



WEB COPY

Reserved on : 14.02.2017

Delivered on: 21.02.2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 21.02.2017

CORAM:

THE HONOURABLE MR.JUSTICE M.DURAISWAMY

S.A.(MD)No.250 of 2011

1.Vasanthakumari

2.Chitra

.. Appellants/Respondents/Defendants

Vs.

Indu Bala

.. Respondent/Appellant/Plaintiff

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree in A.S.No.81 of 2006 and A.S.No.82 of 2006, dated 05.07.2010, on the file of the Subordinate Court, Padmanabhapuram, partly confirming and partly reversing the judgment an decree in O.S.No.230 of 2004, dated 28.02.2006, on the file of the Additional District Munsif Court, Padmanabhapuram.

For Appellants : Mr.V.M.Balamohan Thambi

For Respondent : Mr.M.P.Senthil

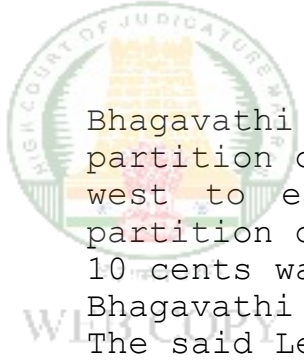
JUDGMENT

The defendants have filed the above Second Appeal. The respondent/plaintiff filed the suit in O.S.No.230 of 2004 on the file of the Additional District Munsif Court, Padmanabapuram for declaration, permanent injunction and to fix the western boundary of the suit property. The trial Court decreed the suit in respect of the declaration and permanent injunction and dismissed the suit in respect of the fixation of the western boundary.

2. Aggrieved over the grant of decree for declaration and permanent injunction, the defendants preferred an appeal in A.S.No.81 of 2006. As against the rejection of the prayer to fix the western boundary, the plaintiff preferred an appeal in A.S.No.82 of 2006. The lower Appellate Court dismissed the appeal in A.S.No.81 of 2006 and allowed the appeal in A.S.No.82 of 2006. Since both the appeals arose from a single suit, the defendants have filed the above Second Appeal.

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

3. According to the plaintiff, the suit property measuring an extent of 80 cents in S.No.1099A, originally belonged to Tharwad of



Bhagavathi Amma. The said Tharwad was partitioned by a registered partition deed. The said Survey Number was divided into 8 plots from west to east. A plan was prepared and it was appended to the partition deed. As per the partition deed, Plot No.5 having an area 10 cents was allotted to Lekshmi Pillai, daughter of Easwari Pillai, Bhagavathi Amma, daughter of Devaki Amma and her minor children. The said Lekshmi Pillai and others sold the plaint schedule property in favour of Bhagavathi Amma, D/o Janaki Pillai, the mother of the plaintiff by a registered sale deed dated 27.10.1954. The said Bhagavathi Amma gifted the suit property to her daughter under a registered gift deed dated 12.06.2002 and she is enjoying the suit property as an absolute owner. The first defendant is the owner in respect of the eastern portion of plot Nos. 1 and 2 and just on the west of the suit property. The defendants 1 and 2 have no title or possession over any portion of the suit property. The sub division made in respect of the suit property is erroneous. In these circumstances, the plaintiff filed the suit.

4. According to the defendants, the suit property does not have an extent of 80 cents and it has got only a lesser area. The plot No.6 in the partition deed was not divided. The share of the first defendant and that of the plaintiff's mother in plots 1 and 2 were exchanged as per the Exchange deed dated 28.08.1951. The plot exchanged in favour of the first defendant touches plot No.5 which was allotted to Lekshmi Pillai. They sold the plot to the mother of the plaintiff in 1954. The second defendant who got the right of the mother as per the gift deed was given plot No.13C. The sub division was made in 1996. In these circumstances, the defendants prayed for dismissal of the suit.

5. Before the trial Court, on the side of the plaintiff, P.W.1 was examined and 9 documents viz., Exs.A.1 to A.9 were marked and on the side of the defendants, D.W.1 was examined and 9 documents viz., Exs.B.1 to B.9 were marked. After taking into consideration the oral and documentary evidences let in by the parties, the trial Court partly decreed the suit by decreeing the relief of declaration and injunction and rejecting the prayer (B). Aggrieved over the same, the plaintiff as well as the defendants preferred appeals and the lower Appellate Court dismissed the appeal preferred by the defendants and allowed the appeal preferred by the plaintiff. Aggrieved over the judgment and decree of the lower appellate Court, the defendants have filed the above Second Appeal.

6. Heard Mr.V.M.Balamohan Thambi, learned Counsel appearing for the appellants and Mr.M.P.Senthil, learned Counsel appearing for the respondent.

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

“(a) Whether the judgment and decree of the Courts below is sustainable, when the respondent/plaintiff has not identified the suit property by way of appointing



commissioner when admittedly Exs.A.1 to A.5 boundary are different?

(b) Whether the judgment and decree of the Courts below are correct when the revenue authority sub divided the plaintiff/respondent and the defendant/appellant property after due notice to all the parties and the same was not challenged by the plaintiff/respondent within the prescribed period?

(c) Whether the Court below is not correct in considering the admission of P.W.1 in the cross-examination and Exs.A.1 to A.5 boundary are perverse?

(d) Whether the first appellate Court is right in rendering the finding that the defendant/appellant has not disputed the identity of the suit property. When admittedly Exs.A.1 to A.5 document do not tally with the suit schedule property and the same was accepted by the trial Court and dismissed the relief of demarcation?"

8. Mr.V.M.Balamohan Thambi, learned Counsel appearing for the appellants submitted that the only dispute in the Second Appeal is with regard to the identification of the property. Further the learned Counsel submitted that if the lower Appellate Court had identified the property by appointing an Advocate Commissioner, it would have solved the dispute between the parties.

9. In support of his contention, the learned Counsel appearing for the appellants relied upon the following judgments:

(i) In **Shreepat Vs. Rajendra Prasad and others** reported in **(2000) 3 M.L.J. 84 (SC)**, the Honourable Apex Court held as follows:

"4. In our opinion, this contention is correct. Since there was a serious dispute with regard to the area and boundaries of the land in question, especially with regard to its identity the Courts below before decreeing the suit should have got the identity established by issuing a survey commission to locate the plot in dispute and find out whether it formed part of Khasra No.257/3 or Khasra No.257/1. This having not been done has resulted in serious miscarriage of justice. We consequently allow the appeal, set aside the order passed by the courts below as affirmed by the High Court and remand the case to the trial court to dispose of the suit afresh in the light of the observations made above and in accordance with law."

(ii) In **John Sylem Vs. Chanthanamuthu Pillai (died) and others** reported in **AIR 2003 MADRAS 374**, the Division Bench of this Court held as follows:

"7. Thus, the plaintiff, apart from producing a document executed by a person whose title to the property conveyed was uncertain and which document set out the boundaries in a vague manner has not adduced any acceptable evidenced to identify and locate the property. An important boundary



mentioned in the schedule to that deed remained vague and it's location unknown. The plaintiff only sought to improve his case with the aid of the reports of the Commissioner. All those reports have been rightly found by the trial Court and the learned Single Judge to be wholly unreliable and not of any use in locating the suit schedule property.

11. The evidence of this witness does not in any manner help the plaintiff to improve his case. The burden of establishing the case is on the plaintiff. Unless the property with reference to which the declaration sought is clearly identified, the plaintiff is not entitled to a decree. The plaintiff has failed to establish that identity. The learned Single Judge was right in rejecting the appeal against the dismissal of the plaintiff's suit."

10. Countering the submissions made by the learned Counsel appearing for the appellants, Mr.M.P.Senthil, learned Counsel appearing for the respondent submitted that the dispute with regard to the identification of the property has not been raised by the defendants in the written statement and therefore, the said contention is liable to be rejected. Further the learned Counsel submitted that the lower Appellate Court has rightly decreed the suit in toto.

11. In support of his contention, the learned Counsel appearing for the respondent relied upon the following judgments:

(i) In **State of A.P. & others Vs. Star Bone Mill & Fertiliser Co.**, reported in **2013(2) CTC 347**, the Honourable Apex Court held as follows:

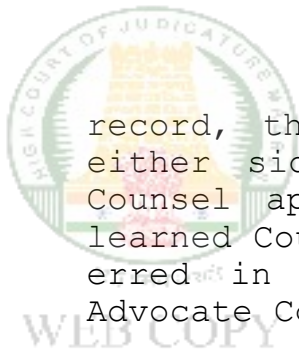
"13. The principle enshrined in [Section 110](#) of the Evidence Act, is based on public policy with the object of preventing persons from committing breach of peace by taking law into their own hands, however good their title over the land in question may be. It is for this purpose, that the provisions of [Section 6](#) of the Specific Relief Act, 1963, [Section 145](#) of Code of Criminal Procedure, 1973, and [Sections 154](#) and [158](#) of Indian Penal Code, 1860, were enacted. All the afore- said provisions have the same object. The said presumption is read under [Section 114](#) of the Evidence Act, and applies only in a case where there is either no proof, or very little proof of ownership on either side. The maxim "possession follows title" is applicable in cases where proof of actual possession cannot reasonably be expected, for instance, in the case of waste lands, or where nothing is known about possession one-way or another. Presumption of title as a result of possession, can arise only where facts disclose that no title vests in any party. Possession of the plaintiff is not prima facie wrongful, and title of the plaintiff is not proved. It certainly does not mean that because a man



has title over some land, he is necessarily in possession of it. It infact means, that if at any time a man with title was in possession of the said property, the law allows the presumption that such possession was in continuation of the title vested in him. A person must establish that he has continued possession of the suit property, while the other side claiming title, must make out a case of trespass/encroachment etc. Where the apparent title is with the plaintiffs, it is incumbent upon the defendant, that in order to displace this claim of apparent title and to establish beneficial title in himself, he must establish by way of satisfactory evidence, circumstances that favour his version. Even, a revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof, both forward and backward, can also be raised under [Section 110](#) of the Evidence Act. "

(ii) In **Ponnu alias Kondappa Naicker and another Vs. Marammal and another** reported in **(2002)1 M.L.J. 434**, this Court held as follows:

"18. It is therefore clear from the aforesaid decisions and discussion that although after notice, under Survey and Boundaries Act the property has been subdivided, it will not bar the aggrieved party from moving the Civil Court to establish his title to the property. Even assuming that there was sub division of 383/1A3 relating to an extent of 2.17 acres and patta was issued in the name of the appellants, it will not confer any title on them unless they are able to establish that they have legal title to the property either by purchase or adverse possession. The documents filed on the side of the appellants themselves indicate that in the boundary, the land of the respondents has been shown on the eastern side thereby establishing that the appellants own land only on the west of the land of the respondents. When the total extent claimed by the plaintiffs is about 13.75 acres, simply because in the patta a lesser extent was given, the right, title and interest of the plaintiffs cannot be deprived on that ground. Under the circumstance, both the Courts below based upon the evidence and the documents came to the conclusion that the respondents alone are in possession and enjoyment of the entire suit property, namely 13.75 acres and this being so, the appellants cannot claim a bit of land measuring 2.17 acres only which is situated on the west of Subba Naidu's land. The finding of the lower appellate Court is based on the legal evidence and there was proper appreciation of law and hence, no interference is called on."



record, the submissions made by the learned Counsel appearing on either side and also the judgments relied upon by the learned Counsel appearing on either side, the only point argued by the learned Counsel for the appellants is that the lower Appellate Court erred in not identifying the suit property by appointing the Advocate Commissioner.

13. On a perusal of the written statement filed by the defendants, it is clear that the defendants have not disputed the identification of the property in the written statement. When the defendants have not disputed the identification of the property in the written statement, absolutely there is no necessity for giving a finding with regard to the identification of the property. If the defendants were really interested, they should have filed an application seeking appointment of Advocate Commissioner before the Courts below. But for the reasons best known to them, the defendants did not file any application seeking appointment of Advocate Commissioner to identify the suit property. Therefore, the Courts below cannot be blamed for not appointing the Advocate Commissioner to identify the suit property. It is for the parties to file appropriate application seeking for appropriate relief. When the defendants have not disputed the identification of the property in the written statement, the said contention cannot be raised for the first time in the Second Appeal.

14. As rightly contended by the learned Counsel for the respondent, the contention put forth by the learned Counsel appearing for the appellants is liable to be rejected for the reason that there is no pleading with regard to the said contention. Taking into consideration the oral and documentary evidences, the lower Appellate Court has rightly decreed the suit in toto. Since the facts and circumstances of the judgments relied upon by the learned Counsel for the appellants are different, they are not applicable to the present case. The ratio laid down in the judgments relied upon by the learned Counsel for the respondent squarely applies to the facts and circumstances of the present case.

15. In these circumstances, I do not find any ground, much less any substantial question of law, to interfere with the judgment and decree of the lower Appellate Court. The Second Appeal is liable to be dismissed. Accordingly, the same is dismissed. There shall be no order as to costs.

Sd/-
Assistant Registrar (CS-II)

/True Copy/

Sub Assistant Registrar



To

1. The Subordinate Judge, Padmanabhapuram.
2. The Additional District Munsif,
Padmanabhapuram.

Copy To:-

The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

- + 1 CC TO Mr.M.P.SENTHIL, ADVOCATE IN SR No. 9600
- + 1 CC TO Mr.V.M.BALAMOHAN THAMPI, ADVOCATE IN SR No. 9536

SSL

TE/SV-MMS : 14/03/2017 : 7P/6C

Pre-Delivery Judgment made in
S.A.(MD)No.250 of 2011
21.02.2017