

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 19.07.2018
Pronounced on: 12.12.2018

CORAM:

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM

S.A.No.2157 of 2001

Kannaiyan ... Appellant/plaintiff

Vs.

1.Ramalingam

2.Ravichandran

3.Narayanan

4.Gurumoorthy

... Respondents/Defendants

Prayer:-Second Appeal filed under Section 100 of C.P.C, against the judgment and decree made in A.S.No.56 of 2000 dated 24.10.2000 on the file of the Additional Sub-Court, Mayiladuthurai in confirming the judgment and decree made in O.S.No.301 of 1997 dated 23.03.2000 on the file of the Principal District Munsif Court, Mayiladuthurai.

For Appellant : Mr.S.Sounthar

For Respondents : Mr.A.Muthukumar

J U D G M E N T

This second appeal has been filed by the plaintiff against the judgment and decree passed by the Additional Sub-Judge, Myladuthurai in A.S.No.56 of 2000 dated 24.10.2000 confirming the judgment and decree passed by the Principal District Munsif, Myladuthurai in O.S.No.301 of 1997 dated 23.03.2000.

2. The appellant herein has filed a suit in O.S.No.301 of 1997 on the file of the Principal District Munsif, Myladuthurai, to declare that the suit property absolutely belongs to the

plaintiff, consequently to restrain the defendants by means of permanent injunction from extending the roof in the suit property or restraining the defendants from interfering with the plaintiff's peaceful possession and enjoyment of the suit property and for mandatory injunction to remove the wall which was constructed by the defendants in the 'AD' portion as mentioned in the plaint plan.

3. The learned District Munsif by the judgment dated 23.03.2000 has dismissed the said suit with costs. Aggrieved by the same, the plaintiff has filed the appeal in A.S.No.56 of 2000 on the file of the Additional Sub-Judge, Myladuthurai. The learned Additional Sub-Judge, by the judgment dated 24.10.2000 has dismissed the said appeal and confirmed the judgment and decree passed by the trial court. Feeling aggrieved, the plaintiff has filed the present second appeal. For the sake of convenience, the parties are referred to as described before the trial court.

4. The averments made in the plaint are, in brief, as follows:

The suit property is a lane which is shown as 'ABCD' in the plaint plan. The suit property and other properties which are situated in S.No.333 were originally belonged to the plaintiff's family. The plaintiff's father Kesava Rao and his brother Govindasami Rao had divided the family properties under a registered partition deed dated 08.06.1948. In the said partition, the land measuring 1½ cents and the house situated therein were allotted to the share of the plaintiff's father. Likewise, the land measuring about 1½ cents and the house situated therein were allotted to Govindasami Rao. Thereafter, the plaintiff's father had purchased the share which was allotted to his brother viz., Govindasami Rao. So the plaintiff's father had become absolute owner of the land measuring about 3 cents and the houses thereon. Thereafter, the plaintiff's father had removed the thatched house and constructed a stone house. Subsequently, the plaintiff's father died. Thereafter, the plaintiff and his brother had divided the family properties orally and the property which is situated adjacent to the suit property were allotted to the share of the plaintiff. The plaintiff is enjoying those properties by paying the house tax etc., The suit property, as already stated, is a lane and the said lane forms part of the property which was allotted to the plaintiff in the oral partition. The property of the defendants is situated on the western side of the 'AB' line as shown in the plaint. The defendants have constructed a wall to the height of 12 feet on the 'AB' line. On the northern side of the said wall on the line of 'BE', a live fence is there. With a view to prevent the plaintiff from enjoying the ABCD

lane, defendants have constructed a wall to the height of 4 feet on 'AB' line. Further, the defendants have an idea to construct a new house on their portion by extending roof in the suit land. Hence, the plaintiff was constrained to file the suit for declaration, permanent injunction and mandatory injunction.

5. The averments made in the written statement filed by the first defendant and adopted by the defendants 2 to 4 are, in brief, as follows:

The suit property does not belong to the plaintiff as claimed in the plaint. In the suit property, there was an old house of the defendants. The house of the plaintiff and the house of the defendants were facing southwards. There was a common wall in between the houses of both parties and above the common main wall, the roof of the plaintiff and the defendants were continuous and interwoven. This common wall was eastern main wall for the defendants' house and western main wall for the plaintiff. The defendants have demolished their own house in front portion and have put up a new house erecting a separate eastern main wall very adjacent to the old common wall. Fortunately, the defendants did not destroy the old flooring up to the eastern main wall. The flooring in the disputed front portion resembles the same under the occupation of the defendants on the west and the said flooring is continuous. This would show that the entire portion including the disputed portion was under the occupation of the defendants. It is false to say that the defendants have put up their new eastern wall in the AB line.

6. The portion marked as 'B' in the Advocate Commissioner's plan is north of the defendants new roof in the 'A' portion. The old house of the defendants in the 'B' portion was continuous up to the main wall on the east. As a matter of fact, the kitchen portion of the defendants was adjacent to the eastern main wall east of the 'B' portion. The smoke sediments spread upon the western face of the main wall will clearly indicate the truth that the defendants were having their kitchen in that space. As the roof in the suit portion became old and dilapidated, the defendants pulled down the roof in that area and reduced the house within the portion marked as 'B' in the Commissioner's report.

7. As soon as the defendants had put up a new roof in the front portion, taking advantage of the same, the plaintiff is making false claim over the defendants' property. The averment that the suit lane served as a lane portion for the plaintiff is not correct. There is no access to the backyard of the plaintiff from the suit lane. The disputed portion was never in the occupation of the plaintiff. It is part and parcel of the defendants' property. The plan attached to the plaint does not

reflect the real facts. The suit property is under the occupation and enjoyment of the defendants for many decades. So even if the plaintiff is found to have title over the same, it has been lost by adverse possession of the defendants. Therefore, the defendants prayed to dismiss the suit.

8. Based on the aforesaid pleadings, the learned District Munsif has framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1 and he also examined one more witness as PW2. He has marked Ex.A1 to Ex.A4 as exhibits on his side. On the side of the defendants, the first defendant was examined as DW1 and one more witness was examined as DW2. No exhibits were marked on the side of the defendants. The report and plan filed by the Advocate Commissioner have been marked as Exs.C1 and C2 respectively.

9. The learned District Munsif, after considering the materials placed before him, found that the plaintiff failed to prove that the suit 'B' schedule property belongs to him. He further found that physical feature of the suit property as noted by the Advocate Commissioner in his report and plan would probabalise the case of the defendants. Accordingly, he dismissed the suit with costs. Aggrieved by the same, the plaintiff has filed an appeal in A.S.No.56 of 2000 on the file of Additional Sub-Judge, Myladuthurai. The learned Additional Sub-Judge, Myladuthurai, has dismissed the said appeal and confirmed the judgment and decree passed by the trial court. Feeling aggrieved, the plaintiff has filed the present second appeal.

10. This court at the time of admitting the second appeal has formulated the following substantial questions of law:-

"i) Whether the judgments of courts below are liable to be set aside in its failure to consider the material admissions of DW1 and DW2?

ii) Whether the judgment of lower appellate court is vitiated in view of its failure to frame proper points for consideration as mandated by Order 41 Rule 31 of CPC and various decisions of this Hon'ble Court?"

11. Heard Mr.S.Sounthar, learned counsel for the appellant and Mr.A.Muthukumar, learned counsel for the respondents.

12.Substantial Questions of Law 1 and 2:

Learned counsel for the appellant has submitted that the courts below failed to appreciate the evidence of PW1 and PW2 in proper perspective. He further submitted that the courts below

failed to consider the admissions made by DW1 and DW2 with regard to the existence of suit land. He further submitted that the courts below relying upon the Advocate Commissioner's report and plan came to the conclusion that the case of the defendants alone would probabalise. He further submitted that it is well settled that based on the Commissioner's report, possession cannot be decided, but the courts below gave much importance to the Commissioner's report and plan and therefore, he prayed to allow the second appeal and set aside the judgments and decrees passed by the courts below and decreed the suit as prayed for.

13. Per contra, learned counsel for the respondents/defendants has submitted that since the plaintiff has filed a suit for declaration and permanent injunction, the burden is upon him to prove his title over the suit property, but he failed to prove the title over the suit property. He further submitted that it is true that the commissioner's report cannot be relied on for the purpose of proving possession but it can be relied on for the purpose of proving the physical features of the property from which certain inference can be drawn. He further submitted that the commissioner's report and plan would clearly show that the defendants have not constructed the wall in the place where originally the parent wall was in existence and on the contrary, the said wall was constructed adjacent to the original wall on the western side. He further submitted that the commissioner's report and plan would show that the parent wall and the fence which is situated on the back side would run on the straight line and that would show that the suit lane fall on the side of the defendants' property. He further submitted that the Advocate Commissioner's report and plan would also show that the defendants have used the disputed portion as kitchen and taking into consideration of the aforesaid facts, the trial court has rightly dismissed the plaintiff's suit and the same has been confirmed by the first appellate court and in the said factual concurrent findings, this court cannot interfere. In support of his contentions, he relied upon the decision of this court in Chellathurai and 5 others Vs. Perumal Nadar, 1998 3 LW 119.

14. The plaintiff has enclosed a plan along with the plaint. In the said plan, he has shown a lane as 'ABCD'. According to the plaintiff, the said 'ABCD' portion belongs to him. To substantiate his case, the plaintiff has not taken any steps to measure the properties of both parties with the help of a surveyor. On the contrary, he has filed an application to appoint an Advocate Commissioner to note down the physical features alone. Accordingly, an Advocate Commissioner was appointed to note down the physical features. The Advocate Commissioner also inspected the suit property and filed a report with a rough plan. The report and rough plan filed by the

Advocate Commissioner have been marked as Exs.C1 and C2 respectively. The Advocate Commissioner's report and plan would show that the defendants' property is situated on the western side and the plaintiff's property is situated on the eastern side. Exs.C1 and C2 also would show that the defendants have constructed a new wall on the western side of the plaintiff's property just adjacent to the original common wall. Further, the said original common wall and the fence which is situated on the back side runs on the straight line.

15. In Chellathurai and 5 others Vs. Perumal Nadar, (supra), this court in paragraph No.9 has observed as follows:

"9. According to me, Ex.C-1 report and Ex.C-2 plan will have a great bearing in deciding the issue in this case. Unfortunately, the lower appellate court has not taken into consideration that material evidence, except for a mere statement that a Commissioner's report has been filed. There is no discussion about Exs.C-1 and C-2 report and plan. Why I am referring to Ex.C-1 report is because, nobody has got any objection to the lie of the property as identified by the Commissioner. It is an impartial report even according to both parties, and the same has been prepared by an independent person. All the other piece of evidence are interested. I am not saying for a moment that the Commissioner's report has to be relied on for the purpose of proving possession. I am relying on the Report and Plan only for the purpose of proving the physical features of the property, from which certain inference can be drawn. "

From the aforesaid decision, it is clear that though the Advocate Commissioner's report and plan cannot be relied on for the purpose of proving possession, they can be relied on for the purpose of proving physical features of the property, from which, certain inference can be drawn. In this case, as already pointed out that the Commissioner's report and plan would clearly show that the defendants have constructed the new wall just adjacent to the original wall on the western side. Further the original wall and the fence which is situated on the back side runs on the straight line. So, it is clear that the defendants have not encroached the plaintiff's property. Taking into consideration of the aforesaid facts, the trial court has held that the plaintiff has failed to prove his case and the first appellate court also has confirmed the same. In the said concurrent findings, this court cannot interfere. Accordingly, the substantial questions of law are answered against the appellant/plaintiff.

16. In the result, the second appeal is dismissed confirming the judgments and decrees passed by the courts below. No costs.

gv

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Additional Sub-Court,
Mayiladuthurai.

2. The Principal District Munsif Court,
Mayiladuthurai.

3. The Section Officer,
V.R. Section,
High Court, Madras.

+1cc to Mr.S,Sounthar, Advocate, S.R.No.86125

+1cc to Mr.A.Muthukumar, Advocate, S.R.No.86635

S.A.No.2157 of 2001

kak (19/03/2019)

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