

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 06.06.2019

Judgment Pronounced on : 20.08.2019

CORAM:

THE HONOURABLE MR. JUSTICE RMT.TEEKAA RAMAN
S.A.No.1377 of 2002

1.Sheik Dawood (Deceased)

2.Easan Beevi

3.Shabir Mohammed

4.Peer Mohammed

5.Zenath Beevi

6.Mohammed Rabeek

7.Abdul Ali

8.Tajudeen

9.Samshate Begum

10.Mohammed Yasin

Appellants

(Appellants 2 to 10 brought on record as
LRs of the deceased sole appellant vide
order of Court dated 29.07.2011 made
in C.M.P.No.1662/2010 in S.A.No.1377 of 2002)

...Versus...

1.Kannaiyan (Deceased)

2.Panneer Selvam

3.Radha Krishnan

4.Amudha

(Respondents 2 to 4 brought on record as
LRs of the deceased sole respondent vide
order of Court 29.08.2018 made in
C.M.P.Nos.12252 to 12254 of 2018 in
S.A.No.1377 of 2002 (RHJ))

.. Respondents

PRAYER: This Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree dated 28.03.2002 made in A.S.No.111 of 2001 on the file of the Principal Subordinate Court, Mayiladuthurai, in reversing the judgment and decree in O.S.No.122 of 1994 dated 12.10.2001 on the file of the Principal District Munsif Court, Mayiladuthurai.

For Appellants:: Mr.A.Muthukumar

For R1 :: Died (steps taken)

For R2 to R4 :: No appearance

J U D G M E N T

This Second Appeal has been filed by the appellants against the judgment and decree passed by the Principal Subordinate Judge, Mayiladuthurai, in A.S.No.111 of 2001 dated 28.03.2002, reversing the judgment and decree passed by the Principal District Munsif Court, Mayiladuthurai, in O.S.No.122 of 1994 dated 12.10.2001.

2. The appellant herein had filed a suit in O.S.No.122 of 1994 on the file of the Principal District Munsif Court, Mayiladuthurai, to declare that the plaintiff (since deceased) is the owner of the suit property, comprised in West of the Eastern fence line in R.S.No.476/3 in respect of two cents, out of the total extent of 1.18 situated at Kadalangudy Village and consequentially, restrain the defendant and his men from causing interference to the plaintiff's possession and enjoyment of the suit property, by means of permanent injunction. The learned Principal District Munsif Court, Mayiladuthurai, by the judgment dated 12.10.2001 had decreed the said suit without costs. Aggrieved by the same, the defendant (since deceased) had filed an appeal in A.S.No.111 of 2001 on the file of the Principal Subordinate Court, Mayiladuthurai. The learned Principal Subordinate Judge, Mayiladuthurai by Judgment dated 28.03.2002, had allowed the said appeal and set aside the judgment and decree passed by the Trial Court and dismissed the said suit. Feeling aggrieved, the plaintiff has filed the present Second Appeal.

3. For the sake of convenience, the parties are referred to as they are described before the Trial Court.

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

The plaintiff is the owner of the suit property. The property was purchased by plaintiff's father and after his death, the same was inherited by the plaintiff. With regard to Western boundary of the suit property O.S.No.498/1985 was filed and the same was partly allowed, against which A.S.Nos.31 and 32 of 1993 were filed. With regard to the Eastern boundary of the suit property, there was a dispute between the plaintiff and the defendant. Hence, the plaint in O.S.No.122 of 1994 was filed. Since the defendant disputed the title of the plaintiff, the suit was filed for declaring the plaintiff as owner of the suit property and to restrain the defendant from interfering with the possession of the plaintiff. The plaintiff restricted his claim in respect of only an extent of 2 cents, situated West of the Eastern fence line. The cause of action for the suit arose on from 11.02.1994, when the defendant attempted

to cut the two "vaagai" trees, situated on the West side of the Eastern fence line. Hence, the plaint.

5. The averments made in the written statement filed by the defendant, are in brief, as follows:-

The defendant is an unnecessary party to the suit. The suit is bad for non-joinder of parties. The dispute is only with respect to the fence line. The plaintiff has not purchased the disputed portion. The sale deed dated 04.06.1946 is not admitted. O.S.No.498 of 1985 and the appeal will not advance the case of the plaintiff as far as the dispute in the suit is concerned. The trees standing on the fence line belongs to the defendant. The defendant's daughter-in-law viz., Amudha has got 54 cents of Nanja land and 3 acres of Punja land, which are situated on the Eastern side of the plaintiff's property. During February 1994, due to quarrel that arose between the plaintiff and Amudha, the plaintiff sought for Surveyor's Report. On inspection, it came to know that the trees are situated on the defendant's property. But, the plaintiff filed the suit against the present defendant, who has nothing to do with it. The plaintiff is not in possession and enjoyment of the suit property. There is no cause of action for the suit and therefore, the defendant prayed to dismiss the suit.

6. Based on the aforesaid pleadings, the Principal District Munsif Court, Mayiladuthurai, had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as P.W.1. He has marked Exs.A1 to A3. On the side of the defendant, the defendant examined himself as D.W.1 and has also examined one more witness as D.W.2 and has marked Exs.B1 to B3. The Report and Plan filed by the Revenue Inspector have been marked as Exs.C1 and C2 respectively. Thereafter, the Survey Inspector of Mayiladuthurai has filed a Report and Plan, which have been marked as Exs.C3 and C4 respectively.

7. The Principal District Munsif Court, Mayiladuthurai, after considering the materials placed before him, decreed the suit as prayed for without costs. Aggrieved by the same, the defendant had filed an appeal in A.S.No.111 of 2001. The learned Principal Subordinate Judge, Mayiladuthurai, by Judgment dated 28.03.2002 had allowed the said appeal and set aside the judgment and decree passed by the trial Court, and accordingly, dismissed the suit which was filed by the plaintiff for the reason that the suit is bad for non-joinder of necessary party and the disputed land does not come into the area of Ex.A2 document. Feeling aggrieved, the plaintiff has filed the present Second Appeal.

8. This Court, at the time of admitting the Second Appeal on 16.08.2002, has formulated the following Substantial Questions of Law:-

"1. When the plaintiff's title to the suit property was admitted by the defendant, whether the lower Appellate Court not erred in law in dismissing the suit for declaration and injunction in entirety?

2. When the Commissioner's Report and Plan suggest that the trees are standing in S.No.476/3, i.e., on the suit property and neither the defendant nor his daughter has any property in the said S.No. whether the lower Appellate Court not erred in law in dismissing the suit?

3. Whether the Judgment of the lower Appellate Court is not vitiated in law for non-consideration of the relevant issues, not disposing the appeal on the issues which are not in controversy?

9. Heard Mr.A.Muthukumar, the learned counsel for the appellants and none appeared for the respondents.

10. The learned counsel for the appellants contended that in view of the specific stand of the defendant(s) having no objection for grant of injunction in respect of the property to the plaintiff, the trial Court ought to have decreed the suit and the defendants have admitted in the cross examination that his daughter is cultivating land measuring two cents of the land. Therefore, the finding of the Lower Appellate Court is not proper and he prayed for allowing the Second Appeal.

11. The measurement of the land in dispute is two cents, description of property namely length and breadth are not given.

12. After hearing the counsels and after perusing the documents, it is seen that the suit was originally decreed and appeal was allowed on the ground that the defendant is not a necessary party to the suit, while Arulmigu Lakshmi Narayana Temple and Amudha are the necessary parties to the suit. However, as they are not impleaded and accordingly, the Lower Appellate Court has allowed the appeal. Consequently, the suit was dismissed.

13. It is seen from evidence of D.W.2-(Govindasamy-independent person) apart from version of P.W.1 and D.W.1,

based upon the answer elicited from the plaintiff-P.W.1 in the cross examination, coupled with the evidence of D.W.2 the disputed property measuring 0.2 cents is on the West of the admitted fence and in this regard, the defendant has stated that P.W.2-Govindasamy has admitted the dispute between the plaintiff and the defendant as to the location of the property with proper identification. The land on the Eastern portion of the fence line is under dispute. From the pleadings and evidence, it is projected as if, the suit property is on the West of the fence. It remains to be stated that neither the plaintiff nor the defendant had projected the evidence in respect of the suit property. Furthermore, even in the written statement, the defendant has categorically stated that the suit property is in enjoyment of one Amudha-(daughter of the defendant). But, she was not added as a party-defendant. Furthermore, when the suit property refers to Eastern side of the fence, in the absence of any pleading or evidence as to who is the owner of the property, under whose enjoyment the suit property lies, also assumes significance.

14. From the admission of D.W.2, it is come to light that the Eastern portion of the fence in entirety belonged to the Temple and initially, D.W.2's father had taken the property on lease. Subsequently, D.W.2-Govindasamy was cultivating the land. Thereafter, his daughter namely Amudha has taken sub-lease from the second defendant-D.W.2 and was cultivating the land. Even after recording the said evidence of D.W.2, plaintiff has not exercised any caution or diligent in adding appropriate parties as party-defendants in the suit.

15. Furthermore, in respect of the suit property, it is also projected through the documentary evidence of Exs.B1 and B2, wherein, it is categorically stated that one Amudha-daughter of Govindasamy, D.W.2 is cultivating the land in question under the Temple and she was dealing with the property and Ex.B3 is the lease deed executed in favour of Panchanathan-father of D.W.2-Govindasamy.

16. Even from the evidence adduced by the defendant, it is seen that the lands in S.No.478 of 2002 measuring 1.6 acres and 48 cents in S.No.480/2 in toto is one acre and 54 cents. The defendant's daughter is the cultivating tenant. However, as rightly pointed out by the lower Appellate Court, the lands in Survey Number pertain to the lands on the Eastern side of S.Nos.478/1 and 478/2 and both the S.Nos. belong to the Temple.

17. As could be seen from the Advocate Commissioner's Report filed before the Trial Court under Exs.C1 and C2 and Surveyor's Report and under Exs.C3 and C4, this Court finds

that based upon Exs.B1 to B3 coupled with oral evidence of D.W.2, the lands in S.No.478/2 with total extent is measuring 1.54 cents and Amudha is the cultivating tenant as a lease hold right. However, the Eastern side of the disputed fence is S.No.478/1 and further, Eastern side is S.No. 478/2 and thus in respect of the suit property, namely, the disputed side is situated on the Eastern portion of S.No.428/1 with further West of the portion, which belongs the cultivating tenant and she is in possession of the land and she is the owner of the land and in respect of suit property its extent, there is no pleading or evidence either by the plaintiff or by the defendant.

18. It remains to be stated that Amudha who is the daughter of D.W.2, is cultivating the land adjacent to the suit property and in view of the admission effected by D.W.2, coupled with documentary evidence of Ex.B1 to B3, the Lower Appellate Court has rightly come to the conclusion that those land are in possession of the cultivating tenant, who is the daughter of the defendant and accordingly, the Lower Appellate Court held that the defendant is not a necessary party to the dispute.

19. As the cultivating tenant is not in enjoyment of the disputed property and while based on evidence, the Lower Appellate Court has come to the conclusion that the land that are in enjoyment of the defendant/respondent is not the suit property. But, it is on the further Eastern side of the property and further, it is also held that with regard to the lands on Eastern side of the fence bearing Surveyor S.No.478/1, the evidence as to who is the owner and as to who is in cultivation or as to who is in enjoyment absolutely no evidence is not available on record and hence, this Court finds that when lands in S.No.428/1 is admittedly belonged to the Temple and due to non impleading of the said Temple as a party-the defendant, the Lower Appellate Court has rightly come to the conclusion that for non-impleading of the necessary party, the suit has to fail and the same does not warrant any interference and such a finding given by the lower Appellate Court appears to be based upon the documentary evidence of the Surveyor's Report and Plan/C1 to C4 respectively coupled with the admission of P.W.1 and D.W.1 in the witness box and also based documentary evidence of Exs.B1 and B3.

20. Accordingly, the finding of the Lower Appellate Court that the Eastern portion of the fence which is shown as a suit property, is not in enjoyment possession and enjoyment of the defendant and the suit property belongs to the Temple and in the absence of the Temple as a party-the defendant, the suit has been rightly rejected by the Lower

Appellate Court for non-impleading of the necessary party and such a finding of the Lower Appellate Court does not warrant any interference by this Court, as the same do not suffer from any illegality or irregularity calling for interference at the Second Appeal stage under Section 100 of C.P.C.

21. In view of the above discussion, this Court finds that though the defendant admitted the possession of the plaintiff, but, he is not a competent person to give such admission. The property belongs to the Arulmigu Lakshmi Narasima Perumal Temple which is not made as a party herein and merely because the suit Survey Number has been mentioned and the same does not confer any right on the plaintiff.

22. In view of the above discussion, all the Substantial Questions of Law framed at the time of the admission, does not merit consideration on the above factual position and hence, all the three Substantial Questions of Law are answered in the negative against the appellant/plaintiff. Consequently, there is no merit in the Second Appeal.

23. In the result,

(i) This Second Appeal is dismissed. No costs.

(ii) The Judgment and Decree passed in A.S.No.111 of 2001 on the file of the learned Principal Sub-Judge, Mayiladuthurai are confirmed.

(iii) Consequently, the said O.S.No.122 of 1994 on the file of the learned Principal District Munsif, Mayiladuthurai stands dismissed.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

To

1.The Principal Subordinate Judge,
Mayiladuthurai.

2. The Principal District Munsif,
Mayiladuthurai.

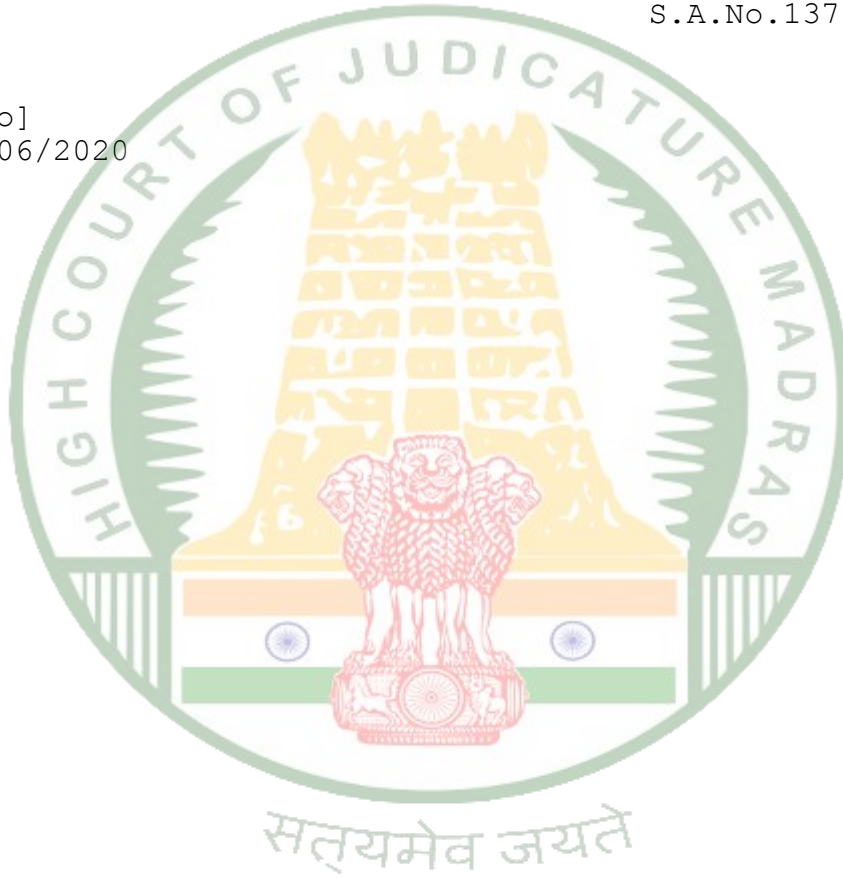
Copy to

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

+1cc to Mr.A.Muthukumar, Advocate Sr.70761

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