

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.03.2015

CORAM:

THE HONOURABLE MS. JUSTICE K.B.K.VASUKI

S.A.No.258 of 2009

- 1.Ranganathan
- 2.Minor Savitha
- 3.Minor Kavipriya
- 4.Minor Mahalakshmi

Minors 2 to 4 are represented by their
father - natural guardian Ranganathan ... Appellants/Plaintiffs

Vs.

Marimuthu Gounder ... Respondent/Defendant

Second Appeal is filed under Section 100 C.P.C against the judgment and decree dated 05.12.2008 in A.S.No.76 of 2003 on the file of the I Additional Sub Court, Villupuram reversing the judgement and decree dated 01.10.2001 made in O.S.No.47/1999 on the file of the First Additional District Munsif, Thirukovilur.

For appellants : Mr.Raghavachari

For respondent : Mr.N.Suresh

J U D G M E N T

The plaintiffs are the appellants herein. The suit was filed against the respondent herein for the relief of declaration of the plaintiffs' title and for permanent injunction restraining the defendant from interfering with the plaintiffs' A schedule property and for mandatory injunction for demolition of construction put up by the defendant in B schedule property which is part of A schedule property and for directing the defendants to hand over the vacant possession of B schedule property to the plaintiffs. The suit A schedule property is measuring 0.19.0 hectares equivalent to 47 cents in resurvey no.204/3A in Mogalar Village, Thirukovilur Taluk within the four boundaries mentioned therein. The suit B schedule property forming part of A Schedule is a vacant land, measuring 53.6m on north south, east west 1m on northern side and 0.8m on southern side within the four boundaries mentioned therein in the same Resurvey no.204/3A.

2.The case of the plaintiffs is that the defendant who is the adjacent owner of the property on the eastern side in R.S.No.204/4 has encroached upon B schedule property adjoining his land on western

side and has been attempting to interfere with the plaintiffs' peaceful possession and enjoyment of the property beyond encroached portion on the western side. The facts that the plaintiffs are entitled to the entire A schedule property measuring 47 cents in R.S.No.204/3A and the defendant is entitled to 11 cents in S.No.204/4 under Ex.B1 sale deed 8.7.1997 are not denied on both sides. As such, the only question to be considered herein is as to whether the defendant has encroached upon B schedule property, which is the eastern portion of A schedule property.

3.While the trial court on the basis of Exs.C3 and C4 Advocate Commissioner's additional report and plan accepted the plaintiffs' case and arrived at the conclusion that the defendant encroached upon the plaintiffs' B schedule property measuring an extent of 1 cent and accordingly decreed the suit in favour of the plaintiffs, the lower appellate court by relying on Exs.C1 and C2 Advocate commissioner's first report and plan and by not taking into consideration Exs.C3 and C4 Advocate Commissioner's additional report and plan reversed the findings of the trial court and negatived the theory of encroachment and dismissed the suit. Hence, this second appeal by the plaintiffs before this Court.

4.The second appeal is admitted on the following substantial question of law:

"When there is no dispute to the title of the plaintiffs in regard to the A schedule property, whether the lower appellate court is right in holding that the plaintiffs had failed to prove their case?"

5.Heard the rival submissions made on both sides and perused the records.

6.As already stated, the suit relief is based on the theory that the defendant has encroached upon B schedule property forming part of A schedule property and the main factor to be considered herein is the issue relating to total extent of the property in the occupation of both the parties. Mere fact that there is no dispute relating to title, will in no manner resolve the issue relating to encroachment. In order to prove the actual extent of the property in the occupation of the parties, the plaintiffs at the first instance, sought for appointment of an Advocate commissioner to go and inspect the property and measure the same with the help of a Taluk Surveyor and IA.564/99 in OS.47/1999 filed by the plaintiffs for the purpose above stated was not opposed by the defendant, as such, the trial court appointed one S.Senthilkumar as Advocate Commissioner to inspect the suit property in the presence of both the parties and submit the report and also permitted the Advocate Commissioner to take the help of the Taluk surveyor. The Advocate commissioner so appointed accordingly measured the property in question with the help of Taluk surveyor and submitted his report and plan. As there was no objection filed on both sides for either the Advocate Commissioner's report or

his plan, the application was closed on 6.7.1999. Thereafter, the plaintiffs have come forward with IA.1102/1999 on 28.7.1999 for reissuing the warrant to the same Commissioner for measuring the property with the assistance of a District Surveyor. The relief was sought for by treating the Advocate Commissioner's report and plan dated 22.06.1999 as defective for the reason that before taking measurement, the boundary stone was removed and re-fixed and when the same was brought to the notice of the Taluk surveyor, he ignored the same and proceeded to make survey of the land without properly locating the plaintiffs' property. The application was seriously opposed by the defendant. It is his case in the counter that the boundary stone laid was in the same place for a decade and as per the measurement of 'A' schedule property, the plaintiffs have been in possession and enjoyment of 47 cents and the defendant was in the occupation of 11 cents in his S.No.204/4. The trial court by order dated 04.11.1999 reissued the warrant to the same Advocate Commissioner to go and re-inspect the property and measure the same with the help of the District surveyor and file additional report and plan. While passing such order, the trial court expressed concern over the conduct of the parties in coming forward with such application long after the closure of the earlier application I.A.564/1999, that too without filing any objection for the same. Thereafter the Advocate Commissioner executed the warrant reissued to him and measured the property with the help of the District Surveyor with reference to land survey register extract and duly submitted his additional report and plan.

7.Both the sets of Advocate Commissioner's report and plan were received as Exs.C1 and C2 and Exs.C3 and C4 by the trial court during trial. As far as Exs.C1 and C2 Advocate Commissioner's first report and plan are concerned, the Advocate Commissioner has in the same, referred to ABCDE portion as Suit A schedule property and BCHI portion as the defendant's property as per which, the plaintiffs have been in possession of ABCDE portion measuring 47 cents in S.No.204/3A and the defendant has been in possession of BCHI portion measuring 11 cents and no portion of A schedule property was encroached upon by the defendant. However, the same Advocate Commissioner has in his Exs.C3 and C4 additional report and plan stated that the plaintiffs have been in possession of ABCDE portion and the defendant has been in the occupation of BCHI portion and the portion shown as BCGF forming part of BCIH portion measuring 1 cent is the encroached portion.

8.As already stated, the trial court relied on Exs.C3 and C4 Advocate Commissioner's Additional report and plan and decreed the suit in favour of the plaintiffs. Whereas the lower appellate court by relying on well laid down legal proposition that the appointment of a Second Advocate Commissioner, without rendering any finding against the correctness of the earlier Commissioner's report, is not warranted, placed no reliance on Exs.C3 and C4 additional report and plan of the Advocate Commissioner and decided the issue against the

plaintiffs and in favour of the defendant on the basis of Exs.C1 and C2 Advocate Commissioner's first report and plan.

9.While according to the learned counsel for the plaintiffs, the additional report and plan filed by the Advocate Commissioner, after revisiting the property is only to rectify the defect or deficiency in the earlier report of the Advocate Commissioner and is only a supplementary report and both the reports ought to have been properly considered by the courts below to resolve the controversy in issue and the judgment holding the appointment of a second Commissioner as unwarranted without recording a finding regarding the correctness of the first report of the Advocate Commissioner is inapplicable to the facts of the present case, according to the learned counsel for the defendant, the warrant ought not have been reissued to the same Advocate Commissioner without scrapping the first report of the Advocate Commissioner and the second report of the Advocate Commissioner is more defective in nature and the first report of the Advocate Commissioner is hence more reliable for deciding the plea of encroachment. Both the learned counsel on record have cited various authorities of the Hon'ble Supreme Court and our High Court in support of their respective contentions regarding the course to be adopted by the trial court for appointing second Advocate Commissioner and for reissuing the warrant to the same Advocate Commissioner for filing supplementary report. This court has no quarrel with the legal submission regarding the circumstances under which and the manner in which either for reissuing the warrant to the same Advocate Commissioner or for appointing second Advocate Commissioner.

10.As far as the present case is concerned, this court is inclined to look into both sets of Advocate Commissioner's report and plan for the following reasons. It is true that the trial court before reissuing the warrant did not choose to go into the correctness of the first report of Advocate Commissioner and what was done by the trial court is to reissue the warrant to the same Advocate Commissioner and to call for additional report and plan from him, without scrapping the first report, which is the situation dealt with by the learned sister judge R.Mala, J. in the decision reported in Indian Kanoon-<http://indiankanoon.org/doc/27418990/> (V.M.B.Mohammed Gani v. S.Ayesha Siddika), wherein, the learned single judge upheld the course adopted by the trial court in reissuing the warrant without scrapping the earlier report. The learned brother judge has in para 19 of the judgment reported in 2000-3-CTC-78 (Veppanathar @ Karuppannan and another v. Kaliappan) observed that "by setting aside the impugned order, it does not follow that the report is accepted by this Court and I direct the lower court to consider the objections in detail along with other evidence and pass orders on the objections to the Commissioner's report and the lower court also will consider whether the defects or deficiency stated in the objection could be rectified by calling for supplement report for which necessary direction shall be given by the

court. Only if the court feels that even supplementary report will not cure the same, the report shall be set aside and second report will be called for by appointing another Commissioner". That means, the Court is empowered to reissue the warrant to the same Advocate Commissioner to call for additional or supplementary report to rectify the defect, if any, in the earlier report, as done in the present case. As both the reports are now available on record, this court is hence inclined to decide the issue in the light of both the reports.

11.As far as Exs.C1 and C2 Advocate Commissioner's first report and plan are concerned, the same are admittedly based on the measurement of the property with the help of Taluk Surveyor. Though it is sought to be argued before this court by the learned senior counsel for the plaintiffs that the measurement was not properly done by the Taluk Surveyor by properly locating the boundaries, the same is not made out before the trial court. No such objection is raised either independently to the first report and plan and such objection is raised only at the time of seeking re-issuance of the warrant and the same is also seriously opposed by the defendant. Unfortunately, there is no finding by the trial court in this regard. As per Exs.C1 and C2 Advocate Commissioner's first report and plan, the entire ABCDE portion measuring 47 cents in S.No.204/3A is occupied by the plaintiffs and CBHI measuring 25.8 x 52.0 is in the occupation of the defendant and the extent of the property in the occupation of the defendant, according to the Advocate Commissioner's report, is hence less than 11 cents.

12.As far as Exs.C3 and C4 Advocate Commissioner's additional report and plan are concerned, the plaintiffs are shown to be in the occupation of ABCDE portion and the extent of the same is omitted to be mentioned in the same. The defendant is in the occupation of BCIIH portion, in which, BCGF is the so called encroached portion which according to para 4 of Ex.C3 Advocate Commissioner's report, is 1 cent. Though the Advocate Commissioner has in the same para stated that the defendant is in the occupation of 12 cents by adding the extent of encroached BCGF portion, the same stands contradicted in paras 3 and 6 of the Advocate Commissioner's first report. While in Ex.C1 Advocate Commissioner's first report, it is categorically stated that the portion of the property measuring not more than 11 cents in S.No.204/4 shown as CBHI in his Ex.C2 plan, is in the occupation of the defendant Marimuthu and the entire ABCDE portion including one cent shown as BCFG measuring 47 cents is in the possession of the plaintiffs, the same Advocate Commissioner in para 3 of his Ex.C3 additional report stated that the vacant site with terraced building of the defendant Marimuthu shown as BCIIH portion is comprised in 11 cents. However, it is contradicted in para 4 by saying that the western wall of terraced portion lies within BCGF portion belonging to the plaintiffs and that portion measuring 1 cent is the encroached area.

13. When the fact remains admitted is that the plaintiffs are entitled to 47 cents and the defendant is entitled to 11 cents and when in both Exs.C1 and C2 report and plan, the extent belonging to the defendant is stated as 11 cents and that 11 cents is stated to be in the occupation of the defendant, how different finding is arrived at by the Advocate Commissioner in his second report is not explained. The second report does not also mention the total extent in the occupation of the plaintiffs. In my considered view, the measurement appears to be taken only on the defendant side property and no measurement appears to be taken on the plaintiffs' side property. Without which, the execution of the warrant on the second occasion cannot be said to be completed and no reliance can be placed on Exs.C3 and C4 Advocate commissioner's second report and plan. Excluding Exs.C3 and C4, the extent in the defendant's occupation is as per Exs.C1 and C2, 11 cents and on the failure of the plaintiffs to produce contra evidence, the theory of encroachment is not made out and the same is rightly held so by the lower appellate court and the same hence warrants no interference by this court and the substantial questions of law are accordingly answered against the plaintiffs.

14. In the result, the second appeal is dismissed. No costs.

-s/d-

Assistant Registrar (CSIII)
dt; 13/10/2015

True Copy

Sub-Assistant Registrar

rk

To

1. The I Additional Sub Judge, Villupuram.

2. The First Additional District Munsif, Thirukovilur.

+1 cc to M/S.N.Suresh Advocate sr.11444

+1 cc to M/S.V.Raghavachari Advocate sr.11610

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aa14/10/2015