

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.02.2017

CORAM

THE HON'BLE MR.JUSTICE M.M.SUNDRESH

S.A.No.1301 of 2000

Mohammed Ismath

.. Appellant/Defendant

.. Vs ..

Mohamudha Beevi

... Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of CPC, against the Judgment and Decree dated 25.04.2000 made in A.S.No.95 of 1999 on the file of Principal Subordinate Judge, Mayiladuthurai reversing the well considered Judgment and Decree dated 17.09.1999 made in O.S.No.175 of 1992 on the file of the District Munsif Court, Sirkali.

For Appellant : Mr.A.Muthukumar

For Respondent : Mr.S.Sounthar

JUDGMENT

The defendant, who suffered a decree at the hands of the Lower Appellate Court in a suit for injunction and possession, is the appellant herein and seeking to reverse the same, the present Second Appeal is filed.

2. At the time of admission, the following substantial questions of law were framed:-

"(a) Has not the Lower Appellate Court erred in law in granting a decree in favour of Respondent/Plaintiff when especially respondent as plaintiff had abandoned the case as set out in the plaint to the effect she is entitled to the suit property as sole heir to her father and setting up a claim that she is a heir of her maternal uncle and that Yusuf Rowther the purchaser under Ex.A.1 is not the father of plaintiff? and

(b) Whether the Lower Appellate Court has not

erred in law in misapplying the ratio in 1980 (1) MLJ 136 without reference to the facts of this case?"

3. At the time of hearing the suit, the following additional substantial question of law has been framed and the counsels are requested to answer it.

"Is not the lower appellate Court committed an error of law in not performing its role as required under Section 96 of the Code of Civil Procedure being the final Court of fact and law?"

4. The suit has been laid by the plaintiff based upon Ex.A.1. Ex.A.1 speaks about the boundaries of the suit properties along with the extent and survey number. According to the plaintiff, there is discrepancy in the description of the property. The appellant/defendant has raised the plea that even as per Ex.A.1, plaintiff is not entitled to the relief as sought for. The trial Court though found that such discrepancies do exist in Ex.A.1 with reference to the descriptions of the suit property with specific reference of the boundaries, nonetheless, the trial Court, after finding that the boundaries as mentioned relatable to the descriptions of the suit property between Ex.A.1 and the plaint schedule property being different, declined to grant the relief. The Lower Appellate Court reversed it holding it is a case of mis description and therefore, the plaintiff is entitled for the relief. Challenging the same, the present Second Appeal has been filed.

5. Learned counsel appearing for the appellant/defendant submits that it is the case of the appellant that both the Courts held that the description between Ex.A.1 and the suit schedule property is not tallying with each other. If that is the case, the Lower Appellate Court ought to have dismissed the suit as done by the trial Court.

6. Learned counsel appearing for the respondent/plaintiff submits that insofar as the 'C' Schedule property is concerned, there is no dispute, since as per the evidence of the defendant, possession is admitted. Insofar as 'B' schedule property is concerned, the Lower Appellate Court has found title though not specifically sought for. Hence, no interference is required.

7. By way of reply, learned counsel appearing for the appellant submits that even with respect to the extent, Ex.A.1 speaks about 18 1/2 cents whereas the extent of the suit property as claimed in the plaint is 19 1/2 cents. It is the settled position of law that the plaintiff has to establish his case. In the case on hand, the plaintiff has relied upon Ex.A.1. Ex.A.1 is found to be true and genuine. The defendant

has not set up any contra plea tracing his title. The Advocate Commissioner found that the suit property is a vacant one with some trees with a recently put up construction. The appellant has also filed objection to the Advocate Commissioner's report. The Lower Appellate Court has made reliance substantially on the Advocate Commissioner's report for coming to the conclusion.

8. In the considered opinion of this Court, the Lower Appellate Court ought to have applied its mind as to where the suit property would lie. Insofar as Ex.A.1 is concerned, the trial Court has raised certain doubts. However, the Lower Appellate Court has taken Ex.A.1 as such. Thus, the Lower Appellate Court has not given any specific finding on Ex.A.1. Similarly, even the Trial Court has not considered that on what basis, the defendant seeks to be in possession. After all every trial in a case is journey towards truth. Therefore, the principle governing the onus qua the plaintiff to prove his case has to be seen on the facts and circumstances of each case. To put it differently, once the plaintiff has proved Ex.A.1 leading to the title, then a Court of law is also bound to ask the defendant to establish his right, provided the suit property and the property involved is one and the same. Therefore, this Court is of the view that there is an element of error on the part of both the Courts. In view of the cloud raised regarding title, it would have been appropriate to the plaintiff to file a suit for declaration in which case both the Courts would have constrained to go into the issue of title at length.

9. At this point of time, this Court does not want to relegate the parties to start the litigation afresh. It is trite law that even in a suit for injunction, the Courts are at liberty to permit the plaintiff to amend the prayer by including one for declaration especially, when disputed questions of facts are involved. In such view of the matter, this Court is inclined to set aside the judgment and decree of the Lower Appellate Court by remitting the case back to it to decide the appeal afresh.

10. Accordingly, the Lower Appellate Court is directed to permit the plaintiff to file an application seeking amendment of the prayer in the suit by including one for declaration, subject to limitation if any. The Lower Appellate Court is directed to go into the questions of title, in the event of allowing such an application. While doing so, the Lower Appellate Court shall take evidence from the side of the plaintiff/respondent as of the defendant/appellant. Lower Appellate Court may give a finding not only on the title of the parties concerned, but also identifying the suit property with reference to EX.A.1. Such an exercise will have to be done and completed by the Lower Appellate Court within a period of eight months from the date of receipt a copy of this judgment. Lower Appellate Court can also have the assistance

of the Advocate Commissioner for the purpose of identifying the suit property in which case he can also have the assistance of an authorized Surveyor. No costs.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

Jrl

To

1. The Principal Subordinate Judge,
Mayiladuthurai.
2. The District Munsif Court,
Sirkali.

Copy to:

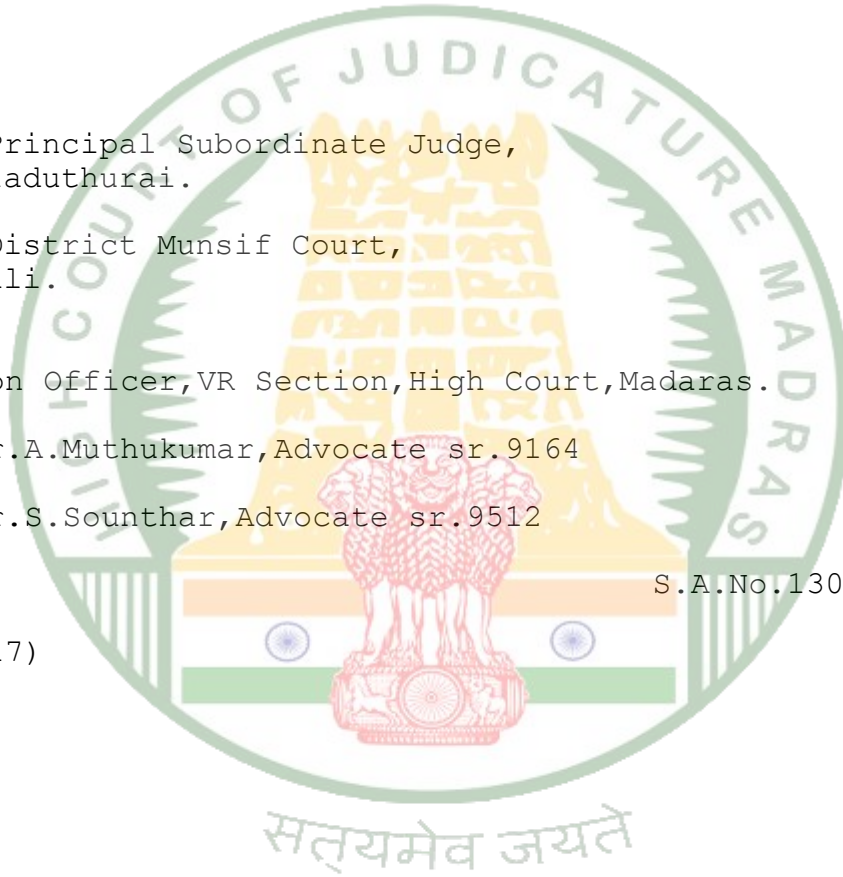
The Section Officer, VR Section, High Court, Madaras.

+1cc to Mr.A.Muthukumar, Advocate sr.9164

+1cc to Mr.S.Sounthar, Advocate sr.9512

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