

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 24.10.2019

CORAM

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A.No.3352 of 2013

and

M.P.No.1 of 2013

N.K.Surana ... Appellant/Respondent/Defendant

Vs.

Eswari Munisingh ... Respondent/Appellant/Plaintiff

Civil Miscellaneous Appeal is filed under Order 41 Rule 3 Read With Section 104 of Civil Procedure Code against the Judgment and Decree dated 24.09.2013 made in A.S.No.19 of 2012 against O.S.No.37 of 2010 passed by the learned Principal District Judge, Villupuram, remitting the suit to the file of the learned Principal Subordinate Judge, Tindivanam, to set aside the same.

For Appellant : Mr. V.Ramesh
for Mr.T.Thiyagarajan

For Respondent : No Appearance (Served)

J U D G M E N T

The appellant herein has filed the present Appeal to set aside the Judgment and Decree dated 24.09.2013 made in A.S.No.19 of 2012 against O.S.No.37 of 2010 on the file of the learned Principal District Judge, Villupuram, and dismiss the suit as not maintainable in law.

2. The case of the respondent/plaintiff is that she has purchased the suit property from one Suseela Jain, W/o. Ashok Jain on 02.05.2008 and took possession of the land and the appellant/defendant has purchased the adjacent land and the respondent/plaintiff applied for patta in her name and accordingly patta was granted by the Revenue Department after due enquiry. The plaintiff has purchased 0.50 cents, whereas, the appellant/defendant has purchased 4.50 cents from the same owner. The plaintiff was living along with her family at Bangalore and she quite often visited the suit schedule property

and when the plaintiff visited the property in the month of January 2009, she found that the defendant had put up a wall of fence in the property so as to restrain the plaintiff to enter into her property and such conduct of the defendant would amount to a criminal trespass and taking advantage the absence of the plaintiff, the defendant encroached the plaintiff's property and put up a wall of fence and defendant has no regard to law. The respondent/plaintiff contended that being merged with money and man power, fence was put up by the appellant/defendant in her property.

3. The appellant/defendant has contended that SDN farm developers owns property at Kheezh Puthupattu Village, Tindivanam Taluk, in Old S.No.367/1, New Survey No.279/1 etc., measuring about 4 acres and 50 cents, out of which an extent of 3 acres was purchased by the defendant is bounded on North by SDN Farms land and south by Ramanathan's land, East by Ramanathan's land and west by Veerasamy, Pandurangan and Manjini's lands as per the schedule given to him. He also purchased another 1 acre 50 cents from the same vendor in the same survey number on 01.03.1995 with the four boundaries have not been stated and as already stated, he had purchased 4 acres and 50 cents. According to him, his brother's land has been fenced. He further contended that 0.50 cents purchased by the respondent herein/plaintiff in the same survey number under Ex.A2 is non-existing land and it has become part and parcel of the passage for the village public of Kheezh Puthupattu Village and no land in existence for the said plaintiff. The suit was filed by the plaintiff before the Sub-Court, Tindivanam and the lower Court concerned is considered that the patta issued was without measuring the property and she has got the patta under the influence of the Revenue Authorities and the suit was dismissed seeking declaration and recovery of possession. Aggrieved by the said order, the respondent/plaintiff has filed an appeal before the learned Principal District Judge, Villupuram in A.S.No.19 of 2012 and the Court, after considering the case on hand had framed the issues and examined all the parties and considered that the sale deed which the plaintiff had purchased the same boundaries has found place in Exs.A1 and A2 and Ex.A5 were the order of the Revenue Divisional Officer considering the existence of 0.50 cents was not proved by the respondent/plaintiff by taking out an Advocate Commissioner petition and with the help of Surveyor 0.50 cents was purchased by her in S.No.279/1 could have been measured. The exact location of the boundaries by Ex.A2 was not able to be located because it is also with the four boundaries as mentioned in the suit schedule which also find placed in the documents of the respondent. Ex.A7 is the order passed by the Tahsildar, Tindivanam that he came to know that the property purchased by the respondent herein/plaintiff is in possession and enjoyment

of appellant herein /defendant and the appellant herein/defendant has put up fence and hence the surveyor nominated by the Tahsildar, Tindivanam could not go over to suit property and measure the same as appellant herein/defendant had effectively prevented him, hence, the Court below, after considering the issue on hand the respondent/plaintiff has got right and title over the suit property; the same could not be traced by the methods known to law and it has to be noted that the appellant/defendant has not claimed the adverse possession and prescription of right and title over the suit property. Hence, the only course open to the Court is to set aside the decree and judgment passed by the lower Court and remit the matter back to the lower court with a direction to appoint an Advocate Commissioner to identify and locate the suit property with the help of a Surveyor and he can identify the suit property within the four boundaries as stated in the suit schedule property and permit both the parties to adduce oral evidence if any through witnesses concerned and mark documents if any and dispose of the matter within 60 days from the date of receipt of material records and parties were directed to appear before the lower Court on 08.10.2013. Challenging the said order, the appellant/defendant has filed this appeal before this Court.

4. The learned counsel for the appellant/defendant contended that the respondent/plaintiff has not produced the sale deed in favour of Ashok Kumar Jain, who derived the suit schedule property to an extent of 0.50 cents either in original or in xerox copy. The respondent/plaintiff has not arrayed her predecessor in title i.e., the said Ilamathi Ammal, Ashok Kumar and his wife Sushila Jain, from whom she purchased the property or summoned them for giving evidence to substantiate her case. The respondent/plaintiff has not initiated the suit against the SDN Farm developers, who is the owner of the entire property to an extent of 4.50 acres and the said SDN Farm developers has already sold 0.50 cents of land out of 4.50 acres to Micro Sulphur Private Limited, on 24.04.2008. The respondent/plaintiff has obtained the patta by undue influence from the Tahsildar without measuring the property and the appellant/defendant wanted to set aside the said order passed by the Appellate Judge. The respondent/plaintiff never sought appointment of Advocate Commissioner and the learned Appellate Judge has remanded the suit for appointment of Commissioner which is against law.

5. Heard the learned counsel on either side and perused the documents placed on record.

6. It is seen from the pleadings that the respondent/plaintiff had purchased the property of 0.50 cents from the same owner from whom the appellant has also purchased and it is also further seen that originally the appellant/defendant had purchased the property of 3 acres and then he had purchased 1 and half cents in the same survey number and the appellant/defendant had submitted that the property purchased by the respondent/plaintiff is not more in existence and it is using by the parties of the said village as a common passage. If at all there is any such passage is in existence, then the lower Court ought to have decide the said issue but the same was not considered. Therefore, a specific defence taken by the appellant/defendant that the said property of 0.50 cents was used as public pathway but the lower Court has not stated about this issue and simply dismissed the suit filed by the plaintiff on various other grounds. The lower Appellate Court has to consider the the said issue. The respondent/plaintiff is not chosen to take out an application for appointment of Commissioner, the lower Court has given a suggestion to bring a solution to the dispute and the First Appellate Court directed the lower Court to appoint an Advocate Commissioner to locate and identify the suit properties within the four boundaries as stated in the suit schedule properties with the help of surveyor and permit both the parties to adduce oral evidence if any through witnesses concerned and mark documents if any and accordingly pronounce judgment within 60 days from the date of receipt of material records.

7. It is also seen from the findings of the lower Court that the Revenue Authorities were prevented from entering into the property of the appellant/defendant.

8. In view of the above said findings, this Court is of the view that the lower appellate Court is rightly come to a conclusion that the property of the respondent/plaintiff which has been purchased for a valuable consideration has to be located whether it falls within the boundaries of the appellant/defendant or whether the said property is used as public passage has to be found. In view of the same, this Court confirms the order of the lower appellate Court and the trial Court is directed to appoint an Advocate Commissioner within a period of two weeks from the date of receipt of a copy of this order and remuneration to be paid by the respondent/plaintiff. The Revenue Authorities are to co-operate with the Advocate Commissioner for measuring the property in the presence of the respondent/plaintiff, appellant/defendant who has purchased the property at later point of time and find out where the plaintiff's property is situated and dispose of the matter within a period of three months after filing the report of the Advocate Commissioner.

9. With the above observations and directions, this Civil Miscellaneous Appeal is disposed of. No costs. Consequently, connected miscellaneous petition is closed.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1. The Principal District Judge,
Villupuram.
2. The Principal Subordinate Judge,
Tindivanam.
3. The Section Officer,
VR Section,
Madras High Court,
Chennai.

+1 CC to Mr.V. Raghavachari, Advocate sr 89069.

C.M.A.No.3352 of 2013
and
M.P.No.1 of 2013

SSD(CO)
SP(17/09/2020)