

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 30.10.2019

PRONOUNCED ON : 03.01.2020

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.944 of 2002

and

CMP.No.7517 of 2002

1. Govindaraju (deceased)
2. Udhayam (deceased)
3. Meenakshi
4. Dharmu
5. Kandasamy
6. Shenbagavalli
7. Bhanumathy (deceased)
8. Selvi. Jayasri

... Appellants/defendants

(Appellants 2 to 8 are brought on record as LR of the deceased sole appellant vide order dated 09.08.2004 in CMP.No.15574 of 2003)

Vs.

Chandra

... Respondent/Plaitiff

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the judgment and decree made in A.S.No.6 of 2002 on the file of the Court of Additional Subordinate Judge, Mayiladuthurai dated 12.04.2002 reversing the judgment and decree made in O.S.No.294 of 1991 on the file of the Court of Additional District Munsif, Mayiladuthurai dated 14.12.2001.

For Appellants : Mr.A. Muthukumar

For Respondent : Mr. S.Sounthar

JUDGMENT

This second appeal has been filed by the defendant against the judgment and decree passed by the Additional Sub-Judge, Mayiladuthurai in A.S.No.6 of 2002 dated 12.04.2002 reversing the judgment and decree passed by the Additional District Munsif, Mayiladuthurai in O.S.No.294 of 1991 dated 14.12.2001.

2. The respondent herein had filed a suit in

O.S.No.294 of 1991 on the file of the Additional District

Munsif, Mayiladuthurai to direct the defendant to surrender possession of the encroached portion which is described in the plaint plan as 'ABCD' and for future mesne profits. The learned Additional District Munsif, Mayiladuthurai, by the judgment dated 14.12.2001 had dismissed the said suit with costs. Aggrieved by the same, the plaintiff had filed an appeal in A.S.No.6 of 2002 on the file of the Additional Sub-Judge, Mayiladuthurai. The learned Additional Sub-Judge, Mayiladuthurai by the judgment dated 12.04.2002 had allowed the said appeal and set aside the judgment and decree passed by the trial court and decreed the suit as prayed for. He directed the defendant to deliver vacant possession of the suit property within two months. However, he directed the parties to bear their respective costs. Feeling aggrieved, the defendant has filed the present second appeal. During pendency of this second appeal, original appellant/defendant died and hence, his legal heirs have been impleaded as appellants 2 to 8.

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 suit property belongs to Dharmapuram Adeenam. The same was taken for Paguthi by the plaintiff from the Dharmapuram Adeenam from Fasali No.1391. A registered Paguthi deed was executed by the plaintiff in favour of the said Adeenam on 05.10.1990. The period of lease was five years. The purpose of taking property for Paguthi was to put up a construction therein. The plaintiff also paid the Paguthi amount upto Fasali No:1400. The defendant is the southern neighbour of the plaintiff. He also vied with the plaintiff to take the suit property for Paguthi but he failed in his attempt. Aggrieved by the same, the defendant caused encroachment over the suit property by pushing the fence to further north. The said encroached portion is shown as 'ABCD' in the plaint plan. In spite of the repeated requests made by the plaintiff, the defendant did not remove the encroachment and hence, he was constrained to file the above suit for the relief of delivery of possession.

5. The averments made in the written statement are in brief as follows:

The description of the property given in the plant schedule and the rough plan attached with the plaint are incorrect and misleading. The alleged portion is in possession of the defendant for the past more than 50 years. In the said portion, the defendant has put up a thatched house and residing therein with his family. He also put up a cattle shed on the north of the house. There are also Karuva trees and Karivepillai trees on the north of the cattle shed and on the south of the fence put up and maintained by the plaintiff as demarcating line between these two properties. Defendant has

been paying the house tax to the Mayiladuthurai Municipality for the house. He also paying the annual Paguthi of Rs.4/- to the Devasthanam as a tenant, which he is enjoyng as 'Uzhiyamdar' for doing service to the temple. The defendant has put up and has been maintained the fence on the east and west of the properties in his possession. The northern fence is put up and maintained by the plaintiff and her predecessor in title. A rough plan showing the location of the house and the fence put up by him on the East-West and of the fence put up by him on the north is also enclosed with the written statement. The fence is now decayed and damaged and the plaintiff has failed to maintain the same with good repair. Thus, the defendant is in possession and enjoyment of the property on the south of the fence which is shown as 'CD' in the rough plan. He is entitled to be in possession of the suit property until he is lawfully evicted by the temple. The allegation that the plaintiff was in possession of the suit property in pursuance of the lease deed with the Dharmapuram Adeenam is incorrect. Even if there is any such lease deed, that will not bind upon the defendant. It is false to state that the fence shifted gradually to a length of 20 feet from November 1990. The defendant already filed a suit for permanent injunction in O.S.No.297 of 1991 on the file of the Additional District Munsif, Mayiladuthurai and the same is pending. In that suit, a Commissioner was appointed and he made a local inspection of the suit property and submitted a report with a plan showing the features of the suit properties. The said report will speak about the unfounded and false nature of the claim put forward by the plaintiff. The plaintiff is not entitled to the relief of recovery of possession as prayed for. Therefore, the defendant prayed to dismiss the suit.

6. Based on the aforesaid pleadings, the learned Additional District Munsif, Mayiladuthurai had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff's husband was examined as PW1 and Exs.A1 to A7 were marked. On the side of the defendant, the defendant examined himself as DW1. He also examined two more witnesses as D.Ws.2 and 3 and he marked Exs.B1 to 14 as exhibits.

7. The learned Additional District Munsif, Mayiladuthurai, after considering the materials placed before him, found that the plaintiff had failed to prove that she was in possession of 'ABCD' portion at any point of time and hence, she is not entitled to file the suit for recovery of possession based on her previous possession. Accordingly, he dismissed the suit with costs. Aggrieved by the same, the plaintiff had filed an appeal in A.S.No.6 of 2002 on the file of the Additional Sub-Judge, Mayiladuthurai. The learned Additional Sub-Judge, Mayiladuthurai had allowed the said appeal and set aside the judgment and decree passed by the trial court and decreed the suit as prayed for and directed

the defendant to deliver vacant possession of the suit property within two months to the plaintiff. However, he directed the parties to bear their respective costs. Feeling aggrieved, the defendant has filed the present second appeal. Since during pendency of the second appeal, the original appellant/defendant died, his legal representatives, have been impleaded as appellants 2 to 8.

8. This court at the time of admitting the second appeal has formulated the following substantial questions of law:

1. When the plaintiff suppressed Ex.B.13 & B.14 and claimed reliefs for larger extent, whether she is entitled to the relief of recovery of possession of any property other than one mentioned in Ex.B.14?
2. When Ex.A.2 & A.3, the report and plan of the surveyor commissioner appointed in the other suit O.S.No.297/91 and the same is in conflict with the other surveyor's report and plan, Ex.B.5 to B.8 and the said suit is till pending, whether the lower appellate Court not erred in law in relying upon Ex.A.2 & A.3 in decreeing the suit?
3. When the plaintiff failed to prove that she has taken 948 sq.ft., in T.S.366 on lease by summoning the D.C.P. Registers from the temple, whether the plaintiff has discharged the burden of her right, title or interest on 948 sq.ft., which is more than what she has purchased under Ex.B.14?"

9. During pendency of this second appeal, this court by the order dated 12.02.2018 has directed the Taluk Surveyor, Mayiladuthurai to measure the properties with reference to the lease deeds of both the parties and sale deed executed by one Gnanambal and identify the suit property and file a report. Subsequently, by the order dated 26.02.2018, it was ordered that the aforesaid order shall be read as 'sale agreement' instead of 'sale deed'. In pursuance of the said orders, the Taluk Surveyor, Mayiladuthurai, has measured the properties and sent a report with two plans through Tahsildar. For the said report, and plans, the learned counsel for the appellants has filed an objection. Thereafter, this court heard Mr.A.Muthukumar, learned counsel for the appellant and Mr.S.Sounder, learned counsel for the respondent.

10. Substantial questions of law 1 to 3:

The learned counsel for the appellants has submitted that the first appellate court erred in reversing the well considered judgment and decree of the trial court. He further submitted that the evidence of DW2 would show that in 1.S.No.366, she entered into a sale agreement with the

plaintiff only in respect to 548 sq.ft and that being so, the plaintiff cannot claim 948 sq.ft. He further submitted that the first appellate court failed to consider that the land belongs to Dharmapuram Adeenam and only lease hold right was given to the plaintiff as well as defendant and that the employee of the said Dharmapuram Adeenam (DW3) gave an evidence that only 548 sq.ft of land was leased out to the plaintiff. He further submitted that the first appellate court erred in relying upon the Advocate Commissioner's report and plan which were filed in another case i.e., in O.S.No.297 of 1991 in O.S.No.297 of 1991. If the Advocate Commissioner's report and plan were marked by examining the Advocate Commissioner, then only the said document can be looked into, but, in that case, the said Advocate Commissioner's report and plan were not at all marked in O.S.No.297 of 1991 and under the said circumstances, the said report and plan should have been marked in this case only by examining the said Advocate Commissioner. Since the said Advocate Commissioner was not examined, no reliance can be placed upon the said Advocate Commissioner's report and plan which were filed in another case. He further submitted that since the plaintiff has filed a suit alleging that the defendant has encroached the suit property, the burden is upon her to prove the same, but she miserably failed to discharge the said burden. He further submitted that it is a well settled law that the plaintiff has to prove his/her case by adducing satisfactory evidence, and that the plaintiff cannot pick up holes in the defendant's case and contend that the defendant has failed to prove his case. He further submitted that the Advocate Commissioner who was appointed in another case i.e., in O.S.No.297 of 1991 has not properly measured the property by giving proper notice to both the parties and hence, the report and plan filed in that case cannot be taken into consideration in the present case. He further submitted that this court at the request of both side counsel, has directed the Taluk Surveyor, Mayiladuthurai, to measure the properties of both the parties with reference to their documents but the said Taluk Surveyor also has not properly measured. Therefore, the report submitted by the Taluk Surveyor and his plans also cannot be taken into consideration and therefore, he prayed to allow the second appeal and set aside the judgment and decree passed by the first appellate court and restore the judgment and decree passed by the trial court.

11. In support of the aforesaid contentions, the learned counsel for the appellants has relied upon the following decisions :

- 1) Sarat Chandra vs. Sarala Bala Ghosh,
AIR 1928 Calcutta 63
- 2) John Sylem Vs. Chanthanamuthu Pillai
and another, 1997 (2) MLJ 537.

12. Per contra, the learned counsel for the respondent/plaintiff has submitted that eventhough the

plaintiff has entered into a sale agreement with one Gnanambal (DW2) vide under Ex.B14 in respect of two items of properties i.e., one in respect of the property situated in T.S.No.835 admeasuring 6072 sq.ft and another item in T.S.No.366 admeasuring 548 sq.ft, subsequently on verification, it was found that the said Gnanambal had saleable interest only in the property situated in T.S.No.835 and hence, the plaintiff has got sale deed from the said Gnanambal under Ex.B13 only in respect of the property situated in T.S.No.835. He further submitted that since the plaintiff found that the said Gnanambal had no saleable right in respect of the property situated in T.S.No.366, she did not get sale deed from the said Gnanambal. He further submitted that since the land situated in T.S.No.366 belongs to Dharmapuram Adheenam, the plaintiff got lease hold right under Ex.A4 on 05.10.1990 in respect of 948 sq.ft of the land in T.S.No.366 from the said Dharmapuram Adheenam. He further submitted that the defendant got lease hold right in T.S.No.366 from the said Dharmapuram Adheenam in respect of the land measuring 2000 sq.ft only and the said property is situated on the south of the plaintiff's lease hold property. He further submitted that the defendant only encroached the plaintiff's property to an extent of 470½ sq.ft by pushing the fence towards north. He further submitted that with regard to the same subject matter of the suit, the defendant also filed a suit in O.S.No.297 of 1991 on the file of the District Munsif, Mayiladuthurai and in that suit, the respondent herein and her husband Sundararajan were shown as defendants and they filed an application in I.A.No.1967 of 1994 to appoint an Advocate Commissioner and accordingly, an Advocate Commissioner was appointed and the said Advocate Commissioner after giving notice to both the parties measured the properties of both the parties with the help of a qualified surveyor with reference to their documents and filed a report and plan stating that the defendant herein had encroached 470.50 sq.ft of the land which belongs to the plaintiff.

13. The learned counsel for the respondent/plaintiff further submitted that since the Advocate Commissioner has filed a report and plan stating that the defendant herein had encroached the plaintiff's property, defendant herein did not agree for conducting his suit i.e., in O.S.No.297 of 1991 along with the present suit and hence, the learned District Munsif has tried this suit alone separately. He further submitted that since the defendant's suit i.e. O.S.No.297 of 1991 was taken up for trial, the Advocate Commissioner's report and plan which were filed in that suit could not be marked as exhibits in that suit. He further submitted that since O.S.No.297 of 1991 also filed in respect of the same subject matter and the parties are also one and the same, certified copies of the Advocate Commissioner's report and plan filed in that suit were obtained and produced in this suit and marked as Exs. A2 and A3 on the side of the plaintiff

and at the time of marking the said documents, the defendant has not raised any objection. He further submitted that the defendant also obtained certified copies of the Advocate Commissioner's report and plan and filed in this case and marked as Exs.B3 and B4 and in such a case, it is not open to the defendant to contend that the Advocate Commissioner's report and plan which were filed in O.S.No.297 of 1991 cannot be taken into consideration in this case. He further submitted that during the pendency of the second appeal, this court by the order dated 12.02.2018 and subsequently modified by the order dated 26.02.2018 has directed the Taluk Surveyor, Mayiladuthurai to measure the properties of both the parties with reference to their documents and file a report with plan and accordingly, the said Taluk Surveyor, Myladuthurai has measured the properties of both the parties with reference to their documents and sent a report with plans and the said report and plans also shall form part of the record as per the provisions of Order 26 Rule 10 of CPC. He further submitted that the said report and plans also would show that the defendants had encroached 339 sq.ft of the plaintiff's property and therefore, he prayed to dismiss the second appeal and confirm the judgment and decree passed by the first appellate court.

14. The suit property is situated in T.S.No.366, Ward No.7, Mayiladuthurai Town and Taluk. Admittedly, the land situated in T.S.No.366 belongs to Dharmapuram Adheenam. As per Advocate Commissioner's report (Ex.A2), the total extent of the said T.S.No.366

is 39775 sq.ft, out of which, the plaintiff claims 948 sq.ft. The oral evidence of DW2 and Exs.B13 and B14 would show that on 08.03.1982, the plaintiff entered into an unregistered sale agreement with one Gnanambal (DW2) in respect of the properties situated in T.S.No.835 admeasuring 6072 sq.ft and T.S.366 admeasuring 548 sq.ft. Subsequently, the plaintiff came to know that the property situated in T.S.No.366 belongs to Dharmapuram Adheenam and as such, the said Gnanambal (DW2) has no right to sell the property situated in respect of T.S.No.366 and accordingly, she got sale deed vide under Ex.B13 on 09.08.1982 in respect of the property situated in T.S.No.835 alone. The oral evidence of PW1 and Ex.A4 would show that on 05.10.1990, Dharmapuram Adheenam had leased out the land admeasuring 948 sq.ft in T.S.No.366 to the plaintiff. Exs.A1, 5 and 6 would show that the plaintiff has paid rent to the Dharmapuram Adheenam for 948 sq.ft. Further PW1 who is the husband of the plaintiff has deposed in his evidence that at the time of leasing out the property to his wife, the temple authorities have measured the property and handed over the possession. So, the oral evidence of PW1 coupled with Exs.A1, A4 to A6 would show that the plaintiff was given 948 sq.ft in T.S.No.366 for lease.

15. Let us now see the case of the defendant. Though the defendant has stated in his written statement and also in his evidence that even before the plaintiff entered into a lease agreement with Dharmapuram Adheenam, he was in possession and enjoyment of the aforesaid alleged encroached portion as a tenant, to substantiate the said plea, he has not produced any documentary evidence. Exs.A2/Ex.B3 would show that the defendant has produced a lease deed of the year 1953 before the Advocate Commissioner and as per the said document, the property measuring 80 ft x 25 ft = 2000 sq.ft alone was leased out to him, but the defendant has purposely failed to produce the said document before the trial court. If the said document was produced before the trial court that would show that the defendant got lease only to an extent of 2000 sq.ft. But as per the Advocate Commissioner's report and plan (Ex.A2 and A3/B3 and B4), the defendant is in possession of 3008 sq.ft. So, it is clear that if the lease deed of the year 1953 is produced, the fact that the defendant is in possession of excess land i.e., the encroachment made by him in the plaintiff's property would come to light and that must be the reason for not producing the said lease deed before the court. Therefore, an adverse inference has to be drawn against him.

16. It is also to be pointed out that though the defendant has produced Exs.B9 to B12 to show that he paid rent to the Dharmapuram Adheenam, in the said documents, the extent of the land leased out to the defendant not mentioned and therefore, based on the said documents, it is not possible to come to a conclusion to what extent the defendant got lease. It is true that the employee of the Dharmapuram Adheenam (DW3) has deposed that only 548 sq.ft of land in T.S.No.366 was leased out to the plaintiff. He further deposed that based on his enquiry, he came to know that only 548 sq.ft in T.S.366 was leased out to the plaintiff, but the registered lease deed (Ex.A4) and the rent receipts (Exs.A2, A5 and A6) would show that 948 sq.ft of land in TS.366 was leased out to the plaintiff. So, it is clear that DW3 gave evidence against their own documents and therefore, no reliance can be placed upon his evidence.

17. In Sarat Chandra vs. Sarala Bala Ghosh (cited supra), the Calcutta High Court has held that the Advocate Commissioner's report and map were not taken into evidence by themselves as contemplated in the Civil Procedure Code, but they were taken under the Evidence Act being proved by the person who made them i.e., Advocate Commissioner who made them was examined in the court and only through him, the documents were marked as exhibits. Further at the time of marking the said report and map, the defendant did not raise any objection. Taking into consideration of the aforesaid facts, the Calcutta High Court has held that since the said documents were marked after examining the concerned Advocate Commissioner, the said document cannot be ignored. In the present case, Exs.A2 and A3 /B3 and B4 are the certified

copies of the Advocate Commissioner's report and plan which were filed in the connected suit i.e., in O.S.No.297 of 1991. The subject matter and the parties are one and the same in both the suits. The present suit was filed by the plaintiff herein in O.S.No.294 of 1991 whereas the suit in O.S.No.297 of 1991 was filed by the defendant in respect of the same subject matter and in such a case, the learned District Munsif should have tried both the suits together to avoid the conflict of decisions, but it appears that the learned District Munsif has tried this suit alone. However, in O.S.No.297 of 1991, the present plaintiff and her husband Sundararajan had filed an application in I.A.No.1967 of 1994 to appoint an Advocate Commissioner to measure the suit property and the said application was allowed and accordingly, Advocate Commissioner was appointed. The Advocate Commissioner has filed his report and plan in that suit. As per Order 26 Rule 10 of CPC, the Advocate Commissioner's report and plan would form part of the record and therefore, the plaintiff as well as the defendant have obtained certified copies of the said report and plan and filed in this suit and marked as Exs.A2 and A3/B3 and B4. Since both the parties marked the certified copies of the said Advocate Commissioner's report and plan, it has to be presumed that both the parties are relying upon the said report and plan and under the said circumstances, it is not open to the defendant to contend that the Advocate Commissioner's report and plan which were filed in another suit cannot be taken into consideration in the present suit. The defendant is estopped from taking such a plea. Therefore, the aforesaid decision will not help the defendant.

18. In John Sylem Vs. Chanthanamuthu Pillai and another (cited supra), this court has held that on going by Order 26 Rules 9, 10 and 18 of CPC, report of the Commissioner can be treated as evidence only if the statutory conditions are complied with i.e., the report should be prepared atleast with notice to the affected persons. In this case, a perusal of Exs.A2 and B3 would show that the Advocate Commissioner has measured the properties of both the parties only after giving proper notice to both the parties. Further, both the parties have produced their documents also before the Advocate Commissioner and only with reference to the said documents, the Advocate Commissioner has measured the properties with the help of a surveyor and therefore, the aforesaid decision also will not help the defendant.

19. In Ex.A2/B3, it is stated that as per the lease deed dated 05.10.1990, 948 sq.ft was leased out to the plaintiff, whereas on measurement, it is found that she is in possession of only 477½ sq.ft. Further, it is stated that as per the lease deed of the year 1953, 2000 sq.ft was leased out to the defendant by the Dhamapuram Adheenam, but on measurement, it is found that he is in possession of 3008 sq.ft i.e., he is in possession of 1008 sq.ft in excess.

Accordingly, Advocate Commissioner has stated that the defendant has encroached the plaintiff's property admeasuring 470 ½ sq.ft. Further, during pendency of the second appeal, as per the orders passed by this court dated 12.02.2018 and subsequently modified by the order dated 26.02.2018, the Taluk Surveyor, Mayiladuthurai has measured the property of both the parties with reference to their lease deeds and also Ex.B14, sale agreement entered between the plaintiff and DW2 and submitted a report with plans. As per Order 26 Rule 10 of CPC, the Taluk Surveyor's report and plans shall form part of the record. In the said report also, it is stated that as per the lease deed executed by the Dharmapuram Adheenam in favour of the plaintiff dated 05.10.1990, 948 sq.ft of land in T.S.No.366 was leased out to the plaintiff but on measurement, it is found that she is in possession of 609 sq.ft only. Further, it is stated that as per the lease deed executed by the same Dharmapuram Adheenam in favour of the defendant dated 30.12.1953, only 2000 sq.ft was leased out to the defendant, but on measurement, it was found that he is in possession of 2340 sq.ft. So, it is clear that out of 948 sq.ft leased out to the plaintiff vide Ex.A4, the plaintiff is in possession of only 609 sq.ft and the remaining extent of 339 sq.ft is in possession of the defendant. It shows that the defendant has encroached 339 sq.ft. Therefore, the plaintiff is entitled to the relief for recovery of possession atleast to the extent of 339 sq.ft as stated by the Taluk Surveyor, Mayiladuthurai, in his report dated 22.03.2018. Accordingly, the substantial questions of law are answered.

20. In the result, the second appeal is partly allowed. Consequently, connected miscellaneous petition is closed. The judgment and decree passed by the courts below are modified. The suit in O.S.No.294 of 1991 on the file of the Additional District Munsif, Mayiladuthurai is partly decreed as follows:

(i) that the defendant shall deliver vacant possession of 339 sq.ft of land to the plaintiff as stated by the Taluk Surveyor in his report and plan dated 22.03.2018 within two months from the date of receipt of a copy of this judgment;

(ii) that the report and plan submitted by the Taluk Surveyor, Mayiladuthurai dated 22.03.2018 shall form part of the decree; and

(iii) that considering the facts and circumstances of the case, the parties are directed to bear their respective costs.

Sd/-

Assistant Registrar(CS)

gv
To

1. The Additional Subordinate Judge, Mayiladuthurai.
 2. The Additional District Munsif, Mayiladuthurai.
 3. The Section Officer, VR Section,
High Court, Madras.
- +lcc to Mr.S.Sounthar , Advocate SR.No. 528
+lcc to Mr.A.Muthukumar , Advocate SR.No. 322

S.A.No.944 of 2002
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