

IN THE HIGH COURT OF JUDICATURE AT MADRAS
Reserved on : 20.12.2018

Pronounced on : 03.01.2019

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

S.A.No.739 of 1997
and
C.M.P.No.7524 of 1997

1.Sukri Konar (died)
2.S.Rangammal
3.S.Palaniammal
4.S.Karuppusamy
5.Rajammal
6.S.Lakshmi
7.S.Bakkiyam
8.S.Padmavathy
9.S.Jayamani
Appellants 2 - 9 are brought
on record as legal
representatives of the
deceased sole appellant vide
court order dated 01/08/2005
made in CMP.Nos.20258 to
20260/2003 in S.A.No.739 of
1997.

... Appellants/1st Defendant
Vs

1.Arumugham s/o.Krishna Konar ..1st Respondent/ Plaintiff
2.Krishna Konar S/o.Vela Konar.. 2nd Respondent/2nd Defendant

PRAYER: The Second Appeal filed under Section 100 of CPC,
against the judgment and decree of the learned Principal
District Judge, Coimbatore in A.S.No.171 of 1995 dated
24.06.1996 confirming the judgment and decree of the II
Additional District Munsif, Coimbatore, in O.S.No.587 of
1985 dated 07.07.1995.

For Appellants : Mr.V.Nicholas
For R1 : Mrs.Mythili Suresh
For M/s.Sarvabhuaman Associates
For R2 : Ex-parte

JUDGEMENT

This Second Appeal has been filed by the first defendant in O.S.No.587 of 1985, on the file of the II Additional District Munsif Court, Coimbatore. O.S.No.587 of 1985, had been filed by the plaintiff Arumugham against two defendants Sukri Konar and Krishna Konar, seeking a judgment and decree for a declaration that the defendants had encroached into the B-schedule properties and that the plaintiff has title to the said property and for delivery of peaceful possession and also for declaration that the plaintiff has absolute title to C-schedule properties and restraining the defendants from encroaching into C-schedule properties.

2.In the plaint, the A-schedule property was given as land in S.No.242/3, Patta No.579 in Somayampalayam Village, Coimbatore. B-Schedule property for which recovery of possession and declaration of title was sought for, was a portion of the land in S.No.242/3, namely, a strip of land about 10 links in width along with the boundaries on the North and the West and about 140 links on the South of S.No.242/3. The C-schedule property for which declaration of title and injunction was sought for, was the remaining portion of land in S.No.242/3 measuring 2.47 acres in Somayampalayam Village, Coimbatore. This suit came up for consideration before the learned II Additional District Munsif Court, Coimbatore on 07.07.1995 and the suit was decreed. Challenging that judgment and decree, the first defendant Sukri Konar filed A.S.No.171 of 1995 before the learned District Munsif Court, Coimbatore. By judgment and decree dated 24.06.1996, the appeal was dismissed.

3.Challenging that judgment, the first defendant had filed the present Second Appeal. It must be mentioned that the second defendant in the suit namely, Krishna Konar remained exparte both during the Trial Court proceedings and in the First Appellate Court proceedings. Even before this Court he chose to remain exparte.

4.The second appeal had been admitted on the following substantial questions of law:

"1.When the burden is on the plaintiff to establish that he is entitled to the property in question whether the Courts

below are correct in wrongly placing the burden on the defendants?"

"2.Whether the Courts below are correct in allowing the plaintiff to take advantage of the weakness of the defendant's case and grant a decree in his favour?"

O.S.No.587 of 1985 (The II Additional District Munsif, Coimbatore):-

5. S.No.242 in Somayampalayam Village, measured 10.28 acres. There was a sub-division of the land into three parts and separate survey numbers, S.No.242/1, 242/2 and 242/3 were allotted. S.No.242/3 measured 2.58 acres. The entire extent of land in S.No.242 were classified as dry lands. Under sale deed dated 09.09.1946, S.No.242/3 was purchased by the plaintiff who was then a minor, represented by his mother Nagammal, from Periyapalani Gounder for a consideration of Rs.2000/-. Possession was also delivered. The plaintiff stated that he has been in continuous possession.

6.In the year 1974-75, the defendants have purchased portion of land in S.No.242/1 and 242/2 along with other lands. S.No.242/1 is adjacent to the plaintiff's land on the North and S.No.242/2 is adjacent to the plaintiff's land on the West. The defendants, taking advantage of the intermittent absence of the plaintiff encroached from three directions on the North, West and South. They also planted stone pillars with a view to lay fencing in the encroached portion. They had encroached 10 links on the Northern and the Western boundaries and to a distance of 140 links on the Southern boundary. It was claimed by the plaintiff that they are in illegal occupation of about 11 cents of the plaintiff's land. This land in which they were in illegal occupation had been mentioned as schedule-B in the plaint. The remaining portion of S.No.242/3 had been mentioned as schedule-C in the plaint. The plaintiff issued notice dated 28.08.1984 to the first defendant. The first defendant issued a reply denying the assertions. It is under these circumstances, that the suit had been filed seeking declaration of title over the B-schedule property and for recovery of possession and also declaration of title over the C-schedule property and permanent injunction protecting possession.

7.The first defendant filed a written statement in which he denied that he had encroached the plaintiff's land

on three sides to an extent of 11 cents. It had been stated that the first defendant is the absolute owner of the lands in S.No.242/1 and S.No.242/2. He was put in possession in pursuance to sale deeds in his favour. At the time of purchase, delivery of possession was also given. The land has well marked ridges, demarcating boundaries. The fence and ridges were in existence for a long time. It was claimed that the plaintiff had introduced false averments of recent encroachment. In the circumstances, the first defendant claimed that the suit should be dismissed.

8.The second defendant also filed a written statement, denying the allegation of the plaintiff. The defendant stated that he was enjoying his property peacefully and had no desire to encroach into the plaintiff's property. It was stated that there was no cause of action against the second defendant. It was stated that the suit should be dismissed.

9.On the basis of the above pleadings, the learned II Additional District Munsif, framed the following issues for trial:

1.Whether the plaintiff is entitled to declaration of title over the B and C-schedule properties and for recovery of possession of the B-schedule properties?

2.Whether the plaintiff is entitled permanent injunction as claimed?

3.Whether the first defendant had prescribed title by continuous possession?

4.To what reliefs are the parties entitled to?

10.During trial, the plaintiff examined himself as PW-1 and examined two other witnesses Jayaraman and Anbunathan as PW-2 and PW-3. The first defendant examined himself as DW-1 and examined another witness Lakshmana Gounder as DW-2. The plaintiff marked Exs.A1 to A6. Ex.A1 is the sale deed in the name of the plaintiff dated 09.09.1946. Ex.A2 and A3 are the notices exchanged between the parties. Ex.A4 is the patta in the name of the plaintiff and Ex.A5 and A6 are the field map of S.No.242. On the side of the defendants two documents were marked. Ex.B1 is the sale deed in the name of the second defendant and Ex.B2, dated

20.06.1975 is the partition deed among the family members of the defendants. During trial, the report of the Advocate Commissioner and the sketch were marked as Ex.C1 to C3.

11. On the basis of oral and documentary evidence, the learned II Additional District Munsif, Coimbatore, found that according to Ex.A1 which is the sale deed dated 09.09.1946, in the name of the plaintiff, he had purchased 2.58 acres in S.No.242/3. It was also found that Ex.A4, patta and Ex.A5 FMB field plan co-related with the sale deed Ex.A1. The learned II Additional District Munsif, also relied on the evidence of PW-1 who claimed that he had been doing agriculture from the year 1959. PW-2, M.Jayaram was the Advocate Commissioner who had been appointed. He had measured the lands in the presence of the counsels and also with the assistance of the Taluk Surveyor and Village Administrative Officer. PW-3, R.Anbunathan was the Taluk Surveyor. He had also measured the lands in S.No.242/3. The rough sketch was marked as Ex.C2. The learned II Additional District Munsif, relied on the rough sketches, Exs.C2 and C3, and found that as a fact, the first defendant had encroached into the lands of the plaintiff in S.No.242/3. It was specifically found that there was an encroachment to an extent of 11 cents. The encroachment was on the North, West and South boundaries of the lands of the plaintiff. It was also found that the first defendant had specifically encroached lands to a width of 10 links throughout the Northern and the Western boundaries and a distance of 140 links on the Southern boundary. Finding this as a fact, the learned II Additional District Munsif, decreed the suit, with costs.

A.S.No.171 of 1995 (The Principal District Court, Coimbatore):-

12. Aggrieved by judgment of the learned II Additional District Munsif, the first defendant filed A.S.No.171 of 1995. This came up for consideration before the learned Principal District Judge, Coimbatore. By judgment, dated 24.06.1996, the learned Principal District Judge, reappraised the evidence and framed points for consideration. The learned Principal District Judge, also relied on the evidence of the Taluk Surveyor, PW-3. The evidence of PW-3 disclosed that as per the field Measurement Books and Resettlement Registers and blue print plan maintained in the office, S.No.242/3 measured 2.58 acres. This was also confirmed in the updated survey conducted in the year 1986. It was also found a fact that sub-divisions 242/4A and 242/4B were in existence from 09.01.1957 and those sub-divisions were apportioned only

from S.No.242/4 and not from S.No.242/3.

13. Consequently, the learned Principal District Judge, accepted the evidence that S.No.242/3 measured 2.58 acres. This land had been purchased by the plaintiff by Ex.A1 dated 09.09.1946. Patta had also been granted for the said lands in Ex.A4. It was also specifically found that Ex.B1, sale deed and the barbed wire fencing mentioned as boundary in Ex.B1 would not advance the case of the defendants. It was specifically found that the sale deed through which the defendants claimed right over the Eastern portion of land in S.No.242/2 had not been produced and it was held that the same had not been produced only because it would be adverse to the interest of the defendants. The learned First Appellate Judge upheld the findings of the trial Court and dismissed the appeal. It was specifically held that the plaintiff had proved his title by Ex.A1, sale deed and also continuous possession by producing Ex.A4, patta. The first appeal was dismissed, with costs.

S.A.No.739 of 1997:

14. As stated above, the first defendant in the suit, Sukri Konar filed the present second appeal, challenging the concurrent findings of the Trial Court and the First Appellate Court. The second appeal had been admitted on the following substantial questions of law:-

"1. When the burden is on the plaintiff to establish that he is entitled to the property in question whether the Courts below are correct in wrongly placing the burden on the defendants?"

"2. Whether the Courts below are correct in allowing the plaintiff to take advantage of the weakness of the defendant's case and grant a decree in his favour?"

15. Heard arguments advanced by Mr.V.Nicholas, learned counsel for the appellants and Mrs.Mythili Suresh, for M/s.Sarvabhauman Associates, learned counsel for the respondent R1. For the sake of convenience, the parties would be referred as plaintiff and first defendant.

16. The plaintiff had purchased 2.58 acres of land in S.No.242/3 in Somayampalayam Village, Coimbatore. He had produced Ex.A1, sale deed to prove title. He had produced Ex.A4 patta to prove possession. Exs.A5 and A6 are the FMB

plans for the entire S.No.24. Quite apart from this, the plaintiff also sought the appointment of Advocate Commissioner to measure the land to determine the encroachment said to have been made by the first defendant. The report of the Advocate Commissioner was filed as Ex.C1. The Advocate Commissioner had measured the lands in the presence of the parties, their counsels, the Surveyor and the Village Administrative Officer. The Advocate Commissioner was examined as PW-2. His report and plan were marked as Exs.C1 and C3. The Surveyor was examined as PW-3. He filed a plan Ex.C2. It had been determined as a fact by both Courts below that the first defendant had encroached land to a width of 11 links on the Northern and Western side and to 140 links on the Southern side. This finding had been concurrently affirmed by both Trial Court and First Appellate Court. The first defendant however claimed title to the said lands. However, Exs.B1 and B2 do not relate to the lands in question. The first defendant had not produced any document to show title to the encroached portion in S.No.242/2.

17.The First Appellate Court had clearly held that the sale deed through which the first defendant claimed title was not produced only because if it is produced it would act adverse to the interest of the first defendant. The learned District Judge, relied on the field measurement book, resettlement register, blue print plan and also the updated survey conducted in the year 1986 as spoken to by PW-3. The evidence of PW-3 was found convincing and reliable. It was held by both the Courts below that the plaintiff had established title by producing his sale deed in Ex.A1 dated 09.09.1946 and established possession by producing patta Ex.A4, dated 10.02.1986. The total extent of land in S.No.242/3 was 2.58 acres. It was held that it was clear that there had been encroachment by the first defendant on the North, West and South sides.

18.The first substantial question of law related to whether the burden was on the plaintiff to establish that he is entitled to the property and whether the Courts below had wrongly shifted the burden on the defendant. I hold that the plaintiff had discharged his burden of proving title by producing Ex.A1, sale deed dated 09.09.1946 and had also discharged continuous possession by producing Ex.A4, patta. The first defendant who also claimed title to the encroached lands had not established such claim by producing the alleged sale deed in his favour. Ex.B1 did not relate to the lands in question. The Courts below had correctly held that the first defendant had not produced the sale deed since if produced it would be adverse to his

claim.

19.The second substantial question of law was whether the Courts below were correct in allowing the plaintiff to take advantage of the weakness of the defendant's case. I hold that the plaintiff had independently proved title and possession. The evidence on the side of the plaintiff, particularly PW-3 who is an independent person, a Surveyor, had been clear and cogent relating the extent of land in S.No.242/3 which measuring 2.58 acres and also spoke about the encroachment of the Northern, Western and Southern boundaries. I hold that the Courts below had actually decided only on the basis of the evidence let in by the plaintiff and not on the weakness of the case of the defendants.

20.In view of all the discussion above, I hold the second appeal is to be dismissed and I hold that no point has been made out to interfere with the well considered judgments of both the Trial Court and the First Appellate Court. Consequently, the Second Appeal is dismissed, with costs. The judgments and decree of both the Trial Court and the First Appellate Court are confirmed. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (CS)

//True Copy//

Sub Assistant Registrar

Smv
To

1.The Principal District Court, Coimbatore

2.The II Additional District Munsif, Coimbatore

3.The Section Officer, VR Section,
Madras High Court.

+1cc to Mr. V.Nicholas, Advocate SR.No. 784

+1cc to M/s.Sarvabhuaman Associates, Advocate SR.No. 539

S.A.No.739 of 1997

A.SK(28/03/2019)