

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 29.08.2019

Judgment Pronounced on : 01.11.2019

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.1336 of 2004
and CMP.No.10320 of 2004

1.Kulanthaivel
2.Ranganayaki (Died) ...Appellants 1 & 2/
Defendants 1 & 2
3.Pazhaniammal
4.Asupathiraman
5.Anjayal ...Appellants 3 to 5

(1st appellant is recorded as legal representative of the deceased 2nd appellant and appellants 3 to 5 are brought on record as legal representatives of the deceased 2nd appellant viz., Ranganayagi, Vide Order of Court dated 11/07/2019 made in CMP.No.22201/2018 in SA.No.1336/2004)

Vs

1.Meenakshi Ammal
Rep. by her Power of Attorney Agent Manickam
...1st Respondent/Plaintiff
2.Govindaraju ...2nd Respondent/3rd defendant

Prayer :- Second Appeal filed under Section 100 of CPC., against the decree and judgment dated 17.03.2003 rendered in A.S.No.49 of 2002 on the file of the Additional District Judge cum Fast Track Court, Ariyalur, confirming the decree and the judgment dated 18.7.1995 rendered in O.S.No.60 of 1994 on the file of the District Munsif of Jayamkondam.

For Appellants : Mr.S.Subbiah, Senior Counsel
Assisted by Ms.D.Sathya Sai

For Respondents : Ms.P.T.Ramadevi [R1]
Not ready in notice Respondent-R2

JUDGMENT

The defendants 1 and 2, who have lost successively before the Courts below, are the appellants herein, in a suit laid for declaration of plaintiff's title over the suit property and for recovery of possession. Parties would be referred to by their rank before the trial Court.

2. The plaintiff has come forward with a straight forward case. The suit property is described as a strip of land measuring 3 cents in Survey No.173/9A. According to the plaintiff, this 3 cents forms part of a larger extent of 16 cents, which she had purchased under Ext.A-1, sale deed dated 03.9.1963. To the immediate east of the property that she had purchased under Ext.A1, lies the property of the defendants which includes the property of the present appellants as well. According to the plaintiff, on the fifth day of Tamil Month Thai, 1991, defendants 1 and 2 had encroached into the suit property, and planted some coconut saplings therein. Subsequently, a suit notice in Ext.A5 was issued on 19.12.1992, and on the same date, it was returned. Thereafter, the defendants sent a reply notice dated 09.01.1993 (Ext.A7), raising untenable contentions. Hence, the suit was laid.

3. Refuting the encroachment as alleged by the plaintiff, the defendants in their written statement contended that they had purchased the property to the immediate east of plaintiff's property under Ext.B1, sale deed dated 17.06.1969. This, he had purchased from his elder brother Kumarasamy Vandayar. Between the properties of the defendants and plaintiff, lies a north-south bund, which is there for more than 150 years. The defendants had planted some coconut saplings some 13 years prior to the institution of the suit, and has been enjoying them. This bund is common to both the plaintiff and the first defendant, and the plaintiff does not have any exclusive right to east of the bund. This is irrespective of the survey number in which the defendants' property that lies to the east of the bund falls. So far as the planting of alleged coconut saplings are concerned, they have been done some 13 years prior to the institution of suit and to that extent, the statement made in the reply notice that they were planted some three years before, was a mistake.

4. Before the trial Court, both sides adduced oral and documentary evidences. The trial Court also appointed a Commission for local inspection and he has laid his report and plan. Based on the evidence before it, the trial Court decreed

the suit for the portion alleged to have been encroached by the defendants 1 and 2. This was marked in the Commissioner's plan OPED.

5. When the matter reached the first appellate Court at the instance of the defendants/appellants herein, the appellate Court entered its finding on the area encroached by the defendants in more specific terms, and stated that the appellants have encroached into 1 cent, out of the total encroachment of 1.25 cents, and the balance 0.25 cent was encroached by the third defendant. This is now in challenge.

6. The appeal was admitted on the following substantial questions of law :

a) Whether the plaintiff without establishing his title to the suit property can only rely upon the report of the Advocate Commissioner?

b) Whether the report of the Advocate Commissioner without drawing the G-Line to locate the lands belonging to the plaintiff and the defendants could be acted upon by the Courts?

7. Mr.S.Subbiah, learned Senior Counsel appearing for the appellants made the following submissions :

- While the Courts below have relied excessively if not solely on Exts.C1 and C2, what the Courts failed to probe was whether the vendor of the plaintiff had 16 cents at all to convey under Ext.A1. Since the burden is on the plaintiff, it is her obligation to establish that her vendor was entitled to the entire 16 cents.
- Secondly, while the plaintiff has alleged that on a certain January day in 1991, the defendants 1 and 2 had encroached into her property and planted coconut saplings, during the cross-examination of DW1 this was given up when the plaintiff suggested that the encroachment was done over a period of time.
- Thirdly, the first defendant and his brother Kumarasamy Vandaiyar had laid a suit in O.S.216 of 1976, claiming easmentary right of irrigation against the plaintiff's husband Manicka Vaandaiyar, before the District Munsif Court, Ariyalur. This suit came to be decreed and it is evidenced by Ext.B7. The present suit in O.S.No.60 of 1994 is therefore, is a fall out of the earlier suit.

Reliance was placed on the authorities in R.Thangam Vs. P.T.Ram Mohan & Others [2019 (1) CTC 739]; Selli Gounder (died) and

others Vs. Masaiyappa Gounder [2017-4-L.W.611] and Ramu (deceased) & others Vs. Samuel Nadar [2017-2-L.W.858].

8. Per contra, the learned counsel for the plaintiff/first respondent argued:

Nowhere, the defendants 1 and 2 have challenged the extent covered under Ext.A-1 sale deed. In other words, they have not denied the title of the plaintiff as to the property covered by Ext.A1 sale deed. What is really in dispute is the title over a north-south bund that separates the fields of the plaintiff and these defendants. The commissioner had measured the property and had found that it belonged to the plaintiff. And, the defendants 1 and 2 who take exception to the Commissioners Report, did not choose to cross examine him, nor provided any material which would ex facie discredit the evidentiary value of the Commissioner's Report. Thirdly, so far as O.S.216/1976 is concerned, that relates to some other property, and has little to do with the suit property. Fourthly, there is no substantial questions of law worthy of consideration involved in this appeal.

9. The last of the argument advanced by the counsel for the respondent is worthy of consideration first. This Court will not interfere with findings on questions of fact, unless they are so perverse, something no reasonable man would ever arrive at. A careful reading of the first Appellate Court judgement nowhere reveals that the findings that it had arrived at even remotely borders on perversity. The argument advanced by the counsel for the appellant to cause a dent in the reasoning of the first Appellate Court have been ably met by the respondent's counsel. They indeed, conforms both to law and logic. To avoid repetition, this Court desist from revisiting the same arguments.

10.1 In conclusion, this court finds no merit in the appeal and the same is dismissed, with costs and the decree and judgment dated 17.03.2003 rendered in A.S.No.49 of 2002 on the file of the Additional District Judge cum Fast Track Court, Ariyalur, is confirmed. Consequently, connected miscellaneous petition is closed.

10.2 Having stated thus, it has to be recorded that there are couple of coconut trees planted by the defendants 1 and 2, lie on the suit property. In law a trespasser or an encroacher is not entitled to any value of improvements. This should necessarily imply that the defendants 1 and 2 have to cut and remove these trees and deliver vacant possession to the plaintiff. However, what these coconut trees have done to lose

their roots and existence? Why should they be exposed in the cross fire of this litigious battle? This Court therefore, grants the plaintiff an option to buy the coconut trees so that the trees could be saved. This option can be exercised before the Execution Court, and for this limited purpose, the Execution Court may attempt at a negotiated settlement of the price to be paid for the trees through ADR.

Sd/-
Asst.Registrar (CS VIII)

/true copy/

Sub Asst. Registrar

ds
To:

1.The Additional District Judge
cum Fast Track Court Judge
Ariyalur.

2.The District Munsif
Jayamkondam.

+1 cc to Mr.D.Sathya Sai Advocate sr91480
+1 cc to M/s.P.T.Ramadevi Advocate sr91078

S.A.No.1336 of 2004

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