



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 19.09.2019
CORAM :

THE HONOURABLE MS.JUSTICE P.T.ASHA

S.A. (MD) No.136 of 2015

and

M.P. (MD) No.1 of 2015

Paramanantham

... Appellant/Appellant/Plaintiff

vs.

Muthuraj

... Respondent/Respondent/Defendant

Prayer:- Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree in A.S.No.8 of 2014 on the file of the Additional Sub Court, Tirunelveli, dated 04.09.2014, confirming the judgment and decree in O.S.No.161 of 2007 on the file of the II Additional District Munsif Court, Tirunelveli, dated 02.02.2013.

For Appellant : Mr.R.Manimaran
For Respondent : Mr.H.Arumugam

JUDGMENT

The unsuccessful plaintiff in the Courts below is the appellant before this Court.

2.This second appeal is filed challenging the judgment and decree in A.S.No.8 of 2014 on the file of the learned Additional Subordinate Judge, Tirunelveli, confirming the judgment and decree in O.S.No.161 of 2007 on the file of the learned II Additional District Munsif, Tirunelveli.

3.The parties are referred to in the same array as in the suit.

4.The suit in O.S.No.161 of 2007 has been filed for declaration, declaring that the 2nd and 3rd items of the suit schedule property belong to the plaintiff, for permanent injunction restraining the defendant and his men and agents from interfering with the plaintiff's peaceful possession and enjoyment of the suit schedule property and for mandatory injunction, directing the defendant to remove the 'AF' Gate shown as 4th schedule property. The second item of property was the northern wall and the third item of property was the lane abutting to the northern wall of the plaintiff.



PLAINTIFF'S CASE:

5.It is the case of the plaintiff that the 2nd and 3rd item of the suit schedule property were part and parcel of the 1st item of suit schedule property. The plaintiff would contend that the 1st item of suit schedule property originally belonged to his grand father, Nagalinga Konar, who had executed a will dated 14.06.1981 in a sound disposing state of mind bequeathing the property in favour of the plaintiff and others. The 1st item of property has been described as 2nd and 3rd items of property in the said will. Further, he would contend that originally the 1st item of suit property was a cattle shed and thereafter, a house bearing Door No.223-B was constructed. The 2nd item of suit property is the northern wall of the 1st item of property.

6.Further, it is the plaintiff's case that beyond the wall, the plaintiff was entitled to the 3rd item of suit property for maintaining/colour washing the wall. Since the defendant had disturbed the plaintiff's usage of the lane and had put up a Gate on the eastern side of the lane, the plaintiff was constrained to file a suit in O.S.No.161 of 2007 in question.

DEFENDANT'S CASE:

7.The defendant had denied the statements made in the plaint and had submitted that their great grand father, Muthu Konar had purchased the northern portion of the 2nd item of the suit property under a sale deed dated 04.10.1922. Since the sale deed is of the year 1922, the southern boundary has been clearly defined as common wall of the plaintiff's property. The said Muthu Konar died leaving behind his only legal heir, Esakki Konar, who had executed a will dated 08.12.1967 in a sound disposing state of mind and had bequeathed the property to his wife and his son, Nallamuthu @ Thalavai Konar. The said Esakki Konar died 25 years prior to the filing of the suit and from that date, his legal heirs have been enjoying the said property. The defendant is one of the sons of said Nallamuthu @ Thalavai Konar. Even in the said will, the 2nd item of suit property has been described as common wall and the Gate had been installed in the eastern end of the pathway 10 years prior to the filing of the suit. Hence, the defendant prayed for dismissing the suit.

TRIAL COURT:

8.On perusal of the pleadings, the learned II Additional District Munsif, Tirunelveli, had framed the following issues:

(i) Whether the plaintiff is entitled for declaratory relief with regard to 2nd schedule property as prayed for by virtues of will dated 14.06.1981?

(ii) Whether the plaintiff is entitled for declaratory relief with regard to 3rd schedule property as prayed for?



(iii) Whether the plaintiff is entitled for mandatory injunction with regard to 4th schedule property as prayed for?

(iv) Whether the 3rd schedule wall is a common wall as averred in the written statement?

(v) Is it true that the 4th schedule gate was put up some 10 years back as averred in the written statement?

(vi) To what other relief?

9. On the side of the plaintiff, P.W1 to P.W3 were examined and Ex.A1 to Ex.A8 were marked. On the side of the defendant, D.W1 and D.W2 were examined and Ex.B1 to Ex.B6 were marked and Court documents Ex.C1 to Ex.C4 were marked.

10. The learned II Additional District Munsif, Tirunelveli, had returned a finding that the 2nd schedule property is the common wall and had held that the plaintiff was not entitled for the relief of declaration. As regard the gate installed in the 3rd schedule property, the learned Judge held that the plaintiff was not able to establish that the disputed gate has been installed within three years before the filing of the suit. Ultimately, the learned II Additional District Munsif, Tirunelveli, had proceeded to dismiss the suit on 02.02.2013.

APPELLATE COURT:

11. Challenging the said judgment and decree in O.S.No.161 of 2007 dated 02.02.2013, the plaintiff had filed A.S.No.8 of 2014 on the file of the learned Additional Subordinate Judge, Tirunelveli. The learned Additional Subordinate Judge, Tirunelveli, had confirmed the judgment and decree of the trial Court. Aggrieved by the said concurrent judgment, the plaintiff is before this Court.

SECOND APPEAL:

12. This second appeal has been admitted on the following substantial questions of law:

(i) Whether the 1st Appellate Court is correct in deciding the title over the suit 2nd and 3rd schedule property only on the basis of the boundary recital in Ex.A2?

(ii) Whether the Courts below are right in not considering the Commissioner's report and plan Ex.C1 and Ex.C2 when the specific contention in the appeal memorandum is that the respondent has no right in T.S.No.876, wherein, the plaintiff's claim exclusive title?



(iii) Whether the 1st Appellate Court is right in considering the secondary evidence and rendering finding on that evidence?

SUBMISSIONS:

13.Mr.R.Manimaran, learned counsel appearing for the appellant would submit that in the will, Ex.A8, the 2nd and 3rd items of suit property have been clearly described. Further, he would submit that both the Courts below have not appreciated the Advocate Commissioner's report and sketch from its correct perspective and this approach has vitiated the judgments and decrees of the Courts below.

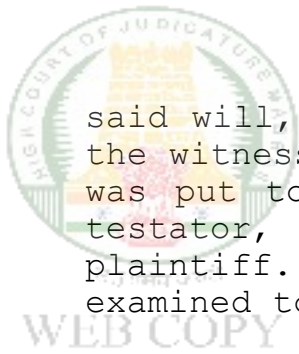
14.Further, the learned counsel appearing for the appellant would submit that in Ex.C1 and Ex.C2, the Advocate Commissioner has stated that the defendant was entitled to an extent of 12 ft., on the eastern side in T.S.No875, and further it is stated that from the point E to A1, the defendant had an extent of 12 ft. However, the defendant was claiming right up to the point A, but the defendant was not entitled to the space between the points A1 and A. Further, he would submit that the Advocate Commissioner after measuring the property came to the conclusion that from the points A1 to H1, the plaintiff was entitled to an extent of 43 ft., and if the two measurements were taken into account, it is a crystal clear that the suit 2nd and 3rd items of properties belong to the plaintiff and the Courts below ought to have decreed the suit as prayed for.

15.Per contra, Mr.H.Arumugam, learned counsel appearing for the respondent would submit that the plaintiff, who rested his entire case on Ex.A8, will, has not proved the same in the manner known to law. That apart, he would submit that the Commissioner's report has clearly stated that the property lying between the points A, B, E, D and C belonged to the defendant and the property lying between the points F, G, H, I, J, and K belonged to the plaintiff and further it is clearly stated that the suit property does not belong to the plaintiff. The learned counsel appearing for the respondent further drew the attention of this Court to the fact that Exs.B2 and B3 showed the southern boundaries as the defendant's property and the same is the northern wall of the plaintiff's property.

DISCUSSIONS:

16.Heard the learned counsel on either side and perused the pleadings and records.

17.The plaintiff places his claim on the will dated 14.06.1981 said to have been executed by his grand father, Nagalinga Konar, in favour of his father and others in respect of suit schedule property. In order to prove the



said will, the plaintiff has sought to examine the daughter, one of the witnesses as P.W2, and in the cross-examination, when a question was put to her as to how she had identified the signature of the testator, she had deposed that the same was identified by the plaintiff. Apart from this witness, no other witnesses have been examined to prove the said will.

18.In view of the categoric admission of P.W2, the Courts below have disbelieved the said will since it has not been proved in the manner known to law. I do not find any reason to interfere with this finding. Ex.B2 is of the year 1922 and in Ex.B2, it is stated that the property purchased by the defendant's great grand father had the southern boundary described as common wall.

19.The fact that Ex.B2, which is of the year 1922, clearly shows that the plaintiff does not have any right in the northern portion of the common wall and the said description was once again reiterated in Ex.B3, will, dated 08.02.1967. The plaintiff cannot claim a right to the common wall. Ex.A8, which is of the year 1981, clearly states that the northern portion of the 2nd item of suit property, namely, the 3rd item of suit property is described as the property of the defendant's predecessor in title. Apart from this, Ex.A8 has not been proved in the manner known to law.

20.The Courts below were right in deciding the title of 2nd and 3rd item of suit schedule property on the basis of the boundary recital in Ex.B2 since the document is of the year 1922. Further, the Courts below have rightly considered Ex.C1 and Ex.C2 and in the Commissioner report, it has been clearly mentioned that the property comprised in T.S.No.876 does not include the 2nd and 3rd items of suit property and on the contrary, it has been clearly mentioned that it falls within the boundaries of T.S.No.875. The will in question cannot be relied upon even for a secondary purpose, because the entire claim of the plaintiff is only on the basis of Ex.A8, will.

21.Under these circumstances, the substantial questions of law are answered against the plaintiff.

22.In the result, this Second Appeal is dismissed and the judgment and decree in A.S.No.8 of 2014 on the file of the Additional Sub Court, Tirunelveli, dated 04.09.2014, confirming the judgment and decree in O.S.No.161 of 2007 on the file of the II



Additional District Munsif Court, Tirunelveli, dated 02.02.2013, is hereby confirmed. No costs. Consequently, connected miscellaneous petitions is also closed.

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Sd/-

Assistant Registrar (CS-II)

// True Copy //

Sub Assistant Registrar (CS)

To

- 1.The Additional Subordinate Judge,
Tirunelveli.
- 2.The II Additional District Munsif,
Tirunelveli.
- 3.The Section Officer, (2 copies)
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to MR.H.ARUMUGAM, Advocate (SR-88199[F] dated 20/09/2019)
+1 CC to MR.R.MANIMARAN, Advocate (SR-88442[F] dated 23/09/2019)

S.A. (MD) No.136 of 2015
19.09.2019

MM

MK (25.10.2019) 6P 7C