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**Reserved on : 12.01.2017**

Delivered on:20.01.2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 20.01.2017

CORAM:

THE HONOURABLE MR.JUSTICE M.DURAI SWAMY

S.A.(MD)No.516 of 2011

and

M.P.(MD)No.1 of 2012

Philip Navaratinam .. Appellant/Appellant/Defendant

Vs.

1.Paul Ponniah(died) ... Respondent/Respondent/Plaintiff

2.Lalitha Paul Ponniah

3.Devakirubai Immanuel Paul

4.Devavaram Gamaliel Paul

5.P.Philipphanuel Dhanasekaran

(Respondents 2 to 5 are brought  
on record as L.Rs., of the deceased  
sole respondent vide court order  
dated 13.07.2011 made in  
M.P.(MD)No.2 of 2010)

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree made in A.S.No.56 of 2007, dated 25.04.2007, on the file of the Principal Subordinate Court, Madurai confirming the judgment and decree made in O.S.No.1422 of 2004 on the file of the Additional District Munsif Court, Madurai, dated 19.01.2007.

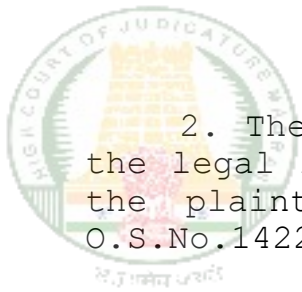
For Appellant : Mr.K.Sekar  
For Respondent : Mr.J.Mathesh  
for R.2 to R.5

: R.1 died

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JUDGMENT

The above Second Appeal arises against the Judgment and Decree passed in A.S.No.56 of 2007, on the file of the Principal Subordinate Court, Madurai, confirming the Judgment and Decree passed in O.S.No.1422 of 2004, on the file of Additional District Munsif Court, Madurai.



2. The defendant is the appellant. The respondents 2 to 5 are the legal representatives of the deceased first respondent, who was the plaintiff in the suit. The plaintiff filed the suit in O.S.No.1422 of 2004 for permanent injunction.

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

(i) According to the plaintiff, originally the suit property was owned by one Pappammal who is his mother. The said Pappammal purchased a vacant site in the year 1951 and later on constructed a house in the suit property. On 27.08.1974, the said Pappammal executed a settlement deed in favour of the plaintiff in respect of the suit property. Since the date of execution of the settlement deed, the plaintiff has been in possession and enjoyment of the same, without any hindrance or obstruction. The suit property is marked as "ABCD" in the plaint rough sketch.

(ii) According to the plaintiff, the defendant is his brother and he is enjoying the property which is adjacent to the suit property which was alleged to be given under a Will executed by their mother Pappammal. The suit property is having two gates. The plaintiff is enjoying both the gates from the date of settlement deed i.e., the right side gate and the gate on the middle. The middle gate is marked as "G" in the plaint plan. The said gate is the entrance for the vacant site of the plaintiff. The plaintiff utilises the middle gate for parking his son's two wheeler and for some other purposes. The defendant is having a separate gate for entering his property.

(iii) On 26.09.2004, the defendant along with his henchmen obstructed the plaintiff's son from entering through the middle gate and tried to lock the gate. The defendant also warned the plaintiff that he should not use the middle gate and also threatened the plaintiff with dire consequences. The plaintiff preferred a complaint to the police on 26.09.2004. The defendant has no right in respect of the middle gate. In these circumstances, the plaintiff filed the suit.

4. The brief case of the defendant is as follows:

According to the defendant, the suit property was purchased in the name of Pappammal by their father Late Ratnam. The mother of the plaintiff and the defendant was only a house wife. After the death of Ratnam, who died intestate, his legal heirs gave permissive possession of the suit property to the plaintiff to enjoy the same and the plaintiff had manipulated to execute a settlement deed dated 27.08.1974 as though Pappammal was the sole owner of the said property. There is a open space between the plaintiff's building on the eastern side and the suit property building on the western side. A major portion of the open space including a portion of the suit property belong to the defendant. The western boundary of the



plaintiff is not demarcated since he is not the owner of the suit property. Even as per the settlement deed dated 27.08.1974, the North-South boundary line starts exactly at the centre of the middle gate marked as "G" in the plaint plan. The said gate leads to the open space which absolutely belongs to the defendant. Due to the misunderstanding between the plaintiff and the defendant, the middle gate marked as "G" was locked by both the plaintiff and the defendant long time back. The plaintiff has no right over the middle gate. In these circumstances, the defendant prayed for dismissal of the suit.

5. Before the trial Court, on the side of the plaintiff, P.W.1 was examined and six documents viz., Exs.A.1 to A.6 were marked. On the side of the defendant, D.W.1 was examined, however no document was marked. The trial Court, taking into consideration the oral and documentary evidences let in by both parties, decreed the suit. Aggrieved over the judgment and decree passed by the trial Court, the defendant preferred an appeal in A.S.NO.56 of 2007 and the lower Appellate Court also confirmed the judgment and decree of the trial Court and dismissed the appeal. Aggrieved over the concurrent findings of the Courts below, the defendant has filed the above Second Appeal.

6. Heard Mr.K.Sekar, learned Counsel appearing for the appellant and Mr.J.Mathesh, learned Counsel appearing for the respondents.

7. At the time of admission of the above Second Appeal, the following Substantial Questions of Law arose for consideration.

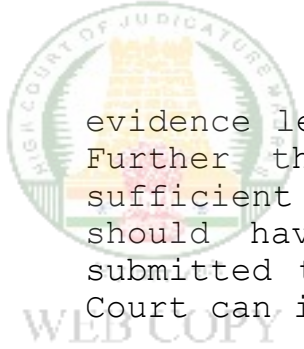
"a) Whether with the photo Ex.A-6 alone, can the boundary of the property be demarcated without the report of Advocate Commissioner or surveyor report?

b) Whether the Court on its own can give its own finding on perusal of the photo alone when there is neither any pleadings in the plaint nor any evidence let in by the plaintiff?

c) Whether the suit itself is maintainable when the plaintiff in his suit for injunction not to interfere in peaceful possession of gate, had asserted by affidavit in his interlocutory application that the gate is interfered by locking the gate by defendant?

d) Whether the suit can be decreed when the plaintiff who has to prove the case has not taken any steps to appoint an Advocate Commissioner to establish his case when the defendant repeatedly denied the rough sketch appended to the plaint?"

8. The learned Counsel appearing for the appellant submitted that the Courts below without taking into consideration the oral



evidence let in by the defendant, had erroneously decreed the suit. Further the learned Counsel submitted that in the absence of sufficient evidence produced by the plaintiff, the Courts below should have dismissed the suit. Further the learned Counsel submitted that under Section 100 of the Civil Procedure Code, this Court can interfere in the concurrent findings of the Courts below.

9. In support of his contentions, the learned Counsel relied upon the following judgments:

(i) In ***Hero Vinoth (minor) Vs. Seshammal*** reported in **(2006)5 Supreme Court Cases 545**, wherein the Honourable Supreme Court held as follows:

"25. In the case at hand the High Court found that the approach of the trial court and the first appellate court was erroneous inasmuch as they proceeded on the basis as if it is a case of easement of necessity. Had the trial court and the first appellate court considered the evidence in the light of the respective stands of the parties and then concluded one way or the other, the position would have been different. When the approach was fundamentally wrong the High Court cannot be faulted for having gone into the question as to what was the proved intention of the party as culled out from the partition deed. The relevant (translated) portion reads as follows:

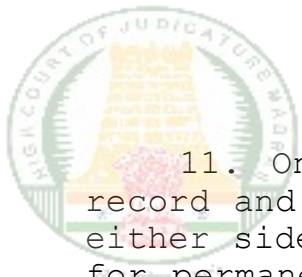
"Aravamutha Chettiar commonly enjoy the well situate on the portion allotted to Purushothaman Chettiar, likewise Purushothaman Chettiar commonly enjoy the lane situate on the portion allotted to Aravamutha Chettiar. Well is the exclusive property of Purushothaman Chettiar and lane is the exclusive property of Aravamutha Chettiar."

and

(ii) In ***Gajraj and Others Vs. Ramadhar and Others*** reported in **AIR 1975 ALLAHABAD 406** wherein the Allahabad High Court held as follows:

"5. In my view, therefore, the issuance of a commission for local investigation by the lower appellate Court will not necessitate a recourse to the provisions of Order 41, Rule 27, Civil Procedure Code. I agree with the lower appellate court that in the facts and circumstances of the case, it was desirable in the interest of justice that there should be a local investigation of the land in dispute with a view to ascertain its exact location and then to decide the controversy between the parties."

10. Countering the submissions made by the learned Counsel appearing for the appellant, the learned Counsel appearing for the respondent submitted that the Courts below have rightly decreed the suit, taking into consideration the oral and documentary evidences let in by the parties. Further the learned Counsel submitted that since the defendant had failed to establish the averments stated in the written statement and also that the plaintiff had established his case by oral and documentary evidences, the Courts below have rightly decreed the suit.

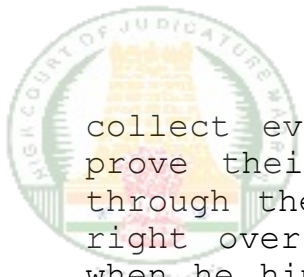


11. On a careful consideration of the materials available on record and the submissions made by the learned Counsel appearing on either side, it could be seen that the plaintiff has filed the suit for permanent injunction in respect of a gate marked as "G" in the plaint plan. According to the parties, the suit gate situates in the middle portion. The defendant contended that the plaintiff has no right in respect of the said gate. However he also contended that about 20 years ago, he and the plaintiff had locked the gate and therefore, the plaintiff should have filed the suit for mandatory injunction and not for bare injunction.

12. The Courts below took into consideration the admission made by the defendant that the suit gate is in enjoyment of the plaintiff and rejected the contention of the defendant stating that he and the plaintiff had locked the gate about 20 years ago. When the defendant had stated that they jointly locked the gate, it implies that the plaintiff has also got a right in the gate. If the plaintiff has no right in the gate, there is no necessity for locking the gate jointly with the defendant. Since the defendant had admitted the enjoyment of the gate by the plaintiff, the contention raised by him that the plaintiff should have filed the suit for mandatory injunction cannot be accepted. That apart, in order to substantiate the said contention, he has not adduced any acceptable evidence.

13. As a matter of fact, the defendant has not produced a single document before the trial Court to establish his case. No doubt, the burden of proof lies on the plaintiff to establish his case and when the plaintiff had established his case by adducing oral and documentary evidences in order to substantiate the averments stated in the written statement, the defendant could have produced some documentary evidences before the trial Court. The defendant also admitted in his evidence that in the Will executed by Pappammal in favour of the defendant, there is no mention about the gate in the Will. The trial Court also rejected the contention of the defendant that the plaintiff should have sought for appointment of an Advocate Commissioner to note down the boundaries for the reason that the defendant himself had admitted that the plaintiff is in possession and enjoyment of the property mentioned in Ex.A.1 settlement deed dated 27.08.1974. When the defendant himself had admitted that the plaintiff is in possession and enjoyment of the property mentioned in Ex.A.1 settlement deed, absolutely there is no necessity for appointing the Advocate Commissioner to ascertain the boundaries of the suit property.

14. Before the trial Court, Ex.A.6 photograph relating to the suit gate was produced by the plaintiff. However the defendant has not disputed the said photograph before the Courts below. When the defendant has not disputed Ex.A.6 photograph, there is no necessity for appointing the Advocate Commissioner. That apart, it is settled position that an Advocate Commissioner cannot be appointed to



collect evidence on behalf of the parties. The parties have to prove their case only by oral and documentary evidences and not through the Advocate Commissioner. When the defendant is claiming right over the gate by virtue of the Will executed by Pappammal, when he himself has stated that there is no mention about the gate in the said Will, the Courts below have rightly rejected the said contention raised by the defendant. After taking into consideration the oral and documentary evidences let in by the parties, the Courts below have concurrently decreed the suit.

15. The appellant/defendant has filed an application in M.P. (MD)No.1 of 2012 seeking for appointment of an Advocate Commissioner. Since the defendant had raised this contention even before the trial Court stating that the plaintiff has not sought for appointment of Advocate Commissioner, the trial Court has given a specific finding that there is no necessity for seeking for appointment of Advocate Commissioner in view of the specific admission made by the defendant. The said finding is applicable even now. Hence, the petition filed by the defendant seeking for appointment of Advocate Commissioner is liable to be rejected.

16. Though there is no dispute with regard to the ratio laid down in the judgments relied upon by the learned Counsel for the appellant, since the facts and circumstances of the present case are completely different, they are not applicable.

17. 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. The petition in M.P.(MD)No.1 of 2012 is also dismissed.

SD/-  
ASSISTANT REGISTRAR(CO)

/TRUE COPY/

SUB ASSISTANT REGISTRAR

To

1. The Principal Subordinate Court, Madurai.
2. The Additional District Munsif Court, Madurai.

+1 CC TO MR. K.SEKAR, ADVOCATE, SR NO.3475

+1 CC TO MR.J.MATHESH, ADVOCATE, SR NO.3668

SSL

MAS/SV-MMS:16.02.2017:6P/5C

Pre-Delivery Judgment made in