

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 31.01.2017

CORAM:

The HONOURABLE MR.JUSTICE M.M.SUNDRESH

S.A.No.101 of 2016

and C.M.P.No.2385 of 2016

and C.M.P.No.1475 of 2017

1.Varutharajan

2.Saravanan

... Appellants/Defendants

Vs.

A.Somasundaram

... Respondent/Plaintiff

Second Appeal is filed under Section 100 C.P.C., against the judgment and decree made in A.S.No.1 of 2014 on the file of the Subordinate Court, Namakkal dated 10.03.2015 reversing the judgment and decree made in O.S.No.323 of 2009 on the file of the Principal District Munsif Court, Namakkal dated 23.09.2013 granting the relief of mandatory injunction.

For Appellants : Mr.C.Jagadish

For Respondent : Mr.R.Sivaraman

J U D G M E N T

The plaintiff filed the suit for declaration, injunction and mandatory injunction. The plaintiff laid the case based upon Exs.A1 and A2. These documents are interse between the plaintiff, his mother and his brother.

2.At the time of admission on 29.03.2016, the following substantial questions of law have been framed:

a) Whether the Lower Appellate Court is right in law in granting the relief of mandatory injunction particularly when the plaintiff has not sought for declaration of his alleged rights over the defendants' property through WW1 gates?

b) Whether the Lower Appellate Court is right in law in ignoring the measurements in the FMB sketch and relying on the erroneous measurements in the sale deeds A3 and A4 particularly when the property sold to the plaintiff has been identified by survey number and boundaries?

c) Whether the Lower Appellate Court is right in law in granting the relief of mandatory injunction

particularly when the plaintiff has not identified the suit property by properly describing the suit property as contemplated under Order VII Rule 3 CPC read with Section 39 of the Specific Relief Act, 1963?

d) Whether the Lower Appellate Court has properly appreciated the material evidence in this case namely, Exhibits A1 to A4 in the proper perspective while granting a relief of mandatory injunction?

3.The sum and substance of the plaintiff's case is that there exists a lane in the East of his property. The property owned by the plaintiff is 44 x 37. The defendants/appellants have encroached upon the remaining 1 feet 2 inches as found by the Commissioner, over which a gate has been put up.

4.The case of the defendants is that the said property is owned by them absolutely. Now, we are concerned with the decree for mandatory injunction as there is no issue with regard to decree qua declaration and injunction. The Lower Appellate Court decreed the suit for mandatory injunction primarily placing reliance on the evidence of P.W.1, who has stated in the cross examination that there exists a lane, which goes to Pallipatti Village.

5.The learned counsel appearing for the appellants submits that the documents relied upon by the plaintiff establishes two facts, one is with respect to the extent and the other is with respect to the boundary and transparency of the title of the defendants/appellants. If these documents are accepted, then the main case of the plaintiff would fall down.

6.The learned counsel appearing for the respondent/plaintiff submits that merely because the documents refer to the boundary, it cannot be stated that there does not exist a lane and in any case Ex.A1 speaks about 44 feet on the South, which has been purchased by the plaintiff from his brother as sale, therefore, the subsequent document has to be seen and further, the evidence of P.W.1 alone interse cannot be looked into. Incidentally, he has made submission that neither the Title Deed standing in the name of his mother is available and if that is taken into consideration, appellants cannot succeed in the appeal.

7.Order 41 Rule 27 of the Civil Procedure Code speaks about the contingency mentioned thereunder. It is not as if any additional documents will not be allowed to be produced, that too, in the 2nd appellate stage. Due diligence is an important factor to be considered. There is no acceptable material to hold that the plaintiff was unable to produce the said document which stands in the name of his mother. Therefore, this Court is not inclined to accept the said document at this stage. After all, the Second Appeal is not a matter of right, but the power has to be exercised within the parameters of Section 100 of the Code.

8.Coming to the other contention raised, the Lower Appellate Court has placed heavy reliance on the evidence of D.W.1, the appellant himself. In such view of the matter, this Court does not find any error in the order. Incidentally, the Lower Appellate Court has taken into consideration the Commissioner's report. Though Commissioner's report is only a piece of evidence, the same has rightly been taken into consideration by the Lower Appellate Court, coupled with the evidence of the appellant himself. Thus, this Court does not find any substantial question of law warranting interference. However, it is hereby clarified that as found by the Commissioner, insofar as the declaration portion is concerned, the plaintiff is entitled for the remaining extent of 1 feet 2 inches alone, after entitlement of the plaintiff for 44 feet.

9.The decree for mandatory injunction is modified in view of the submission made by the learned counsel for the plaintiff that beyond the extent of 44 x 37 of the South, which is inclusive of the remaining portion of 1 feet 2 inches, as found by the Commissioner, it is open to the appellant to put up the gate.

10.The question of law is answered accordingly and the Second Appeal is disposed of. No costs. C.M.P.No.1475 of 2017 stands dismissed since this Court is not inclined to accept the said document at this stage. Consequently, the connected miscellaneous petition is closed.

Sd/-
Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

To

1.The Subordinate Judge, Namakkal.

2.The Principal District Munsif Court, Namakkal.

Copy to:

The Section Officer,
V.R.Section,
High Court, Chennai.

+1 cc to Mr.R.Sivaraman, advocate, sr.6068

+1 cc to Mr.C.Jagadish, advocate, sr.5995.

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