

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.06.2016

CORAM

THE HONOURABLE MR. JUSTICE P.KALAIYARASAN

S.A. No.1888 of 2001

1. Senthamaraikannan
2. Devaki
3. Lakshmipathy
4. Rajasekaran (Deceased)
5. Ravichandran
6. Devarajan
7. Gopalakrishnan
8. Geetha
9. Rekha

... Appellants / Plaintiffs

(Appellant 8 and 9 were brought on record as LR's of the deceased 4th appellant, vide order of Court, dated 01.10.2015 made in C.M.P.No.486/15 in S.A.No.1888 of 2001.)

vs.

Jaya

... Respondent / 2nd Defendant

Second Appeal is preferred under Section 100 of the Code of Civil Procedure against the Judgment and Decree, dated 15.06.2001 made in A.S.No.9 of 2001 on the file of the Principal Subordinate Court, Mayiladuthurai, confirming the Judgment and Decree, dated 15.12.2000 made in O.S.No.286 of 1989 on the file of the Principal District Munsif Court, Mayiladuthurai.

For Appellants : Mr.D.Veerasekaran  
For Respondent : Mr.A.Muthukumar

J U D G M E N T

This Second Appeal is filed against the Judgment and Decree, dated 15.06.2001 made in A.S.No.9 of 2001 on the file of the Principal Subordinate Court, Mayiladuthurai, confirming the Judgment and Decree, dated 15.12.2000 made in O.S.No.286 of 1989 on the file of the Principal District Munsif Court, Mayiladuthurai.

2. The plaintiffs in O.S.No.286 of 1989 on the file of the Principal District Munsif Court, Mayiladuthurai are the appellants herein. The suit was initially filed for permanent

injunction and then alternative relief of directing the defendants to surrender the possession of "B" schedule property was sought for, as they subsequently trespassed into the property, without prejudice to the prayer of permanent injunction.

3. The parties herein will be referred to according to their rank in the suit.

4. The property was purchased in Court auction sale in O.S.No.45 of 1954 on 10.09.1956 by one Rajammal, grand mother of the first plaintiff. The second plaintiff has been maintaining the other plaintiffs and plaintiffs have been in possession of the property. The defendants are the adjacent owner of the plaintiffs, on the southern side of the suit property. The survey number to the suit property is 139/2. The defendants previously attempted to put up a fence by encroaching into a portion of the suit property. When the second plaintiff thwarted the attempt, they took signature in the blank paper from the second plaintiff by using rowdy elements. In the first week of May, the defendant is attempting to put up a fence, claiming right over the suit property. The second plaintiff lodged complaint to the concerned police. The defendant trespassed upon the "B" schedule property in and around last week of July 1989. The defendant is a trespasser, therefore, the present suit was filed initially for permanent injunction and subsequently for alternative relief of recovery of possession of "B" schedule property without prejudice to the main prayer in respect of "A" schedule property.

5. In the written statement as well as the additional written statement, it has been averred that in the plaint, the description of property, four boundaries and survey number are not given correctly and on this ground, the suit is liable to be dismissed. The suit property does not relate to the property purchased in Court sale auction by the grand mother of the first plaintiff. Even if so, the suit is not maintainable, as the other legal heirs are not added as parties. The survey number of the suit property as mentioned in the plaint, i.e., 139/2 is not correct. In May 1989, plaintiffs encroached defendants property, by putting fence in AB line, after removing the fence in CD line of the plan filed along with the written statement. When the same was complained to the police and panchayatdars, the plaintiffs agreed to put up the fence in its original position, but they have not done so till date. In anticipation of the civil action by the defendants, the present suit has been filed.

6. The plaintiffs have no title or possession over the suit property. They have not filed any document to show the title. Even if they have got any title, it is barred by limitation.

7. The trial Court, after raising issues, took oral and documentary evidence. On the side of the plaintiffs, P.W.1 to P.W.3 were examined and Exs. A1 to A4 were marked and on the side of the defendants, one witness was examined and Exs.B1 to B4 were marked. The Advocate-Commissioner's Report, Plan and Surveyors Report and Plan were marked as Exs.C1 to C4. The trial court after discussing the entire evidence, oral and documentary, came to the conclusion that the plaintiffs have not established the title to the suit property by producing the sale certificate and also found mainly on the basis of the Surveyor's Report, that the disputed land is situate in S.No.138/1, which belongs to the temple. The trial Court, therefore, held that both the plaintiffs as well as the defendant are not entitled to claim right over the disputed property and thus dismissed the suit.

8. The plaintiffs preferred appeal in A.S.No.9 of 2001 on the file of the Principal Sub-Court, Mayiladuthurai. In the appeal, the plaintiffs also filed an application to receive the certified copy of the sale certificate of the court sale as additional evidence. The first appellate court, re-appreciated the entire evidence and came to the conclusion that no ground is made out to interfere in the finding and conclusion of the trial court. Thus the first appellate court dismissed the appeal as well as the application filed to receive the document as additional evidence.

9. The concurrent Judgment of both the Courts below is challenged in this Second Appeal.

10. At the time of admission, following Substantial Questions of Law were raised :

"1. Whether the findings of the Courts below are sustainable in law relating to the probative value of Ex.A.1 to A.4, in the absence of any material evidence at the instance of the respondent to substantiate her claim over the suit property in a manner known to law ?

2. Whether the judgment and decree of the courts below based merely on Surveyor report relating to the mis-description of Survey number and the temple name, are sustainable in law, when there is no dispute by its location in C3 and C4 with reference to identity of the property between the appellants and the respondent and when the appellants have claimed right based on Ex.A.1 and A.2 ? "

11. Heard Mr.D.Veerasekaran, learned counsel appearing for the appellants as well as Mr.A.Muthukumar, learned counsel appearing for the respondent.

12. The property in dispute is in Resurvey No.139/2, measuring 120 x 18 feet. The Surveyor, who inspected the property has been examined as P.W.3. He says in his evidence that the disputed suit property is in S.No.138/1 and it belongs to the Temple. However, he says that he has not located the survey number shown in the plaint. Though the plaintiffs failed to file the sale certificate, relied Ex.A.1 to A.4 to point out the survey number of the suit property. In Ex.A.1 and Ex.A.2, properties in 3 lots are mentioned. In this, first and third lot properties are house properties and only lot No.2 relates to vacant land, measuring 120 x 18 feet.

13. Learned counsel appearing for the appellants argued that there is lacuna of evidence as far as identity of the suit property is concerned, with reference to survey number, in the absence of the sale certificate. He further contents that in the sale certificate, the suit property is mentioned as Resurvey No.139/2.

14. While both the Courts below observed about non-filing of title deed by the plaintiffs, decided the suit, only on the basis of the Surveyor's Report, which has not pointed out about Resurvey number and had also not located S.No.139/2. Therefore, the document, i.e., sale certificate sought to be received as additional evidence, ought to have been received by the first appellate court, to fill up the lacuna of evidence and to arrive at just decision of the case.

15. This Court finds force in the argument of the learned counsel for the respondent.

16. It is also pertinent to note that this Court passed an order in C.M.P.No.11885 of 2005 in this second appeal, as follows :

"The appellant / plaintiff has filed this petition for restraining the respondent from in any manner alienating or encumbering the suit property, which was the subject matter of the dispute in O.S.No.286/1989. The respondent has filed counter. In paragraph 5 of the said counter, it is stated that "the respondent has already sold her house excluding the property in dispute to one Mani Bharathi under a Registered Sale Deed". In paragraph 5, it is further stated that the disputed property measuring 1080 sq.ft in the "B" schedule property was not sold by the respondent.

The statement of the respondent in paragraph 5 of the counter is recorded and this petition is closed."

17. The defendants sold their property excluding the suit property. Now it has to be decided whether the plaintiffs has got title over the suit property, by analysing the evidence including the additional document, namely, sale certificate and whether the Surveyor identified the property in his report with reference to the survey number in the sale certificate, without any mis-description. For this purpose, this Court is of the considered view that the matter has to be remanded back to the lower appellate court for fresh analysis, including the additional document, namely sale certificate and if necessary, for re-inspection by the Surveyor or examination of the Surveyor again.

18. In the result, the second appeal is allowed. The judgment and decree of the lower appellate court, dated 15.06.2001 made in A.S.No.9 of 2001 on the file of the Principal Subordinate Court, Mayiladuthurai are set aside. A.S.No.9 of 2001 is remitted back to the lower appellate court to dispose the same, as solely on merits, uninfluenced by the findings of this Court in this second appeal. Both the parties are directed to bear their own costs in this second appeal. As the suit relates to the year 1989, the lower appellate Court is directed to dispose the same, according to law, within a period of six months, from the date of receipt of the order. Registry is directed to return the original papers relating to the suit if any.

s/d-  
Assistant Registrar

True Copy

Sub-Assistant Registrar

tsvn

To

1. The Principal Subordinate Court  
Mayiladuthurai.

2. The Principal District Munsif Court  
Mayiladuthurai.

3. The Section Officer  
VR Section High Court Madras (with Records)  
+1 cc to Mr.D.Veerasekaran Advocate sr.29403

S.A. No.1888 of 2001

pvr (co)  
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