

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :05.07.2019

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

S.A.No.711 of 2015

P.Munusamy

... Appellant/Plaintiff

Vs

1.D.Parthasarathy

2.D.Mahadevan

3.D.Mani

4.D.Raja

5.D.Dharman

6.D.Yasodha (died)

7.Selvaraj

8.Lakshmanan @ Velu

Suresh (Died)

9.Thilagavathi

10.Ezhilarasi

... Respondents

PRAYER: The Second Appeal filed under Section 100 of CPC, against the judgment and decree of the Subordinate Court, Poonamallee, in A.S.No.64 of 2011 dated 30.07.2014 confirming judgment and decree of the Additional District Munsif, Poonamallee, in O.S.No.610 of 2003 dated 25.02.2011.

For Appellant : Mr.R.Bharathkumar

For RR1 to 10 : C.Harini

JUDGMENT

The plaintiff is the appellant herein. The plaintiff had suffered an order of dismissal of the suit filed by him in O.S.No.610 of 2003 by judgment and decree dated 25.02.2011 passed by the Additional District Munsif, Poonamallee. Subsequently, the appeal suit in A.S.No.64 of 2011 preferred by the plaintiff and which came up for consideration before the Sub Court, Poonamallee, was also dismissed by judgment and decree dated 30.07.2014.

2. The plaintiff then filed the present second appeal. The second appeal had been admitted on 11.08.2015, on the following three Substantial Questions of Law:-

"1. Whether the findings of the first appellate Court that the plaintiff has not taken any steps to appoint an Advocate Commissioner to measure the suit property are perverse, when that Court itself marked the report of Advocate Commissioner and plan as Ex.C1 and C2 vide order dated 30.06.2014 made in I.A.No.58 of 2014 filed under Order 41 Rule 27 of CPC for reception of additional evidence?

2. Whether the judgment and decree of the Courts below are correct and justified, in dismissing the suit, when both the Courts have held that the plaintiff is the absolute owner of 'A' schedule property in which 'B' schedule forms part?

3. Whether the judgment and decree of the Courts below are correct and justified in law when DW1 himself admitted in his evidence that his property is situated on the eastern side of A schedule, which enables the plaintiff to succeed in the suit in view of Sections 17, 21 and 58 of Indian Evidence, Act, 1872?"

3. The facts in brief are that the plaintiff had filed the suit seeking declaration of title with respect of a property described as B schedule in the plaint and for a consequential direction against the defendants to deliver vacant possession of the said property after removing any superstructure and for a permanent injunction from putting up any further construction over the said property. The plaintiff had also sought for damages.

4. The B schedule property was described as a part of A schedule property. The A schedule property were lands situated at Konrajuppam, Ayanambakkam Village in S.No.482/1 measuring 0.07.5 hectares, in S.No.482/2A2 measuring 0.10.0 hectares and

in S.No.482/2A1 measuring 0.05.0 hectares. The B schedule property had been described in the plaint as being the property on the Eastern side with specific measurement of 14 ft. East to West on both sides and 190 ft. North to South on both sides.

5. The learned Additional District Munsif, Poonamallee, on analysis of the evidence, had thought it fit to dismiss the suit, primarily on the ground, that the plaintiff had not proved that B schedule property, over which the relief was claimed was actually part of A schedule property. This naturally meant that the Court felt that the plaintiff had not established the fact that B schedule property was within the A schedule property. Note was also taken of the statement in the written statement that the defendants had claimed that they had never encroached into B schedule property. On these grounds, claiming that the plaintiff not established grounds to grant the relief which he sought to the satisfaction of the Court, the learned Additional District Munsif, dismissed the suit.

6. The learned First Appellate Court Judge, by judgement dated 30.07.2014, whether examined a report by an Advocate Commissioner was very much necessary to decide the issue involved in the case.

7. This point came up for consideration before the First Appellate Court, in view of the fact, that the appellant / plaintiff, had filed I.A.No.58 of 2014, under Order 41 Rule 27 of the Code of Civil Procedure, seeking to produce as additional documents, the report and sketch of the Advocate Commissioner. The Advocate Commissioner had been appointed during the course of trial and though the report and the sketch were on the records of the Court, during trial, they were not marked as exhibits. The said report and sketch were not proved in manner known to law. Consequently, the Court had no occasion to examine the said report of the Advocate Commissioner. Even though the First Appellate Court had specifically framed the said point for consideration, a reading of the judgment shows that there is no discussion on either the contents of the report of the Advocate Commissioner or whether it was of assistance to arrive at any conclusion with respect to the relief sought.

8. As a matter of fact, the learned First Appellate Court Judge found fault with the appellant / plaintiff. That even in the appeal proceedings, he had not taken recourse to appoint an Advocate Commissioner. The first substantial question of law

which had been framed at the time of admission of the Second Appeal revolves around the Advocate Commissioner's report and plan.

9. The learned counsel for the appellant who assailed the judgement of the First Appellate Court stated that it was a fact that an Advocate Commissioner had been appointed and it was also a fact that the report and the plan were not at all taken into consideration by the First Appellate Court. As a matter of fact, the records do not reveal the nature of order passed in I.A.No.58 of 2014 which had been, as aforesaid filed under Order 41 Rule 27 CPC to take on file as additional evidence the said report and plan of the Advocate Commissioner.

10. The learned counsel for the respondents / defendants stated that even though the Commissioner's report was on the record, the same could be of no assistance to the Court, since it had not been prepared with the assistance of a Surveyor. The learned counsel stated that it was essential that a Surveyor is appointed to measure and identify the disputed properties, more particularly the schedule mentioned A and B properties in the plaint and whether B schedule property is part of the A schedule property.

11. I have carefully considered the arguments advance.

12. Though the learned First Appellate Court Judge had framed as point for consideration whether the Advocate Commissioner's report and plan can be referred or not, very unfortunately, in the course of answering the said point for consideration there is no discussion at all regarding the Advocate Commissioner's report and plan. The said report and plan have also not been marked as exhibits.

13. Both the learned counsels at the Bar stated that it would only be in the interest of both the parties that a fresh Advocate Commissioner is appointed to identify and measure the properties with the help of a Surveyor. I agree with that submission. Appointment of an Advocate Commissioner is essential because the respondents herein have disputed the fact that B schedule property was part of A schedule property. This is a question of fact which has to be determined once again. Appointment of a fresh Advocate Commissioner can naturally be resorted to only if the earlier report and plan are rejected. They are rejected since they have not been prepared with the assistance of a Surveyor.

14. For the aforesaid reasons, the Judgment and decree of the First Appellate Court dated 30.07.2014 is set aside and the matter is remanded back to the Sub Court, Poonamallee to rehear A.S.No.64 of 2011. The learned Sub Judge Poonamallee is requested to issue notice to both the parties for appearance on receipt of records in A.S.No.64 of 2011 and permit both the parties to let in additional oral or documentary evidence and record the same and thereafter, deliver a judgment on merits, on the issues raised. If the parties deem it necessary, they may also file an application seeking appointment of an Advocate Commissioner who can seek assistance of a Surveyor and the report /plans submitted in pursuance thereof may also dealt with in accordance with law by the learned Sub Judge, Poonamallee. It is hoped that special attention would be bestowed by the learned Sub Judge, Poonamallee, owing to the fact that the parties have been at lis for sometime and take effective steps to dispose of A.S.No.64 of 2011, on or before 31.01.2020.

15. The Second Appeal is allowed and A.S.No.64 of 2011 is remanded back to the Sub Court, Poonamallee. No costs. Registry is directed to send back the original records to Sub Court, Poonamallee.

s/d-
Assistant Registrar(CS VI)

True Copy

Sub-Assistant Registrar

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To

- 1.The Sub Judge, Poonamallee.
- 2.The Additional District Munsif, Poonamallee.
- 3.The Section officer
VR Section, Madras High Court.

+1 CC to Mr.M.V. Seshachari, Advocate sr 57418.
+1 CC to Mr.R.Bharathkumar , Advocate sr 57099.

S.A.No.711 of 2015

NMI (CO)
SP(14/10/2019)