

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.07.2018

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

S.A.No.1300 of 2013 and
M.P.Nos.1 of 2013 & 2 of 2014 and
C.M.P.No.6236 of 2018

Chandra Anathasayanam

... Appellant/Appellant/1st Defendant
-Vs-

1. D.K.Selvam ... Respondent/1st Respondent/plaintiff

2. Anuman ... Respondent/2nd Respondent/2nd Defendant

PRAYER: Second Appeal filed under Section 100 C.P.C. against the judgment and decree dated 23.07.2013 in A.S.No.16 of 2012 on the file of the Sub Court, Tirupattur, Vellore District confirming the judgment and decree dated 29.03.2012 in O.S.No.117 of 2006 on the file of the District Munsif, Tirupattur.

For Appellant :Mr.V.Ayyadurai, Senior Counsel for
M/s.R.Maheswari

For Respondents :Mr.J.R.K.Bhavanandham for R1
R2 - Notice served - No Appearance

J U D G M E N T

This Second Appeal has been filed against the judgment and decree dated 23.07.2013 in A.S.No.16 of 2012 on the file of the Sub Court, Tirupattur, Vellore District confirming the judgment and decree dated 29.03.2012 in O.S.No.117 of 2006 on the file of the District Munsif, Tirupattur.

2 The appellant is 1st defendant, 1st respondent is plaintiff and 2nd respondent is 2nd defendant in the original suit. 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.117 of 2006 for the relief of declaration and permanent injunction.

4 The case of the plaintiff is that he is the absolute owner of the suit property based on the will dated 03.02.1985 executed by one Yogasundaram in favour of the plaintiff. Since

the defendants trespassed into the property, the plaintiff filed a suit for declaration and permanent injunction.

5 The defendants filed their written statement denying all the averments in the plaint by stating that they are the absolute owners of the suit property and the plaintiff wrongly mentioned the description of the properties in the plaint. The suit properties situated at S.No.31/4A is measuring an extent of 9.38 acres. The plaintiff failed to prove the fact that where the 60 cents claimed by the plaintiff is lying within the 9.38 acres. Hence the suit is liable to be rejected.

6 Based on the pleadings of the parties, the trial court has framed the following issues:

1. Whether the description of the suit properties has been rightly given or not?
2. Whether the plaintiff is in possession of the suit properties?
3. Whether the agreement dated 22.09.1971 has been executed with respect to the suit properties?
4. Whether there is cause of action for the suit?
5. Whether the plaintiff has paid the correct court fee?
6. Whether the plaintiff is entitled to suit prayer?

7 Before the trial Court to prove the claim of the plaintiff, P.W.1 to P.W.5 were examined and marked documents Ex.A1 to Ex.A10, on the side of the defendants, D.W.1 & D.W.2 were examined and Ex.B1 to Ex.B25 were marked.

8 The trial Court after considering both side arguments and oral and documentary evidences adduced by both the parties, decreed the suit in favour of the plaintiff by judgment and decree dated 29.03.2012.

9 Aggrieved against above judgment and decree dated 29.03.2012, the first defendant has filed an appeal in A.S.No.16 of 2012 before the Subordinate Court, Tirupattur, Vellore District.

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 dismissed the appeal by judgment and decree dated 23.07.2013 and confirmed the judgment and decree of the trial Court.

11 Aggrieved against the judgment and decree dated 23.07.2013 made by the first appellate court in A.S.No.16 of 2012, the first defendant has preferred the present second appeal. At the time of admitting the second appeal, this Court framed the following substantial questions of law for consideration:

- (1) Whether the Courts below have substantially erred in law in placing the burden of proof on the defendant while ignoring the well settled principle of law that the plaintiff should prove his case?
- (2) Whether the Courts below have failed to follow the time tested proposition of law that the plaintiff should succeed on the strength or fail on the strength of his case, pleadings and evidence and not on the weakness of the defence?
- (3) Whether the Court below have failed to follow the principles laid down in 100 L.W.895, 1996 (1) MLJ 118 and 1998 (2) CTC 157 that the plaintiff is bound to prove his case and has to succeed based on his strength and evidence?
- (4) Whether the Courts below are right in decreeing the suit in the absence of site inspection or any other material in the formal report of a Advocate Commissioner or Surveyors report identifying property?

12 The learned Senior Counsel appearing for the appellant/1st defendant would submit that there is no dispute with regard to the survey number mentioned in the plaint, the identity of the property alone disputed. Hence an Advocate Commissioner may be appointed for the purpose of identifying the properties in question.

13 The learned counsel appearing for the first respondent/plaintiff has no serious objection and he has also accepted for appointment of an Advocate Commissioner to identify the properties in question.

14 Heard the learned counsel appearing on either side and perused the materials available on record.

15 On perusing the records, it is seen that neither the trial Court nor the first appellate Court has appointed an Advocate Commissioner to identify the properties in question. Since no Advocate Commissioner has been appointed in the original suit or appeal to identify the properties in question and also considering the fact that both the counsel have agreed to appoint an Advocate Commissioner to identify the properties,

without going into the merits of the case, this Court is inclined to set aside the judgment and decree dated 23.07.2013 made by the first appellate court in A.S.No.16 of 2012 and remand back the matter to the first appellate Court for considering the issue afresh.

16 Accordingly, the judgment and decree dated 23.07.2013 made in A.S.No.16 of 2012 is hereby set aside for the limited purpose for appointing an Advocate Commissioner to identify the properties in question. The first appellate Court is directed to appoint an Advocate Commissioner within ten days on receipt of the communication of the this order to identify the properties in question. The Advocate Commissioner shall identify the land in question with qualified surveyor and file a report before the first appellate Court within a period of one month from the date of receipt of the warrant. On receipt of such report from the Advocate Commissioner, the first appellate Court is directed to consider the same and dispose of the appeal in A.S.No.16 of 2012 afresh in accordance with law within a period of three months from the date of receipt of a copy of this order. Both the parties are directed to co-operate for early disposal of the above appeal. It is made clear that this Court has not expressed any of its opinion on the merits of the case.

17 The first appellate Court is directed to give suitable directions to the Advocate Commissioner to be appointed in this case that he shall inspect the suit properties with the help of the qualified Surveyor. The Surveyor has to identify and measure the entire extent of 9.38 acres in S.No.31/4A and also identify the land measuring to an extent of 60 cents of the suit property as per boundaries mentioned in sale deed dated 22.09.1971 and will dated 03.02.1985. If any sub division or change of survey number has taken place after the sale dated 22.09.1971, file a report with correlation certificate.

18 With the above observations and directions, this second appeal is disposed of. Consequently connected miscellaneous petitions are closed. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

cgi

To

1. The Sub Court, Tirupattur, Vellore District

2. The District Munsif, Tirupattur.

Copy to:

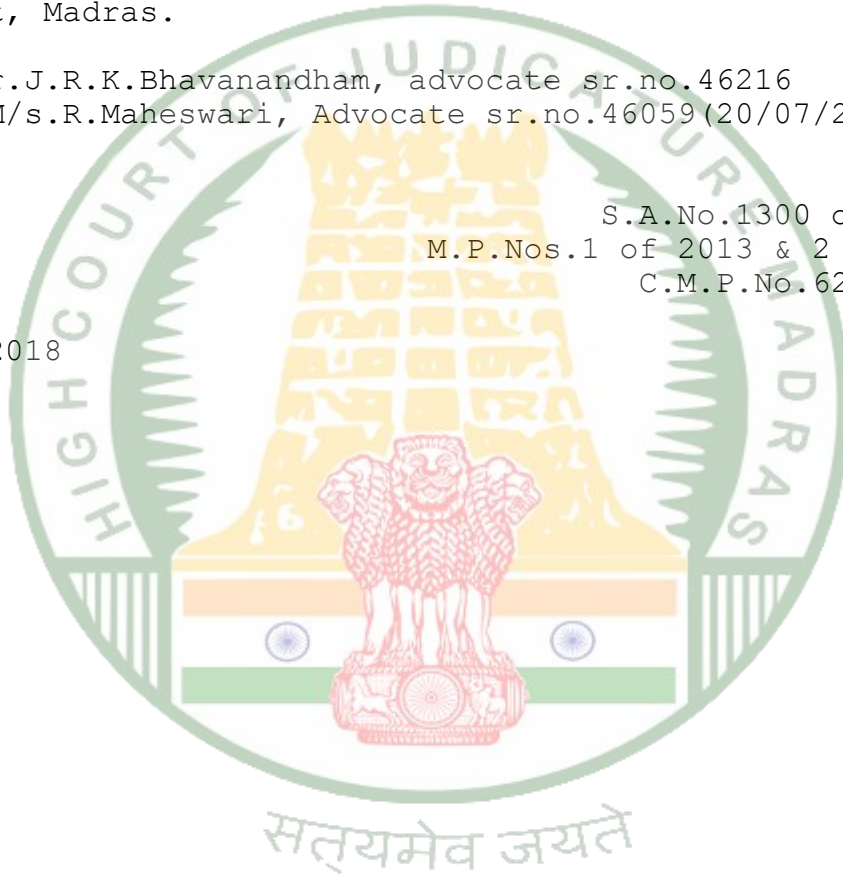
The Record Keeper,
VR Section,
High Court, Madras.

+1cc to Mr.J.R.K.Bhavanandham, advocate sr.no.46216

+2cc to M/s.R.Maheswari, Advocate sr.no.46059(20/07/2018)

S.A.No.1300 of 2013 and
M.P.Nos.1 of 2013 & 2 of 2014 and
C.M.P.No.6236 of 2018

nr 18/07/2018



WEB COPY