

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.11.2019

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.145 of 2014
and CMP.No.24092 of 2019

1. M.Saraswathi
2. M.Saravanan
3. M.Gopalakrishnan
4. M.Madhavan

..Appellants/LRS Plaintiffs

Vs.

Andal

..Respondent

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 21.09.2012 made in AS No.543 of 2009 on the file of the IV Additional City Civil Judge at Chennai confirming the Judgment and Decree dated 26.08.2008 made in OS No.2771 of 2007 on the file of the XII Assistant City Civil Court at Chennai.

For Appellants	: Mr.A.V.Arun
For Respondent	: Mr. N.Suresh

J U D G M E N T

This appeal has been filed by the legal representatives of the plaintiff in OS No.2771 of 2007, challenging the dismissal of the suit filed for declaration of title and for delivery of vacant possession.

2. According to the plaintiff, the suit properties originally belonged to Parthasarthy Pillai. Upon his demise, in a partition that took place on 19.04.1926, the suit properties and other properties were divided amongst three sons of Parthasarathi Pillai viz., C.P.Varadharaja Pillai, C.P.Sundararaja Pillai and C.P.Murugesan Pillai. The plaintiff is the son of C.P.Sundararaja Pillai and the defendant is the daughter of C.P.Murugesan pillai. Claiming that the defendant had encroached upon an extent of 330 sq.ft. of land, over the property that is allotted to C.P.Sundararaja Pillai, the plaintiff has come forward with the above suit seeking declaration of title and recovery of possession.

3. The suit was resisted by the defendant contending that she is in possession of the property that was allotted to her father in the partition in the year 1926 and there has been no encroachment made by her.

4. The Trial Court dismissed the suit holding that the plaintiff has not established that the defendant has encroached upon the property allotted to his father viz., C.P.Sundararaja Pillai. The Trial Court also faulted the plaintiff for not taking steps for proving the encroachment by appointment of a Commissioner. Aggrieved, the plaintiff preferred an appeal in AS No.543 of 2009.

5. Pending appeal, it appears that the plaintiff died and his wife and three sons, viz. the appellants herein, were brought on record as appellants 2 to 5 pending appeal.

6. Before the Lower Appellate Court, the appellants filed an application in CMP No.796 of 2011 seeking appointment of a Commissioner. The Lower Appellate Court, by order dated 21.10.2011, allowed the application and appointed one Mr.Jeeva, a practising Advocate, as Commissioner to measure the property with the help of a qualified Government Surveyor and file his report. The Commissioner appears to have filed an interim report on 30.01.2012, indicating that he could not get the assistance of a qualified Government Surveyor as the Tahsildar concerned had informed him that there is acute dearth of Government Surveyor. Therefore, he had sought for modification of the warrant to enable him to take the assistance of a qualified private surveyor.

7. The respondent herein/the defendant in the suit filed an objection to the Commissioner's interim report stating that the Government Surveyor alone should measure the property. This objection was filed in February 2012. It is seen from the records that the application for appointment of Commissioner was being adjourned from time to time. The endorsements made by the learned Appellate Judge shows that even on 18.07.2012, the Commissioner application was adjourned for filing of objection. However, the learned appellate Judge, without affording an opportunity or re-issuing the warrant to the same Commissioner to have the property measured by a private Surveyor or by a Government Surveyor, all of a sudden, on 25.07.2012, decided to close the application and directed issuance of notice to the appellants for hearing the main Appeal. The learned Appellate Judge proceeded to dispose of the appeal by the impugned judgment on 21.09.2012.

8. The following questions of law were framed at the time of admission.

1. Whether the lower appellate court is justified in dismissing the plea of the appellants seeking extension of the warrant of the Advocate Commissioner by simply recording that there is no progress in it, when the fact remains is that necessary assistance from Revenue Department was not made available?

2. Is not that the lower appellate court erred in rendering a finding that the respondent had proved her ownership over the schedule property when a reading of Ex.A8, Ex.A9 and Ex.B9 would show that the plaintiff is having title to the schedule property and only the identification of the same is at dispute?

9. The controversy relates to encroachment as alleged by the plaintiff. The Lower Appellate Court has felt the need for appointment of Commissioner and allowed the application appointing a Commissioner to take the help of a Government Surveyor to measure the property. The Commissioner had filed the interim report expressing his difficulties in obtaining assistance from a qualified Government Surveyor and seeking permission of the Court to engage a private Surveyor. Without deciding on the question, as to whether, a private surveyor can be deputed or specific directions have to be issued for the Government Surveyor to measure the property, the learned Appellate Judge, taking note of the pendency of the appeal, closed the Application filed by the Commissioner and proceeded to dispose of the main appeal itself by recording a finding that the appellants have not established the factum of encroachment.

10. This manner of disposal of the appeal suit, in my considered opinion, is wholly unsatisfactory. When the Appellate Judge has realised the necessity for appointment of a Commissioner and directed him to measure the property with a help of a Government Surveyor, he could have issued a direction to have the property measured by a private surveyor, more so, when the Advocate Commissioner has expressed difficulties in measuring the property with the help of a Government Surveyor.

11. This Court had, in Rukmani and 4 others v. A.S.Chinnaiah, reported in 2002 (5) CTC 104, given detailed guidelines for the Courts to follow in cases where the services of a Government Surveyor are required. It is crystal clear from the proceedings of the Lower Appellate Court which were made available to this Court that the Lower Appellate Court had not adopted the procedure suggested by this Court in the above Judgment.

12. In view of the foregoing discussion, I have no hesitation in concluding that the Lower Appellate Court miserably erred in proceeding with the main Appeal by closing the Commissioner's Application.

13. In such perspective of the matter, the question of law No.1 is answered in favour of the appellants; the judgment and decree of the Lower Appellate Court are set aside; the matter is remanded to the Lower Appellate Court with a direction to re-open the CMP 796 of 2010 and appoint a fresh Commissioner with a direction to him to seek the assistance of a qualified Government or Private Surveyor to measure the property and file his report. Upon receipt of the Commissioner's report, the Lower Appellate Court shall proceed to dispose of the Appeal in the manner known to law. Needless to state, the guidelines issued by this Court in Rukmani and 4 others v. A.S.Chinnaiah, cited supra, shall be scrupulously adhered to by the Lower Appellate Court while disposing of the Commissioner's Application. The parties are required to appear before the Lower Appellate Court on 16.12.2019.

14. Since the impugned judgment and decree are set aside and the matter remanded to the Lower Appellate Court, the appellants will be entitled to refund of the Court fee paid in the Second Appeal.

15. In the upshot, this second appeal stands disposed of with the above directions. There shall be no order as to costs. Connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

jv
To

1. The IV Additional City Civil Judge, Chennai.
(Appeal directed to be posted on 16.12.2019)
2. The XII Assistant City Civil Judge, Chennai.
3. The Section Officer,
V.R.Section, High Court of Madras.
(Directed to forward the records the original record before
16.12.2019)

+1cc to Mr.N.Suresh , Advocate SR.No. 93647

+1cc to Mr.A.V.Arun , Advocate SR.No. 93612

+2ccs to Mr.N.Suresh , Advocate SR.No. 93647 (16/12/2019)

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A.SK(11/12/2019)