

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.02.2018

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

S.A.No.526 of 2000 and
C.M.P.No.4509 of 2000

Balaiyan @ Balan

... Appellant/Plaintiff

-Vs-

1. Sundarambal

2. Sambandam

... Respondents/Defendants

PRAYER: Second Appeal filed under Section 100 C.P.C. against the judgment and decree made in A.S.No.76 of 1998 dated 06.04.1999 on the file of the Additional Subordinate Judge, Mayiladuthurai, reversing the judgment and decree made in O.S.No.315 of 1990 dated 31.03.1998 on the file of the District Munsif, Sirkali.

For Appellant : Mr.S.Sounthar

For Respondents: Mr.V.Prabhu for R1- No Appearance
Notice Served for R2 - No Appearance

J U D G M E N T

This Second Appeal has been filed against the judgment and decree made in A.S.No.76 of 1998, dated 06.04.1999, on the file of the learned Additional Subordinate Judge, Mayiladuthurai, reversing the judgment and decree made in O.S.No.315 of 1990, dated 31.03.1998, on the file of the learned District Munsif, Sirkali.

2 The plaintiff is appellant and defendants are respondents in this Second Appeal. For the sake of convenience, the parties are referred to as per their rank in the original suit.

3 The plaintiff filed a suit in O.S.No.315 of 1990, to declare the right of the plaintiff to use the suit "A" schedule property as common pathway, for permanent injunction restraining the defendants from interfering with suit "A" schedule property, to remove the superstructure made in suit "B" schedule property and to surrender the possession of suit "B" schedule property to the plaintiff.

4 The case of the plaintiff is that the suit property in Survey No.182/12 measuring an extent of 0.04 cents was assigned to him by way of assignment patta dated 14.09.1972. Subsequently

he constructed a house in the vacant site and since then he is in possession and enjoyment of the said property. "A" schedule property was used as common path way for many years and that the defendants were created hindrance on the same. While that being so, the defendants encroached "B" schedule property and put up a thatched shed. In this connection, there was a dispute arose between the plaintiff and the defendants. There was a panchayat held on 25.06.1989 to resolve the dispute between the parties, wherein it was agreed by the defendants that they will not create any hindrance in the common path way and undertakes to remove the thatched shed put up in the "B" schedule property. But the defendants failed to keep up their words as promised by them.

5 The defendants stoutly denied the averments made in the plaint by stating that the plaintiff has forcibly obtained the signature of the first defendant in the consent letter. The "B" schedule property was not belongs to the plaintiff and he has no right over the property, since the "B" schedule property was enjoyed by the predecessors of the defendants and by the defendants even now. Hence the defendants are legally entitled for "B" schedule property, by means of adverse possession.

6 Based on the pleadings put forth by both the counsels, the trial court has framed the following issues:

1. Whether the plaintiff is entitled for declaration and permanent injunction in respect of suit "A" schedule property?
2. Whether the panchayat held on 25.06.1989 is true, valid and whether is binding on the defendants?
3. Whether the plaintiff is entitled to recovery of possession in respect of suit "B" schedule property?
4. Whether the defendants have got valid right on suit "B" schedule property?
5. Whether the case has been rightly valued for court fee?
6. To what reliefs the plaintiff is entitled to?

7 Before the trial court, the plaintiff examined himself as P.W.1 and marked documents Ex.P1 to Ex.P5. On the side of the defendants, the first defendant examined herself as D.W.1 and marked documents Ex.D1 to Ex.D38.

8 The trial court, after considering the oral and documentary evidence, dismissed the suit in respect of "A" schedule property and decreed the the suit in respect of "B" schedule property in favour of the plaintiff, by judgment and

decree dated 31.03.1998.

9 Aggrieved over the judgment and decree of the trial court dated 31.09.1998, the defendants preferred an appeal in A.S.No.76 of 1998 before the Additional Sub-court, Mailaduthurai, in which the plaintiff also filed a cross appeal. The first appellate court heard both the appeals together and taken the following points for consideration:

1. Whether the plaintiff is entitled for declaration and permanent injunction in respect of suit "A" schedule property?
2. Whether the plaintiff is entitled to recovery of possession from the defendants in respect of suit "B" schedule property?
3. To what reliefs the appellants are entitled to finally?
4. To what reliefs the appellant in cross appeal is entitled to finally?

10 After hearing the arguments of both the learned counsel on either side and considering the above said facts, as the first appellate court a fact finding court, it re-appreciated the entire evidence on records and arrived at a finding independently and thereby the cross appeal filed by the plaintiff was dismissed and the appeal filed by the defendants was allowed by judgment and decree dated 06.04.1999, wherein the judgment and decree of the trial court insofar as the "A" schedule property is concerned was confirmed and the decree insofar as the "B" schedule property was reversed by favouring the defendants.

11 Aggrieved against the judgment and decree dated 06.04.1999 made by the first appellate court in A.S.No.76 of 1998, the plaintiff has come forward with the present second appeal. At the time of admitting the second appeal, this Court framed the following substantial questions of law for consideration:

a. Whether the burden of proving undue influence, coercion, etc., pleaded by defendant lies on her or it is for the plaintiff to prove the negative that there is no undue influence, etc., whether the courts below erred in casting the burden on working person?

b. Whether the judgments of courts below vitiated in overlooking the material admission of DW1 in written statement as well as evidence on box, that suit A schedule property is a common pathway?

12 When the matter was taken up for hearing, the learned counsel for the appellant is present and none appeared on behalf of the respondents to contest the case.

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

14 According to the learned counsel for the appellant, property in Survey No.182/12 measuring to an extent of 0.04 cents was assigned to him by way of assignment patta dated 14.09.1972, which includes the "B" schedule property also and since then he is in possession and enjoyment of the properties. "A" schedule property was used as common path way for many years and that the defendants were creating hindrance on the same. The defendants encroached the "B" schedule property and put up a thatched shed. In this connection, there was a panchayat held on 25.06.1989, wherein it was resolved and agreed by both the parties that the "A" schedule property can be used as common path way and to surrender the "B" schedule property to the plaintiff. The plaintiff and the defendants had signed in the muchalika entered into between them in the Panchayat.

15 It was contended by the learned counsel for the plaintiff that when the defendants taken a defence that the signature found in the muchalika was forcibly obtained by the plaintiff, the burden of proof is casted on the defendants only to prove the same.

16 On a perusal of the materials, it goes to show that both the courts below have concurrently held that there is no common path way in "A" schedule property as alleged by the plaintiff and dismissed the suit with regard to "A" schedule property. Insofar as the "B" schedule property is concerned, the first appellate court reversed the judgment and decree of the trial court and favoured to the defendants by observing that there was no material evidence to prove that the "B" schedule property was included in the assignment patta dated 14.09.1972 and also the fact that the defendants encroached the same on 10.06.1992. As the first appellate court is fact finding court, unless there is any perversity in respect of appreciation of facts and evidence, this Court can not interfere with the said findings.

17 In view of the above discussions, this court is of the considered view that in the absence of any substantial material to prove the contention of the plaintiff, the plaintiff is not entitled to claim any right over the suit properties. The first appellate court has rightly held that the plaintiff ought to have produced the copy of muchalika or any other record to show that there was a panchayat settlement had taken place between

both the parties, and the defendants agreed to use the "A" schedule property as common path way and to surrender the "B" schedule property. When there is a failure on the part of the plaintiff to produce any panchayat muchalika and examining any of the panchayatars, the contention of the plaintiff is not legally sustainable. It is a cardinal principle that the plaintiff has to prove his case and he cannot take advantage of the weakness of the defendant's case. In this case the plaintiffs miserably failed to prove his case in a manner known to law. Hence this second appeal is liable to be dismissed.

18 In the result, the second appeal is dismissed as there is no substantial questions of law involved in this second appeal. The learned counsel for the plaintiff has not made out any case to interfere with judgment and decree dated 06.04.1999 made in A.S.No.76 of 1998, on the file of the Additional Subordinate Judge, Mayiladuthurai. Consequently connected miscellaneous petition is closed. No costs.

-s/d-

Assistant Registrar(CS-II)

True Copy

Sub-Assistant Registrar

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To

1. The Additional Subordinate Judge, Mayiladuthurai.
2. The District Munsif, Sirkali.
3. The Section officer
VR Section, High Court, Madras(2 copies)

+1 Cc to Mr.S. Sounthar, advocate sr 14208.

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S.A.No.526 of 2000

BR(CO)
SP(10/04/2018)

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