

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 11.11.2019

DELIVERED ON: 28.11.2019

CORAM

THE HONOURABLE MR.JUSTICE P.RAJAMANICKAM

S.A.NO.1339 OF 2004

AND

CMP.NO.1760 OF 2007

1.Muthupaiyan
2.Palanisamy
3.Prakasam
4.Valar
5.Sarasu
6.Mani

.... Appellants

Vs.

1.K.Subban (Deceased)
2.Palaniyammal
3.Alamelu
4.Selvi
5.Ramarathinam
6.Lakshmanan
7.Eswaran

.... Respondents

(RR2 to 7 brought on record
as LRs of the deceased sole
respondent vide order of Court
dated 08.01.2019 made in
CMP.No.22259 of 2018 in
S.A.No.1339 of 2004)

PRAYER:

Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 05.09.2003 made in A.S.No.35 of 2000 on the file of the Sub Court, Sankari, reversing the judgment and decree dated 26.11.1999 made in O.S.No.189 of 1995 on the file of the District Munsif Court, Sankari.

For Appellants : Mr.N.Manoharan

For Respondents: Mrs.A.B.Reehna Begum
for Mr.T.R.Rajaraman for R2 to R7

JUDGMENT

This Second Appeal has been filed by the defendants against the judgment and decree passed by the Sub-Judge, Sankari, in A.S.No.35 of 2000 dated 05.09.2003 reversing the judgment and decree passed by the District Munsif, Sankari, in O.S.No.189 of 1995 dated 26.11.1999.

2. The first respondent herein had filed a suit in O.S.No.189 of 1995 on the file of the District Munsif, Sankari, to restrain the defendants and their men from cutting and removing the row of trees south-north on the western side of the plaintiff's land by way of permanent injunction. The learned District Munsif, Sankari, by the judgment dated 26.11.1999 had dismissed the said suit with costs. Aggrieved by the same, the plaintiff had filed an appeal in A.S.No.35 of 2000 on the file of the Sub-Judge, Sankari. The learned Sub-Judge, Sankari by the judgment dated 05.09.2003 had allowed the said appeal and set aside the judgment and decree passed by the trial Court and decreed the suit as prayed for with costs. Feeling aggrieved, the defendants have filed the present Second Appeal.

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

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

(a) The plaintiff had purchased 3.64 acres of land situated in S.No.15/1 of Kaveripatti Village, under a registered sale deed dated 08.07.1969 and from that date onwards, he has been in possession and enjoyment of the said property. The second defendant is the first defendant's wife and the third defendant is their son. The fourth defendant is the wife of the third defendant. The plaintiff's property is situated on the eastern side and the defendant's property is situated on the western side. The plaintiff and the defendants are neighbouring land owners. The vendors of the plaintiff planted Palmirah trees north-south in between the plaintiff's land and the lands of the defendants. The plaintiff is entitled to the lands of 10 feet on the west of the row of trees. There are 61 Palmirah trees, 30 Vembu trees, one Aaya tree, one Unjai tree and Elanthai tree in the said row of trees in the lands of the plaintiff. The defendants made attempted to encroach upon the plaintiff's land and hence, the plaintiff lodged a complaint before the Police on 15.12.1994. Thereafter, he has issued a legal notice to the defendants 1 to 3 and 7 others on 17.12.1994. The third defendant received the said notice, but others refused to received the same. However, the defendants 1 to 3 and 7 others

had issued reply notice through counsel on 26.12.1994. They had admitted in the said reply notice that it is true that there is a row of trees between the land of the plaintiff and the defendants and that they belong to the plaintiff.

(b) On 02.05.1995 the plaintiff's daughter and sons were cutting fruits of Palmirah trees and at that time, the defendants prevented them from cutting the fruits and also assaulted the plaintiff's daughter and sons. With regard to the said incident, also a police complaint was lodged but the police did not take any action. On 29.05.1995 the defendants threatened the plaintiff that they would cut and remove the entire row of trees and hence, the plaintiff was constrained to file the above suit for the relief of permanent injunction.

5. The averments made in the written statement filed by the third defendant and adopted by the defendants 1, 2 and 4 are, in brief, as follows:-

(a) The plaintiff is entitled only to a row of Palmirah trees and rest of the trees belong to the defendant's family. A false report had been lodged by the plaintiff's daughter before the police and hence, no action was taken on the said complaint. It is true that there were exchange of notices between the plaintiff and the defendants. The reply notice sent by the defendants does not concede the title of the plaintiff to the trees other than the palmirah trees in one row. No occurrence took place on 29.05.1995 as alleged in the complaint. The defendants' lands are situated on the west and that the plaintiff's land is situated on the east. There are number of trees consisting of Palmirah trees, Neem trees, Aaya trees, Elandhai trees and Unjai trees in the defendants' land and the usufructs of the same are being enjoyed by the defendants. The land of the plaintiff is on a higher level than the land of the defendants. The plaintiff issued a notice stating that he has planted a row of Palmirah trees and hence, the said trees belong to him. He further claimed that the land to a breadth of 10 feet west of the row of the Palmirah trees also belong to him.

(b) In the reply notice, the defendants admitted that one row of Palmirah trees as belonging to the plaintiff. But they denied the land west of the above said row of the Palmirah trees as of belonging to the plaintiff. In the notice sent by the plaintiff, there is no reference to the trees other than the Palmirah trees standing in that row. The rest of the trees mentioned in the suit property are standing in the defendants' land and they are enjoying the same. If a Commissioner visited the suit property will vouchsafe the facts stated supra.

Therefore, the defendants 1, 2 to 4 prayed to dismiss the suit.

6. Based on the aforesaid pleadings, the learned District Munsif, had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1 and also examined one more witness as PW2. He had marked Exs.A1 to A6 as exhibits. On the side of the defendants, the third defendant was examined as DW1 and Exs.B1 and B2 were marked.

7. The learned District Munsif, after considering the materials placed before him found that it is the duty of the plaintiff to prove that he is entitled to the suit properties. He further found that in the reply notice (Ex.A5) the defendants had admitted that the plaintiff is the owner of Palmirah trees only and they had not admitted that the plaintiff is the owner of other trees. Accordingly, he dismissed the suit. Aggrieved by the same, the plaintiff had filed an appeal in A.S.No.35 of 2000 on the file of the Sub-Judge, Sankari. The learned Sub-Judge, had allowed the said appeal and set aside the judgment and decree passed by the trial Court and decreed the suit as prayed for with costs. Feeling aggrieved, the defendants have filed the present Second Appeal.

8. This Court, at the time of admitting the second appeal, has formulated the following substantial questions of law:-

"1.Whether the first Appellate Court is right in construing the counter statement filed in I.A.No.610 of 1995 as admission as defined under Sections 17 and 21 of the Indian Evidence Act, 1872, when the other parts of the evidence and the pleadings are very clear and unequivocally denied the claim of the plaintiff?

2. Whether the averments in the reply legal notice marked as Ex.A6 and the counter statement filed in I.A.No.610 of 1995 could be construed as admission?"

9. Heard Mr.N.Manoharan, the learned counsel for the appellants and Mrs.A.B.Reehana Begum for Mr.T.R.Rajaraman, the learned counsel for the respondents 2 to 7.

10. Substantial Questions of law 1 and 2:

The learned counsel for the appellant has submitted that the first Appellate Court erred in reversing the well considered judgment and decree of the trial Court. He further submitted that since the plaintiff has filed the suit, the burden is upon him to prove that the suit trees belong to him. He further submitted that though the burden is upon the plaintiff to prove that the suit trees belong to him, he has not taken any steps for appointing an Advocate Commissioner to measure the lands of both the parties. The defendants themselves had filed an application seeking for the appointment of an Advocate Commissioner, but the plaintiff had opposed the said application and consequentially the said petition was dismissed. He further submitted that if a Commissioner had been appointed to measure the properties of both the parties and file a report, it would have helped the Court to decide the issue whether all the trees are coming within the boundaries of the plaintiff, but unfortunately, the application which was filed by the defendants for appointing an Advocate Commissioner was dismissed by the trial Court.

11. He further submitted that in the pre-suit notice (Ex.A4) the plaintiff had claimed only row of Palmirah trees and the same has been admitted by the defendants in their reply notice (Ex.A5) but, in the plaint, the plaintiff has included other trees also such as, Neem tree etc. He further submitted that in the counter filed in I.A.No.610 of 1995 also, the defendants have admitted that the plaintiff is the owner of the Palmirah trees alone. He further submitted that the trial Court taking into consideration of the aforesaid facts had rightly dismissed the suit but, the first Appellate Court had erroneously reversed the findings of the trial Court and therefore, he prayed to allow the Second Appeal and set aside the judgment and decree passed by the first Appellate Court and restore the judgment and decree passed by the trial Court.

12. The learned counsel for the appellants/defendants in support of his contentions, relied upon the following decisions:-

- 1) Union of India Vs. Ibrahim Uddin and another, (2012) 8 SCC 148;
- 2) Ram Lal and others Vs. Salig Ram and others, (2019) 4 MLJ 251 (SC).

13. Per contra, the learned counsel for respondents 2 to 7 has submitted that admittedly, the plaintiff's land is situated on the east and the defendants' land is situated on the west and that the plaintiff's land is on a higher level than the

defendants' land and that the row of trees are lying only on the boundary of the plaintiff's land and as such, the defendants are not entitled to claim any right over the said trees. She further submitted that since the other trees are situated in between the Palmirah trees, in the pre-suit notice, the plaintiff has used the word "பனஞ்சாரி" i.e., row of Palmirah trees. She further submitted that there is no evidence that Palmirah trees and other trees are in different rows and therefore, it has to be presumed that all the trees are lying in a single row and since Palmirah trees are predominately there, the said row has been called in colloquial language as "பனஞ்சாரி". She further submitted that since in the pre-suit notice, the plaintiff has used the word "பனஞ்சாரி" that does not mean that the said row contains Palmirah trees alone.

14. She further submitted that the defendants not only admitted in their reply notice that the said trees belong to the plaintiff but also in the counter affidavit filed in I.A.No.610 of 1995, they admitted that the said row of trees belong to the plaintiff. She further submitted that it is well settled that an admission made by the opposite party is the best evidence. She further submitted that the defendants knowing fully well that the aforesaid trees belong to the plaintiff, at a belated stage, with a view to drag on the proceedings had filed an application to appoint an Advocate Commissioner and the same was rightly dismissed by the trial Court, but without taking into consideration of the aforesaid facts the trial Court has held that the plaintiff has not taken any steps to appoint an Advocate Commissioner and the said finding is against the earlier order passed by the trial Court.

15. She further submitted that the Advocate Commissioner can be appointed only when the Court is satisfied that on the materials available on record, the parties are not able to produce the desired evidence, but in this case, the defendants have admitted in their reply notice and also in the counter affidavit filed in I.A.No.610 of 1995 that the aforesaid tree belong to the plaintiff and in such a case, the Advocate Commissioner need not be appointed.

16. She further submitted that even assuming that the defendants had admitted only the Palmirah trees belong to the plaintiff, the trial Court ought to have granted a decree at least to that extent, but, it has dismissed the entire suit. She further submitted that the first Appellate Court taking into consideration the aforesaid facts had rightly set aside the findings of the trial Court and decreed the suit as prayed for

and in the said factual findings, this Court cannot interfere and therefore, she prayed to dismiss the Second Appeal.

17. The learned counsel for the respondents 2 to 7 in support of her contention, relied upon the decision in

Chandrasekaran Vs. Doss Naidu, (2005) 3 MLJ 473;

18. According to the plaintiff, he purchased the properties situated in S.No.15/1 Kaveripatti Village, ad-measuring 3.64 acres under a registered sale deed dated 08.07.1969 and from that date onwards, he has been in possession and enjoyment of the said property. It is his further case that adjacent to his land on the western side, the defendants' land is situated. His further case is that his vendors planted Palmirah trees in the north-south row in between his land and the defendants' land. His further case is that he is entitled to the land of 10 feet even on the west of the row of trees. His further case is that in the aforesaid row there are 61 Palmirah trees, 30 Vembu trees, 1 Aaya tree, 1 Unjai tree and 1 Elandhai tree and the said trees belong to him.

19. The defendants have not disputed in their written statement that the plaintiff had purchased 3.64 acres of land in S.No.15/1 under a registered sale deed dated 08.07.1969. They have also not disputed that Palmirah trees are belong to the plaintiff, but they are disputing the claim of the plaintiff that the Vembu trees, Aaya tree, Unjai tree and Elandhai tree also belong to the plaintiff and also that the plaintiff is entitled to 10 feet of the land on the west of the row of Palmirah trees.

20. In the pre-suit notice (Ex.A4) the plaintiff has stated that in between his land and the land of the defendants 1 to 3, there is a "பனஞ்சாரி" (a row of Palmirah trees) which runs north-south. He further stated that on the west of the said row of trees he got 10 feet land.

21. In the reply notice (Ex.A5), in Paragraph No.3, the defendants have stated as follows:-

"...It is true that my clients 1 to 3 have their lands west of lands belonging to your client. It is also true that there is a row of trees between the land of my clients 1 to 3 and your client and that they

belong to your client. But it is false to say that your client has lands to a breadth of 10 feet west of the row of trees. The west of the row of trees only belongs to my clients 1 to 3. The row of trees constitutes the boundary between the land of my clients 1 to 3 and your client..."

22. In the said reply notice (Ex.A5) in Paragraph No.7 stated as follows:-

"...My clients main objection is your clients claim for land west of the row of trees..."

23. From the aforesaid recitals, it is clear that the defendants have admitted in unequivocal terms that there is a row of trees between the land of the plaintiff and the land of the defendants 1 to 3 and the said row of trees belong to the plaintiff. Their main objection is only with regard to the plaintiff's claim for land west of the row of trees.

24. It is true that in Ex.A4 notice, the word "பனஞ்சாரி" has been used but in the reply notice (Ex.A5) the defendants have not stated that in the said row of trees there are only Palmirah trees but the other trees are lying in another row. On the contrary, they have simply stated that there is a row of trees between the land of both the parties and the said trees belong to the plaintiff. They have not claimed that the plaintiff is entitled for Palmirah trees only and the other trees belong to them. On the contrary, they have claimed that the main objection is only with regard to the claim of the plaintiff that he got the land of 10 feet on the western side beyond the aforesaid row of trees. So, it is clear that the defendants raised objection only with regard to the claim of the plaintiff that he got the land of 10 feet on the west of the aforesaid row of trees. They have not disputed the plaintiff's right over the trees.

25. It is also relevant to refer to the averments made in Para No.4 of the counter affidavit filed in I.A.No.610 of 1995 in O.S.No.189 of 1995 which reads as follows:-

"4. The averments in para No.3 are partly correct and partly incorrect. It is true that the petitioner/ plaintiff is the owner of the land on the east and this respondent/defendant is the owner of the land on

the west. It is true that dividing these two lands is a row of a variety of trees. It is false to say that the petitioner/plaintiff has lands to a width of 10 feet west of the row of trees."

26. From the aforesaid averments, it is clear that the defendants had admitted that in between the lands of both the parties there is only one row of trees which contains variety of trees. It is also clear that they denied the claim of the plaintiff that he got the land of width of 10 feet west of the aforesaid row of trees. So, the trees are situated in a single row and when the defendants admitted that the plaintiff is entitled to the row of Palmirah trees, then, it has to be presumed that the other trees which are situated in the same row also would belong to the plaintiff.

27. It is seen from the evidence of DW1 that during cross examination, the Court had asked a question as to whether Palmirah trees and other trees are lying in the same straight row and for that DW1 has answered that the Palmirah trees, Neem trees, Aaya tree and Elandhi tree are not lying in a same straight line. He further stated that the other trees are lying 2 feet away from the row of Palmirah trees, but no such plea raised in the reply notice, counter affidavit in I.A.No.610 of 1995 and also in the written statement. It is well settled that no amount of evidence can be looked into without proper pleading. Therefore, the aforesaid statements for the first time made by DW1 before the Court that the other trees are lying in a different row cannot be accepted.

28. As already pointed out that the defendants' main objection is only with regard to the claim made by the plaintiff that he got 10 feet of land on the west of the aforesaid row of trees. Admittedly, the plaintiff after seeing the objection raised by the defendants in their reply notice (Ex.A5), had restricted his claim in the suit only with regard to the trees. He has not claimed 10 feet of the land on the west of the aforesaid row of trees. It appears that taking advantage of the word "பனஞ்சாரி" is used in (Ex.A4) notice, for the first time in the written statement, the defendants raised a technical plea that the word "பனஞ்சாரி" denotes only the row of Palmirah trees.

29. As already pointed out that if really, Palmirah trees and other trees are lying in different rows, the defendants would have stated the said fact in their reply notice itself and also in the counter affidavit filed in I.A.No.610 of 1995. All

along they took a plea that they are not having any dispute with regard to the row of trees and their dispute is only with regard to the claim made by the plaintiff for 10 feet of land which is situated on the west of the aforesaid row of trees, but, they suddenly took a plea in the written statement that the word "பனஞ்சாரி" does not include other trees. The said plea cannot be accepted. Since in the said row Palmirah trees are predominately present, the plaint may have used the word "பனஞ்சாரி" and that does not mean that the other trees which are in the same row have to be excluded.

30. In Union of India Vs. Ibrahim Uddin and another, (cited supra) the Hon'ble Supreme Court has observed in para No.34 which reads as follows:-

"34. Section 58 provides that a fact may not need to be proved in any proceeding which the parties thereto agreed to admit at the hearing or which, before the hearing, they agreed to admit by any writing under their hands or which they admitted by their pleading, even in that case the Court may, in its discretion, even if such an admission has been made by the party, require the fact admitted to be proved otherwise than by such admission. In fact, admission by a party may be oral or in writing. "Admissions" are governed under Sections 17 to 31 of the Evidence Act and such admissions can be tendered and accepted as substantive evidence. While admission for purposes of trial may dispense with proof of a particular fact. Section 58 deals with admissions during trial i.e. at or before the hearing, which are known as judicial admissions or stipulations dispensed with proof. Admissions are not conclusive proof but may operate as estoppel against its maker. Documents are necessarily either proved by witness or marked on admission."

31. From the aforesaid decision, it is clear that as per Section 58 of the Indian Evidence Act, a fact may not need to be proved in any proceeding which the parties there to agree to admit at the hearing or before the hearing, or by their pleading. Further, it is clear that the admissions are not conclusive proof but may operate as estoppel against its maker. It is also clear that the documents are necessarily either proved by witness or marked on admission.

32. In this case, the defendants had in unequivocal terms admitted in their reply notice (Ex.A5) that there is a row of trees in between the land of the plaintiff and the land of the defendants 1 to 3 and the said trees belong to the plaintiff. In the counter filed by the defendants in I.A.No.610 of 1995 also they admitted that there is a row of trees in between the lands of the plaintiff and the defendants 1 to 3 and in the said row there are varieties of trees. So, it is clear that only one row of trees in which Palmirah trees, Neem trees and other trees are lying. Further in (Ex.A5) the defendants have categorically stated that their main objection is only with regard to the claim of the plaintiff that he got 10 feet of the land on the west of the aforesaid row of trees. Therefore, the aforesaid decision, in fact is in favour of the plaintiff and the said decision will not help the defendants.

33. In Ram Lal and others Vs. Salig Ram and others, (cited supra), the Hon'ble Supreme Court taking into consideration of the facts and circumstances of the said case has held that if the report of the Local Commissioner was suffering from any irregularity i.e., for want of following the applicable instructions, the proper course for the High Court was either to issue a fresh commission or to remand the matter for reconsideration but the entire suit could not have been dismissed for any irregularity on the part of Local Commissioner.

34. In this case, since the defendants admitted that the aforesaid row of trees belong to the plaintiff, there is no necessity for the appointment of Commissioner. Therefore, the aforesaid decision will not apply to the facts of this case.

35. In Chandrasekaran Vs. Doss Naidu, and Rangasamy Vs. The Superintending Engineer, Tamil Nadu Electricity Board and others, (cited supra), It was held that the Advocate Commissioner could be appointed only when the court is satisfied that on the materials available on record, the party is not able to produce the desired evidence, the court may assist the party to appoint the Advocate Commissioner to obtain the evidence.

36. In this case, admittedly, the defendants had filed an application before the trial Court to appoint an Advocate Commissioner but the trial Court had dismissed the said application. As against the same, the defendants have not filed any appeal or revision and that being so, it is not open to the defendants to contend in the second appeal that the appointment of Advocate Commissioner is absolutely necessary.

37. In the plaint schedule, the plaintiff has stated that his properties are situated in S.No.15/1 ad-measuring 3.64 acres and also claimed Palmirah trees and other trees and the said trees, according to the plaintiff, are situated within the boundaries of the aforesaid property. The defendants have also taken a plea in their written statement that the plaintiff's land is situated on the higher level than their land and in such a case, the plaintiff can claim the right over the trees which are situated only within the boundaries of the aforesaid extent. If any trees are situated in the land which is lying lower than the plaintiff's land, those trees naturally would belong to the defendants 1 to 3 in which, the plaintiff cannot claim any right.

38. Without considering the facts and evidence in a proper perspective the trial Court had dismissed the plaintiff's suit and hence the first Appellate Court had rightly interfered with the findings of the trial Court and reversed the judgment and decree passed by the trial Court and decreed the suit as prayed for. In the said factual findings, this Court cannot interfere. Accordingly, the substantial questions of law are answered against the appellants/defendants.

39. In the result, the Second Appeal is dismissed. The judgment and decree passed by the first Appellate Court are confirmed. Considering the facts and circumstance of the case, the parties are directed to bear their respective costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

dna

To

- 1.The Subordinate Court, Sankari.
- 2.The District Munsif Court, Sankari.

+lcc to Mr.N.Manoharan, Advocate, S.R.No.99658
+lcc to Mr.T.R.Rajaraman, Advocate, S.R.No.100136

S.A.No. 1339 of 2004
and
CMP.No.1760 of 2007

SJ(CO)
CS/28/10/2020