



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 21.09.2017

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THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

SECOND APPEAL (MD) No.599 of 2015

and

M.P.(MD).No.2 of 2015

S.Ramiah Konar @ Somu

... Appellant /
Appellant / Defendant

Vs.

P.Sudalaimuthu Konar

... Respondent /
Respondent / Plaintiff

PRAYER: Appeal filed under Section 100 of C.P.C., against the judgment and decree, dated 22.10.2013, made in A.S.No.12 of 2012 by the learned Principal Subordinate Judge, Tenkasi, confirming the judgment and decree, dated 28.10.2011, made in O.S.No.580 of 2009 by the learned Additional District Munsif, Tenkasi.

For appellant

... Mr.H.Arumugam

For respondent

.... No appearance

JUDGMENT

The defendant, who had lost before both the Courts below, is the appellant. The suit was filed for declaration and permanent injunction.

2.The case of the plaintiff is that the suit schedule properties were purchased by the plaintiff and his brother by name Narayana Konar by a registered sale deed, dated 02.06.1968. His brother Narayana Konar, without any issue, died 30 years ago. After his death, the plaintiff has been in possession and enjoyment of the same by paying Panchayat tax, etc. The suit 1st schedule property is a house. The suit 2nd schedule property is a passage, through which the plaintiff has been draining the drain water and rain water. Taking advantage of the fact that there is no exclusive wall dividing the property of the plaintiff and the defendant, on 11.12.2009 the defendant attempted to put up a wall claiming exclusive right over the suit 2nd schedule property. Hence, the suit was filed.



3. The suit was resisted by the defendant contending that since one Esakkiammal, who is the wife of deceased Narayana Konar, has not been impleaded in the suit, the suit itself is not maintainable on the ground of non joinder of necessary party. The defendant had obtained title to the suit 2nd schedule property through a gift deed executed in the year 1968 by his maternal grandmother - Madathi Ammal. Since then, he has been in possession and enjoyment of the suit 2nd schedule property. Thus, he prayed for dismissal of the suit.

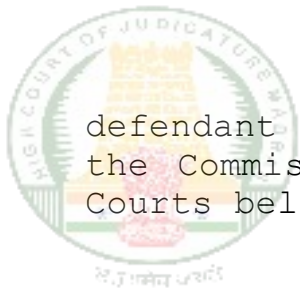
4. Before the trial Court, on the side of the plaintiff, the plaintiff himself was examined as PW1 and Exs.A1 to A5 were marked. On the side of the defendant, the defendant himself was examined as DW1 and another witness was examined as DW2 and Exs.B1 to B7 were marked. The third party documents were also marked as Exs.X1 to X4. The Advocate Commissioner's report and plan were marked as Exs.C1 and C2. On consideration of the documents and evidences, the trial Court had decreed the suit as prayed for and on appeal, the first appellate Court had also confirmed the same. Aggrieved by the same, the defendant has filed this appeal.

5. At the time of admission of the second appeal, only notice was ordered.

6. Heard the learned counsel for the appellant. There is no representation for the respondent, though the notice was served and his name is printed in the cause list.

7. The learned counsel appearing for the appellant/defendant contended that when the properties are situate in Natham promboke and the adjacent properties are having different extent, the Advocate Commissioner ought to have measured even the property of the defendant, with the help of Surveyor. Though the defendant had filed his objection with regard to the report of the Commissioner, the Courts below have failed to consider the same.

8. It is the case of the plaintiff that he had been draining the water only through the disputed passage (2nd schedule property), which is east of his property and west of the defendant's property. It is the case of the defendant that he has been in possession of the suit 2nd schedule property by putting up fencing and by obtaining patta. Admittedly, both the plaintiff and the defendant are claiming exclusive right over the suit 2nd schedule property. When there is a dispute with regard to the measurement of the property, especially in natham promboke, the trial Court ought to have directed the Advocate Commissioner to measure the property of the plaintiff as well as the defendant, with the help of Surveyor. But, in this case, it is seen that the Commissioner had measured only the property of the plaintiff. The



defendant had also filed an objection with regard to the report of the Commissioner. But, the same has not been considered by the Courts below.

9. It is further contended by the learned counsel for the appellant/defendant that since the property was originally purchased by the plaintiff and his brother, after the death of his brother, his brother's wife is automatically entitled to the ownership of the property and hence, the suit filed by the plaintiff, without impleading the legal heir of his brother, is bad for non-joinder of necessary parties. But, according to the plaintiff, his brother's wife had remarried and the remarriage would disentitle her right to the property and thus, he is entitled to the ownership of the entire property.

10. Reliance was placed on **2008 (2) CTC 92 (Cherotte Sugathan (d) by LR's. and others Vs. Cherotte Bharathi & others)**, in this regard, wherein the Hon'ble Supreme Court has held that the remarriage of the wife cannot be a ground for her losing right to succeed to her deceased husband's property. Thus, the right of widow in deceased husband's property, after remarriage, cannot be denied. Therefore, the contention of the plaintiff and the finding of the Courts below that the plaintiff has become the absolute owner of the suit properties, as the wife of the plaintiff's brother had remarried, is liable to be rejected. The plaintiff ought to have added the brother's wife, who is the owner of the half share as a necessary party.

11. The learned counsel for the appellant / defendant also contended that the predecessor of the plaintiff had purchased only half share in the suit property under Ex.A5, however, sold the entire property to the plaintiff under Ex.A1 and as such the sale deed of the plaintiff is not valid. As stated earlier, when the actual measurement of the property was not taken with the help of surveyor, the identity of the property cannot be done with regard to the alleged sub-division of suit property.

12. In the light of the above, this Court is inclined to remit the matter back to the file of the trial Court.

13. In the result, this second appeal is allowed and the judgment and decree passed by the Courts below are set aside and the Advocate Commissioner's report and plan are scrapped, and the matter is remitted back to the file of the trial Court. The trial Court is directed to permit the parties to implead necessary parties, adduce fresh evidence, if any, appoint an Advocate
<https://hcservices.courts.gov.in/hcservices/> to measure the property of the plaintiff as well as the defendant and then, decide the matter afresh, after hearing both the parties, within a period of six months from the date of



receipt of a copy of this order. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-III)

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/True Copy/

Sub Assistant Registrar

To

1. The Principal Subordinate Judge,
Tenkasi.

2. The Additional District Munsif, Tenkasi.

+ 1 cc TO Mr.H.Arumugam , Advocate in SR No. 80813

gcg

AE/KP/SAR1/03.11.2017/4P/4C

S.A. (MD) No.599 of 2015
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