

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.09.2019

PRONOUNCED ON : 27.11.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.804 of 1996

Vijayalakshmi ...Appellant/Defendant

Vs.

Mariappan ...Respondent/Plaintiff

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the judgment and decree made in A.S.No.124 of 1993 dated 17.07.1995 on the file of the Subordinate Judge, Udumalpet, confirming the judgment and decree made in O.S.No.112 of 1987 on the file of the District Munsif, Pollachi, dated 15.10.1993.

For Appellant : Mr.N. Manoharan
for M/s.V.Balaji

For Respondent : Set exparte

JUDGMENT

This second appeal has been filed by the defendant against the Judgment and decree passed by the Sub-Judge, Udumalpet, in A.S.No.124 of 1993 dated 17.07.1995 confirming the judgment and decree passed by the District Munsif, Pollachi, in O.S.No.112 of 1987 dated 15.10.1993.

2. The respondent herein had filed a suit in O.S.No.112 of 1987 on the file of the District Munsif, Pollachi, to declare that he is the absolute owner of the suit property and consequently, grant a mandatory injunction directing the defendant to remove the compound wall and handover the possession of the suit property and for permanent injunction to restrain the defendant, her men, etc, from interfering with his peaceful possession of the suit property after restoration of possession.

3. The learned District Munsif, Pollachi, by the judgment and decree dated 25.04.1989 had decreed the suit declaring that the plaintiff is the absolute owner of the suit property and gave a direction during execution proceedings, a Commissioner has to be appointed and the lands of both the parties have to be measured and thereafter if found that

there was any encroachment on the plaintiff's property, the said encroachment should be removed by way of mandatory injunction and granted permanent injunction to restrain the defendant from interfering with the plaintiff's peaceful possession and enjoyment of the suit property and also directed the defendants to pay costs. As against the same, the defendant had filed an appeal in A.S.No.48 of 1989 on the file of the Sub-Judge, Udumalpet. The learned Sub-Judge, Udumalpet had remanded the matter to the trial court for fresh disposal. Accordingly, the suit was restored to file and thereafter, the plaint was amended incorporating the Survey Number in the description of the property. Thereafter, the learned District Munsif, Pollachi, by the judgment dated 15.10.1993 again decreed the suit as prayed for directing the defendant to hand over the possession of the suit property to the plaintiff within one month after removing the compound wall and also granted permanent injunction restraining the defendant, her men, etc., from interfering with the peaceful possession and enjoyment of the suit property of the plaintiff after restoration of possession and also directed the defendants to pay the costs of the suit to the plaintiff and since the suit was filed *informa pauperis*, the defendant was directed to pay court fees to the Government.

4. Aggrieved by the same, the defendant had filed an appeal in A.S.No.124 of 1993 on the file of Sub-Judge, Udumalpet. The learned Sub-Judge, Udumalpet, by the judgment dated 17.07.1995 had dismissed the said appeal with costs and thereby confirmed the judgment and decree passed by the trial court. He directed the defendant to deliver vacant possession of the suit property to the plaintiff within two months from the date of judgment after removing the compound wall. Feeling further aggrieved, the defendant has filed the present second appeal.

5. For the sake of convenience, the parties are referred to as described before the trial court.

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

The plaintiff is the absolute owner of the suit property. The suit property was allotted to one Subba Naicker by way of Government grant, about 60 years ago. From the date of said allotment/assignment, the said Subba Naicker was in possession and enjoyment of the suit property. After his death, his son Pappa Naicker succeeded to the suit property. The said Pappa Naicker had sold the suit property to one Chinnaswamy under a registered sale deed dated 14.01.1953. The plaintiff is the son of the said Chinnaswamy. The said Chinnaswamy died on 18.08.1985 and thereafter the plaintiff succeeded to the suit property as the only legal heir. The plaintiff has been in possession and enjoyment of the suit property from the date of death of his father. Since the plaintiff is residing at

Pollachi, the defendant with a view to grab the suit property stealthily put up a compound wall in the suit property in the month of December, 1985. Soon after coming to know about the illegal act of the defendant, the plaintiff made a request to the defendant to remove the compound wall but the defendant did not oblige to the demand of the plaintiff. Hence, the plaintiff issued a lawyer's notice dated 16.02.1986 calling upon the defendant to remove the compound wall. The defendant, after receipt of the said notice, instead of complying with the demand made in the said notice, sent a reply notice with false averments. Hence, the plaintiff was constrained to file the above suit for the relief of declaration, delivery of possession, mandatory injunction and permanent injunction.

7. The averments made in the written statement are in brief as follows:

It is false to state that the suit property was originally belonged to one Subba Naicker and after his death, his son Pappa Naicker succeeded to the same and the said Pappa Naicker sold the suit property to the plaintiff's father Chinnaswamy and after the death of the said Chinnaswamy, the plaintiff succeeded to the suit property as his sole legal heir. It is also false to state that the plaintiff has been in possession and enjoyment of the suit property after the death of his father and subsequently, the defendants put up a compound wall encroaching the suit property. The property admeasuring 25 cents and 50 sq.ft of vacant site which is described in the written statement schedule originally belonged to one Nachimuthu Achari and he sold the said property to one Mariammal in the year 1934 and the said Mariammal, in turn, sold the same to one Kasivisalakshi for Rs.300/- in the year 1952. The said Kasivisalakshi had sold the said property to the defendant's husband Balasubramaniam on 13.05.1982 for Rs.15000/-. After the death of the defendant's husband, the defendant and her son B. Sadasivam and her daughter B.Banudevi succeeded to the said property and they have been in possession and enjoyment of the same as absolute owners. The plaintiff also is fully aware of the aforesaid facts. The defendant's son Sadasivam and daughter B.Banudevi are necessary parties to the suit. Since they have not been added as parties, the suit is bad for non-joinder of necessary parties. There was an old dilapidated house in the suit property and the defendant demolished the same and put up a compound wall around her property for her convenient enjoyment. There was a well and the same was also closed. Hence, the allegation that the defendant had put up a compound wall stealthily with a view to grab the property of the plaintiff is false. For the notice issued by the plaintiff, the defendant had sent a suitable reply. The description of the property is not only incorrect but also misleading and the plaintiff purposely omitted to give Survey Number to the suit property. The plaintiff has no title to the suit property and hence he is not entitled to the relief of

declaration and other reliefs. Therefore, the defendant prayed to dismiss the suit.

8. After remand, the plaintiff had amended the plaint incorporating the survey number in the suit property. Thereafter, the defendant had filed an additional written statement.

9. The averments made in the additional written statement are in brief as follows:

The Survey Number is now falsely introduced by the plaintiff under the guise of amendment. The plaintiff has not carried out the instructions containing in the remand order passed in A.S.No.48 of 1992. Therefore, the defendant prayed to dismiss the suit.

10. Based on the aforesaid pleadings, the learned District Munsif had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1 and he marked Exs.A1 to A5 as exhibits. On the side of the defendant, the defendant examined herself as DW1 and also examined one more witness as DW2. She had marked Exs.B1 to B6 as exhibits.

11. The learned District Munsif, Pollachi, after considering the materials placed before him, decreed the suit on 25.04.1989 declaring that the plaintiff is the absolute owner of the suit property and gave a direction that during execution proceedings, a Commissioner has to be appointed and the lands of both the parties have to be measured and thereafter if found that there was any encroachment on the plaintiff's property, the said encroachment should be removed by way of mandatory injunction and granted permanent injunction to restrain the defendant from interfering with the plaintiff's peaceful possession and enjoyment of the suit property and also directed the defendants to pay costs.

12. Aggrieved by the same, the defendant had filed an appeal in A.S.No.48 of 1989 on the file of the Sub-Judge. Udumalpet. The learned Sub-Judge, Udumalpet, by the judgment dated 23.01.1992 had allowed the said appeal and remanded the matter to the trial court with a direction that an Advocate Commissioner has to be appointed to ascertain whether there is any encroachment in the suit property and after receipt of the Advocate Commissioner's report and plan, the trial court has to dispose of the suit in accordance with law. Accordingly, the suit was restored to file and thereafter the Advocate Commissioner was appointed and the Advocate Commissioner had inspected the suit property and file a report with plans. Thereafter the Advocate Commissioner was examined as DW3 and his report and plans were marked as Exs.C1 to C3 respectively.

13. The learned District Munsif after considering the materials placed before him, found that the defendant had encroached the suit property and accordingly, he decreed the suit as prayed for and directed the defendant to deliver vacant possession of the suit property to the plaintiff within a month from the date of judgment after removing the compound wall and also granted permanent injunction restraining the defendant, her men, etc., from interfering with the peaceful possession and enjoyment of the suit property of the plaintiff after restoration of possession and directed the defendant to pay the costs of the suit to the plaintiff and that since the suit was filed *informa pauperis*, the defendant was also directed to pay court fees to the Government. Feeling aggrieved, the defendant had filed an appeal in A.S.No.124 of 1993 on the file of the Sub- Judge, Udumalpet. The learned Sub-Judge, Udumalpet, by the judgment dated 17.07.1995 had dismissed the said appeal confirming the judgment and decree passed by the trial court and directed the defendant to deliver vacant possession of the suit property within two months from the date of judgment passed in the appeal after removing the compound wall.

14. Feeling further aggrieved, the defendant has filed the present second appeal.

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

"Whether the judgments of the Courts below are vitiated by an erroneously understanding of the documents marked in the case and the law applicable to the case."

16. Since the notices which were sent by the court to the respondent could not be served, substituted service by paper publication was effected and even thereafter, the respondent not appeared either in person or through counsel and hence he was set set *exparte*. Since the respondent has been set *exparte*, after hearing the arguments of Mr.N.Manokaran, the learned counsel for the appellant/defendant and perusing the records, the judgment is being passed in this second appeal.

17. Substantial question of law:

The learned counsel for the appellant/defendant has submitted that the courts below failed to see that when the plaintiff filed a suit for declaration, the burden is upon him to prove his title and he cannot rely upon the documents of the defendant to prove his title. He further submitted that the courts below, failed to see that originally the plaintiff did not give the Survey Number for the suit property and only after remand by the first appellate court, the plaintiff had amended the plaint by incorporating the Survey Number. He further submitted that the courts below failed to see that the defendant has established her title over the suit property through oral and documentary evidence. He further submitted

that the courts below failed to see that the first appellate court while remanding the matter in A.S.No.48 of 1989 had specifically directed the trial court to appoint an Advocate Commissioner and ascertain whether there is any encroachment, but the Advocate Commissioner has not measured the suit property and has not stated that there was any encroachment in the suit property and without taking into consideration of the aforesaid facts, the trial court had erroneously decreed the suit and the same has been mechanically confirmed by the first appellate court. He further submitted that according to the plaintiff, the defendant had encroached the suit property and that being so, the plaintiff ought to have asked for delivery of possession but on the contrary, he prayed for mandatory injunction and hence, the said suit is not maintainable and therefore he prayed to allow the second appeal and set aside the judgments and decrees passed by the courts below and dismiss the suit.

18. It is seen from the typed set of papers filed by the appellant/defendant that the first appellate court by the judgment dated 23.01.1992 in A.S.No.48 of 1989 remanded the matter to the trial court with a direction that the Advocate Commissioner has to be appointed and that the said Advocate Commissioner has to find out whether there was any encroachment in the suit property and file a report with a plan and thereafter, the trial court has to dispose of the suit in accordance with the law. In pursuance to the said order, the trial court has restored the suit on file and appointed an Advocate Commissioner. A perusal of the Commission Warrant, shows that the Advocate Commissioner was appointed to note down the physical features alone, but he was not directed to measure the suit property with the help of a qualified surveyor and ascertain whether there is any encroachment in the suit property as directed by the first appellate court. The trial court not at all followed the directions of the first appellate court and the very purpose of remand itself was defeated. The Advocate Commissioner's report shows that at the time of inspection, the defendant's counsel gave a memo requesting the Advocate Commissioner to measure the property and find out whether there is any encroachment, but he refused to measure the property by saying that in the Commission Warrant, he was directed to note down the physical features alone.

19. In the surveyor's plan which was filed along with the Commissioner's report (Ex.C3), it is stated that the suit property is ad measuring 25 cents and 50 sq.ft whereas in the plaint schedule, the extent of the suit property is mentioned as only 10 cents. It is the case of the defendant that she is entitled to 25 cents 50 sq.ft. So, it appears that the surveyor has mentioned in his plan only the extent which has been claimed by the defendant. The surveyor has not measured the properties by referring to the sale deeds of both the parties and FMB. Therefore, the Commissioner's report and the

plan filed along with his report would not serve the purpose. The trial court without taking into consideration of the aforesaid facts had erroneously decreed the suit and the first appellate court also mechanically confirmed the same. Hence, this court is of the view that the matter has to be remitted back to the trial court to comply with the directions of the first appellate court made in A.S.No.48 of 1989 dated 23.01.1992 to re-issue the warrant to the same Commissioner or to appoint some other Advocate Commissioner directing him to measure the properties with reference to the title deeds produced by both the parties, FMB plan and other revenue records and to ascertain whether any encroachment has been actually made by the defendant in the suit property and thereafter dispose of the case. Accordingly, the substantial question of law is answered.

20. In the result, the second appeal is allowed. The Judgments and decrees passed by the courts below are set aside. The matter is remitted back to the trial court. The trial court is directed to re-issue Commission warrant to the same Advocate Commissioner or to appoint some other Advocate Commissioner directing him to measure the properties with the help of a qualified surveyor with reference to the title deeds produced by both the parties, FMB plan and other revenue records and find out whether any encroachment has been made by the defendant over the plaintiff's property and file a report with plan and thereafter the trial court shall dispose of the suit in accordance with law. Considering the facts and circumstances of the case, the parties are directed to bear their respective costs.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

To

1.The Subordinate Judge, Udumalpet.

2.The District Munsif, Pollachi.

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

+1 cc to Mr.P.Krishnan, Advocate,sr.99360

sr(co)
krd 6/10