

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.04.2016

CORAM

THE HONOURABLE MR. JUSTICE P.KALAIYARASAN

S.A. No.790 of 2001
and C.M.P.No.398 of 2015

1. Selvaraj
2. Thangamani
3. Kamala
4. Saroja

... Appellants/Plaintiffs 2 to 5

vs.

1. Nagarajan
2. Rajagopal

... Respondents/Defendants

Second Appeal is preferred under Section 100 of the Code of Civil Procedure against the Judgment and Decree, dated 28.04.2000 made in A.S.No.94 of 1999 on the file of the Subordinate Court, Mayiladuthurai, confirming the Judgment and Decree, dated 17.09.1999 made in O.S.No.393 of 1996 on the file of the Principal District Munsif Court, Mayiladuthurai.

For Appellants : Mr.S.Sounthar

For Respondents : Mr.A.Muthukumar

J U D G M E N T

The Second Appeal arises out of the Judgment and Decree, dated 28.04.2000 made in A.S.No.94 of 1999 on the file of the Subordinate Court, Mayiladuthurai.

2. This Second Appeal is preferred against concurrent findings of the Court below, dismissing the plaintiffs' suit for declaration and permanent injunction. Unsuccessful plaintiffs are the appellants. For convenience, parties are to be referred to in their original rank in the suit.

3. The plaintiffs 2 to 5 are children of the first plaintiff. During the pendency of the suit, first plaintiff died. The first plaintiff's wife Thillai Ammal had originally purchased suit "A" schedule property from one Janaki Ammal under sale deed, dated 11.11.1965. The suit "B" schedule property is part of "A" schedule property. "B" schedule property is shown as ABCD in the plaint plan. After the demise of Thillai Ammal,

plaintiffs have been in enjoyment of the suit property.

4. The defendants, who are adjacent residents in Door No.3B on the western side of the suit property, have no right to enter through "B" schedule, i.e., ABCD property. They use the pathway only to go to the backyard, i.e., through CDEFGHIJ and not through ABCD of the plaintiff. Since the plaintiffs did not agree to sell their property to the defendants, they threatened to use ABCD as the pathway, to go to their house.

5. Denying the plaintiffs' right and interest in the suit property over ABCD portion in the plaintiff plan, the defendants claim that the same is only a pathway (Nadai). DEFG in the plaintiff plan is also not a common property and the same is a room of the defendants. The father of the first defendant purchased his property under sale deed, dated 29.04.1957 from one Adhilakshmi Ammal. For the convenient sake, plaintiffs' father opened a door in the NE northern wall. It does not mean that he has abandoned his right over ABCD. When the defendants placed the table for ironing in the common pathway, dispute arose in between the parties. When the property was surveyed, at the instance of the police, it was found out that the plaintiffs encroached 54 sq.ft of the defendants backyard. When that was questioned, the plaintiffs have come forward with the present suit.

6. Based on the above pleadings, the trial court framed three issues and after analysing both oral and documentary evidence, three witnesses, each on the side of the plaintiffs and defendants, 38 documents on the side of the plaintiffs and 2 documents on the side of the defendants, apart from Commissioner's Report and plan, dismissed the suit.

7. The lower appellate court reiterated the findings of the trial court and dismissed the appeal.

8. Both the courts found that the plaintiff has not established the title and exclusive possession of "B" schedule property through the documents, Ex.A.1, Ex.A.2 and Ex.A.10. Further, both the Courts also pointed out the report of the Advocate Commissioner in favour of the defendants.

9. At the time of admission, the following Substantial Questions of Law were framed for consideration :

"1. Whether the Judgments of the Courts below are vitiated by non-consideration of title documents of appellants and respondents, which prove beyond doubt the suit property belongs to the appellants absolutely and respondents have separate entry to

their house ?

2. Whether the Judgment of the lower appellate court is vitiated by non-consideration of oral evidences as mandated under Order 41 Rule 31 of C.P.C ?"

10. Heard, Mr.S.Sounthar, learned counsel appearing for the appellants and Mr.A.Muthukumar, learned counsel appearing for the respondents.

11. Learned counsel appearing for the appellants contend that combined reading of Ex.A.1 and Ex.B.1 shows that the defendants have no right in "B" schedule property, i.e., ABCD in the plaint plan and that oral evidence has not been properly appreciated.

12. Learned counsel appearing for the respondents contend that this Court cannot interfere with the findings of the Courts below, unless the findings are perverse.

13. Our Supreme Court in Vinoth (minor) v. Seshammal, reported in 2006 (4) CTC 79, has summarized the principles relating to Section 100 CPC as follows :

"24. The principles relating to Section 100 CPC., relevant for this case may be summarised thus:

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the

Court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognized exceptions are where (i) the Courts below have ignored material evidence or acted on no evidence; (ii) the Courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the Courts have wrongly cast the burden proof. When we refer to 'decision based on no evidence', it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

14. Applying the ratio of the above said decision in the case on hand, the reasoning and conclusion of the trial court and the lower appellate court cannot be found fault with. The plaintiffs have to establish their case, based on their documents and cannot pick the holes from the defendants documents.

15. The plaintiffs placed the claim on the basis of their documents, Ex.A.1, Ex.A.2 and Ex.A.10. From the description of the properties in the above documents, it is not clear that plaint "B" schedule property exclusively belongs to the plaintiffs. In both Ex.A.1 and Ex.A.10, while mentioning property description as southern half of house and eastern half of backyard, right of common usage has also been mentioned. Excepting "B" schedule ABCD portion, plaintiffs admit common pathway to the backyard.

16. There is no clarity even in mentioning the extent in the above documents. Though southern half portion of the house and eastern half of backyard are mentioned, when total extent comes, it is mentioned 2/3rd share.

17. Learned counsel appearing for the appellants argued that if the above documents are read together with the defendants document, Ex.B.1, it will disclose that the defendants have no right over ABCD.

18. The non-mentioning of any pathway in the defendants document, which is much earlier to the documents of the plaintiffs does not lead to any inference that the defendants have no right over ABCD.

19. The plaintiffs plead that the defendants have got separate door number for their house. But from the evidence, door number for the plaintiffs and defendants is found as one and the same, i.e., 3. Further, the Advocate-Commissioner, who inspected the suit property also said in his report that "B" schedule property, i.e., ABCD portion in the plaint appears to be a pathway.

20. Having separate entry to the defendants house, will not preclude them from having the right over ABCD, either to go to their house or backyard.

21. Considering all these aspects, both the courts below, by analysing both the documentary and oral evidence, rendered the finding against the plaintiffs.

22. I do not see any reason to interfere with the concurrent findings of the Courts below and both the substantial questions of law are answered against the appellants and in favour of the respondents and accordingly, the second appeal is liable to be dismissed.

In the result, this Second Appeal is dismissed. No costs. Consequently, connected C.M.P.No.398 of 2015 is also dismissed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

tsvn

To

1. The Subordinate Court, Mayiladuthurai.

2. The Principal District Munsif Court, Mayiladuthurai.

1 cc to Mr.S.Sounthar, Advocate, sr.27486

1 cc to M/s.A.Muthukumar, Advocate, sr.27786

S.A. No.790 of 2001

ug co

kra 24.06.2016