

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON : 01.08.2019
PRONOUNCED ON: 12.09.2019
CORAM:
THE HON'BLE MR.JUSTICE T.RAVINDRAN
S.A.No.220 of 2016

1. Sammandam Pillai (Died)
2. Saroja
3. Singaravelan
4. Jayanthi
5. Shanthi
6. Vasanthi

[Appellants 2 to 6 brought on record
as LR's of the deceased sole appellant
Viz., Sammandam Pillai vide order of
Court dated 26.06.2019 made in
C.M.P.Nos.10853, 10561 and 10852
of 2019 in S.A.No.220 of 2016]

.... Appellants/Plaintiff

Vs.

Krishnaveni

.... Respondent/Defendant

Prayer: Second Appeal filed under Section 100 of C.P.C.,
against the judgment and Decree of Additional Sub Court,
Mayiladuturai, dated 23.07.2015 made in A.S.No.54 of 2013,
confirming the judgment and decree of the Principal District
Munsif Court, Mayiladuturai dated 29.08.2013 made in O.S.No.345
of 2010.

For Appellants : Mr.S.Sounthar

For Respondent : Mr.R.Shiva Kumar
for M/s.K.M.Vijayan Associates

J U D G M E N T

1. Challenge in this Second Appeal is made to the judgment and decree dated 23.07.2015 passed in A.S.No.54 of 2013 on the file of the Additional Subordinate Court, Mayiladuturai, confirming the judgment and decree dated 29.08.2013 passed in O.S.No.345 of 2010 on the file of the Principal District Munsif Court, Mayiladuturai.

2. The Second Appeal has been admitted on the following substantial question of law:

Whether the Lower Appellate Court is justified in law in holding that the respondent is in possession of the suit property based on the Advocate Commissioner's report? Whether the Advocate Commissioner is entitled to give a finding as to possession usurping the power of the Court?

3. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4. For the sake of convenience, the parties are referred to as per their rankings in the trial court.

5. Suit for permanent injunction or in the alternative for the recovery of possession.

6. Briefly stated, according to the plaintiff the suit property belonged to his mother Alamelu Achi and she had bequeathed the same in his favour by way of a Will dated 26.03.1980 and since then it is the plaintiff who has been in the possession and enjoyment of the suit property by obtaining patta etc., and the suit property has been shown as "ABCD" in the plaint plan and the property lying on the southern side of the suit property in the suit survey number belongs to the plaintiff and the suit survey number consists of 8 cents and the property belonging to the defendant is comprised in different survey number and the defendant's property is lying to the northern side of the suit property and taking advantage of the same, the defendant without any right or authority, had attempted to interfere with the plaintiff's possession and enjoyment of the suit property and further it is stated that the Surveyor had been appointed to measure the suit property and knowing that the suit property is only in the possession and enjoyment of the plaintiff and that it is only the plaintiff who

has title to the suit property, inasmuch as, the defendant without any authority or entitlement attempted to trespass into the suit property, according to the plaintiff, he has been necessitated to institute the suit for appropriate reliefs.

7. The defendant resisted the plaintiff's suit contending that the plaintiff's mother Alamelu Achi has no title to the suit property and the alleged Will said to have been executed by Alamelu Achi in favour of the plaintiff dated 26.03.1980 is not true and valid and the same is a fabricated record and on that basis the plaintiff is not entitled to claim any title, possession and enjoyment of the suit property. The defendant's predecessors in title owned 11 cents in R.S.No.136/12 and in the defendant's document, the survey number of the Punja land has been wrongly give as 150/3 and for Natham land, the survey number had been wrongly given as 136/12 and the defendant and her predecessors' in title owned 0.04 cents in Natham R.S.No.150/3 and 0.11 cents in R.S.No.136/12 and originally one Senthamarai Ammal had executed a settlement deed dated 18.03.1976 settling the abovesaid properties in favour of Rajaraman and in the abovesaid document also the mistake in the survey numbers had occurred and the abovesaid properties had been acquired by the defendant and his brother by way of a sale deed dated 03.05.1984 and thereafter the defendant's brother had conveyed his half share in the abovesaid properties in favour of the defendant and in all the above documents, the mistake as to the survey numbers as abovestated had occurred and the defendant and her predecessors in title are entitled to 0.11 cents in R.S.No.136/12 and 0.04 cents in R.S.No.150/3 and in the survey proceedings, the plaintiff's property has been divided as R.S.No.136/12 C and the defendant's property had been subdivided as 136/12A, however the plaintiff's plan is misleading and the plaintiff has not given correct figures in the plan, taking advantage of the wrong description of the survey numbers in the defendant's documents, the plaintiff is attempting to grab the suit property by taking advantage of the helpless situation of the defendant. The report of the Advocate Commissioner would also expose that it is only the defendant who is in the possession and enjoyment of the suit property and the plaintiff is not in the possession and enjoyment of the suit property and it is false to state that R.S.No.136/12A is on the western end and the Advocate Commissioner and Surveyor who had been appointed to measure the suit property and sub-divide the properties belonging to the parties had not properly measured and subdivided and even otherwise, the defendant is entitled to the properties within the boundaries described in his title deeds and the plaintiff's mother or the plaintiff has no title, right or interest over the suit property and hence the suit is

liable to be dismissed.

8. In support of the plaintiff's case, P.Ws.1 to 4 were examined. Exs.A1 to A9 were marked. On the side of the defendant, D.Ws.1 and 2 were examined. Exs.B1 to B7 were marked. Further, Exs.X1 and Exs.C1 to C4 were also marked.

9. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial court was pleased to dismiss the plaintiff's suit. Impugning the same, the present second appeal has been preferred.

10. The plaintiff claims title to the suit property as well as the possession and enjoyment of the same on the footing that his mother Alamelu Achi had owned the suit property and she had bequeathed the same in his favour by way of a Will dated 26.03.1980, the copy of which Will has been marked as Ex.A6. The defendant has in toto challenged the truth and validity of the abovesaid Will and also contended that the plaintiff's mother has no title to the suit property and therefore she is not entitled to bequeath the suit property in favour of the plaintiff by way of the abovesaid Will and therefore according to the defendant, the Will projected by the plaintiff is a fabricated record. In the light of the abovesaid pleas put forth by the parties, the plaintiff being the suitor and based his title, possession and enjoyment of the suit property based on the Will said to have been executed by his mother on 26.03.1980, in such view of the matter, the plaintiff at the foremost, should establish that his mother had title to the suit property and competent to bequeath the same in his favour by way of the impugned Will. The plaintiff has not placed any material to evidence that his mother Alamelu Achi had right and title over the suit property. The plaintiff has also not pleaded in the plaint as to how his mother had acquired title to the suit property. The same has also not been disclosed in Ex.A6 Will and as abovenoted, absolutely there is no material on the part of the plaintiff for proving the title of plaintiff's mother qua the suit property. In such view of the matter, as rightly contended by the defendant as well as correctly determined by the Courts below, particularly, the trial court, the plaintiff having miserably failed to establish his case that his mother had title to the suit property, on that score alone, it is found that the Will projected by him and marked as Ex.A6 said to have been executed by his mother cannot at all be validly countenanced.

11. Furthermore, the plaintiff has not marked the original Will. He has only marked the certified copy of the same as Ex.A6. The plaintiff would state that the original Will has been lost, however as to what further steps the plaintiff had taken to retrieve the lost Will, there is no material worth acceptance on the part of the plaintiff.

12. As above pointed out, the defendant has challenged the truth and validity of the Will said to have been executed by Alamelu Achi. Despite the same, the plaintiff has not examined the attestors to the Will. It is put forth by the plaintiff that one attesting witness Krishnamoorthy Pillai had died and the other attestor Mani Pather is residing in foreign shores. However, there is no proof on the part of the plaintiff to establish that the attestor Mani Pather is living in abroad. The scribe of the Will is also stated to have expired, even with reference to the same, there is no material to establish the same. The plaintiff has endeavored to sustain the Will projected by him by examining the staff of the Registrar's office as P.W.2. P.W.2 has only stated that Ex.A6 Will had been registered in his office. That apart, he has not pleaded any direct knowledge about the Will in question. In such view of the matter, no reliance could be placed upon his evidence for sustaining the truth and validity of the impugned Will. The plaintiff has also examined RadhaKrishnan, S/o Krishnamoorthy Pillai as P.W.3. P.W.3 would only claim that his father had informed him that he had signed as the attesting witness to the Will executed by Alamelu Achi and therefore as rightly held by the trial court, the abovesaid evidence of P.W.3 would only be in the nature of hearsay evidence and in such view of the matter, no credence could be attached to his evidence for upholding the truth and validity of the impugned Will. Therefore the evidence of P.Ws.2 and 3 would not in any manner advance the plaintiff's case for buttressing the truth and validity of Ex.A6 Will. सत्यमेव जयते

13. The presumption u/s.90 of the Evidence Act cannot be extended in respect of the Will in the light of the decision of the Apex Court reported in 2009 (3) SCC P.No.687 [Bharapur Singh and others Vs. Shamsheer Singh]. In any event, as abovenoted, when the plaintiff has failed to establish his mother's title to the suit property, in such view of the matter, the inevitable conclusion is that the Will dated 26.03.1980 said to have been executed by the plaintiff's mother bequeathing the suit property in favour of the plaintiff cannot at all be

accepted and therefore, it is found that the trial court is wholly justified in non-suiting the plaintiff, on the footing that the Will projected by him for claiming title, possession and enjoyment of the suit property has not been established by the plaintiff in any manner.

14. The plaintiff would however putforth the case that he has been in the possession and enjoyment of the suit property based on the impugned Will and that the defendant is attempting to interfere with this possession and enjoyment. Considering the documents projected by the defendant in toto, it is found that the defendant owned an extent of 0.11 cents in R.S.No.136/12 and 0.04 cents in R.S.No.150/3 and the abovesaid extent of 0.11 cents being Punja land and the extent of 0.04 cents being Natham, the defendant's claim of title to the possession and enjoyment of the said properties could be gathered from the documents marked as Exs.B1 to B4. It is found that in Exs.B1 to B3, the survey numbers of the Punja lands and Natham lands had been wrongly mentioned by interchanging them and the same had come to be rectified by the defendant by way of the rectification deed marked as Ex.B4. Therefore, as rightly found by the Courts below, considering the lie of the defendant's abovesaid properties as well as the boundaries given in the abovesaid sale deeds uniformly, it is found that the property belonging to the defendant lies in Survey No.136/12C and not in Survey No.136/12A as sought to be made out by the plaintiff. In this connection, the plaintiff would rely upon the survey proceedings conducted in respect of the properties belonging to the parties. According to the defendant, the survey proceedings had not been properly conducted and the re-classification of the survey numbers had been wrongly given during the abovesaid proceedings and therefore according to the defendant, based on the boundary recitals contained in his title document, the Court should hold that it is he who is having the title to the suit property lying in Survey No.136/12C. In this connection, the defendant's documents as well as the reports and plans of the Advocate Commissioner marked as Exs.C1 to C4 read together, it is noted as determined by the Courts below, from the boundary recitals, the defendant's property is lying only in S.No.136/2C and therefore the wrong classification of the survey number qua the suit properties belonging to the defendant as lying in S.No.136/12 A would not deter the defendant from claiming right over his properties particularly lying in R.S.No.136/12C. In the light of the position that the boundaries would prevail for determining the title of the rival parties vis-a-vis the disputed extent, the trial court as well as the first appellate court had analysed the documents

projected in the matter, particularly, the defendant's documents coupled with Exs.C1 to C4, in all, found to have rightly determined that the defendant's property is lying in R.S.No.136/12C and the reliance placed by the plaintiff upon Exs.A8 and A9, as rightly determined by the trial court in particular, the defendant had acknowledged the same with reference to the notice issued by the surveyor before measuring the suit property and by way of the said acknowledgment it cannot be held that the defendant had accepted that the plaintiff has title to the suit property and the same is lying in the suit survey number. In the light of the abovesaid factors, when the Courts below had not solely relied upon Exs.C1 to C4 for upholding the possession and enjoyment of the defendant qua the suit property, in such view of the matter, the arguments putforth by the plaintiff's counsel that the Courts below had erred in determining that the defendant is in the possession and enjoyment of the suit property solely based upon Exs.C1 to C4 cannot at all be countenanced and therefore the said contention raised by the defendant as a question of law does not merit acceptance in any manner.

15. Considering the abovesaid discussions, as above pointed out, the plaintiff has miserably failed to establish his claim of title, possession and enjoyment of the suit property and on the other hand, when the defendant has placed acceptable and reliable materials buttressing his claim of title, possession and enjoyment of the suit property, in all aspects, the Courts below are found to be wholly justified in rejecting the plaintiff's suit and accepting the defence version. In such view of the matter, no valid reason is made out warranting interference with the concurrent judgment and decree of the Courts below. In my considered opinion, no substantial question of law is found to be involved in this Second Appeal. Be that as it may, the substantial question of law formulated in this Second Appeal is accordingly answered against the plaintiff and in favour of the defendant.

16. The defendant's counsel in support of his contentions placed reliance upon the decision of the Apex Court dated 07.07.2006 passed in Appeal No.2836 of 2006 [Subhaga and Others Vs. Shobha and others] and the decision of the Madras High Court dated 17.09.2010 rendered in S.A.No.648 of 1999 Samayana Thevar Vs. Abdul Razack and another]. The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at hand.

17. In conclusion, the Second Appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

To

1. The Additional Subordinate Judge,
Additional Sub Court,
Mayiladuturai.
- 2.The Principal District Munsif,
Principal District Munsif Court,
Mayiladuturai.

Copy to

The Section Officer,
VR Section,
High Court,
Chennai.

+1cc to Mr.S.Sounthar, Advocate sr.70711
+1cc to M/s.K.M.Vijayan Associates, Advocate sr.78350

S.A.No.220 of 2016

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