

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 22.08.2019

JUDGMENT PRONOUNCED ON : 04.10.2019

CORAM

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

S.A.No.1825 of 1998

1. C.G.Nataraja Mudaliar (Deceased)
2. N.Palani
(2nd appellant brought on record as
L.Rs of the deceased sole appellant vide
order of Court dated 25.11.16 made in
C.M.P.No.1197 to 1199/11 in S.A.No.1825/1998) .. Appellants

...Versus...

1.Gengammal (Died)
2.Ponnurose
3.Jeevanandam
4.Krishnamoorthy
5.Indirani
6.Rajendran
7.Selvi
8.Minor Malar
9.Minor Rekha
10.Vedachalam
[R10 brought on record as L.Rs of the deceased
R1 vide order of Court dated 09.04.2019 in
C.M.P.No.826,831 and 836/2019
in S.A.No.1825/1998 (PRMJ)] ... Respondents

PRAYER:This Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree in A.S.No.20 of 1994 dated 24.02.1997 on the file of the Court of Subordinate Judge, Tiruvallur and judgment and decree made in O.S.No.31 of 1981 dated 28.11.1983 on the file of the Court of the District Munsif of Ponneri.

For Appellant :: Mr.Agilesh,
For Mr.N.Maninarayanan

For R3,4,6to9 :: Mr.Anantharamakrishnan

J U D G M E N T

The unsuccessful plaintiff is the appellant herein.

2. For the sake of convenience, the parties are referred to as per their ranking before the Trial Court.

3. The appellant/plaintiff has filed a suit for declaration of title and for recovery of possession along with mesne profits.

4. The plaint proceeds on the basis that (i) the plaintiff under Ex.A1 registered Sale Deed dated 25.08.1971 purchased an extent of 1069 sq.ft., in S.No.237/48/A1/B1 which covers the suit property measuring about 535 sq.ft. This sale was preceded by an unregistered agreement, the copy of which is Ex.A2 dated 27.06.1969.

(ii) According to the plaintiff, the first defendant along with certain others on 26.12.1971 (which is mistakenly stated in the plaint as 26.12.1972) was alleged to have trespassed and fenced the suit property. A criminal complaint was laid before the jurisdictional sub Magistrate, who by his judgment, the certified copy of which is Ex.B1 dated 20.06.1973, dismissed the same. Thereafter, for the declaration of title and for possession of the suit property, the present suit is instituted.

5. The respondent/defendant resisted the claim of the declaration of title and recovery of possession inter-alia contending that:-

(i) The first defendant under Ex.B2 sale deed dated 26.06.1968 purchased 5 cents of land to the East of the property purchased by the plaintiff under Ex.A1. This sale was preceded by an unregistered agreement Ex.B4 dated 22.05.1968. There was some discrepancy in the Survey Number given in the sale deed that has been rectified through Ex.B8 rectification deed dated 26.08.1982.

(ii) The first defendant was given patta for the property purchased under Ex.B2 on 01.12.1968 vide Ex.B3 patta, Ex.B5 series are five house-tax receipts, in the name of the first defendant for having been in possession of the property. Pending suit, the first defendant died and his wife and children are added as defendants 2 to 8. The first defendant's wife, the sixth defendant now has a patta for that property under Ex.B7, issued by the Revenue Department for 5½ cents of land.

6. In short, according to the respondent/defendant, the suit property is part and parcel of the property purchased by the first defendant from the plaintiff's vendor under Ex.B2, it was in the year 1968; that the suit property is a portion reserved for road, which was given by way of gift deed to the first defendant's father-in-law by the plaintiff's vendor; thereby, the defendant thus disputed the alleged plaintiff's title to the suit property.

7. During trial, on the side of the plaintiff, the plaintiffs are examined as P.W.1 and P.W.2 and marked Exs.A1 and A2. On the side of the defendants, the sixth defendant examined herself as D.W.1 and marked Exs.B1 to B8. The Report and Plan filed by the Commissioner have been marked as Exs.C1 and C2 respectively.

8. The trial Court, by taking into consideration the respective pleadings and the evidence, has held that the suit property was not identifiable and in the absence of any linear measurement, alleged encroachment cannot be found out and the sale deed in favour of the defendant was much earlier in point of time and accordingly, dismissed the suit. Aggrieved against, A.S.No.20/94 has been filed and on re-consideration and re-appreciation of facts, the Appeal Suit was dismissed, by judgment and decree, dated 24.02.1997. As against which this Second Appeal has been filed by the appellant / plaintiff.

9. The Second Appeal has been admitted on 01-02-1999 on the following Substantial Questions of Law:-

(1) Whether the encroachment made can be justified on the ground that it was a common feature in a particular area? And

(2) When title is claimed on the basis of title deed whether the courts below were justified in ignoring the measurements given in it?

10. Heard both sides and perused the records.

11. The learned counsel for the appellant has made submissions in support of the Substantial Questions of law and the learned counsel for the respondents has made submissions in support of the judgement of the Courts below.

12. On a consideration of the documentary evidence and the respective arguments advanced by the respective counsel, it is evident that the plaintiff/appellant has filed a suit for declaration of title and for recovery of possession. As per the suit schedule, the land in S.No.237/48/S1/B1 situated in Thiruvottiyur Saidapet Taluk, Chengalpattu District, admeasuring about 535 sq.ft., bounded on the North by plaintiff's land was encroached by Kalavathi, on the East by plaintiff's school, on the West by Harikrishna's land and on the South by defendant's land.

13. The admitted factual matrix of the case are that the property purchased by the plaintiff and the first defendant was originally owned by one and the same owner namely T.S.Gopal and

his family. The first defendant under Ex.B2 dated 26.06.1968 purchased 5 cents of land bounded on the South by Thulukkana Naicker Street, East by Balumudali's property, West and North by the property of his vendor namely T.S.Gopal in S.No.237/48/A/185. This extent is now shown through patta issued by the Revenue authorities as 5 ½ cents.

14. It appears from the records that after the sale deed in the year 1968 under Ex.B2, it was in favour of the first defendant. The plaintiff said to have been purchased the property under Ex.A1 sale deed in the year 1971 to an extent of 1069 sq.ft in the S.No.237/48/A/185. About three years thereafter, under Ex.A1 sale deed dated 25.08.1971, the plaintiff purchased an extent of 1069 sq.ft of property covered by S.No.237/48/A1/B1 which was bounded on the South by the property of the first defendant, East by the property of the plaintiff himself, North by the property of Kalavathi and on the West the Northern portion is bounded by the passage leading to the school and the Southern portion by the property of one Harikrishnan. Out of this property, the plaintiff has carved out 535 sq.ft, to say that it has been encroached upon by the first defendant.

15. At this juncture, it remains to be stated that it is admitted by the plaintiff's counsel as well as by plaintiff that a separate suit for declaration of title of the Northern portion out of the property purchased under Ex.A1 in the possession of Kalavathi is pending. This would mean that the entire property purchased by the plaintiff under Ex.A1 has been subjected to litigation, i.e., the Northern portion having been allegedly trespassed by Kalavathi and the Southern portion by the defendants.

16. The encroached portion is shown as the suit property covered on the South by the defendant's property, East by the plaintiff's school, North again by plaintiff's property allegedly encroached by one Kalavathi and West by the property of Harikrishnan. The alleged encroachment was the subject matter of a criminal case and as evident from Ex.B1 that alleged trespass has been dismissed as not proved.

17. As per the version of P.W.1, he seeks relief of declaration to an extent of 535 sq.ft only. According to him, P.W.1 could depose that from and out of purchase in the year 1971, he has brought the property and he allege that he is in possession of the suit property.

18. Per contra, the first defendant projected that she is in possession of the property as per Ex.B2 since 1968, much prior in time than that of the plaintiff. Though a schedule has been provided under Ex.A1 sale deed, for the reasons best known, the plaint does not give any linear measurement towards description of actual property measuring 535 sq.ft except a bare statement

to that effect. Both the courts below have rightly come to the conclusion that in the absence of any linear measurement regarding the extent of property, the suit property could not be identifiable.

19. At this juncture, it remains to be stated that both the plaintiff as well as the first defendant have purchased the suit property from the family members of T.S.Gopal, who is the erstwhile owner of the property. As stated supra, the first defendant purchased the property anterior in point of time than that of the plaintiff. Ex.B4 agreement of sale fortifies the fact that the vendor was selling to the first defendant, the property which is in possession. P.W.1, both in his pleadings as well as in evidence stated that, he took possession on the date of his purchase under Ex.A1 on 25.08.1971. However, as per the Ex.B1 copy of the judgment in C.C.No.15/73 the alleged trespass was said to have been only on 26.12.1971.

20. It also remains to be stated that the criminal trespass complaint given by the plaintiff in C.C.No.15/73 was dismissed. Ex.B1 judgment copy also goes against the alleged possession and trespass by the first defendant and hence, fixing of actual boundary of the suit property occurs. In the absence of any linear measurement, both the Courts below have concurrently held that the suit for injunction or for declaration of title cannot be granted.

21. In the cross-examination, it is elicited from P.W.1 that in respect of other portion of the land covered under Ex.A1, the same is said to have been encroached by one Kalavathi and another Civil Suit is pending consideration and until both the cases are tried together by a joint trial, whether there was an encroachment or not as alleged, the same cannot be gone into, especially in the absence of any linear measurement being given by the plaintiff either in the plaint or in his evidence.

22. Yet another issue is that in respect of the disputed land said to have been gifted to the suit, a same is also not identified by the plaintiff.

23. My attention was drawn to Exhibits C1 and C2. The Commissioner has noted two stones at the point D and C in the sketch, which the learned counsel for the defendants state they are survey stones fixing the southern edge of their property purchased under Ex.B2. If this stone is taken as the southern boundary then the defendants' present possession to the North of the stones comes within the area covered by the sale deed Ex.B2. Then the alleged encroachment by the defendants' over the property of the plaintiff cannot be made out.

24. As stated supra, in support of the claim the defendant

had examined the sixth defendant namely Tmt.Indira Ammal as D.W.1 who had executed Ex.B-8, in whose name Ex.B7 patta stands. Furthermore, as per Ex.B8 Rectification deed was executed by T.S.Gopal in favour of Munusamy Reddy coupled with Ex.B2. It appears that defendants' purchase was duly reflected by the sale deed along with the revenue record-Ex.B7. For the reasons best known, the original sale deed of the sale effected in favour of the plaintiff was not marked before the trial Court. Ex.A1 is only a certified copy and furthermore, the vendor of the plaintiff or his wife was not examined as to the actual extent sold in favour of the plaintiff also assumes significance. Hence, basing reliance on the non-examination of the Dhamayanthi Ammal, the wife of the vendor of the plaintiff and also as no linear measurement with regard to alleged encroached area measuring 535 sq.ft, both the Courts below have rightly come to the conclusion that the plaintiff is not proved his title to the suit property and not proved his possession, but on the contrary the first defendant has proved his title to her land in occupation. Thus, the judgment and decree granted by both the Courts below do not suffer from any irregularity or illegality warranting interference at this appellate stage and hence, both the Substantial questions of Law do not arise on the factual background of this case.

25. In the result,

(i) This Second Appeal is dismissed.

(ii) The judgments and decrees of the First Appellate Court and the Trial Court are confirmed.

(iii) No costs.

Sd/-

Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

To

1. The Subordinate Judge, Tiruvallur
2. The District Munsif, Ponneri.

Copy to:

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

+1 cc to M/s.N.Maninarayanan, advocate,sr.84941

+1 cc to M/s.N.R.Anantha Ramakrishnan,advocate,sr.85675.

vsnII(co)

krd 28/9

S.A.No.1825 of 1998