

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE:8.3.2016

CORAM

THE HONOURABLE MR.JUSTICE T. MATHIVANAN

S.A.No.137 of 2015

and

M.P.No.1 of 2015

Manikandan ... Appellant / Defendant

Versus

Chellammal ..Respondent/ Plaintiff

Prayer: Second appeal is filed against the judgment and decree, dated 18.10.2012 and made in A.S.No.63 of 2011 on the file of the Principal Sub Court, Mayiladuthurai, confirming the judgment and decree, dated 13.8.2010 and made in O.S.No.137 of 2008 on the file of the Principal District Munsif, Mayiladuthurai.

For Appellant : Mr.S. Sounthar

For Respondent : Mr.A.Muthukumar

JUDGMENT

Challenge is made in this memorandum of second appeal to the judgment and decree, dated 18.10.2012 and made in the appeal in A.S.No.63 of 2011 confirming the judgment and decree, dated 13.8.2010 and made in the suit in O.S.No.137 of 2008 on the file of the learned Principal District Munsif, Mayiladuthurai.

2. The appellant herein is the defendant in the suit in O.S.No.137 of 2008 whereas the respondent is the plaintiff.

3. As it is manifested from the records, the respondent had filed a suit in O.S.No.137 of 2008 on the file of the learned Principal District Munsif, Mayiladuthurai as against the appellant seeking the relief of permanent injunction and costs.

4. This suit was resisted by the appellant by filing his written statement.

5. On appreciation of the evidences both oral and documentary, the trial Court had proceeded to decree the suit on 13.8.2010 as prayed for.

6. Challenging the judgment and decree of the trial Court, the defendant had preferred an appeal in A.S.No.63 of 2011 on the file of the learned Principal Subordinate Judge, Mayiladuthurai and this appeal was also dismissed on 18.10.2012 confirming the judgment and decree of the trial Court.

7. The defendant, who has lost his case before both the courts below, stands before this Court with this second appeal.

8. The facts which are necessary for the disposal of this second appeal are as under:-

9. The suit property is belonged to the respondent/plaintiff in respect of which patta was issued in his favour on 28.4.1997 under Natham Land Revenue Scheme by a Special Tahsildar.

10. Even prior to the issuance of the patta on 28.4.1997 he had been in possession and enjoyment of the property for more than 20 years. The defendant had been residing on the South of the plaintiff's property. The respondent/plaintiff's house is facing west and she is also having backyard on the rear side of her house. While she was making arrangements to put up a fence in the backyard, the appellant/defendant, claiming right over that portion had obstructed her.

11. On account of this reason, the respondent had arranged to survey the property and thereafter, it was made clear that the defendant has no right over the suit property. Without accepting the survey made by the concerned authority, the appellant/defendant had been making disturbances to the respondent's peaceful possession and enjoyment and hence, she was constrained to file the suit.

12. On the other hand, the appellant, while refuting the averments of the plaint, has contended that the property identified and shown as "A, B, C, D, E, F, G, H" in the plan appended to the written statement, is belonging to him.

13. The property comprised in survey No.141/3 measuring 22 cents and the other portion comprised in survey No.143/3 measuring 5 cents are encircled in one unit and therefore, the respondent has no right to the east of the fence, which is shown as "BC" in the plan.

14. Similarly, the respondent has no property to the East of "CD" fence. He would further contend that in the year 1988, the plaintiff was given patta in respect of 3 cents of land comprised in survey No.141/1. The portion lying on the east of that land is kept vacant. He (appellant) has been in possession and enjoyment of the vacant site lying in between the survey Nos.141/3 and 143/3 for more than 60 years.

15. The vacant site comprised in survey No.141/1 is kept vacant and it is located at the centre of the portion shown as "A, B, C, D, E, F, G and H" and therefore, the appellant has been enjoying the said property within the four boundaries along with his family property measuring 27 cents. Since, the portion comprised in survey No.141/1, which is lying on the eastern side of the respondent's house had been in his possession and enjoyment for more than 60 years, he has prescribed adverse possession over the suit property.

16. Since the portion lying in survey No.141/1 is located within the same boundaries, the appellant has become the absolute owner of the said property under the principle of boundary prevails over the area.

17. According to the defendant, as per patta, which was issued in the year 1988, the plaintiff is entitled to only 3 cents but he had obtained another patta in the year 1997 stealthily by playing fraud upon the revenue officials. Hence, he has urged to dismiss the suit.

18. Based on the pleadings of the parties to the suit, the trial Court has formulated the following two issues:-

a. Whether the plaintiff is entitled for permanent injunction?

b. To what other relief, if any?

19. In order to find answer for the above issues, the parties to the suit were directed to face the trial.

20. The husband of the respondent/plaintiff was examined as P.W.1 and during the course of his examination Exs.A1 to A24 were marked.

21. On the other hand, the appellant/defendant and yet another witness were examined as D.W.1 and D.W.2 respectively and during the course of their examination, Exs.B1 to B5 were marked.

22. It may be relevant to note here that prior to the commencement of trial, a Commissioner was appointed to note down the physical features of the suit property comprised in S.No.511/1 and measure the same with the assistance of a qualified surveyor.

23. Accordingly, the Commissioner, after inspecting the suit property, had filed his report and plan along with the surveyor's report and plan and the same were marked as Exs.C1 to C4.

24. On appreciation of the evidences, the learned trial Judge, viz., Principal District Munsif, Mayiladuthurai had proceeded to decree the suit with costs on the ground that the possession of the suit property stood established by the respondent/plaintiff and that the appellant/defendant had

placed RCC Circular Rings in the suit property high-handedly to make it appear as if he has been putting up a septic tank.

25. When the second appeal came up for admission, the appellant/defendant had claimed that he is the owner of the property comprised in S.Nos.141/3 and 143/3.

26. Under these circumstances, this Court has found that a dispute is prevailing over the identification of the respective properties and as such both the learned counsels had suggested that an Advocate Commissioner might be appointed with a direction to measure the suit property as well as the properties of the appellant/defendant with reference to the revenue records and the title deeds and to submit a report so that the issue could be resolved to the satisfaction of both the parties.

27. As submitted by both the learned counsels one Mr.K.Raja Mohan, a member of Mayiladuthurai Bar was appointed as Advocate Commissioner with a direction to measure the land comprised in S.Nos.511/1, 141/3 and 143/3.

28. In pursuant to the Commissioner warrant issued to him, he had inspected and measured the suit property with the assistance of a Taluk Surveyor, Mayiladuthurai, and ultimately he had submitted his report and plan along with the report and plan of the Taluk Surveyor, before this Court on 25.7.2015.

29. It is obvious to note here that the suit itself was filed seeking the relief of bare injunction. The suit property as it is described in the plaint schedule is situated at "Mayiladuthurai Taluk, 59 Acroor Village belongs to Pattamangalam, comprised in S.No.511/1, which is classified as 'Natham' measuring 245 Sq.mts. within the following boundaries:-

- a. East to Road
- b. North to appellant/defendant's house and backyard.
- c. East to Kaliamoorthy's house and backyard.
- d. South to Ramalingam's house and Backyard and Alwar Kuttai.

30. According to the respondent/plaintiff, the suit property is in her possession and enjoyment for more than 20 years, even prior to the issuance of patta in her name on 28.4.1997 and the same is kept vacant.

31. Unfortunately, the appellant/defendant has not spoken to about the land comprised in S.No.511/1 in his written statement, instead, he has spoken to about the lands comprised in S.No.141/1, 141/3 and 143/3.

32. Mr.S.Sounthar, learned counsel appearing for the appellant/defendant while advancing his argument has identified the following two substantial questions of law:-

a. Whether the Courts below are justified in granting decree for permanent injunction in favour of the plaintiff, when P.W.1 had categorically admitted the possession of the appellant/defendant?

b. Whether the judgments of the Courts below are vitiated in view of misreading the material evidence on record, namely, Advocate Commissioner's plan and report?

33. It is pertinent to note here that the trial Court after accepting the case of the respondent/plaintiff had granted the decree of permanent injunction as prayed for.

34. The conclusion of the trial Court has been endorsed by the first appellate court.

35. Normally, when there are concurrent findings given by the courts below, this Court being the second appellate court must be very slow and cautious enough in making its interference with the judgments of the courts below.

36. It is the settled position of law that the concurrent finding of fact cannot be interfered within the second appeal by the High Court. The High Court can interfere only under the following circumstances:-

- a. When the finding is recorded without evidence.
- b. When the finding recorded seems to be perverse in nature.

37. Only under the above circumstances, the High Court can exercise the powers conferred under Sections 100 and 115 of the Code of Civil Procedure.

38. Secondly, although in second appeal, the High Court sees if there is any substantial question of law, it is still bound to interfere with the findings of fact, if there is failure to consider the pleadings and recording findings on such plea.

39. As argued by Mr.S. Sounthar, it is imperative on the part of this Court to find as to whether the above identified substantial questions of law are sufficient for the interference of this Court with the concurrent findings given by the courts below in the light of the scope delineated under the provisions of Section 100 of the Code of Civil Procedure.

40. At this stage, it may be appropriate to extract the provisions of Section 100 C.P.C., which reads as under:-

"100. Second Appeal : (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from, an appellate decree passed ex-parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard as on the question as formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question.

Provided that nothing in this sub-section shall be deemed to take away or, abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

41. As envisaged under sub-section 1 of Section 100, if the High Court is satisfied that the case involves substantial question of law, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court.

42. In so far as the case on hand is concerned, this Court, after having taken into account the cumulative effect of the evidences available on record, is of considered view that no substantial question of law is involved.

43. As already discussed in the foregoing paragraphs, though the plaintiff claims his possession in respect of S.No.511/1 measuring 245 sq.mts., the defendant in his written statement has neither denied the claim made by the respondent/plaintiff nor controverted his claim by producing any satisfactory legal evidence.

44. Mr.K.RajMohan, learned Advocate Commissioner had been to the disputed site and measured the same with the assistance of Taluk Surveyor and after having executed his warrant, he had filed his detailed report along with the plan, which are supported by the report and plan given by the Taluk Surveyor.

45. Mr.K.RajMohan has stated in his report that as claimed by the respondent/plaintiff, the land comprised in S.No.511/1 has been classified as 'Natham' and as per the Adangal Extract issued under Natham Nilavari Thittam, patta (Ex.A1) stands in the name of the respondent/plaintiff for an extent of 245 sq.mts. with the following boundaries:-

"East of Mela Street:

North of house under construction, owned by Raju (Previously owned by Defendant's father Packirisamy and R.S.No.511/13, also owned by Defendant's father Packirisamy).

West of R.S.No.511/2;

South of house owned by Ramalingam s/o. Thangavel Padayachi in R.S.No.141/5 & R.S.No.143/7."

46. He has also stated that as per the revenue records, the land comprised in R.S.No.511/1 was identified and measured. The extent of the land is exactly available on earth as per the measurement of the revenue records. In R.S.No.511/1 on the western side (Front, Road side) plaintiff's residential house is in existence and on the rear (eastern) side, vacant site is available. R.S.No.511/3 is situated on the South of R.S.No.511/1, R.S.No.143/7 and R.S.No.143/6 are situated on the North of R.S.No.511/1. As per the adangal extract issued under Natham Nilavari Thittam for R.S.No.511/13, patta stands in the name of appellant/defendant's father Packirisamy for an extent of 625 sq.mts.

47. He has also further stated that R.S.No.141/3 is a natham. As per the Adangal, it is the vacant site measuring 191 sq.mts., but there is a thatched house belonging to a third person and not in the name of any person. R.S.No.143/3 is a nanja land by classification and as per the 'A' register it measures 350 sq.mts. and stands in the name of one Srinivasa Pathar. However, he has stated in his report that no document was produced either by the respondent/plaintiff or by the appellant/defendant for R.S.No.141/3 and 143/3.

48. It is to be noted here that the respondent/plaintiff did not stake her claim over the area comprised in S.No.141/3 and 143/3. But her claim is only in respect of the portion comprised in R.S.No.511/1.

49. In this connection, Mr.RajMohan has also stated that as per the revenue records both the survey numbers did not belong to the defendant and the portions comprised in R.S.No.141/3 and 143/3, which are situated on the northern side of R.S.No.511/1 and 511/13, beyond few survey numbers, are belonging to third parties.

50. With reference to his plan, he has stated that the portion shown as 'KLMN' is contiguous, open and without any bunds or fences or live pole trees. In the said 'KLMN' portion, it could not be identified that it is in the exclusive possession and enjoyment of any person, but it is almost covered with bushes and Karuvai plants.

51. Besides this, he has also stated in his report that R.S.No.143/7 is situated on the north of R.S.No.511/1. As per the xerox copy of the registered sale deed, dated 18.12.1980 produced by the defendant, it was executed in favour of one P. Sambandam, who is none other than the grandfather of the defendant. As per this sale deed, the extent of the land is 0.05 cents and one of the boundaries as mentioned in the sale deed is "North of Lane". As per 'A' Register, R.S.No.143/7 is classified as "Nanja land" and it stands in the name of one Ramachandran, who is shown as the vendor in the above sale deed, and it measures 0.02.0 ares, which is equivalent to 0.05 cents as mentioned in the sale deed.

52. Lastly, he has stated that on the backyard of R.S.No.511/13 there are three coconut yielding trees and in

R.S.No.511/1 there are three coconut trees. Besides, there are three Portia trees, a neem tree, a Nuna tree, which are all having the width of 3 to 4 ft.

53. This Court has carefully perused the report submitted by K.RajMohan, Advocate Commissioner, who was appointed in pursuant to the order of this Court along with the surveyor's plan and sketch.

54. This Court has also perused the report and plan submitted by the Advocate Commissioner appointed by the trial Court as well as the report and plan of the Surveyor, which were marked as Exs.C1 to C4.

55. Having regard to the related facts and circumstances of the case, this Court is of considered view that Mr.RajMohan has satisfactorily and unambiguously identified the suit property, which is comprised in S.No.511/1 measuring 245 sq.mts.

56. This Court would like to place it on record that the appellant/defendant has not stated anything about the area or the land comprised in S.No.511/1 over which the respondent/plaintiff has claimed her possession and enjoyment.

57. The respondent/plaintiff has specifically alleged that the appellant/defendant had been making disturbances in her possession and enjoyment of the suit property comprised in S.No.511/1 by erecting RCC Circular Rings for the purpose of erecting a septic tank. This has been clearly identified by Mr.N. Balaji, learned Advocate Commissioner, who was at the first instance appointed by the trial Court.

58. The claim of the appellant/defendant that the issuance of patta at first to the respondent/plaintiff in respect of three cents was neither justified nor substantiated by him.

59. The appellant/defendant is also fair in admitting that he was not issued with any patta in respect the of disputed site. He has also admitted that he had not purchased the particular portion from anybodyelse.

60. Further, he would state that he had been in possession and enjoyment for more than 60 years and as such he had prescribed adverse possession.

61. The defendant has miserably failed to substantiate his claim and when he claimed adverse possession in respect of the particular area, he ought to have admitted the ownership of other person, but he did not do so.

62. The trial Court as well as the lower appellate Court have categorically found that the respondent/plaintiff was issued with patta on 28.4.1997 under Ex.A.1 to the extent of 245 sq.mts. comprised in S.No.511/1.

63. In Gurudev Kaur and others vs. Kaki and others, which was decided on 18.4.2006 by the Apex Court in S.L.P.(C) No.20797 of 2003, while speaking on behalf of the Division Bench, Justice Dalveer Bhandari, has made reference to the decision in Harjeet Singh vs. Amrik Singh (2005) 12 SCC 270), wherein it has been held that the High Court has no jurisdiction to interfere with the findings of fact arrived at by the first appellate court.

64. Further, His Lordship has also made reference to the decision in H.P.Pyarejan vs. Dasappa ((2006) 2 SCC 496), wherein the Apex Court has held that under Section 100 of the Code (as amended in 1976) the jurisdiction of the Court to interfere with the judgments of the Courts below is confined to hearing of substantial questions of law. Interference with the finding of fact by the High Court is not warranted if it invokes re appreciation of evidence.

65. In the light of the above decisions, this Court is of view that the concurrent findings of fact given by the Courts below, do not warrant the interference of this Court.

66. Further, as argued by A. Muthu Kumar, learned counsel appearing for the respondent/plaintiff, no question of law, much less substantial question of law, is involved for the interference of this Court.

67. For the foregoing reasons, the second appeal is liable to be dismissed.

Accordingly, the same is dismissed confirming the judgment and decree of the Courts below. However, there will be no order as to costs. Connected M.P. is also dismissed.

Sd/-
Asst.Registrar (CO)

/true copy/
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Sub Asst. Registrar

rnb

To

1. The Principal Sub Judge,
Mayiladuthurai.

2. The Principal District Munsif,
Mayiladuthurai.

1 cc to Mr.S. Sounthar, Advocate Sr. 14856

1 cc to Mr.A. Muthukumar, Advocate, S. 14761

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TEJ (CO)

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