



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on: 22.11.2016

Delivered on: 25.11.2016

CORAM :

THE HONOURABLE MR.JUSTICE **S.S.SUNDAR**

Second Appeal (MD) No.462 of 2011

M.P. (MD) No.2 of 2011

A.Anto Benny

...Appellant/Respondent/Defendant

-Vs-.

Kani Rajan

...Respondent/Appellant/Plaintiff

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 23.06.2010 made in A.S.No.76 of 2009 on the file of the Subordinate Judge, Padmanabhapuram by reversing the judgment and decree dated 06.11.2009 made in O.S.No.84 of 2006 on the file of the Additional District Munsif, Eraniel.

For Appellant : Mr.R.Devaraj
For Respondent : Mr.M.Ajmal Khan
Senior Counsel
for M/s. Ajmal Associates

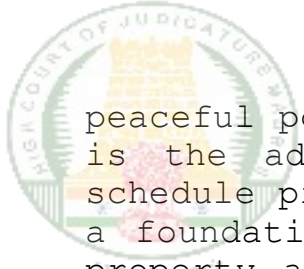
JUDGMENT

The defendant in O.S.No.84 of 2006 on the file of the Additional District Munsif Court, Eraniel, is the appellant in the above Second Appeal.

2.The respondent herein, as plaintiff, filed the suit in O.S.No.84 of 2006 for declaration of his title, possession and enjoyment over the plaint 'B' schedule property and for mandatory injunction directing the appellant to remove the encroachment over the 'B' schedule property in respect of all the structures including the pillars and beam constructed by the appellant in the 'B' schedule property. The suit is also for a permanent injunction restraining the appellant from trespassing into the plaint 'B' schedule property.

3.The brief facts, as set out in the plaint, are as follows:

3.1.The suit 'A' schedule measuring an extent of 9 cents comprised in old Survey No.9032 corresponding to Resurvey No.218 in Colachal village including the building bearing Door No.26/48 belonged to the plaintiff as per the sale deed dated 02.09.2003. As per the sale deed, the plaint 'A' schedule property is in the



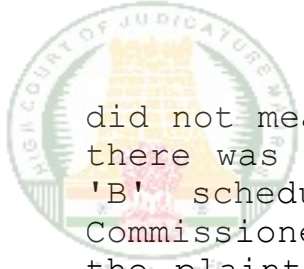
peaceful possession and enjoyment of the plaintiff. The defendant is the adjacent owner on the western side of the plaint 'A' schedule property and that he made an attempt on 08.06.2006 to dig a foundation pit on the western side of the plaint 'A' schedule property and made an attempt to raise some construction and this attempt was thwarted.

3.2.Apprehending encroachment by the defendant, the plaintiff filed a suit originally for a declaration and consequential injunction in respect of the plaint 'A' schedule property. By way of amendment, the plaintiff subsequently pleaded that the defendant, after filing of suit, encroached into the plaint 'B' schedule property by constructing RCC pillar. Hence, it was further stated that the encroachment after the suit made the plaintiff to amend the plaint for seeking the relief of mandatory injunction in respect of the plaint 'B' schedule property. The plaint 'B' schedule property is described in the plaint as an extent of half a cent measuring 6 links x 85 links which forms part of the 'A' schedule on the western side.

3.3.The appellant filed a written statement claiming title over the plaint 'A' schedule on the ground that the 'A' schedule property originally belonged to one Jesai Kamalam and it was the defendant who entered into a sale agreement with the original owner. It is the further case of the defendant that the defendant being the brother-in-law of the plaintiff sought for some financial assistance from the plaintiff to get the sale deed in favour of the defendant. It was further pleaded by the defendant that the plaintiff agreed to give a sum of Rs.2.75 lakhs to the defendant on condition that the sale deed should be registered in the name of the plaintiff and that the plaintiff would execute the re-sale deed in favour of the defendant upon the defendant repaying the entire amount of Rs.2.75 lakhs with bank interest to the plaintiff. It was the specific case of the defendant that the possession of the suit property was only with the defendant and that it was the defendant who let out the suit property to few tenants and getting rent from the tenants. The defendant also claimed that he was in lawful possession as real owner of the property and that he is making efforts to become the absolute owner of the plaint schedule after getting the sale deed from the plaintiff as agreed upon. After the plaint was amended, the defendant filed an additional written statement alleging that the 'B' schedule property is an integral part of the defendant's property and that the construction alleged in the amended plaint is within the property of the defendant. It is to be noted that the defendant in the additional written statement has specifically referred to the Commissioner's report. According to the defendant, the Commissioner's report is liable to be set aside and that the defendant is taking steps for scrapping the report.

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3.4.The trial Court dismissed the suit holding that the Commissioner's report cannot be relied upon since the Commissioner



did not measure the property of the defendant. While finding that there was no encroachment by the defendant in respect of the suit 'B' schedule property, the trial Court also found that the Commissioner did not measure the suit property properly and that the plaintiff has not proved the fact that the suit 'B' schedule forms part of 'A' schedule so as to grant any relief to the plaintiff. The trial Court further found that the plaintiff has not proved his possession over the suit property. Since the trial Court declined to grant the declaration, the trial Court also found that the plaintiff is not entitled to the decree for mandatory injunction.

3.5. Aggrieved by the judgment and decree of the trial Court, the respondent herein filed an appeal in A.S.No.76 of 2009 on the file of the Sub Court, Padmanabhapuram. The lower appellate Court found that the plaintiff is entitled to the plaint 'A' schedule property as per Ex.A1 and disbelieved the case of the defendant having regard to the fact that the defendant did not choose to examine himself to prove his case. After considering the evidence of plaintiff as well as the Commissioner's report and plan, the lower appellate Court accepted the case of the plaintiff. Relying upon the Commissioner's report, the lower Appellate Court has come to the conclusion that 'B' schedule property which is having an area of 0.425 cents forms part of 'A' schedule property and that the plaintiff is entitled to the relief of declaration and injunction and mandatory injunction as prayed for in the suit. The lower appellate Court has granted two months time for the defendant to remove the encroachment by the construction of pillars and beam in the suit 'B' schedule property. Aggrieved by the judgment of the lower appellate Court, the present Second Appeal has been filed.

4. At the time of admission, the following questions of law were framed by this Court:

"(i) Whether the respondent / plaintiff is entitled for decree of declaration, permanent injunction and for mandatory injunction without identifying the property by metes and bounds?

(ii) Whether the total extent of property is sufficient without the measurement of four boundaries to declare the title of the respondent / plaintiff ?

(iii) Whether the report of the Advocate Commissioner is sufficient to decide the title and the encroachment?

(iv) Whether the non examination of appellant / defendant in witness box is fatal to the case of the appellant / defendant ? and

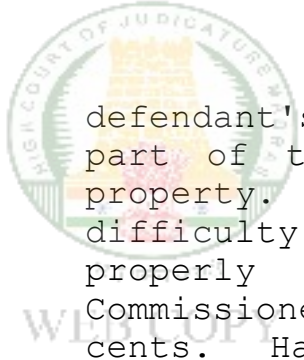
(v) Whether the findings of the lower appellate Court are perverse in not considering the evidence of P.W.1 (respondent / plaintiff)?"



5. Mr. R. Devaraj, learned counsel appearing for the appellant attacked the Commissioner's report and plan and submitted that the findings of the appellate Court relying upon the Commissioner's report and plan are not sustainable. The learned counsel for the appellant pointed out that the Commissioner has not measured the defendant's property and that the suit properties have not been identified with reference to boundaries so as to declare the title of the plaintiff. Describing the Commissioner's report as an incomplete one, the learned counsel for the appellant submitted that the report of the Advocate Commissioner is not sufficient to decide the title of the plaintiff over the suit 'B' schedule and to hold that there is encroachment as alleged by the plaintiff. The learned counsel for the appellant also submitted that the failure to examine the defendant is not fatal in this case especially when the plaintiff has not proved this case on the basis of the evidence adduced by him. Finally, the learned counsel for the appellant submitted that the findings of the lower appellate Court are perverse on the ground that the evidence of P.W.1 was not considered.

6. As against the submission of the learned counsel for the appellant, Mr. M. Ajmal Khan, learned Senior Counsel for the respondent, after referring to the pleadings relied upon the Commissioner's report and plan. Since the Commissioner's report was not questioned by the defendant before the trial Court, the submission of the learned counsel for the appellant questioning the Commissioner's report and plan without even taking steps to scrap the Commissioner's report are not tenable. Since the findings of the lower appellate Court was on the basis of the materials and the conclusions by the appellate Court are supported by reasons, the learned Senior Counsel for the respondent submitted that this Court need not interfere with the findings of fact.

7. Considering the submissions of both sides, I find that the defendant has not examined himself as a witness to prove his case with regard to his possession over the entire 'A' schedule property. Having pleaded the case denying the title of the plaintiff over plaintiff 'A' schedule, the defendant chose to file an additional written statement, after the amendment of plaintiff disputing the alleged encroachment by him in respect of the plaintiff 'B' schedule property. The only question before the appellate Court was, therefore, whether the suit 'B' schedule property is part and parcel of plaintiff 'A' schedule property. Admittedly, in this case, the Commissioner was examined as C.W.1 and through him Exs. C1 to C3 were marked. It appears that the Commissioner visited the suit property after issuing a notice to the defendant. The lower appellate Court has rendered a finding that the defendant has not even cross-examined the Commissioner. He was examined in C.W.1. Though objections were filed for the Commissioner's report, no steps were taken by the defendant to reissue the warrant to the same Commissioner in order to prove the



defendant's case that the suit 'B' schedule property does not form part of the plaint 'A' schedule or that it is his exclusive property. Going by the Commissioner's report, there is no difficulty for any one to find that the 'B' schedule has been properly identified by the Advocate Commissioner and the Commissioner has found that the area of 'B' schedule is 0.425 cents. Having regard to the specific finding that the suit 'A' schedule property is lying as a single plot within the portion marked as "ABCD", the lower appellate Court is right in relying upon the Commissioner's report and came to the conclusion that the 'B' schedule is part of plaint 'A' schedule and that the defendant has encroached into the plaint 'B' schedule by putting up a round pillar and RCC beam in the suit 'B' schedule property. Since the western boundary of 'A' schedule and 'B' schedule has been identified by the Advocate Commissioner with reference to a granite wall on ground level, the Commissioner report with regard to the encroachment by the defendant in the 'B' schedule property cannot be found fault with unless the defendant produce any evidence to discredit the report of the Advocate Commissioner. In the present case, the defendant has neither examined himself nor cross-examined the Advocate Commissioner.

8.Hence, the conclusions of the lower appellate Court by relying upon the Commissioner's report and plan cannot be blamed. As submitted by the learned Senior Counsel for the respondent, the appellate Court has rightly come to the conclusion with regard to the encroachment over the plaint 'B' schedule property by the defendant. In such circumstances, I find that the findings of the lower appellate Court are only on the basis of reliable and acceptable evidence and this Court in Second Appeal cannot interfere with the findings unless the findings are either perverse or not supported by any evidence. Hence, I find no merit in this Second Appeal and the questions of law are answered against the appellant. The Second Appeal is dismissed and the judgment and decree dated 23.06.2010, passed in A.S.No.76 of 2009 on the file of the Sub Court, Padmanabhapuram, is confirmed. However, there is no order as to costs. Consequently, the connected miscellaneous petitions are closed.

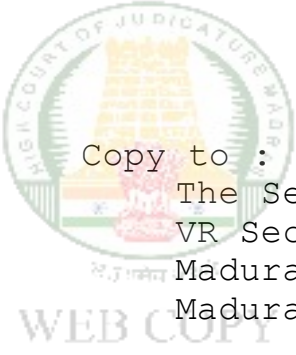
Sd/-
Assistant Registrar

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Sub Assistant Registrar

To

- 1.The Subordinate Judge,
The Subordinate Court,
Padmanathapuram.
- 2.Additional District Munsif,
District Munsif Court,
Eraniel.



Copy to :
The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.

+1 cc to M/s.R.Devaraj, Advocate in SR.No.73905
+1 cc to Mr.Ajmal Associates in SR.No.73078

SRM
TTN/KM/SAR/10.01.2017 : 6P-6C

Judgment made in
Second Appeal (MD) No.462 of 2011
25.11.2016