

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 29.04.2019

Delivered on: 14.06.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.59 of 2013

and

M.P.No.1 of 2013

1.Rajendran

2.Rani

... Appellants/Respondents/
Plaintiffs

Vs.

1.Pugazhmaran

2.Ramanathan

...Respondents/Appellant/
Defendant

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree made in A.S.No.87 of 2007 dated 28.11.2011 passed by the Sub Court, Ariyalur allowing the appeal which was modifying the decree and judgment made in O.S.No.160 of 2003 dated 03.07.2007 passed by the District Munsif Court, Jayamkondam.

For Appellants : Mr.R.Sethuvarayar

For Respondents : Mr.T.Sai Krishnan
for M/s.Sai and Bharathi

JUDGMENT

This Second Appeal has been filed by the plaintiffs against the judgment and decree passed by the Sub-Judge, Ariyalur in A.S.No.87 of 2007 dated 28.11.2011 modifying the judgment and decree passed by the District Munsif, Jayamkondam in O.S.No.160 of 2003 dated 03.07.2007.

2. The appellants herein had filed a suit in O.S.No.160 of 2003 on the file of the District Munsif, Jayamkondam, for the relief of permanent injunction restraining the defendants, their men, etc., from destroying the fence and from encroaching the suit property. The defendants had filed a counter claim to declare their title over the area which is mentioned as 'FBGI' in the rough plan filed along with the written statement and directing the plaintiffs to remove the encroachment made in the

aforesaid area by way of mandatory injunction and deliver vacant possession. The learned District Munsif, Jayamkondam by the judgment dated 03.07.2007 dismissed the suit as well as the counter claim. Aggrieved by the dismissal of the counter claim, the defendants had filed an appeal in A.S.No.87 of 2007 on the file of the Sub-Judge, Ariyalur. The second plaintiff had filed a cross objection against the dismissal of the suit. The learned Sub-Judge, Ariyalur by the judgment dated 28.11.2011 had allowed the said appeal and modified the judgment and decree passed by the trial Court and set aside the judgment and decree passed by trial Court in respect of counter claim and accordingly, he decreed the counter claim, however, he confirmed the judgment and decree passed by the trial Court with regard to the dismissal of the suit. Feeling aggrieved, the plaintiffs 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:-

The plaintiffs are husband and wife. From 1990, the first plaintiff works at foreign country Dubai and once in a year, he comes over home. Their family is managed by the second plaintiff. They are having residential house-site and the same is shown as suit property. The suit property originally owned and enjoyed by the first plaintiff's grand father Govinda Padayachi and it was followed by his father Kesavan and in continuation, the first plaintiff inherited. The plaintiffs are having old thatched house on southern side and they are raising new construction on northern side. The suit property is measuring 120 feet on north-south; on east-west, it is 28 feet on northern side and 28½ feet on southern side. There are fixed physical features on all sides, and old Kalli fences. On eastern side there is a century old Kalli fence to half length between B-B1 as shown in the plaint rough plan. Between the points B1 and B2 padal fence is there. The defendants are father and son and they are having residential house-site, on eastern side of B-C Line. Very often, they meddled with the fence along B-B2. On questioning, they indulged in quarrelling with the second plaintiff. On return from Dubai, 10 days back, the first plaintiff questioned their actions, but they threatened to cut and destroy the fence. Their aim is to encroach the suit property. Hence, the plaintiffs constrained to file the above suit for the relief of permanent injunction.

5. The averments made in the written statement and counter claim filed by the first defendant and adopted by the second defendant, are in brief as follows:-

(a) It is false to say that the entire suit property is in possession and enjoyment of the plaintiffs. The plaint rough plan does not reflect the real facts. It is also false to say that the suit property originally belonged to the first plaintiff's grand father and after his death, it devolved upon his father Kesavan and after his death, the first plaintiff got the property. It is also false to say that on all sides of the suit property there are fixed physical features with old Kalli fences. The entire extent of the suit property does not come within the Natham New S.No.60/19. The properties situated in Natham New S.Nos.60/21 and 60/20 belonged to the defendants. The entire portion which is shown as 'ABCD' in the plaint rough plan does not belong to the plaintiffs. In the aforesaid 'ABCD' portion, eastern portion comes within the boundaries of new S.No.60/21 and 60/20. The first plaintiff's father Kesavan and son of elder brother of the said Kesavan entered into a partition of family properties under a registered partition deed dated 07.02.1968 and as per the said partition deed, the property measuring 30 human feet alone was allotted. Subsequently, as per the partition deed dated 13.07.1978, the first plaintiff, his brother and their father Kesavan partitioned the properties which the said Kesavan got under the partition deed dated 07.02.1968. As per the said partition deed, in the suit property on the western side east-west 22 feet alone allotted to the share of the first plaintiff's families. Accordingly, in the said property on the western side the said 22 feet area was divided into 3 and western most portion measuring 22x20 feet and on the northern most area property measuring 11 x 98 feet was allotted to the first plaintiff's brother namely Rasangam; on the southern side of the property is measuring 11 X 98 feet and on the eastern side the property measuring 20 X 22 feet was allotted to the share of the first plaintiff. The said Rasangam what he got under aforesaid partition sold to the first plaintiff under a registered sale deed dated 27.08.1983 and in the said document also it has been clearly stated that out of 28 feet east-west, 22 feet on the west alone sold to the first plaintiff. In the suit property which is shown as 'ABCD' in the plaint rough plan on the western side east-west 22 feet alone the first plaintiff entitled and to the east of the aforesaid 22 feet property measuring east-west 14 feet and north-south 150 feet was purchased by the first defendant from one Thangarasu under a registered sale deed dated 05.07.1977. On the east of the aforesaid property the first defendant got ancestral property having the same extent. So, in Old S.No.60/21 on the western side, the first plaintiff got the

property east-west 22 feet alone and on the east of the aforesaid 22 feet, the first defendant got the property east-west 28 feet.

(b) The first plaintiff is working in a foreign country and earning a lot and with a view to invest the said money, in the last week of August 2003, when the defendants were out of station, the first plaintiff laid a foundation encroaching the defendants' property and also filed the above suit.

(c) Subsequently, the first plaintiff with the help of police constructed the house in the first week of September 2003. To show the correct picture of the location of the suit property and encroachment made by the plaintiffs, the defendants also filed a rough plan along with their written statement and the same has to be treated as part and parcel of the written statement. In the said rough plan the portion which is belonging to the first defendant is shown as 'BCEF' and the portion which has been encroached by the plaintiffs shown as 'BGIF' in the said rough plan. The title of the plaintiff over the suit property is denied by the defendants and hence, the plaintiffs should have asked for the relief of declaration of title, but they have not asked for the relief of declaration. Further, the defendants filed a counter claim to declare their title over the portion which is shown as 'FBGI' in their plan and the encroachment made by the plaintiffs have to be removed by way of mandatory injunction and the plaintiffs have to be directed to deliver vacant possession of the aforesaid portion of the property.

6. The averments made in the reply statement filed by the second plaintiff and adopted by the first plaintiff are in brief as follows:-

In the partition deed dated 07.02.1968 a share was allotted on the west of the suit property to the sons of Ponnusamy, Deivasigamani and Paramasivam and subsequently, the entire share has become the share of Paramasivam. The said Paramasivam sold his share to his father-in-law Poorasamy. The said Poorasamy and his son Sivasamy had gifted the said property to son of Paramasivam namely, Thirumurugan under a registered settlement deed dated 29.07.1976. In those documents, the western share which was allotted to the son of Ponnusamy, east-west it has been mentioned as 35 human feet. The same extent might have been allotted to the plaintiffs' also. 35 human feet is equivalent to 28 ½ of standard feet. Only for the said extent patta was also

grated in favour of the plaintiffs. S.No.60/20 is situated on the east of S.No.60/19. The said property belongs to one Arumugam and his brother Velayutham. They are entitled to only 14 human feet east-west. So, the total measurement of 28 human feet is equivalent to 22 standard feet. The plaintiff is the son of the said Velayutham. The first defendant purchased only 14 human feet land east-west under a registered sale deed dated 05.07.1977. So, the defendants are entitled to east-west 22 feet only. The said measurement is mentioned in the field measurement plan also. The defendants' property is situated in S.No.60/20 only and not in S.No.60/21. S.No.60/21 also got east-west 22 standard feet only. Therefore, the plaintiffs prayed to dismiss the counter claim and decree the suit as prayed for.

7. Based on the aforesaid pleadings, the learned District Munsif, had framed necessary issues and tried the suit. During trial, on the side of the plaintiffs, the second plaintiff examined herself as PW1 and also examined three more witnesses as P.Ws.2 to 4. They also marked Exs.A1 to Ex.A9 as exhibits. On the side of the defendants, the first defendant examined himself as DW1 and two more witnesses were examined as D.Ws.2 and 3. They have marked Exs.B1 to Ex.B7 as exhibits. The Advocate Commissioner's Report and plan were marked as Exs.C1 and Ex.C2 respectively. One document was marked as Ex.X1 through PW2.

8. The learned District Munsif, after considering the materials placed before him, found that as per Ex.B2 partition deed dated 07.02.1968, the first plaintiff's father namely Kesavan was allotted the property comprising in S.No.61/90 measuring east-west 30 human feet, north-south 200 human feet. He further found that east-west measurement 30 human feet is equivalent to 25 standard feet only and as such, the first plaintiff is entitled to only 25 standard feet east-west and hence, the plaintiffs are not entitled for the relief of permanent injunction in respect of the suit property. He further found that since the first plaintiff is entitled to 25 feet east-west, the contention of the defendants that they are entitled to 28 feet east-west cannot be accepted and hence, the defendants also not entitled to get any relief by way of counter claim. Accordingly, he dismissed the suit as well as the counter claim. Aggrieved by the dismissal of the counter claim, the defendants had filed an appeal in A.S.No.87 of 2007 on the file of the Sub-Judge, Ariyalur. The second plaintiff had filed a cross objection against the dismissal of the suit. The learned Sub-Judge, Ariyalur by the judgment dated 28.11.2011 had allowed the said appeal setting aside the judgment and decree

passed by the trial Court to the effect that the counter claim is allowed, however, he confirmed the trial Courts' judgment and decree with regard to the dismissal of the suit. Feeling aggrieved, the plaintiffs have filed the present Second Appeal.

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

" 1. Whether both Courts below are right in dismissing the suit of appellants when both Court found the appellants entitled to 22 feet on east west and the same was admitted by the respondent in view of the Order VII Rule 7 of CPC?

2. Whether the Appellate Court is correct in granting decree in favour of defendant in counter claim, due to the finding that the plaintiff has failed to prove their case, that they are entitled for 28 feet on east to west of plaintiff mentioned property?

3. Whether the Appellate Court is correct in granting decree in favour of defendant in counter claim, without identifying or locating the properties in dispute, through Commissioner or Taluk Surveyor?"

10. Heard, Mr. R. Sethuvarayar, the learned counsel for the appellants and Mr. J. Sai Krishnan for M/s. Sai and Bharathi, the learned counsel for the respondents.

11. Substantial Questions of law 1 to 3 :

The learned counsel for the appellants has submitted that even though the second plaintiff had filed a cross objection in the appeal filed by the defendants, with regard to the dismissal of the suit, the first Appellate Court while disposing the appeal, not at all referred to the said cross objection. He further submitted that the first Appellate Court did not pass any order in respect of the cross objection. He further submitted that the first Appellate Court without referring to the cross objection filed by the second defendant, had dismissed the suit in the appeal filed by the defendants against the

dismissal of their counter claim. He further submitted that even as per Ex.B1, the plaintiffs are entitled to east -west 30 human feet which is equivalent to 25 standard feet and that being so, the first Appellate Court ought not to have dismissed the entire suit and decreed the counter claim for the extent of 28 feet east-west.

12. He further submitted that the Courts below failed to note that the Advocate Commissioner has not measured the properties with the help of a qualified Surveyor and located and identified the properties of both the parties and therefore, he prayed to allow the Second Appeal and set aside the judgments and decrees passed by the Courts below and remitted the matter to the trial Court with a direction to re-issue the Commission warrant to measure the properties of both the parties with the help of a qualified Surveyor and locate the properties of both the parties and thereafter dispose of the case in accordance with law.

13. Per contra, the learned counsel for the respondents/defendants has submitted that the trial Court had dismissed the suit filed by the plaintiffs and also the counter claim filed by the defendants. As against the dismissal of the suit, the plaintiffs have not filed any appeal, but the second plaintiff alone filed a cross objection in the appeal filed by the defendants. He further submitted that the first Appellate Court in its judgment though not specifically referred to the cross objection, it has thoroughly discussed the pleadings and evidence and finally allowed the appeal and set aside the judgment and decree of the trial Court in respect of the dismissal of the counter claim and decreed the counter claim and consequently, dismissed the plaintiffs' suit and there is no irregularity or illegality in the procedure followed by the first Appellate Court. He further submitted that since the first Appellate Court had dismissed the plaintiffs' suit and decreed the counter claim, the plaintiffs ought to have filed separate second appeals' one in respect of the dismissal of their suit and another as against the allowing of the counter claim but they have not filed any second appeal in respect of dismissal of their suit and hence, the judgment and decree passed by the first Appellate Court in respect of dismissal of the plaintiffs' suit has become final and the same will operate as res judicata.

14. He further submitted that the first Appellate Court taking into consideration in Ex.B3 partition deed dated 13.07.1998 which was executed between the first plaintiff and his brother, wherein, it is specifically stated that the east-

west measurement as 22 standard feet only. He further submitted that the plaintiffs failed to prove that they are entitled for 28 standard feet east-west. He further submitted that the first Appellate Court after taking into consideration of all the aforesaid facts had rightly allowed the counter claim and dismissed the suit and in the said factual findings, this Court cannot interfere and therefore, he prayed to dismiss the Second Appeal.

15. The learned counsel for the appellants, by way of reply has submitted that since the first Appellate Court has not passed separate decrees in respect of the appeal and cross objection, a single Second Appeal is sufficient and that non-filing of the Second Appeal against the dismissal of the suit will not operate as res judicata. He further submitted that even if no separate appeal is filed against the dismissal of the suit, in view of the powers conferred under Order 41 Rule 33 of CPC, this Court can grant appropriate relief.

16. In support of the aforesaid contentions, he relied upon the following decisions:-

- 1) Bihar Supply Syndicate Vs. Asiatic Navigation, AIR 1993 SC 2054.
- 2) Sajjadanashin Sayed Mohamed Vs. Musa Dadabhai Ummer and others, MANU/SC/0122/2000 = AIR 2000 SC 1238.
- 3) Renganayagi and others Vs. K.R.Renganathan Mudaliar, MANU/TN/2271/2009 = 2009 (5) CTC 300.

17. Admittedly, the plaintiffs had filed a suit for the relief of permanent injunction restraining the defendants from destroying the fences and encroaching the suit property. The defendants had filed a counter claim to declare their title over the portion which is shown as 'FBGI' in the plan filed along with the written statement and for consequential relief of mandatory injunction to remove the encroachment and for delivery of possession. The trial Court had dismissed the suit as well as counter claim. As against the dismissal of the counter claim the defendants had filed an appeal in A.S.No.87 of 2007 on the file of the Sub-Judge, Ariyalur. It is seen from the records received from the first Appellate Court that the second plaintiff had filed a cross objection on 14.12.2007 vide SR.No.4504/2007 against the dismissal of the suit. The said cross objection was returned by the learned Sub-Judge, directing to pay the deficit Court fee. The second plaintiffs' counsel had re-presented the said cross objection on 12.03.2018 vide SR.No.1632/2008 but in the judgment passed by the first

Appellate Court (Sub-Judge, Ariyalur), the said cross objection was not at all referred to. The learned Sub-Judge proceeded to dispose of the appeal as if no cross objection has been filed. No point for consideration formulated with regard to cross objection and no finding given and no order passed as to whether, the said cross objection is allowed or dismissed. So, it appears that it was not at all brought to the knowledge of the first appellate court Judge as to the filing of cross objection. Therefore, the judgment and decree of the first Appellate Court is liable to be set aside on this ground alone.

18. It is also to be pointed out that the first Appellate Court has held that as per Ex.B3 and Ex.B4, the first plaintiff is entitled for 22 standard feet east-west but, it has failed to take into consideration the measurements given in Ex.B2 wherein, it is stated that on the west, the first plaintiff's father is entitled to 30 human feet. The trial Court has held that the 30 human feet is equivalent to 25 standard feet but the first Appellate Court has not given any finding as to what is the equivalent standard feet for 30 human feet. Further, the first Appellate Court has held that as per Ex.B5, the first defendant had purchased the property measuring east-west 14 standard feet and after holding so it went on to say that on the east of the aforesaid property the defendants got the ancestral property to the same measurement and for arriving such finding, there is no evidence at all. The first Appellate Court has not stated on what basis, it has come to the conclusion that the defendants are having ancestral property to the same extent with that of the property mentioned in Ex.B5.

19. Therefore, this Court is of the view that the properties have to be measured with the help of a qualified Surveyor with reference to their title deeds, field measurement plan and other revenue records and properties of both the parties have to be identified and located and then only the dispute between the parties can be solved. So, on this ground also, the matter has to be remitted back to the first Appellate Court. Since this Court has decided to remand the matter to the first Appellate Court, on the ground of not considering the cross objection, this Court has not decided the question as to whether, this Second Appeal is hit by the principle of res judicata or not. Hence, the aforesaid decisions are not discussed. Accordingly, the substantial questions of law are answered.

20. In the result, the Second Appeal is allowed.

The judgment and decree passed by the first Appellate Court in A.S.No.87 of 2007 on the file of the Sub-Court, Ariyalur, are set aside. The matter is remanded to the first Appellate Court. The first Appellate Court is directed to appoint an Advocate Commissioner to measure the properties of both the parties with the help of a qualified Surveyor with reference to the title deeds of both the parties, field measurement plan and other revenue records and locate their properties, file a report with plan. The first Appellate Court is further directed that after receipt of the Commissioner's report and plan as aforesaid, it has to dispose of the appeal and cross objection in accordance with law.

Considering the facts and circumstances of the case, the parties are directed to bear their respective costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-

Asst.Registrar (CS VII)

/true copy/

Sub Asst. Registrar

dna

To

1.The Sub-Court, Ariyalur.

2.The District Munsif Court, Jayamkondam.

+1 cc to M/s.Sai and Bharath Advocate sr48392

+1 cc to M/s.R.Sethuvarayar Advocate sr48939

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