additional District Court, Tiruvannamalai, in reversing the judgment and decree dated 02.01.1998 in O.S.No.222 of 1993 on the file of the Additional District Munsif Court, Tiruvannamalai.

2.The averments made in the plaint are as follows:-

(i)The plaintiff has purchased 'A to C' and 'D' suit schedule properties from one Paramasivam pillai under the registered sale deeds dated 30.10.1973 and 05.02.1974 respectively. Further, he purchased the portion which is shown as 'B D E F' in the plaint plan from the defendant under a registered sale deed dated 07.09.1979 and the same was shown as 'E' schedule property in the plaint. Subsequently, the portions which are shown as 'KLNO', 'OPQR' in the plaint plan have been sold to the defendant by the plaintiff. Since the defendant has given trouble to the plaintiff from enjoying the suit properties, a Panchayat was convened during August 1992, in which, an agreement was entered into between the plaintiff and the defendant. As per the agreement, the defendant should take the sale deed from the plaintiff in respect of the 'D' schedule property and the defendant should execute the release deed in respect of the well which situates in the 'B' schedule property. But the defendant failed to do so. The defendant has also trespassed over the 'C' schedule property and put up a cement tub and gobar gas plant. Therefore, the plaintiff constrained to file the suit for declaration of title and for permanent injunction in respect of 'A B D and E' schedule properties against the defendant and for mandatory injunction directing the defendant to remove the cement tub (thotti) and gobar gas plant in 'C' schedule property and to deliver vacant possession to the plaintiff. Therefore, he prayed for decree.

3.The gist and essence of the written statement filed by the defendant are as follows:

(i)The plaintiff has no right in the well situates in the B schedule property, which was purchased by the defendant under the registered sale deed dated 15.05.1974. 'C' schedule property was only measuring 87 feet East to West not 100 feet. The plaintiff has only purchased 87 feet and he sold 62 feet east to west and 7 ½ feet north to south to the defendant under the registered sale deed dated 07.09.1979. As per the terms of agreement, the defendant has taken possession of 'D' schedule property and also put up a gobar gas plant. Therefore, he prayed for dismissal of the suit.

4.The gist and essence of the additional written statement filed by the defendant are as follows:

(i)Even prior to filing of the suit, the defendant has put up the gobar gas plant and cement tub. There is no 'C' schedule property as stated in the plaint. On the basis of the agreement, the defendant has also filed a suit in O.S.No.523 of 1995 on the file of the Principal District Munsif Court, Tiruvannamalai. Therefore, he prayed for dismissal of the suit.

5.The Learned Trial Judge after considering the averments both in the plaint, written statement, additional written statement and

arguments on either side counsel, has framed necessary issues and on perusing the oral and documentary evidence viz., P.W.1, P.W.2, D.W.1 and Exs.A1 to A6, Exs.B1, B2 and Exs.C1 and C2, decreed the suit in respect of 'A' 'D' and 'E' schedule properties and dismissed the suit in respect of 'B' and 'C' schedule properties. Aggrieved against the judgment and decree passed by the trial court, the plaintiff preferred an appeal in A.S.No.55 of 1998 on the file of the Additional District Court, Tiruvannamalai.

6.The learned First Appellate Court has considered the arguments advanced on either side, framed necessary point for consideration, reversed the Judgment and Decree passed by the Trial Court in respect of 'B' and 'C' schedule properties. Against the Decree and Judgment passed by the first Appellate Court, the present second appeal has been preferred by the defendant/appellant.

7.At the time of admission, the following substantial questions of law have been framed:

"1.Whether the lower appellate Court is right in decreeing the suit and in declaring the title of the plaintiff on the basis of the Commissioner's report?

2.Whether the lower appellate Court is right in upholding the title of the plaintiff in the absence of documentary proof and title to the "C" schedule mentioned property?

3.Whether the lower appellate Court ought not to have dismissed the suit when the plaintiff had failed to prove his case in respect of "C" schedule mentioned property?

4.Whether the lower appellate Court is right in directing mandatory injunction in the absence of title with the plaintiff?

5.Whether the respondent/plaintiff is not disentitled from seeking the relief of mandatory injunction under the principles of acquiescence?"

8.Challenging the judgment and decree passed by the first appellate Court, learned counsel for the defendant/appellant submits that in the 'C' schedule property, measurement of East to West is not 100 feet and it is only 87 feet. The respondent/plaintiff has stated that he purchased 100 feet and he sold out 62 feet to the appellant/defendant and he is claiming 38 feet from East to West and 7 ½ feet from North to South in the 'C' schedule property, but there is no such 'C' schedule property as stated in the plaint. So the respondent/plaintiff cannot claim any title over the 'C' schedule property and that factum was not considered by the first appellate Court and it has not properly appreciated Exs.A1, A4, C1 and C2. Therefore, he prayed for allowing the second appeal.

9.Resisting the same, learned counsel for the respondent/plaintiff submits that as per Ex.A1, respondent/plaintiff has purchased 100 feet from East to West and 7 ½ feet from North to

South. As per Ex.A5, the plaintiff/respondent has sold East to West 62 feet and North to South 7 ½ feet to the defendant/appellant on 07.09.1979. So the balance extent is 38 feet, which is shown as 'C' schedule property and that has been properly appreciated by the trial Court. As per Ex.B1, well has been settled to one Muthukrishnan and the same has been purchased by the appellant/defendant under Ex.B2. So the trial Court has correctly held that except the well, the respondent/plaintiff is entitled to 'B' schedule property and the same has been rightly considered by the first appellate Court.

10.Learned counsel for the respondent/plaintiff further submits that as per Ex.A1, the respondent/plaintiff has purchased 'A B C' schedule properties and the third item of Ex.A1 is the 'C' schedule property which is measuring East to West 100 feet, North to South 7 ½ feet. As per Ex.A2, the respondent/plaintiff has purchased 'D' schedule property. But the Advocate Commissioner in his report categorically stated that 'C' schedule property is merged with 'D' schedule property and he has given two measurements. That factum was rightly considered by the first appellate Court. It is further submitted that as per Ex.B1/settlement deed, one Paramasivam Pillai, who is the original owner, has executed a settlement deed in favour of one Muthukrishnan on 29.02.1972 and in turn, he sold the same to the appellant/defendant on 15.05.1974 as per Ex.B2. The trial Court has rightly held that well has been already settled in favour of Muthukrishnan and so Paramasivam Pillai has no right over the well on the date of execution of Ex.A1 (i.e.) on 30.10.1973. Hence, the first appellate Court has dismissed the suit in respect of well in the 'B' schedule property. The appellant/defendant has not preferred any appeal against the decree and judgment passed by the trial Court. But the first appellate Court rightly considering Exs.A1, A4, C1 and C2 has rightly decreed the suit in respect of 'B' and 'C' schedule properties. Therefore, he prayed for dismissal of the second appeal.

11.Considered the rival submissions made on both sides and perused the materials available on record.

12.The respondent herein as a plaintiff filed a suit for declaration of title in respect of 'A B D E' schedule properties and also for mandatory injunction in respect of 'C' schedule property stating that on 30.10.1973, the respondent/plaintiff has purchased 'A to C' schedule properties from one Paramasivam pillai. Similarly, he has purchased 'D' schedule property from the same owner on 05.02.1974. On 07.09.1979, the respondent/plaintiff has purchased 'E' schedule property from the appellant/defendant. The appellant/defendant had purchased some portions of the property from the respondent/plaintiff and put up a cement tub (thotti) and also gober gas plant in the 'C' schedule property. Since there was dispute arose, Panchayat was convened on 01.08.1992 and there was an agreement entered into between the plaintiff and defendant, but the same was not acted upon. So the respondent/plaintiff has filed the

suit for declaration of title in respect of 'A B D E' schedule properties and mandatory injunction for removing the cement (tub) thotti and gober gas plant put up in the 'C' schedule property.

13.The appellant/defendant raised a plea that the well situated in the 'B' schedule property is belonging to him and the same was purchased by him under Ex.B2 on 15.05.1974. The 'C' schedule property was measuring East to West 87 feet not 100 feet. But the first appellate Court has not considered the same. The trial Court after considering the oral and documentary evidence, decreed the suit in respect of 'A D E' schedule properties and dismissed the suit in respect of 'B and C' schedule properties. Against the same, the respondent/plaintiff has preferred an appeal in A.S.No.55 of 1998 and that appeal was allowed by the first appellate Court. Aggrieved over the judgment and decree passed by the first appellate Court, the present second appeal has been preferred by the appellant/defendant.

Substantial questions of law 1 to 5:

14.Admittedly, there is no dispute in respect of 'A D E' schedule properties. The only dispute is in respect of 'B and C' schedule properties. As per the plaint plan, 'B' schedule property was measuring East to West 22 ½ feet and North to South 82 ½ feet including the well. In the Commissioner's report under Ex.C1, it was mentioned as 22 ½ feet X 50 feet including the well situated on the south east. It is admitted that original owner of the suit properties was one Paramasivam pillai and he has executed a settlement deed on 29.02.1972 in favour of his step brother Muthukrishnan under Ex.B1 in respect of two items of the property comprised in S.No.312/1A out of 30 acres 96 cents, from whom, the appellant/defendant purchased the same on 15.05.1974 under Ex.B2. In Ex.B1, it was specifically mentioned that old thatched house inclusive of well in the backyard.

15.As per Ex.A1, the respondent/plaintiff has purchased the property from Paramasivam Pillai on 30.10.1973 in respect of three items of property. Item 1 is 'A' schedule property measuring East to West 3 feet and North to South 60 feet; Item 2 is 'B' schedule property measuring East to West 22 ½ feet and North to South 82 ½ feet; Item 3 is 'C' schedule property measuring East to West 100 feet and North to South 7 ½ feet;

16.As per Ex.A2, sale deed dated 05.02.1974, the respondent/plaintiff has purchased 'D' schedule property from Paramasivam pillai and it is measuring East to West 27 feet and North to South 22 feet.

17.As per Ex.A4, sale deed dated 07.09.1979, the respondent/plaintiff has purchased 'E' schedule property from the appellant/defendant, which is measuring East to West 6 feet and North to South 51 feet.

18.The only dispute is in respect of 'B and C' schedule properties. As per the Commissioner's report under Ex.C1, 'C' and 'D' schedule properties are merged with each other. But no one has filed any objection against the Commissioner's report. The only point to be decided is that whether East to West is measuring 100 feet or 87 feet in the 'C' schedule property. But there is no dispute in respect of North to South measuring 7 ½ feet. The Advocate Commissioner in his plan under Ex.C2 categorically stated that total extent is 100 feet and 62 feet was sold by the respondent/plaintiff to the appellant/defendant under Ex.A5. So the balance extent is 38 feet which is in possession of the respondent/plaintiff. The first appellate Court in its judgment came to the correct conclusion that the respondent/plaintiff is entitled to entire 'B' schedule property except the well, which was sold by the said Muthukrishnan to the appellant/defendant. So the respondent/plaintiff is entitled to declaration and injunction in respect of 'B' schedule property excluding the well and the findings rendered by the first appellate Court regarding this aspect is hereby confirmed.

19.In respect of 'C' schedule property, as already stated that as per Exs.C1 and C2, East to West is measuring 100 feet, in which, the respondent/plaintiff has sold 62 feet to the appellant/defendant and the balance extent comes to 38 feet, which is owned by the plaintiff/respondent herein. In the plan under Ex.C2, it was further stated that cement tub (thotti) and gober gas plant were put up in the property which is in occupation of the respondent/plaintiff. So the appellant/defendant is entitled to only 62 feet from point N. As per the Commissioner's report under Ex.C1, the respondent/plaintiff is in possession of 26 ½ feet from the Point J to K. So the respondent/plaintiff is entitled to 38 feet, wherein the cement tub and gober gas plant are situated. So the appellant/defendant has not entitled to more than what he has purchased under Ex.A5 (i.e.) 62 feet from Point N.

20.Learned counsel for the appellant/defendant vehemently argued that 10 feet from East to West lies on the road. Therefore, the claim of the respondent/plaintiff is untenable. But the above argument does not hold good. Because the Commissioner has measured the property with the help of Taluk Surveyor and Ex.C2 plan has been signed by the Taluk Sub-Inspector of Survey. On that basis only, measurement has been given, which shows the total extent of 'C' schedule property is East to West 100 feet and North to South 7 ½ feet, which was purchased by the respondent/plaintiff under Ex.A1, out of which, he has sold only 62 feet to the appellant/defendant and balance extent of 38 feet is retained by him. So the respondent/plaintiff has proved that he is entitled to 38 feet. That factum was rightly considered by the first appellate Court by holding that since the respondent/plaintiff is the owner of balance 38 feet in the 'C' schedule property, wherein the defendant/appellant herein has put up gober gas plant and also cement tub, so the respondent/plaintiff is

entitled to mandatory injunction in respect of 'C' schedule property for removal of the cement tub as well as gober gas plant. Thus, substantial questions of law 1 to 5 are answered against the appellant/defendant.

21.For the foregoing reasons, the judgment and decree passed by the first appellate Court are sustainable and hence, they are hereby confirmed. I do not find any merits in this second appeal and the second appeal is liable to be dismissed and it is hereby dismissed.

22.In fine,

- The Second Appeal is dismissed.
- The decree and judgment passed by the first appellate Court are hereby confirmed.
- Two months time is granted to the appellant/defendant for removal of cement tub(thotti) and gober gas plant in the 'C' schedule property.
- No costs.
- Consequently, connected Miscellaneous Petition is closed.

Sd/-

Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

kj

To

1.The Additional District Court, Tiruvannamalai.

2.Additional District Munsif Court, Tiruvannamalai.

3.The Record Keeper, V.R.Section, High Court, Chennai.

+1 cc to Mr.S.UdayaKumar Advocate sr.38649

S.A.No.1278 of 1999
and C.M.P.No.13143 of 1999

aa21/08/2015