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IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 17.03.2020

JUDGMENT PRONOUNCED ON : 30.11.2020

CORAM: THE HON'BLE MR.JUSTICE N.SESHASAYEE

S.A.NOS.1062 & 1145 OF 2002
AND CMP NOS.2682 & 2684 OF 2020

Mani

... Appellant / Respondent / Defendant
(in both Second Appeals)

Vs

1. A.S.Thirunavukkarasu

... Respondent / Appellant / Plaintiff
(in S.A.No.1062 of 2002)

2. N.Krishnamurthy

... Respondent / Appellant / Plaintiff
(in S.A.No.1145 of 2002)

Prayer in S.A.No.1062 of 2002 :- Second Appeal filed under Section 100 of CPC, against the judgment and decree of the learned Subordinate Judge, Chidambaram in A.S.No.33 of 1999 dated 08.10.2001 setting aside and reversing the decree and judgment of the learned District Munsif at Chidambaram in O.S.No.730 of 1989 dated 29.06.1999.

Prayer in S.A.No.1145 of 2002 :- Second Appeal filed under Section 100 of CPC, against the judgment and decree of the learned Subordinate Judge, Chidambaram in A.S.No.18 of 1999 dated 08.10.2001 setting aside and reversing the decree and judgment of the learned District Munsif at Chidambaram in O.S.No.731 of 1989 dated 29.06.1999.

For Appellant : Mr.R.Srinivas
(in both cases)

For Respondents : Mr.A.S.Velmurugan
(in S.A.No.1062/2002)
[No appearance]

: Mr.J.Srinivasa Mohan
(in S.A.No.1145/2002)



COMMON JUDGMENT

1.1 The appellant herein is the defendant in two separate suits that were filed by two separate plaintiffs, who share ownership over adjacent plots of lands for declaration of title of the respective properties scheduled to in the plaint, and for recovery of possession from the same defendant. The appellant/defendant had substantially same defence in both the suits. And during trial both the parties have relied fundamentally on the same set of documentary evidences. Its an ideal case for joint trial, but the trial court chose to try the suits separately and dismissed both the suits. These decrees came to be reversed by the first appellate court when it decreed the suits. Hence, these second appeals at the instance of the defendant.

1.2 Parties would be referred to by their rank before the trial court. So far as the plaintiffs are concerned, they would be referred to only as plaintiff, unless the context of the discussion requires specific reference to the specific plaintiff in relation to the suit that he has laid.

Facts:

2.1 The suit properties involved in both the suits are comprised in Sy.No.1325. This property was developed into a layout by Chidambaram Housing Co-operative Society. The two plots relevant for the present are Plots No.116 and 117. The Plot No.116 came to be allotted to the plaintiff (Krishnamurthy) in O.S.No.731/1989 from which S.A.1145/2002 is preferred, and that Plot No.117 came to be allotted to the plaintiff (Thirunavukkarasu) in O.S.No.730/1989, from which S.A.1062/2002 has arisen. Both the plaintiffs have purchased their respective plots Vide separate sale deeds dated 9.3.1988 executed by the said Housing Society. The details are now tabulated :

Suit No.	First Appeal No.	Second Appeal No.	Plaintiff	Plot No.	Sale Deed Dated	Exhibit No.
OS.731/1989	AS.18/1999	SA.1145/2002	Krishnamurthy	116	090388	A1
OS.730/1989	AS.33/1999	SA.1062/2002	Thirunavukkarasu	117	090388	A1

According to the plaintiffs in both the suits, the defendant has been an encroacher of a channel poromboke that lies to the east of Plot No.116, (subject matter in O.S.No.731/1989), and that he has encroached into Plot no.116 to an extent of 43 feet x 26.5 feet. On purchase under Ext.A-1 in both the suits, these plaintiffs had approached the defendant to vacate the land, to which he initially consented, and as he did not vacate the



property both the plaintiffs issued separate notices dated 24.7.1989, both of which came to be marked as Ext.A3 in the respective suits.

2.2 The defendant had issued his reply dated 05.8.1989, wherein he had contented that he has been in occupation of 40 x 40 ft. in poromboke land for more than 12 years, and that he has been paying B-memo charges, which the Government collects as penalty from the encroachers of the Government lands. Hence, both the allottees of plot Nos:116 and 117 have filed separate suits as detailed above.

3. As outlined in the opening paragraph of this judgement, the defendant had filed identical written statements in both the suits, wherein he had denied that the Government had ever handed over the property in S.No.1325 to the Housing Society and had adopted the same line of defence that he had earlier disclosed in his reply notices issued to the respective plaintiffs.

4.1 Both the suits went to trial and as already indicated they were separately tried. The trials Court has appointed a Commissioner for local inspection, and he has filed his reports. They, though are part of the evidence under Order 26 Rule 10 C.P.C, yet they were not formally seen marked by the trial Court. Both the plaintiffs were examined as PW1 in the respective suits. They then examined an official of the Co-operative Housing Society as P.W.2 in both the suits. The defendant too examined himself as DW1 in both the suits. He also examined another witness as DW2.

4.2 The plaintiffs in both the suits have filed substantially the same documents which came to be marked as Ext.A1 to A10 substantially in the same order in both the suits. Of them Ext.A1, in each of the suit is the title deed of the plaintiff. The defendant on his part has produced Exts.B1 to B4, of which Ext.B-1 to B3 are B-memo charges collected from him, but are dated after the suit. There is only one document in Ext.B-4, which is a circular issued by Tahsildar, Chidamabaram, dated 12.4.1988, and this document alone is anterior to the suit.

4.3 Both the plaintiffs have produced their sale deeds executed by the Co-operative Housing Society in their respective suits as Ext.A-1. The other documents included copy of the layout plan (not certified) as Ext.A-2. These are followed by Exts.A-3 and A-4 which are the suit notice and the reply of the defendant. Both the plaintiffs have produced the property tax receipts issued in their respective too. Critically, both these plaintiffs have produced Town Survey Field Register of Municipality which shows that Sy.No:1325 which are correlated to



part of Old Sy.No:1015/2 to 8 stands in the name of the concerned Housing Society. This document came to be marked as Ext.A-12 in O.S.731/1989, but marked Ext.A-8 in O.S.730/1989.

4.4 Insofar as Ext.B-1 to B-3, the receipts issued for payment of B-Memo charges are concerned, they relate to the period between 1994 to 1997. However, the plaintiffs in both the suits have filed the proceedings of Tahsildar dated 19-07-1996, as per which the Tahsildar has cancelled the B-Memo issued to the defendant as per certain proceedings of the Revenue Divisional Officer. This document is marked as Ext.A-5 = A-11 in O.S.731/1989 and Ext. A-7 in O.S.730/1989.

4.5 On appreciating the evidence before it, the trial court dismissed the suit on the ground that the plaintiffs in both the suits, inasmuch as they have pleaded that the property in Sy.No:1325 originally belonged to Government, they have not established that the Government had handed over its possession over this property to the Housing Society, and that the defendant, even though is a trespasser, is entitled to defend his possession against any subsequent trespassers.

5.1 The plaintiffs in both the suits therefore have preferred separate first appeals, which is shown in the tabular column in paragraph No.2.1 above.

5.2 Before the first appellate Court, they have filed necessary applications to receive two additional documents under Order 41 Rule 27 CPC. The documents produced are the certified copy of the approved lay-out where the plaintiffs have purchased their respective plots, and the document showing the Return of Acquired Lands. It may be mentioned that the first of the documents mentioned is already available on record as Ext.A-2 in both the suits, but as the same was not certified, a certified copy of the layout was produced. They came to be marked by the first appellate court.

5.3 Revisiting the evidence recorded by the trial Court and also on the basis of the evidence that it had admitted, and also placing reliance on the Commissioners' report, the first appellate court thought it fit to allow both the appeals. And, curiously enough, the first Appellate Court also failed to mark the Commissioners' reports which are part of the record. Challenging both the decrees of the first Appellate Court, these appeals are filed.

6. On admission, the following substantial questions of law are framed in both the appeals :



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S.A.No.1062 of 2002	S.A.No.1145 of 2002
1. Whether the lower Appellate Court was right in receiving additional documents in appeal without there being any valid ground to do so under Order 1 Rule 27 CPC? 2. Whether the Sub Court had not erred in holding that the suit property was a part of a layout without ascertaining whether the same as actually situated in the housing land or the portion of a poromboke which was admittedly existent in the area?	1. Whether the first appellate court erred in law and misdirected itself in reversing the judgment of the trial Court on the basis of additional documentary evidence produced, but without evidence to speak about the contents? 2. Whether the reception of additional evidence by the first Appellate Court is contrary to Order 41 Rule 27 CPC? 3. Whether the first appellate Court erred in law in reversing the findings of the trial Court on the basis of additional evidence adduced at the appeal hearing and when there is no plea that the lands were acquired by the State and made over to the co-operative Society?

7. The learned counsel for the appellant/defendant argued:

- The positive case of the plaintiffs in both the suits is that plot Nos:116 and 117 are in Sy.No:1325 and that it was a poromoboke land and that the Government had handed over this property to the concerned Housing Board. In this regard, an Advocate-Commissioner was appointed by the trial



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Court and he had visited the property twice, and during his second visit, he was assisted by the Municipal surveyor. The Commissioner in his second report had mentioned that according to the Municipal surveyor who assisted him, there was no poromboke land in Sy.No:1325, and that only Sy.No:1309 was Natham poromboke. This report was part of the record, and even though neither of the courts below have marked it formally in the case, yet this court may now appreciate it. When no part of the property on which the layout was developed was part of any poromboke land, the case of the plaintiffs ought to fail.

- Secondly, when the first appellate Court chose to admit the two additional documents as evidence under Order 41 Rule 27 CPC, it ought to have granted opportunity to the appellant/defendant to lead in rebuttal evidence in terms of Order 41 Rule 28 CPC, and the denial of the opportunity ran inconsistent to all norms of fairness in procedure to which the defendant indeed is entitled.

8. Per contra, the learned counsel for the plaintiff/respondent in S.A.1145/2002 argued that it was no case of the defendant that he was not in occupation of part of plot Nos:116 and 117 and this the commissioner had indicated candidly in his first report. Secondly, even in his written statement it is not contended that Sy.No:1325 was not a poromboke. Thirdly, in the second of the additional document marked by the first appellate Court, the relevant old survey number that is correlated to Sy.No:1325 is Old Sy.No:1015/4 part, and this was shown only as a wet land. Fourthly, there is no dispute as to identification of the plots in question, and the classification of land prior to the development of the layout is of no consequence.

9.1 This court gave its careful consideration to the rival submission. The line of argument of the appellant's counsel, basing it on the Commissioner's report, in the opinion of this court has only managed to tighten the noose on the defense of the defendant. It may be that the plaintiffs might have been under a degree of misconception that the plots that they had purchased from the Housing Society was part of poromboke land. And, the defence that the Government had not handed over the poromboke land to the concerned Housing Society, alone was his line of defense. If he were now to state that the entire Sy.No:1325 was not poromboke land, then he has no business to squat on the plots that the plaintiffs had purchased.

9.2 Alternatively, so far as the statement of the surveyor which the Commissioner had referred to in his report that the property in Sy.No:1325 is not a poromboke land, the same cannot be



admitted in evidence, in terms of Order XXVI Rule 10(2) CPC. It reads:

"Report and depositions to be evidence in suit :- The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, as to his report, or as to the manner in which he has made the investigation."

In terms of this provision, the statement of the surveyor as to the nature of the classification of the property in Sy.No:1325 can only be treated as a statement of evidence taken by the commissioner, and this part of the statement cannot become a part of the record unless the person who gave the statement was examined.

9.3 If the alternative point as discussed above is now taken for further consideration, then there is available on record that the proceeding of the Tahsildar dated 19-07-1996 (marked Ext.A-5:Ext.A-11 in O.S.731/1989, and Ext.A-7 in O.S.730/1989), while advertizing and appreciating the evidence, the trial court appeared to have blindfolded itself to its existence on record. The primary set of documents which the defendant had produced are Exts.B-1 to B-3. These are the receipts, post institution of the suit, and issued by the revenue officials for collection of, what is commonly known as B-Memo charges. This in essence is a penalty for the unauthorised occupation of government land, and is not the same as the land tax/kist. Vide the above referred proceedings, the Tahsildar has cancelled them, quoting the proceeding of the Revenue Divisional Officer. This is not seen to have been explained by the defendant. Not even before this court now.

9.4 Turning to the second leg of appellant's argument that opportunity has not been granted to the defendant in terms of Order XLI Rule 28 CPC is concerned, at least one of the documents is the copy of the layout plan and it is already available on record. The other document is the record from the Municipality giving the return of lands acquired.

10. This Court is conscious of the mandate of the language of Order XLI Rule 28. And, this court is equally conscious that the procedure law, as a hand maid of justice, provides for



certain degree of flexibility. Now, what is the rebuttal evidence that the defendant is capable of producing? Has he anything with him? It should not be forgotten that what is produced is an official documentary evidence. If he has a better document which has the potential to nullify the effect of the document of the Municipality, then he could have informed this court about it at least now. Let it be reminded that the suits were laid in 1989, and these appeals are laid in 2002. Unless this court is made known about the availability of any rebuttal evidence, what purpose would it serve to remand or remit the matter to the Court below. Not even a prayer was made to this Court that the defendant is ready with the rebuttal evidence, for, if only this court were informed, this court itself would have ventured to record the same. An opportunity indeed was available to the defendant, but it now stands forfeited.

11. In fact, this court finds that even without the additional evidence, the suits should have been decreed. What the trial court has ignored is, to apply the fundamental rule that civil cases must be decided on a preponderance of probability. The returns of the Municipality shows that the plots 116 and 117 falls within Old Sy.No:1015/4 part, and this is shown as a wet land. This is one of the property that falls within R.Sy.No:1325. The other properties that fall within it are classified as Government land. Now, when the defendant contends that he is only in possession of poromboke land, and since according to him, the property in old Sy.No:1015/4 is not a poromboke land, then he has no business to stay there. Necessarily, the substantial questions framed in both the appeals fail.

12. In conclusion, both the appeals are dismissed and the judgment and decree in A.S.No.33 of 1999 and A.S.No.18 of 1999, both dated 08.10.2001 on the file of the learned Subordinate Judge, Chidambaram are hereby confirmed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS-V)

//True Copy//

Sub Assistant Registrar

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To:

1. The District Munsif,
Chidambaram.
2. The Subordinate Judge,
Chidambaram.

+2ccs to Mr.J.Srinivasa Mohan, Advocate, S.R.No.38317

S.A.Nos.1062 & 1145 of 2002

SS (CO)
RLP (03/06/2022)