



Reserved on: 09.01.2017
Delivered on: 12.01.2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 12.01.2017

CORAM:

THE HONOURABLE MR. JUSTICE M. DURAISWAMY

S.A. (MD) No. 1218 of 2011

1. R. Suresh Kumar

2. R. Muthukumar .. Appellants/Appellants/Defendants

Vs.

Muthukannan .. Respondent/Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree passed in A.S.No.4 of 2009, on the file of the Principal District Court, Thoothukudi, dated 28.02.2011 confirming the judgment and decree in O.S.No.18 of 2007, on the file of the Subordinate Court, Kovilpatti, dated 16.12.2008.

For Appellants	: Mr. R. Manimaran for Mr. S. Meenakshi Sundaram
For Respondent	: Mr. K. Hemakarthikeyan

JUDGMENT

The above Second Appeal arises against the judgment and decree passed in A.S.No.4 of 2009, on the file of the Principal District Court, Thoothukudi, confirming the judgment and decree passed in O.S.No.18 of 2007, on the file of the Subordinate Court, Kovilpatti.

2. The defendants are the appellants and the respondent is the plaintiff in the suit. The plaintiff filed the suit in O.S.No.18 of 2007 to declare the title of the plaintiff in respect of "C" schedule property and directing the defendants to hand over the possession of the "C" schedule property, after removing the superstructure and for mesne profits.

3. The brief case of the plaintiff is as follows:

<https://hcservices.ecourts.gov.in/hcservices/>

(i) According to the plaintiff, originally "A" and "B"



schedule properties belonged to one Muthu Nadar, who purchased it by a registered sale deed dated 06.02.1954. The said Muthu Nadar executed a registered Will dated 24.05.1988 bequeathing "A" schedule property to the plaintiff and "B" schedule property to the defendants. The plaintiff and the defendants are the grandsons of the said Muthu Nadar born to his two sons. In the said Will, "A" schedule property comprises of 5 shops and a vacant land measuring an extent of 2487 sqft and "B" schedule property comprises of 3 shops and a vacant land measuring 10465 sqft.

(ii) According to the plaintiff, the document writer who prepared the Will committed an error in omitting to mention the eastern portion after mentioning the 5 shops portion. After the demise of Muthu Nadar, the plaintiff and the defendants are enjoying their respective shares of property which includes 5 shops and 3 shops respectively. The dispute between the plaintiff and the defendants is with regard to "C" schedule property which is a vacant site, wherein at present there is a small carriage shed.

(iii) According to the plaintiff, the defendants are attempting to grab the "C" schedule property which is nothing but a portion of the plaintiff's "A" schedule property. The "C" schedule property is measuring 2487 sqft excluding the plaintiff's 5 shops covering the "A" schedule. Collusively the first defendant filed a suit against the plaintiff in O.S.No.6 of 2005 for partition of "B" schedule property and in the said suit, they deliberately included the "C" schedule property as if it was available for partition. The suit is said to have been compromised. The plaintiff is not a party to that suit. Therefore, the compromise decree is not binding on him. Muthu Nadar had died on 03.10.1990. On the guise of the decree, the defendants are attempting to encroach the "C" schedule property by making false claim. In these circumstances the plaintiff filed the suit.

4. The brief case of the defendants 1 and 2 is as follows:

According to the defendants, "C" schedule property is not a part of "A" schedule property and it is a part of "B" schedule property only. The plaintiff is trying to grab the "C" schedule property from the first defendant to whom "C" schedule property has been allotted in the partition. The Will dated 24.05.1988 executed by Muthu Nadar is very clear and unambiguous. The plaintiff is trying to misinterpret and give distorted version. The defendants are enjoying the "C" schedule property from 03.10.1990, that is the date on which the said Muthu Nadar had died, continuously, peacefully and to the knowledge of the plaintiff and others. Therefore, the defendants prescribed title by adverse possession. The defendants also denied the allegations stated in the plaint as false. In these circumstances, the defendants prayed for dismissal of the suit.



5. Before the trial Court, on the side of the plaintiff, two witnesses were examined and nine documents viz., Exs.A.1 to A.9 were marked and on the side of the defendants, D.W.1 was examined and two documents viz., Exs.B.1 and B.2 were marked. The Advocate Commissioner's report and plans were marked as Exs.C.1 to C.3. The trial Court, taking into consideration the oral and documentary evidences let in by the parties, decreed the suit. Aggrieved over the judgment and decree of the trial Court, the defendants preferred an appeal in A.S.No.4 of 2009 and the lower Appellate Court also confirmed the judgment and decree passed by the trial Court and dismissed the appeal. Aggrieved over the concurrent findings of the Courts below, the defendants have filed the above Second Appeal.

6. Heard Mr.R.Manimaran, learned Counsel appearing for the appellants and Mr.K.Hemakarthiskeyan, learned Counsel appearing for the respondent.

7. The appellants have raised the following Substantial Questions of Law in the Second Appeal:

"1.Whether the findings of the Courts below perverse in interpreting Ex.A.2 by coming to the conclusion that certain words are missing?

2.Whether the Courts below are correct in arriving to the conclusion regarding the market value of property to the parties when there are no pleadings and issues and in the absence of evidence from competent authority?

3.Whether the Courts below had arrived at a perverse finding when Commissioner's report and plan are not looked into in a proper perspective in the light of oral evidence of respective properties?"

8. On a careful consideration of the materials available on record and the submissions made by the learned Counsel appearing on either side, it could be seen that the dispute is only with regard to "C" schedule property. The parties are not disputing their right in respect of "A" and "B" schedule properties. The plaintiff is the elder brother's son of the defendants' father. Ex.A.2 is the Will dated 24.05.1988 executed by Muthu Nadar in favour of the plaintiff and the defendants. The plaintiff's father and the defendants' father are the sons of the said Muthu Nadar. In Ex.A.2 Will, the plaintiff was allotted 5 shops bearing Door Nos.6,7,8,9 and 10 and a vacant site measuring an extent of 2487 sqft. The defendants were allotted a vacant site measuring an extent of 10,465 sqft along with three shops. According to the defendants' submission, "C" schedule property claimed by the plaintiff is coming within the boundaries of "B" schedule property. In order to get a clear picture of the boundaries of the properties, an



Advocate Commissioner was appointed before the trial Court, who also filed his report and plans which were marked as Exs.C.1 to C.3.

9. The case of the defendants that they are entitled to "C" schedule property is contrary to the recitals found in Ex.A.2 Will. As rightly contended by the plaintiff, the decree passed in O.S.No.6 of 2005 is not binding on him for the reason that he was not a party to the said suit. As per Ex.C.3, the measurement of "A" schedule property comes to 2754 sqft, whereas the Will discloses only 2487 sqft. The Advocate Commissioner found that the defendants are in enjoyment of more extent than what was allotted to them. The Courts below took into consideration the oral and documentary evidences along with the Advocate Commissioner's report and plans and decreed the suit. In order to prove Ex.A.2-Will, the attestor was examined as P.W.2. That apart, the defendants did not dispute the truth and genuineness of the said Will. Therefore, the Courts below rightly came to the conclusion that Ex.A.2 - Will is a true and genuine document. The plaintiff had clearly established his case by adducing oral and documentary evidences. The Courts below have rightly decreed the suit.

10. In these circumstances, I do not find any ground much less any substantial question of law to interfere with the concurrent findings of the Courts below. The Second Appeal is liable to be dismissed. Accordingly, the same is dismissed. There shall be no order as to costs.

Sd/-

Assistant Registrar(CSII)

/True Copy/

Sub Assistant Registrar

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To

1. The Principal District Court, Thoothukudi.
2. The Subordinate Court, Kovilpatti.

COPY TO:

THE RECORD KEEPER,

V.R.SECTION, MADURAI BENCH OF MADRAS HIGH COURT, MADURAI

+1cc to Mr.S.MEENAKSHI SUNDARAM, Advocate Sr.No. 2423

+1cc to Mr.K.HEMAKARTHIKEYAN Advocate Sr.No. 2431

JAM/02.02.17/SV-MMS/4P-6C

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12.01.2017