

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 23.07.2018

Delivered on: 29.01.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.1670 of 2000

Balakrishnan
Appellant/Appellant/Plaintiff

...

Vs.

Elumalai Gounder
Respondent/Respondent/Defendant

...

PRAYER: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree of the Additional District Court, Tiruvannamalai, dated 29.06.2000 in A.S.No.22 of 2000 confirming the judgment and decree of the Principal District Munsif, Arni, dated 28.02.1997 in O.S.No.797 of 1990.

For Appellant : M/s.V. Raghavachari

For Respondent : Mr.Dr.G. Krishnamurthy

JUDGMENT

This second appeal has been filed by the plaintiff against the judgment and decree passed by the Additional District Judge, Tiruvannamalai, in A.S.No.22 of 2000 dated 29.06.2000 confirming the judgment and decree passed by the Principal District Munsif, Arni, in O.S.No.797 of 1990 dated 28.02.1997.

2. The appellant herein had filed a suit in O.S.No.797 of 1990 on the file of the Principal District Munsif, Arni, for the relief of declaration of his title to 'IJKH' portion in the plaint schedule and for recovery of possession of the said property. The learned Principal District Munsif, Arni, by the judgment and decree dated 28.02.1999 had dismissed the said suit without costs. Aggrieved by the same, the plaintiff had filed an appeal in A.S.No.22 of 2000 on the file of the Additional District Judge, Tiruvannamalai. He also filed an application in I.A.No.28 of 2000 seeking permission for adducing additional

documentary evidence and another application in I.A.No.199 of 2000 to appoint an Advocate Commissioner to measure the suit property and file a report with plan. The learned Additional District Judge, Tiruvannamalai, by the judgment and decree and order dated 29.06.2000 had dismissed the said appeal and said applications without costs and confirmed the judgment and decree passed by the trial court. Feeling aggrieved, the plaintiff has filed the present second appeal. For the sake of convenience, the parties are referred to as described before the trial court.

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

One Annamalai Gounder got the suit property through a partition and enjoyed the same for several years and sold the same to the plaintiff under a registered sale deed dated 22.02.1990 for a valid consideration of Rs.10,427/-. The plaintiff has been in possession and enjoyment of the suit property from the date of the said sale. In the plaint plan, the plaintiff has shown the properties which were purchased by him under the said sale deed as 'ABCD' and 'EFGH'. One Arjuna Gounder who is not having any right over the aforesaid properties, had sold a portion of the said properties in favour of the defendant under a registered sale deed dated 11.07.1990 which is covered under the plaintiff's sale deed and the same has been mentioned as 'IJKH' in the plaint plan. On the basis of the said sale deed, the defendant tried to trespass into 'IJKH' portion and hence the plaintiff has filed the suit for permanent injunction to restrain the defendant from interfering with his peaceful possession and enjoyment of the portion marked as 'IJKH' in the plaint plan. During pendency of the said suit, the defendant trespassed into the aforesaid portion of the property and hence the plaintiff had amended the plaint for declaration and delivery of possession.

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

The defendant is disputing the title to the suit property. So the plaintiff ought to have sue for the declaration of title and for possession. The suit for bare injunction is not maintainable. The description of the property is deliberately made, with misleading and non-existing boundaries. A plan which is filed along with the written statement may be read as part and parcel of the written statement. The red marked portion 'ABCD' is the disputed place and it belongs to the defendant by virtue of the registered sale deed dated 11.07.1990. The defendant is in possession and enjoyment of the said property from the date of purchase. The plaintiff could not have purchased the property which is shown as 'ABCD' in the plan filed along with the written statement. His vendor also could

not have been ever in possession of the property. In the oral partition which took place between the defendant's vendor Arjuna Gounder and his brother Chinnasamy Gounder, the aforesaid portion allotted to Arjuna Gounder. Since the said Arjuna Gounder expressed his desire to sell a portion of his vacant site which was adjacent to the defendant's house and vacant site, he purchased the same for better and convenient enjoyment. On the other hand, the vendor of the plaintiff viz., Annamalai Gounder had no property whatsoever near the aforesaid property. The wife of Arjuna Gounder purchased a site on 01.07.1968 from one Ramasamy Gounder next to south of the 'ABCD' portion and the boundaries mentioned in the said document would clearly show that the 'ABCD' portion belonged to the defendant's vendor's father. Therefore, the defendant prayed to dismiss the suit.

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

The plaintiff falsely alleged that he had been in possession of the suit property. Finding his pleading untenable, the plaintiff has come with amendment as if he had been dispossessed and therefore, he prayed to dismiss the suit.

6. Based on the aforesaid pleadings, the learned District Munsif, Arni, had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1 and he also examined two more witnesses as PW2 and PW3. He had marked Exs.A1 to A6 as exhibits. On the side of the defendant, the defendant examined himself as DW1 and also examined one more witness as DW2. The defendant had marked Ex.B1 to Ex.13 as exhibits.

7. The learned District Munsif, Arni, after considering the materials placed before him found that the vendor of the plaintiff viz., Annamalai Gounder and the vendor of the defendant viz., Arjuna Gounder are cousins and hence to ascertain whether the properties which were purchased by the plaintiff under Ex.A2 and the property purchased by the defendant under Ex.A1 / Ex.B2 are separate properties or they overlapped each other, an Advocate Commissioner should have been appointed and he should measure the properties with the help of a surveyor and file a report. He further found that since the plaintiff has come to the court for the relief of declaration, he should have taken steps for appointment of an Advocate Commissioner, but he has not taken any such steps. He further found that the plaintiff failed to prove the title over the suit property. Accordingly, he dismissed the suit without costs.

8. Aggrieved by the said judgment and decree, the plaintiff had filed an appeal in A.S.No.22 of 2000 on the file of

Additional District Judge, Tiruvannamalai. He also filed an application under Order 41 Rule 27 CPC in I.A.No.28 of 2000 seeking permission for adducing additional documentary evidence and another application in I.A.No.199 of 2000 to appoint an Advocate Commissioner to inspect the property with the help of a Surveyor and file a report with plan. The learned Additional District Judge, Tiruvannamalai, by the judgment and decree and order dated 29.06.2000 had dismissed the said appeal and also the said Interlocutory Applications without costs and confirmed the judgment and decree passed by the trial court. Feeling aggrieved, the plaintiff has filed the present second appeal.

9. It is seen from the records that when the above second appeal came up for hearing for admission on 02.11.2000, this court has passed the following order:

"Heard. Notice of motion, returnable in three weeks. Private notice is also permitted. Status quo to be maintained till then."

10. Subsequently on 17.09.2002, the second appeal came up for hearing and on that date, this court has set aside the order passed by the first appellate court in I.A.No.199 of 2000 and directed the trial court to appoint an Advocate Commissioner to inspect and measure and locate the property purchased by the plaintiff under Ex.A2 sale deed and the property purchased by the defendant under Ex.A1/B2 sale deed with the help of a surveyor and receive the report and submit the same to this court. For proper appreciation, the relevant portion of the said order is extracted hereunder:

"11. The appellant had also taken necessary steps before the lower appellate court by filing an application in IA.No.199 of 2000 for appointment of an Advocate Commissioner to measure the suit properties with the help of a surveyor but that petition was dismissed on the ground that there is no overlapping of the property purchased by the plaintiff and the defendant. But, however, in view of the observations made by the trial court and also in view of the fact that the plaintiff's vendor and the defendant's vendor were cousins and the plaintiff and the defendant claim almost one and the same property. I feel that it is fit case where appointment of an advocate commissioner is necessary which would put the entire contravercy at rest. That in order to meet the ends of justice also, feel that appointment of an advocate commissioner is necessary and therefore, the order set aside and the same stands restored and the petition is sent to the Trial Court.

12. The trial court is hereby directed to appoint an advocate Commissioner to inspect, measure and locate the property purchased by the plaintiff under the sale deed dated 22.02.1990 (Ex.A.2) and the property purchased by the defendant under the sale deed dated 11.07.1990 (Ex.A.1=B2) with the help of surveyor and also to note down whether there is any overlapping of the properties and file a report with plan within two weeks from the date of inspection,

(ii) the Commissioner within a weeks time from the date of receipt of a copy of this Order and

(iii) the advocate Commissioner is directed to fix a date after giving atleast one week notice to the parties concerned before inspection.

(iv) on filing of the report by the Advocate Commissioner, the trial court shall grant two weeks time for filing objections, if any, by the parties.

(v) After completion of the above said directions, forward the entire records to this courts."

11. In view of the aforesaid direction of this court, the entire records were sent to the trial court. The trial court has appointed an Advocate Commissioner. The Advocate Commissioner also inspected the properties mentioned under Ex.A2 sale deed and under Ex.A1/B2 sale deed and measured with the help of a surveyor and filed his report along with a rough plan, a xerox copy of Field Measurement plan and a xerox copy of Adangal register. The learned District Munsif, Arni, has forwarded the same to this court.

12. When the second appeal came up for hearing on 24.06.2018, the learned counsel for the appellant requested this court to mark the Advocate Commissioner's report and his plan as exhibits for which learned counsel for the respondent has not raised any objection. He gave consent for marking those documents. Hence, the Advocate Commissioner's report and his plan were marked as Exs.C1 and 2 respectively by consent.

13. This court on 18.07.2018 after hearing both sides and perusing the records found that the substantial questions of law were not formulated. Therefore on 18.07.2018, after hearing both sides, this court has formulated the following substantial questions of law:

"1. Whether the courts below ought to have applied the principle that the boundary recitals in the document would have a bearing in adjudication of title?

2. Whether the lower Appellate court is right in upholding the case of the defendant on a non-existing admission of PW1 and should it not have known that there is no estoppel against title?"

14. Heard Mr.V.Raghavachari, learned counsel for the appellant and Mr.Dr. G.Krishnamurthy, learned counsel for the respondent.

15. Substantial questions of law 1 and 2:

The learned counsel for the appellants has submitted that the courts below failed to consider that appellant/plaintiff had purchased the suit property under Ex.A2 on 22.02.1990 from one Annamalai Gounder and subsequently under Ex.A6 dated 03.07.1991, the plaintiff's son had purchased the adjacent property and in the said document, the southern boundary has been shown as the suit property. He further submitted that the courts below failed to appreciate that under Ex.A6, one Vellachi W/o.Arjuna Gounder who is the wife of the defendant's vendor had indicated the southern boundary as that of Annamalai Gounder and that itself would indicate that the vendor of the defendant viz., Arjuna Gounder had no right in and over the suit property. He further submitted that the trial court had observed that the properties purchased by the plaintiff and the defendant may have overlapped but the plaintiff had not taken any steps to measure the suit property by an Advocate Commissioner with the assistance of a Surveyor and accordingly dismissed the plaintiff's suit. He further submitted that the first appellate court had observed that the properties were not overlapping and that the application filed by the appellant for appointment of an Advocate Commissioner was also dismissed by the first appellate court. He further submitted that when this second appeal came up for hearing before this court on 17.09.2002, this court taking into consideration of the aforesaid facts, has set aside the order passed by the first appellate court in I.A.No.199 of 2000 (Commission Petition) and directed the trial court to appoint an Advocate Commissioner to inspect, measure and locate the property purchased by the plaintiff under the sale deed dated 22.02.1992 (Ex.A2) and the property purchased by the defendant under a sale deed on 11.07.1990 (Ex.A1=B2) with the help of a surveyor and also to note down whether there is any overlapping of a property and file a report with a plan and accordingly, the trial court has appointed an Advocate Commissioner and the Advocate Commissioner also inspected the properties and measured the suit properties with the help of a surveyor and filed a

report and plan and the same have been submitted to this court by the trial court and they were marked as Exs.C1 and C2 respectively by consent. He further submitted that the Advocate Commissioner's report and plan would clearly show that the suit property comes within the boundaries of the properties purchased by the plaintiff and his family members under Exs.A2 to A6 and therefore, the defendant cannot claim any right over the suit property. He prayed that in view of the commissioner's report and plan, to allow the second appeal and set aside the judgments and decrees passed by the courts below and decree the suit as prayed for.

16. Per contra, the learned counsel for the respondent/defendant has submitted that the first appellate court has categorically observed that the properties were not overlapping. He further submitted that based on the admission made by PW1 in his evidence, the first appellate court has held that there is no dispute regarding the identification of property in the said findings, this court cannot interfere. He further submitted that there is a dispute regarding the correlation of old Survey Number and new Survey Number and the very identity of the property is in doubt. He further submitted that in the Commissioner's report, the Advocate Commissioner has stated that in the Natham Survey Scheme, new Survey Number has been assigned as 289 and the suit property falls in S.No.289/10, but there is no proof that in the Natham Survey Scheme, the properties were re-surveyed and new survey number has been assigned as S.No.289/10 for the suit property and therefore, no reliance can be placed upon the Commissioner's report. He further submitted that both the courts below concurrently found that the plaintiff failed to prove title and possession and in the said concurrent findings, this court cannot interfere.

17. In support of the aforesaid contentions, the learned counsel for the respondent/defendant has relied upon the following decisions:

1. Raja and another Vs. Paramantha and another
2014 -2-LW -301

2. Lakshmi represented by her power agent Siva
Nagapattinam Vs. K. Ramani ad (2014) 1 MLJ 60

18. The trial court had observed that the plaintiff's vendor Annamalai Gounder and the defendant's vendor Arjuna Gounder were cousins. It also took a view that the properties which were purchased by the plaintiff and the defendant might have been overlapping and the said issue could have been solved only by appointment of an Advocate Commissioner and measuring the property with the help of a Surveyor, but the plaintiff did not take any steps for appointment of a Commissioner. After observing so, the trial court has dismissed the suit.

19. Aggrieved by the judgment and decree passed by the trial court, the plaintiff preferred an appeal in A.S.No.22 of 2000 before the Additional District Judge, Tiruvannamali. In the said appeal, the appellant/plaintiff has filed an application in I.A.No.199 of 2000 for appointment of an Advocate Commissioner. The appellant/plaintiff pointed out the observation of the trial court with regard to the possibility of overlapping of the property purchased by the plaintiff and the defendant and prayed for appointment of an Advocate Commissioner, but the first appellate court dismissed the said application. The first appellate court also observed that the plaintiff is claiming the property which is marked as 'ABCD' in Ex.B1 plan filed by the defendant along with written statement. It also observed that he has clearly accepted the Ex.B1 and claiming title over the 'ABCD' portion marked in Ex.B1. Under these circumstances, there is no doubt regarding the identification of the property. Moreover, he has stated that the property claimed by the appellant and the respondent are not overlapping. After observing so, the first appellate court had dismissed the application filed by the appellant for appointment of an Advocate Commissioner.

20. When this second appeal came up for hearing before this court on 17.09.2002, this court has considered the findings of the first appellate court and held that on going through the evidence of PW1 would does not disclose any such admission by the plaintiff and therefore, the observation of the lower appellate court that the plaintiff has admitted that there is no overlapping of the properties purchased by the plaintiff and the defendant is perverse".

21. Further, this court took a view that in order to meet the ends of justice, appointment of an Advocate Commissioner is necessary and accordingly, setting aside the order passed by the first appellate court in I.A.No.199 of 2000 and directed the trial court to appoint an Advocate Commissioner to inspect, measure and locate the property purchased by the plaintiff under the Ex.A2 sale deed dated 22.02.1990 and the property purchased by the defendant under the sale deed dated 11.07.1990 (Ex.A1=B2) with the help of a surveyor and also to note down whether there is any overlapping of the properties and filed a report with plan. Accordingly, the trial court has appointed an Advocate Commissioner and the Advocate Commissioner also inspected the suit property and measured the suit property with the help of a surveyor with reference to the sale deeds viz., Exs.A1 = B2, A2, A4, A5 and A6 , field measurement plan and Adangal register and filed a report with a rough plan. He also enclosed a xerox copy of the Field Measurement plan and xerox copy of the Natham Land Tax Scheme Adangal extract. The Advocate Commissioner's report

has been marked as Ex.C1 and his plan has been marked as Ex.C2 by consent.

22. Admittedly, the suit property falls in S.No.193/15. A perusal of the xerox copy of the Natham Land Tax Scheme Adangal extract which has been filed along with the Advocate Commissioner's report would show that the corresponding new Natham Survey Number for old S.No.193/15 is 289. Further, the said Adangal extract would show that the aforesaid Survey Number has been sub-divided and pattas have been issued to various person and in so far as the Natham Survey No.289/10 is concerned, no patta has been issued in favour of any person. According to the Advocate Commissioner, the disputed area is shown in his rough plan as 'KEJL' and 'KEPQ' and they are situated in S.No.289/10. Taking into consideration of the aforesaid fact and also Field Measurement plan, the Advocate Commissioner has measured the properties with the help of a surveyor. The Advocate Commissioner has stated in his report that the properties which were purchased by the plaintiff and his son Muruganandam under Exs.A2, A4, A5 and A6 sale deeds are shown as 'MNEFOP' in his rough plan. He further stated that the property purchased by the defendant under Ex.A1=B2 dated 11.07.1990 is shown as 'KEJL' in his rough plan. A perusal of the said rough plan (Ex. C2) would clearly show that the portion which is under dispute (suit property) comes within the boundaries of the properties purchased by the plaintiff and his son under Exs.A2, A4, A5 and A6.

23. Admittedly, the plaintiff had purchased the suit property under Ex.A2 on 22.02.1990 and only thereafter, i.e., on 11.07.1990, the defendant had purchased his property under Ex.A1=B2. It is also an admitted fact that both the parties have not produced any documentary evidence to show as to how their respective vendors got title over the properties purchased by them. It is also an admitted fact that the property under dispute is a Natham land. Under the said circumstances, the parties could have produced the documents to show that how their vendors got title over the said properties but they have not produced any such documents. Under the said circumstances, the case has to be decided only based on the available materials.

24. As already pointed out that the plaintiff had purchased the suit property under Ex.A2 on 22.02.1990 as vacant site. Once it is proved that the plaintiff had purchased the suit property under Ex.A2 sale deed, the defendant being the subsequent purchaser should have verified whether his vendor has got saleable interest in the same property. Further at the time of purchasing the property, the defendant had not taken any steps

to measure the property. Only as per the direction of this court, now the Advocate Commissioner had measured the properties with reference to the relevant documents with the help of a surveyor. The report filed by the Advocate Commissioner and the plan would show that the property said to have been purchased by the defendant comes within the boundaries of the properties which were purchased by the plaintiff and his son and therefore, this court is of the view that the plaintiff got title over the suit property and the defendant is not having any title over the suit property.

25. In the decision in Raja and another Vs. Paramantha and another (supra), this court has held that there is a dispute regarding correlation of old Survey Number and new Survey number and the very identity of the property even is in doubt. Further, it was held that without resolving those problems, the court should not grant a decree for declaration of a title. In this case, as already pointed out that as per the direction of this court, Advocate Commissioner has been appointed and the Advocate Commissioner also measured the suit property and filed a report. From the said report and plan, the suit property would easily be identified and the said property comes within the boundaries of the properties purchased by the plaintiff and his son and therefore, the aforesaid decision will not help the respondent.

26. In Lakshmi represented by her power agent Siva Nagapattinham Vs. K. Ramani and another (supra), a suit was filed for bare injunction and not for declaration of title and in the said suit, both the courts below concurrently gave findings that the plaintiff did not prove her possession and enjoyment as on the date of filing of the suit. Only that findings could have been taken as binding on the plaintiff and as against as such findings, this court has held that the second appeal would not lie. Whereas in this case, the plaintiff has filed the suit for declaration of his title and for delivery of possession. Therefore, the aforesaid decision will not apply to the facts and circumstances of the cases.

27. For the aforesaid reasons, this court is of the view that the findings of the courts below are against the evidence. Further in view of Exs.C1 and C2 (Commissioner's report and plan), the plaintiff is the owner of the suit property and as such, the plaintiff is entitled for the relief of declaration of title over the suit property and also for delivery of possession as prayed for in the plaint. Accordingly, the substantial questions of laws are answered in favour of the appellant/plaintiff.

28. In the result, the second appeal is allowed. No costs.

The judgments and decrees passed by the courts below are set aside. The suit filed by the appellant in OS..No.797 of 1990 on the file of the District Munsif, Arni, is decreed as follows:

(i) that it is declared that the plaintiff is the absolute owner of the property which is mentioned as 'KEJL' in the Advocate Commissioner's plan (Ex.C2) and

(ii) that the defendant is directed to deliver vacant possession of the aforesaid portion of the property within a period of three months to the plaintiff from the date of receipt of copy of this judgment. The Advocate Commissioner's plan (Ex.C2) shall form part of the decree.

s/d-
Assistant Registrar (CS VI)

True Copy

Sub-Assistant Registrar

To

1.The Additional District Court,
Tiruvannamalai.

2.The Principal District Munsif,
Arni.

+1 CC to Mr.G. Krishnamurthy, Advocate sr 6884.

+1 CC to Mr.V.Raghavachari, Advocate sr 6288.

S.A.No.1670 of 2000

BS (CO)
SP (28/08/2019)

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