

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.06.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

S.A.No.299 of 2018
and C.M.P.No.8319 of 2018

K.Rajeswari

.. Appellant/Plaintiff

Vs.

K.Murali

.. Respondent/Defendant

PRAYER: Second Appeal is filed under Section 100 of C.P.C against the judgment and decree dated 26.10.2017 made in A.S.No.27 of 2016 on the file of the II Additional Sub Court, Cuddalore, confirming the judgment and decree dated 15.03.2016 made in O.S.No.460 of 2009 on the file of the Principal District Munsif Court, Cuddalore.

For Appellant : Mr.D.D.Baskar

J U D G M E N T

Second Appeal is filed against the judgment and decree dated 26.10.2017 made in A.S.No.27 of 2016 on the file of the II Additional Sub Court, Cuddalore, confirming the judgment and decree dated 15.03.2016 made in O.S.No.460 of 2009 on the file of the Principal District Munsif Court, Cuddalore.

2.The appellant is plaintiff and the respondent is defendant in O.S.No.460 of 2009 on the file of the Principal District Munsif Court, Cuddalore. The appellant is challenging the concurrent findings of the Courts below. The appellant filed the said suit for declaration of title to the suit 'B' schedule property and for recovery of possession. According to the appellant, originally 'A' schedule property and other properties belonged to one Muthiya Mudaliyar and one Sambandam Mudaliyar. The Muthiya Mudaliyar died intestate, leaving his two sons viz., Annamalai and Anandan as his legal heirs. After death of the said Muthiya Mudaliyar, his two sons Annamalai & Anandan, Sambandam Mudaliyar and his son Guru Nathan partitioned the properties by registered partition deed dated 17.08.1986. In the said partition, Sambandam Mudaliyar and his son Guru Nathan were allotted 4 acres and 40 cents in the 'A' schedule

properties in the Survey Nos.16/1-6.06, 16/2-0.60, 17/1-2.64 and 18/1-3.48, out of 12 acres and 78 cents. The appellant purchased the said property by the deed of sale dated 03.11.1994 for valuable consideration from Sambandam Mudaliyar and his son Guru Nathan. From the date of purchase, the appellant is in possession and enjoyment of the 'A' schedule property and she is cultivating and paying kist to the revenue authority.

2(a).The respondent purchased the adjacent property in Survey No.6/2 from Annamalai and Anandan, sons of Muthiya Mudaliyar on 19.06.2003 without ascertaining the measurements in the field. From the date of purchase, the respondent created problem with possession of the 'A' schedule property. The appellant applied for resurvey on 20.09.2005 for which resurvey was done on 03.10.2005 and boundaries and measurements of 'A' schedule property was ratified by the Surveyor and the same was acknowledged by the Tahsildar by the letter dated 16.11.2005.

2(b).The respondent earlier filed O.S.No.554 of 2005 on the file of the Additional District Munsif Court, Cuddalore, for declaration of his property, permanent injunction and for declaration that sub division made in favour of the appellant is wrong, illegal and ultra vires. In the said suit, an Advocate Commissioner was appointed without hearing the appellant. The said Advocate Commissioner submitted a report along with plan and pointed out straight survey line, survey stones and curved ridges (Varappu). After contest, the learned Trial Judge by conversion of the Ares into cents, rendered a wrong finding that the appellant had obtained patta for one cent excess. The learned Trial Judge in the decree had held that the appellant has title to the extent of 4 acres and 40 cents described in 'A' schedule property. The appellant filed a Review Petition No.1213 of 2007 in O.S.No.554 of 2005 before the Additional District Munsif Court, Cuddalore. The said Review Petition was allowed, correcting the mistake that appellant obtained patta for one cent in excess. After judgment in the said suit, a Panchayat was convened, wherein the respondent agreed for a compromise, based on which the appellant formed a new ridge in survey straight line on 12.11.2009. Within two days, the respondent changed his mind and removed the straight line survey stones and ridges. On 17.11.2009, the respondent encroached 'B' Schedule property with the help of unlawful elements. The respondent has no right to encroach the 'B' schedule property. The appellant gave police complaint on 18.11.2009 and filed the present suit for the relief stated above.

3.The respondent filed written statement and additional written statement on 15.03.2010 and 25.02.2011 respectively. The suit in O.S.No.554 of 2005 filed by the respondent was decreed, declaring the title of the respondent to the suit

property i.e., for 7 acres and 85 cents and granted permanent injunction. The appellant did not file any Appeal challenging the same and hence the said judgment has become final. The present suit is hit by Principles of res judicata as per Section 11 of CPC. The issues and parties involved in both the suits are one and the same. The respondent also denied that the appellant purchased 4 acres and 40 cents and she is in possession and enjoyment of the suit property and she is also cultivating the property.

3(a).According to the respondent, no sub-division was made in the field as claimed by the appellant and any sub-division based on the sale deed will not confer any title to the property. He also denied that he is creating problem in the southern boundaries of the 'A' schedule property and laying survey stone and acknowledgment by Tahsildar. The respondent also denied the Panchayat after judgment in O.S.No.554 of 2005 and straight survey line laid on 12.11.2009 and within two days, the respondent removed the boundary line and formed the curved ridges. The curved ridges between the appellant and respondent is in existence for more than 25 years to the knowledge of the appellant and the appellant is estopped from raising the issue in the present suit.

4.The respondent filed additional written statement and contended that the vendor of the appellant and respondent have sold more extent than the title they had.

5.Based on the pleadings, the learned Trial Judge framed necessary issues and additional issues. Before the Trial Court, the appellant examined 2 witnesses as P.Ws.1 and 2 and marked 12 documents as Exs.A1 to A12. The respondent examined himself as D.W.1 and marked 6 documents as Exs.B1 to B6.

6.The learned Trial Judge considering the pleadings, oral and documentary evidence, dismissed the suit, holding that the appellant failed to prove the fact that the respondent trespassed the suit property on 17.11.2009 and there is suspicion about the alleged police complaint dated 18.11.2009, marked as Ex.A12, alleged to have been given by the appellant to the police.

7.Against the said judgment and decree dated 15.03.2016 made in O.S.No.460 of 2009, the appellant filled A.S.No.27 of 2016 on the file of the II Additional Sub Court, Cuddalore. The learned I Appellate Judge framed necessary points for consideration. Considering all the materials on record, judgment and decree of the Trial Court and arguments of the counsel for parties, dismissed the Appeal, confirming the judgment and decree of the trial Court.

8. Against the concurrent findings of the Courts below, the plaintiff has come out with the present Second Appeal.

9. The learned counsel appearing for the appellant contended that the Courts below failed to frame proper issues and failed to appreciate the oral and documentary evidence properly. The Courts below failed to see that appellant is an earlier purchaser and respondent has shown the appellant as owner of the northern side of the property and having admitted appellant's purchase of 4 acres and 40 cents, the respondent is estopped from denying the title of the appellant. The Courts below failed to see that shortage of extent purchased by appellant and respondent was not pleaded in O.S.No.554 of 2005 and judgment and decree in O.S.No.554 of 2005 constitutes res judicata. The Courts below having appointed the Advocate Commissioner with Surveyor, cannot ignore the report and plan of the the Advocate Commissioner and failure to refer the Surveyor's plan proves encroachment made by the respondent. The Courts below failed to take into consideration admission of the respondent.

10. Heard the learned counsel for the appellant and perused the materials available on record.

11. The issue in the present suit, O.S.No.460 of 2009 is not with regard to the title of the appellant to the land measuring 4 acres and 40 cents. Similarly, title of the respondent to land measuring 7 acres and 85 cents is also not an issue in the present suit.

12. The issue in the present suit is whether on 17.11.2009, the respondent encroached the 'B' schedule property alleged to be owned by the appellant. According to the appellant, after the judgment in earlier suit in O.S.No.554 of 2005 and order in Review Petition No.1213 of 2007 dated 09.10.2009 filed to review the judgment and decree in O.S.No.554 of 2005, there was a Panchayat convened and respondent agreed for compromise. Based on the said compromise, the appellant laid straight survey line on 12.11.2009. But within two days, the respondent changed his mind, removed the survey stone on the southern boundary and ridges and encroached the 'B' schedule property on 17.11.2009 and formed the curved ridges. According to the appellant, she gave a complaint to the police on 17.11.2009. The said police complaint was marked as Ex.A12. The Courts below considering the exhibits, found that the date of damage caused to the ridges have been inserted in the complaint and date of complaint has been over written. These two alterations created suspicion. The appellant has not produced CSR copy or any other related documents to prove that the complaint was given on that day.

12(b).According to the appellant, after the decree in O.S.No.554 of 2005, a Panchayat was held and the respondent agreed for compromise and straight survey line was laid in the place of curved ridges. The respondent denied the agreeing for compromise in Panchayat. P.W.1, in his cross examination has stated that the Panchayat was convened only in the year 2004 and thereafter no Panchayat was convened. P.W.2 in his evidence has deposed that the Panchayat was convened, but nobody attended the same. Considering these evidence, the Courts below have disbelieved the contention of the appellant that on 12.11.2009, there was a Panchayat, the respondent agreed for compromise, appellant laid a straight survey line and within 2 days, the respondent removed the boundary stones and again formed the curved ridges. In addition to the above facts, the Courts below have considered the report of the Advocate Commissioner appointed in O.S.No.554 of 2005 and present suit in O.S.No.460 of 2009 and held that the Advocate Commissioner has stated in the report that curved ridges is old one with fully grown grass.

12(c).The contention of the learned counsel for the appellant that the Courts below failed to consider the admission of the respondent is without merits. The learned I Appellate Court has extracted the relevant portion of the evidence of D.W.1. In the said evidence, the respondent, as D.W.1 has categorically denied that he encroached the property of the appellant, but he has stated that he is enjoying his property only. The Courts below have also taken into consideration the admitted facts that both the appellant and respondent did not measure the property before their purchase. They purchased the property only based on the boundaries. When there is a dispute with regard to extent, the boundaries will prevail. Both the Courts below have considered all the facts in proper perspective and held that appellant has failed to prove that respondent encroached 'B' Schedule property. The Courts below have given valid reason for arriving at the said finding of facts. There is no error warranting interference by this Court with the judgment and decree of the Courts below. No question of law much less than the substantial question of law has been raised in this Second Appeal.

13.In the result, the Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS VI)

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Sub Assistant Registrar

LPP/gsa

To

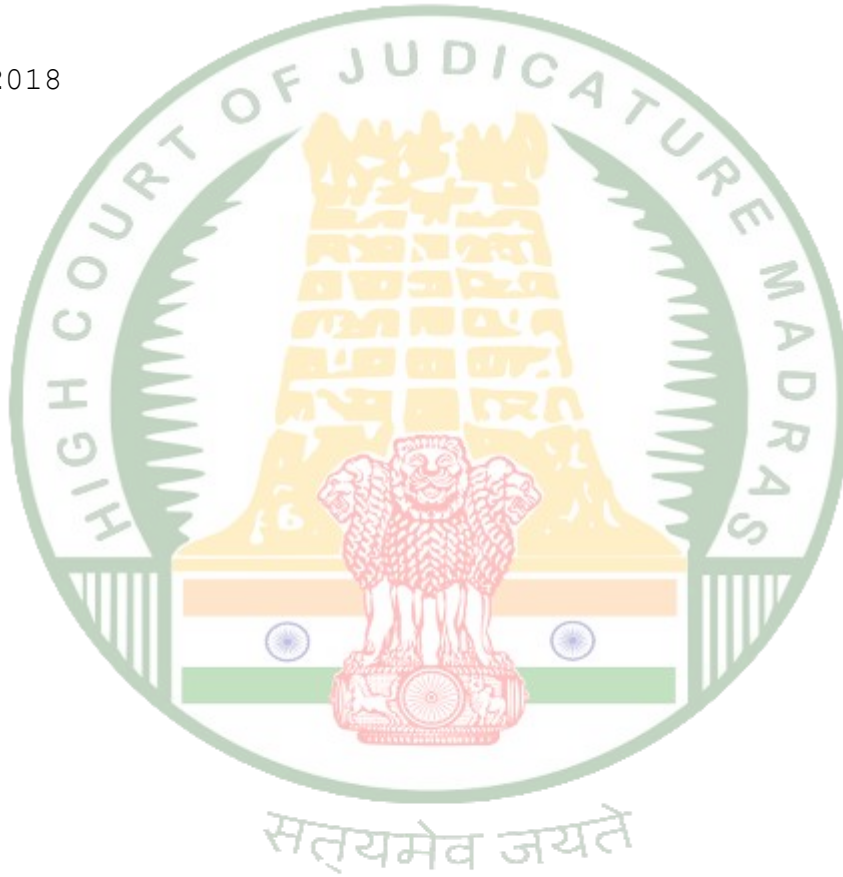
1.The II Additional Sub Judge, Cuddalore

2.The Principal District Munsif, Cuddalore

+1cc to Mr.R.Gururaj, Advocate sr.no.35288

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