

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13-12-2017

CORAM

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

S.A.No.124 of 2015

Oyyammal .. Appellant/Plaintiff

-vs-

Poongothai .. Respondent/Respondent

PRAYER: Second Appeal filed under Section 100 of C.P.C against the judgment and decree passed in A.S.No.10 of 2011 dated 03.11.2014 on the file of the Court of Additional Subordinate Judge, Mayiladuthurai in reversing the judgment and decree passed in O.S.No.459 of 2005 dated 13.02.2009 on the file of the Court of Principal District Munsif, Mayiladuthurai.

For Appellant : Mr.A.Muthukumar

For Respondent : Mr.S.Sounthar

J U D G M E N T

The plaintiff has preferred the above Second Appeal challenging the judgment and decree passed in A.S.No.10 of 2011 on the file of the Sub Court, Mayiladurai.

2. The suit is filed by the plaintiff for recovery of possession of the 'B' schedule property and for mesne profits. The suit property is a cultivable land situated in Thiruvavaduthurai Village. The suit property belonged to Arulmighu Komugtheeswarar Swami Temple. The plaintiff's husband had taken the property for lease and was cultivating the same till his lifetime. After his death, a fresh lease deed was executed by the plaintiff in favour of the temple in the year 1987. It is also stated that the plaintiff had registered as a tenant under the record of the tenancy rights. 'B' schedule property is part of 'A' schedule property. It is the specific case of the plaintiff that the defendant encroached upon the 'B' schedule property and has been enjoying the same. It is further stated that due to drought, the plaintiff was not able to cultivate the said land and hence she had started using it as brick-kiln. On the western side, the defendant's husband had taken on lease an extent of 97 cents from the very same temple-

authorities. After the death of the defendant's husband, the defendant has been enjoying the same as tenant. The plaintiff has stated that as the request of the defendant to the plaintiff to give up her leasehold right was rejected, the defendant encroached upon the 'B' schedule property by removing the bund. It is further stated that on 05.10.2005, the defendant encroached upon the 'B' schedule property measuring an extent of East-West 10 feet and North-West 208 feet and started cultivating the same. Hence, the suit is filed for recovery of possession and mesne profits.

3. The suit was resisted by the defendant contending that the plaintiff has not specifically mentioned the survey numbers of the property and denied the alleged trespass by the defendant in any portion of the land under occupation of the plaintiff. It is further stated that the boundaries mentioned in the plaint are also not correct. According to the defendant, the present suit was filed, as a counter blast to the suit filed by the defendant in O.S.No.384 of 2005. As there was no cause of action for the suit and as the suit is filed as such for recovery of possession without praying for declaration, it is not maintainable. Hence, the defendant has sought for dismissal of the suit.

4. Before the trial Court, on the side of the plaintiff, the plaintiff was examined herself as P.W.1 and two more witnesses were examined as P.W.2 and P.W.3 and Exs.A1 to A7 were marked. On the side of the defendant, the defendant examined herself as D.W.1 and one more witness was examined as D.W.2 and Exs.B1 to B3 were marked. Apart from these documents, Exs.C1 to C3 were marked as Court documents.

5. Upon the oral and documentary evidence produced on either side, the trial Court had decreed the suit. However, on appeal, it was reversed by the lower Appellate Court in A.S.No.10 of 2011 by dismissing the suit. Aggrieved by the same, the plaintiff has preferred the above Second Appeal.

6. At the time of admission, by order dated 19.10.2016, the following substantial questions of law are formulated:-

- a) Whether the lower appellate Court erred in law in holding that the plaintiff has not proved the encroachment made by the defendant upon the suit property when the defendant does not dispute the correctness of Ex.A1 and overwhelming evidence such as Ex.C2, Ex.C3 and oral evidence of P.W.2 and P.W.3 prove the encroachment?

b) When the correctness of the entries in Ex.A-1 was not disputed by the defendant, whether the lower appellate Court erred in law in ignoring the same contrary to Section 15 of the Tamil Nadu Agricultural Land Record of Tenancy Rights Act, 1969?

c) When the defendant had admitted the plaintiff's entitlement to 41 cents and P.W.2 also supports the case of the plaintiff, whether the lower appellate erred in law in dismissing the suit particularly when the plaintiff was in possession of 4 cents less and the defendant was in possession of 11 cents more in the same Survey Number?

7. Heard the learned counsel for the appellant and the learned counsel for the respondent and perused the materials available on record.

8. It is not in dispute that the property belonged to Arulmighu Komugtheeswarar Swami Temple and the plaintiff is the lessee of the same. It is also the case of the plaintiff that the 'B' schedule property is part of 'A' schedule property and that the 'B' schedule property was trespassed by the defendant. The suit property is an extent of 41 cents with specific boundaries and the western side of the 'A' schedule property is the 'B' schedule property, which is measuring about 20 feet x 208 feet an extent of 4 ½ cents.

9. The learned counsel for the respondent has specifically contended that the boundary description as mentioned in the plaint is incorrect. However, it is contended by the learned counsel for the appellant that as per the report of the Commissioner, which is marked as Exs.C1 to C3, the suit property was rightly identified and given the boundaries. But, it has to be seen that the Surveyor has given a plan separately and that is not demarcated. When the plaintiff has specifically stated that 'B' schedule property is measuring about 20 feet by 108 feet, the plaintiff should have also described the boundary description of the 'B' schedule property. The plaintiff has simply pointed out that the 'B' schedule property is a part of the 'A' schedule property and given the boundary description of the 'A' schedule property. In the absence of exact boundary description of the 'B' schedule property, the appellate Court has found that the plaintiff has not given the exact measurements and boundaries for 'B' schedule property, which is alleged to be the part of 'A' schedule property. From a reading of the plaint, it is stated by the plaintiff that during the end of August, the defendant had attempted to damage the ridge.

Therefore, the plaintiff had given a complaint to the Manager of the temple-Trust whereas while filing the suit, it is stated that the defendant had encroached the land and damaged the ridge and attached the suit property with her property. But, the plaintiff has not let in any evidence regarding the same. This fact is corroborated by the evidence of P.W.3, who is the Headman of the Village and he has specifically stated that the plaintiff had given a complaint that she has been cultivating 41 cents and that the entire extent is not available. When P.W.2-Surveyor measured the same, instead of 41 cents, only 37 cents were available and alleged that the balance 4 cents is with the possession of the defendant. Insofar as the evidence of D.W.1 is concerned, he has specifically stated that she has not occupied the 4 ½ cents as alleged by the plaintiff. Thus, the question of law (a) is answered against the appellant.

10. Secondly, the plaintiff has not sought for declaration and as a consequence sought for recovery of possession. It is the simple case of the plaintiff that the suit property was encroached upon by the defendant on 05.10.2005 and the suit is filed only for recovery of possession and mesne profits. It is pointed out by the learned counsel appearing for the respondent that in the complaint given by the plaintiff to the temple-Trust, it was only alleged that there is only lesser extent available with her, whereas, in the plaint, it is stated that the defendant had encroached and occupied the said extent. Thus, the plaintiff is not clear about the exact boundaries within which the lesser extent is available. That is the reason why the plaintiff has also not given the four boundaries for 'B' schedule property. The appeal is filed against the judgment after the remand in the earlier round. After which, a Commissioner was appointed and the lands were measured by a Surveyor. The land Surveyor has stated that in Survey No.8/1, the total extent was 4.27 acres, which was leased out to 4 people by the temple. 37 cents are in possession of the plaintiff and 1.16 acres are in possession of the defendant and the balance is in possession of two other persons.

11. Now, the question that has to be decided is as to whether the plaintiff has identified the extent not available with her.

12. The defendant has specifically denied the encroachment as alleged by the plaintiff and she has further stated that there is a ridge in between the plaintiff and the defendant's property. D.W.2, who was examined on the side of the defendant, has admitted that there is a ridge in between the plaintiff and the defendant's property for many years and it is not the specific case of the plaintiff that the ridge was disturbed and the defendant has encroached into the plaintiff's property. It

is the bounden duty of the plaintiff to examine the other two lessees also to ascertain the exact extent, which she is claiming short of. In the absence of measuring the entire extent of the property available in Survey No.8/1, the plaintiff cannot allege that the 'B' schedule property is in possession and occupation of the defendant. In fact, if the plaintiff had appointed a Commissioner even at the trial stage, at the first instance, the alleged encroachment could have been proved whereas the Commissioner was appointed only after remand. Even presuming that the defendant is in possession of excess of what she is entitled to, in the absence of evidence that the said extent is the shortage of land belonging to the plaintiff, the plaintiff cannot claim the same.

13. In view of the above, the questions of law (b) and (c) are also found against the appellant. Therefore, despite the fact that the defendant is in possession of the land in excess of what she is entitled to, in the absence of any evidence to establish that the said excess is the extent belonging to the plaintiff, the plaintiff is not entitled to the decree as prayed for.

14. In the result, the Second Appeal is dismissed by confirming the judgment and decree of the lower appellate Court. No costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

srn

To

1. The Additional Subordinate Judge, Mayiladuthurai
2. The Principal District Munsif, Mayiladuthurai.
3. The Record Keeper, V.R.Section,
High court, Madras-104 (2 Copies)

+1cc to Mr.S.Sounthar, Advocate, S.R.No.88772

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S.A.No.124 of 2015

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cs/05/02/18