

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 03.11.2015

CORAM:

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

Second Appeal No.925 of 2015

Selamban

.. Appellant

-Vs-

Balarama Reddy

.. Respondent

SECOND APPEAL filed under Section 100 of Code of Civil Procedure against the judgment and decree dated 09.11.2012 in A.S.No.53 of 2010 on the file of the learned Subordinate Judge, Ponneri, confirming the decree and judgment in O.S.No.176 of 1997 on the file of the learned District Munsif, Ponneri dated 10.11.2009.

For Appellant : Mr.V.Bhiman

For Respondent : ...

J U D G M E N T

The defendant in O.S.No.176 of 1997 on the file of the learned District Munsif, Ponneri is the appellant herein. The respondent is the sole plaintiff in the suit. Originally, the plaintiff filed the said suit for permanent injunction to restrain the defendant from in any manner interfering with his peaceful possession and enjoyment of the suit schedule property. The suit was filed for a total extent of 84 cents comprised in Survey No.263/3 at Jaganathapuram Village in Ponneri Taluk.

2. In the written statement, it was contended that the plaintiff had title and he was in possession of only 70 cents. Thus, dispute was raised in respect of 14 cents. Thereafter, the plaintiff filed I.A.No.1241 of 2003 before the trial court seeking to amend the suit prayer suitably, so as to add the prayer of declaration of his title for 14 cents of land which was under his possession. That petition was dismissed by the trial court by an order dated 05.01.2004. Thereafter, an Advocate Commissioner was appointed and the Commissioner filed a report. Based on the Commissioner's Report, yet another interlocutory application was filed by the plaintiff in

I.A.No.167 of 2004 seeking to amend the plaint. That was resisted by the defendant on the ground that similar prayer made by the plaintiff in I.A.No.1241 of 2003 had been dismissed. Rejecting the said objection, the trial court allowed I.A.No.167 of 2004 by an order dated 08.11.2005. That order had not been challenged by the defendant. Thus, the same has become final. Accordingly, the suit was amended by the plaintiff.

3. As per the amended plaint, the suit property was now described as two items, namely, 'A' and 'B' Schedule of properties. So far as the 'A' Schedule of property is concerned, it is the entire extent of 84 cents which comprised in Survey No.263/3 and 'B' Schedule of property is to an extent of 14 cents forming part of 'A' Schedule of property. After the amendment, the relief sought for is for declaration declaring the title of the plaintiff and recovery of possession of 'B' schedule property from the defendant.

4. After full trial, the trial court decreed the suit as prayed for. As against the same, the defendant filed an appeal in A.S.No.53 of 2010 before the learned Subordinate Judge, Ponneri. By judgment and decree dated 09.11.2012, the lower appellate court dismissed the appeal. As against the same, the defendant has come up with this Second Appeal.

5. This Second Appeal has come up before me today for admission. I have heard the learned Counsel for the appellant and I have also perused the records carefully.

6. The learned Counsel for the appellant would submit that there are substantial questions of law involved in the Second Appeal. The first substantial question of law raised by the learned Counsel for the appellant is that the order made in I.A.No.1241 of 2003 wherein the trial court has rejected the plea for amending the plaint was res judicata for entertaining I.A.No.167 of 2004 since the decree passed in this suit declaring the title of the plaintiff and recovery of possession of 'B' schedule property is based on such amendment made in the order in I.A.No.167 of 2004 dated 08.11.2005. The said decree and judgment of the trial court confirmed by the lower appellate court is not valid and the same is liable to be set aside.

7. In my considered opinion, it is not so. Of course, it is true that I.A.No.1241 of 2003 was dismissed by order dated 05.02.2004. Subsequently, a specific plea was taken in I.A.No.167 of 2004 that the amendment sought for could not be allowed in view of the earlier order made in I.A.No.1241 of 2003. But the trial court held that I.A.No.167 of 2004 was maintainable since I.A.No.1241 of 2003 was dismissed because the

property was not properly described whereas in I.A.No.167 of 2004, the property was duly described based on the Commissioner's Report. At any rate, the order made in I.A.No.167 of 2004 became final as the appellant/defendant did not raise any objection by challenging the same before the higher forum. Thus the order in I.A.No.167 of 2004 was final and thereafter, the defendant without raising any objection proceeded with the trial. After having lost the suit, the defendant has now raised this as a legal ground.

8. In my considered view, it is not at all available for the defendant to raise such an objection because the order in I.A.No.167 of 2004 had become final as there was no challenge made against the same. Therefore, the first ground raised by the learned Counsel for the appellant is rejected.

9. The second ground raised by the learned Counsel for the appellant is that there is no proof that the plaintiff has got title for 'B' schedule property.

10. I have gone through the written statement and also the evidence available.

11. In the written statement, the defendant has not claimed any title at all. Though he claims to have been in possession of the 'B' schedule property, he has not stated as to how and under what right he came to be in possession of the 'B' schedule property and what is the character of his possession. The courts below have appreciated that the plaintiff has got title over the 'B' schedule property and he is entitled for recovery of possession from the defendant. This is essentially on facts and there is no question of law involved at all.

12. In view of the above, I find that there is no question of law much less a substantial question of law involved warranting admission of the Second Appeal. Thus, I do not find any merit in the Second Appeal.

13. In the result, the Second Appeal fails and the same is accordingly dismissed. The decree and judgment of the Lower Appellate Court confirming the decree and judgment of the trial court is confirmed. No costs.

Sd/
ASSISTANT REGISTRAR (CS-III)

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SUB-ASSISTANT REGISTRAR

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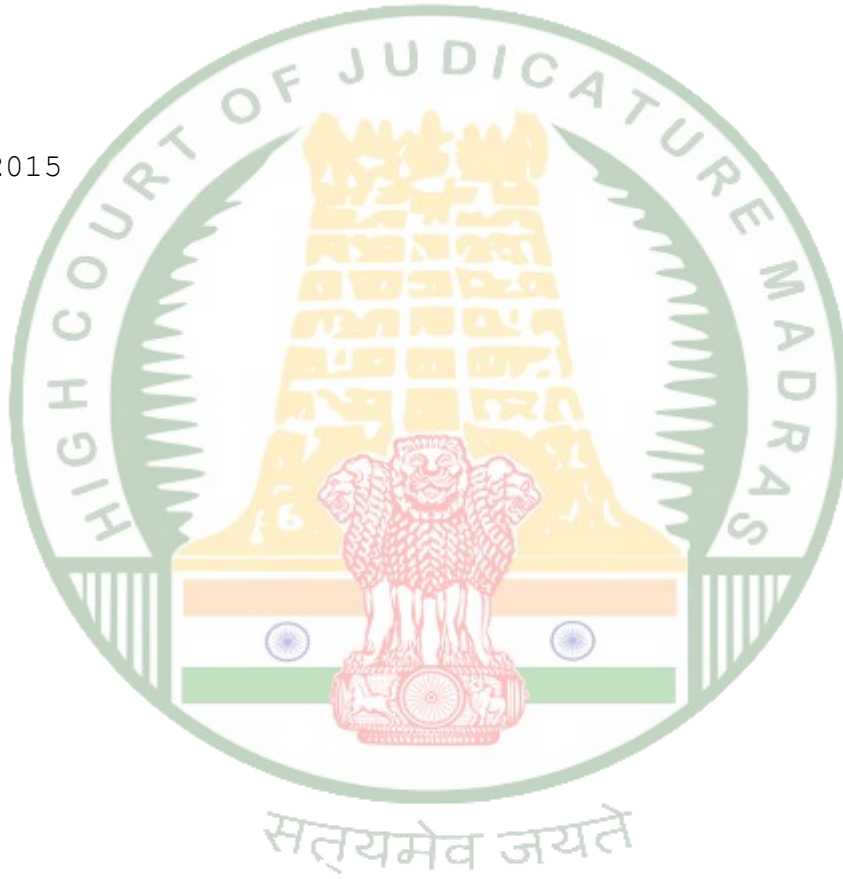
1.The Subordinate Judge, Ponneri.

2.The District Munsif, Ponneri.

+1 CC to MR.V.Bhiman Advocate. SR.NO. 10442

S.A.No.925 OF 2015

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