

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16-09-2015

CORAM:

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

SECOND APPEAL No.1577 of 1999

Natarajan .. Appellant/Respondent/Plaintiff

vs.

Sathiyavani .. Respondent/Appellant/Defendant

Second Appeal is preferred under Section 100 CPC against the judgment and decree of the learned Principal District Judge, Nagapattinam, dated 15.3.1999 in A.S.No.335 of 1997, reversing the judgment and decree of the learned District Munsif, Nannilam, dated 22.10.1997 in O.S.No.22 of 1996.

For Appellant : Mr.A.Muthukumar

For Respondent : Mr.J.Nandagopal

J U D G M E N T

The plaintiff, who emerged successful before the Trial Court, but lost the case in the appeal before the lower Appellate Court, is the appellant in the present Second Appeal.

2. The plaintiff filed the original suit in O.S.No.22 of 1996 against the respondent herein for the relief of permanent injunction restraining her from interfering with the possession of the plaintiff in respect of the suit property by disturbing the eastern fence of the plaintiff, excavating trench, putting up wall and protruding eaves or sunshades over the suit property which belongs to the appellant herein/plaintiff.

3. The suit property is defined as an extent of 3,488 sq. ft., consisting of the backyard portion measuring 2,513 sq. ft. and the front portion measuring 75 feet x 13 feet = 975 sq. ft., comprised in Survey No.79/15-A situated on the North of Nannilam North Street, Nannilam Town. According to the plaint averments, the entire property comprised in Survey No.79/15 before sub-division was jointly owned by the appellant herein/plaintiff and his brother Rathinasamy and on partition, the Eastern portion measuring 75 feet x 12 feet abutting the

road and corresponding backyard of 2,513 sq. ft. came to be allotted to Rathinasamy, whereas the Western portion measuring 75 feet x 13 feet abutting the street and 2,513 sq. ft., forming the backyard corresponding to the said portion came to be allotted to the share of the appellant herein/plaintiff. The further contention of the appellant herein/plaintiff is that, at the time of partition, the boundary was marked by implanting 7 granite stones on the dividing line; that the portion East of the dividing line fell to the share of Rathinasamy, whereas the portion West of the dividing line fell to the share of the appellant herein/plaintiff. Contending further that the portions that fell to the share of the appellant herein/plaintiff and that of his brother Rathinasamy were subdivided and assigned with Survey Nos.79/15-A and 79/15-B respectively and that the respondent/defendant, who purchased the share of Rathinasamy designated with Survey No.79/15-B, was trying to obliterate the fence put up by the appellant herein/plaintiff on the Eastern border of his property and encroach upon the property of the appellant herein/plaintiff, the appellant/ plaintiff approached the Trial Court with the abovesaid suit for perpetual injunction against the respondent herein/defendant.

4. The respondent herein/defendant resisted the suit contending that though in the partition, the plaintiff's share abutting the street was shown to be having an East-West measurement of 13 feet, the actual breadth available is 13-1/2 feet and that in order to suppress the said discrepancy alone, the appellant herein/plaintiff chose to file the suit and take an Advocate Commissioner to inspect and measure the suit property. However, the respondent herein/defendant had taken a plea that she would be satisfied if she was given half (1/2) share in the excess portion over and above 75 feet x 12 feet allotted to her vendor in the partition. Contending further that she was not making any attempt to interfere with the possession of the property of the appellant herein/plaintiff, she prayed that the suit should be dismissed.

5. After framing necessary issues, the learned Trial Judge conducted a Trial, in which, the appellant herein/plaintiff figured as the sole witness (PW-1) and produced 10 documents marked as Exs.A-1 to A-10 on his side, whereas the respondent herein/defendant appeared as the sole witness (DW-1) and produced two documents, marked as Exs.B-1 and B-2 on her side. An Advocate Commissioner was appointed who inspected the property and submitted his report and plan which were marked as Exs.C-1 and C-2. A telegram sent by the respondent herein/defendant to the Advocate Commissioner came to be marked as Ex.C-3. During the course of trial, the appellant herein/plaintiff contended that despite there being an order of temporary injunction in force, the respondent herein/defendant put up a construction encroaching upon a portion of the

plaintiff's property in violation of the order and pursuant to the same, the Advocate Commissioner's Warrant was reissued. The Advocate Commissioner accompanied by the Taluk Surveyor again inspected and measured the property and submitted a report. The Taluk Surveyor has also submitted a report and the plan drawn at the time of inspection was also produced. The said Reports and the plan were marked as Exs.C-4 to C-6.

6. The learned Trial Judge, on an appreciation of evidence, especially relying on the Advocate Commissioner's Report, the Taluk Surveyor's Report and the plan, arrived at the conclusion that the respondent herein/defendant had put up a construction encroaching upon a portion of the appellant's/plaintiff's property and the encroached portion measured 42 feet x 1/2 feet. Based on the said finding, the learned Trial Judge decreed the suit and granted a decree for permanent injunction and also a mandatory injunction for removal of the construction put up on the encroached portion.

7. As against the said decree of the Trial Court dated 22.10.1997, the respondent herein/defendant preferred an appeal in A.S.No.335 of 1997 on the file of the Principal District Judge, Nagapattinam. The learned lower Appellate Judge, after hearing, relying on the fact that there was an excess extent than what was allotted to the appellant herein/plaintiff and his brother Rathinasamy in the partition and if an equal division had taken place, no encroachment could be found. On the basis of such finding, the learned lower Appellate Judge allowed the appeal, set aside the decree passed by the Trial Court and dismissed the suit in entirety. As against the said decree of the lower Appellate Court dated 15.3.1999, the present Second Appeal came to be filed by the appellant herein/plaintiff.

8. The Second Appeal was admitted on 14.10.1999, noticing the following to be the substantial questions of law involved in the Second Appeal:-

"(1) Whether the Court below is right in dismissing the suit on the ground that plaintiff has property more than 13 feet East to West and hence he cannot sustain the suit when admittedly the partition has taken place between the plaintiff and his brother and stones have been laid to demarcate the property and plaintiff has been in possession of the property West of the dividing line ever since the date of partition and at any rate has possessory title ?

(2) Whether the lower Court erred in not applying the principle laid down in 1991 (1) MLJ 31 ?"

9. The arguments advanced by Mr.A.Muthukumar, learned counsel for the appellant and by Mr.J.Nandagopal, learned counsel for the respondent are heard. The judgments of the Courts below and the other materials available on record are perused and they are also taken into consideration.

10. It is an admitted fact that the entire property comprised in the undivided Survey No.79/15 jointly belonged to the appellant herein/plaintiff and his brother Rathinasamy and that they effected partition on 9.10.1993 under a registered Partition Deed, a certified copy of which has been marked as Ex.A-1. It is also not in dispute that the rear portion, which is described as backyard, has been equally divided and the appellant herein/plaintiff and Rathinasamy, vendor of the respondent herein/defendant, were allotted 2,513 sq. ft., each. It is also not in dispute that the Southern portion abutting the street was a narrow stretch of land with a North-South length of 75 feet. Assuming that the East-West breadth of the stretch of the land was 25 feet, division came to be made, in which, the Western portion was allotted to the appellant herein/plaintiff and the Eastern portion was allotted to Rathinasamy, vendor of the respondent/defendant. While doing so, the East-West measurement of the stretch of land allotted to the appellant herein/plaintiff was noted as 13 feet, whereas the East-West measurement of the stretch of land allotted to Rathinasamy was noted as 12 feet. The respondent herein/defendant has purchased the property allotted to the share of Rathinasamy from him. After her purchase, the problem arose, perhaps because the parties came to know that the East-West breadth of the above narrow stretch of land divided into Eastern and Western portions, was little more than 25 feet. Under the said circumstances alone, complaining that the respondent herein/defendant was trying to encroach upon a portion of the appellant's/plaintiff's property and obliterate the live fence put up by him, the appellant herein/plaintiff approached the Trial Court with the suit for permanent injunction.

11. It is the clear and categorical case of the appellant herein/plaintiff that when extent or measurement differs, the boundaries will prevail, if such boundaries can be identified with accuracy. The case of the appellant herein/plaintiff is that, at the time of partition, the boundary line was fixed and on the boundary line 7 granite stones were planted on earth to mark the boundary line. Since such a boundary with the help of the boundary stones (granite stones) can be identified with accuracy, the respondent herein/defendant cannot contend that excess extent was available to the appellant

herein/plaintiff and hence she would be entitled to an equal share in the excess extent. The Advocate Commissioner, who inspected the property twice, made it clear in his Reports and plan that the property on the East of the dividing line measured 12 feet. The second visit of the Advocate Commissioner along with the Taluk Surveyor alone brought out the fact that there was some excess extent in the portion allotted to the appellant herein/plaintiff than the measurement noted in Ex.A-1 Partition Deed. Such excess extent ranges from 1/2 feet to 1 feet East-West. The correctness of the particulars found in the Advocate Commissioner's Report and the Surveyor's Report, have not been disputed and in fact, both the parties have admitted that the Surveyor's Report and plan and the Advocate Commissioner's Report provide the correct features and measurements of the property of the appellant herein/plaintiff and the respondent herein/defendant. The Reports also show that the granite stones planted on the dividing line were found intact. No case has been made out by the respondent herein/defendant and in fact, there is no reliable evidence to prove that the appellant herein/plaintiff shifted the boundary stones to the further East of the boundary line even though there is such an avement in the written statement. In fact, except the interested testimony of DW-1, there is no other piece of evidence to support or substantiate the abovesaid contention of the respondent herein/defendant.

12. On the other hand, the evidence of PW-1 that the granite stones planted on the boundary line were not tampered with and they were intact has been corroborated and even confirmed by the Advocate Commissioner's Report, Surveyor's Report and the plan marked as Exs.C-4 to C-6. It has also been clearly established that after partition, a sub-division took place and the property that fell to the share of the appellant herein/plaintiff was assigned with Survey No.79/15-A, whereas the property allotted to his brother Rathinasamy was assigned with Survey No.79/15-B. The Eastern part type of land abutting the street that fell to the share of Rathinasamy measured 75 feet x 12 feet. As per the Revenue records, the Surveyor's measurements were in consonance with the measurements found in Ex.A-1 Partition Deed. Similarly, the Western portion allotted to the appellant herein/plaintiff was assigned with Survey No.79/15-A. His share in the Southern stretch of land abutting the street, though mentioned to be 75 feet x 13 feet, was found to be measuring North-South 75 feet and East-West measurement vary from 13-1/2 feet to 14 feet. The partition took place in 1993. No objection was raised regarding the revenue entries made. Only after the respondent herein/ defendant purchased the property of Rathinasamy, the problem arose. Even then the respondent herein/defendant was not able to show that the division of the above said stretch of land abutting the street was equal.

13. On the other hand, from Ex.A-1 registered Partition Deed, it will be clear that Rathinasamy, vendor of the respondent herein/defendant, was allotted a portion measuring 75 feet x 12 feet, forming the Eastern part of the stretch of land abutting the street and the appellant herein/plaintiff was allotted the remaining part on the West of the portion allotted to Rathinasamy. The fact that unequal division was made is quite obvious from Ex.A-1 Partition Deed. Such unequal division was because there was a thatched house in the portion allotted to the appellant herein/plaintiff. The same shall be the reason why an excess extent of 75 sq. ft. over and above the extent allotted to Rathinasamy under Ex.A-1.

14. Be that as it may, by clear oral and documentary evidence, the appellant herein/plaintiff was able to substantiate his case that, at the time of division, the boundary line was clearly marked and 7 granite stones were implanted on earth along the boundary line. It is quite obvious that the measurements and the extents as found in Ex.A-1 do not tally with the measurements and the extents actually available on ground. When such is the case, as rightly contended by the learned counsel for the appellant, if the boundary can be fixed with accuracy, the boundary will prevail over the extent or measurement. In the case on hand, the appellant herein/plaintiff was able to prove that the boundary was fixed and on the boundary line 7 granite stones noted by the Advocate Commissioner were planted. The principle that the boundary will prevail over the extent or measurement gets attracted to the case on hand. Therefore, the contention of the respondent herein/defendant that since there is an excess extent, she will be entitled to half (1/2) of that excess extent, cannot be countenanced.

15. The learned lower Appellate Judge, on an erroneous appreciation of evidence, rendered an unsustainable finding to the effect that the plaintiff had not proved that boundary was fixed and granite stones were planted along the boundary line at the time of partition. As a corollary, the lower Appellate Judge chose to render a finding that the excess extent would be available to both of them in equal moieties and the same had made the learned lower Appellate Judge to arrive at a conclusion that the appellant herein/plaintiff was bound to fail in the suit filed by him. Both the findings are not only erroneous but also perverse, as they are not supported by any reliable evidence, apart from being an inference which is against the evidence adduced in the case.

16. At the time of filing the suit, the appellant herein/ plaintiff chose to file an interlocutory application for temporary injunction, the learned Trial Judge chose to grant an

order of interim injunction during the pendency of the suit. Within 15 months from the date of the first inspection by the Advocate Commissioner, the respondent herein/defendant chose to put up a construction encroaching upon a small portion beyond the boundary line on the West. Hence, the plaintiff was constrained to seek re-issuance of warrant to the Advocate Commissioner and such re-issuance of warrant to the Advocate Commissioner resulted in the submission of Exs.C-4 to C-6, which make it clear that the respondent herein/defendant has encroached upon the portion of the appellant herein/plaintiff to a length of 42 feet and a breadth of 1/2 feet. As such encroachment was made not only during the pendency of the suit, but also in violation of the order of injunction, the learned Trial Judge rightly applied the ratio decided in Palaniammal vs. Pechimuthu and others reported in 1991 (1) MLJ 31 to mould the relief and grant the relief of mandatory injunction for the removal of the construction put up by the defendant encroaching upon the plaintiff's land and in violation of the injunction order, in addition to the grant of perpetual injunction as sought for in the plaint. Such a finding of the Trial Court, which was taken with clear vision of what transpired and what the law is, has been unnecessarily interfered with by the lower Appellate Court. The Lower Appellate Court, as rightly contended by the learned counsel for the appellant, ought not to have interfered with the well considered judgment and decree of the Trial Court and hence the decree of the lower Appellate Court is bound to be set aside and thereby the decree passed by the Trial Court is to be restored.

17. For the reasons stated in the foregoing discussions, this Court answers both the substantial questions of law in favour of the appellant and against the respondent. The resultant position shall be that the Second Appeal shall succeed and the decree of the Trial Court shall be restored after setting aside the decree passed by the lower Appellate Court.

18. In the result, the second appeal is allowed. The decree of the lower Appellate Court dated 15.3.1999 made in A.S.No.335 of 1997 is set aside. The decree of the Trial Court dated 22.10.1997 made in O.S.No.22 of 1996 is restored and confirmed. Time for complying with the direction two months. There shall be no order as to costs.

Svn

-s/d-

Assistant Registrar (CS-V)

True Copy

Sub-Assistant Registrar

To

1. The Principal District Judge,
Principal District Court,
Nagapattinam.
2. The District Munsif,
District Munsif Court,
Nannilam.
3. The Section Officer/Record Keeper,
V.R. Section, High Court, Madras.

+ 1 cc to Mr.A.Muthukumar, Advocate SR 50974

+ 1 cc to Mr.J.Nandagopal, Advocate SR 50862

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