

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 05.10.2020	PRONOUNCED ON: 07.10.2020
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CORAM::

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

S.A.NO.270 OF 2010

V.Sivaraj,
S/o.Velayutha Chettiar,
Residing at Mettupalayam Village,
Panamalai Madura, Ananthapuram Post,
Villupuram Taluk and District.

... Appellant/Appellant/
Plaintiff

/versus/

Senthil Kumar,
S/o.C.Ramalingam,
Residing at Mettupalayam Village,
Panamalai Madura, Ananthapuram Post,
Villupuram Taluk and District.

... Respondent/Respondent/
Defendant

Prayer:

Second Appeal is filed under Section 100 of Civil Procedure Code, praying against the judgment and decree dated 13.04.2009, made in A.S.No.65 of 2005, on the file of the Court of the 1st Additional Subordinate Judge, Villupuram, confirming the judgment and decree dated 28.02.2005 made in O.S.No.220 of 2001, on the file of the Court of the Additional District Munsif, Villupuram.

For Appellant : Mr.T.Dhanasekaran

For Respondent : Mr.T.Dhanya Kumar

JUDGMENT

(The case has been heard through video conference)

Heard the Learned Counsel for the appellant and the Learned Counsel for the respondent.

2. The plaintiff in the suit who lost his case before the Courts below is the Appellant herein. The suit was filed for declaration and permanent injunction in respect of a wall morefully described under schedule "B" of the plaint.

3. The case of the plaintiff/appellant is that, a total extent of 13 cents in S.No.8/8 of the Mettupalaym Village in Panamalai Madura, Villupuram District was divided into three portions. The southern portion to an extent of $4\frac{1}{4}$ cents out of 13 cents is the property of the defendant. The northern portion of $4\frac{1}{4}$ cents out of 13 cents belongs to one Sakthivel. In between these two portions $4\frac{1}{2}$ cents was purchased by the father of the plaintiff, on 26.04.1937. By virtue of registered settlement deed dated 16.08.1957 same was settled in favour of plaintiff. In the year 1979, when the plaintiff intended to built a house in 'A' schedule property, he entered into an oral agreement with one Kamalam (defendant's mother) and her sister Pappammal to built a $1\frac{1}{4}$ feet width wall on the southern side of 'A' schedule property. Kamalam and Pappammal had agreed to give an extent of 6 inches ($\frac{1}{2}$ feet) to built a join wall, for which the plaintiff had executed an unregistered unilateral agreement dated 16.06.1979. Though the agreement was entered, it was not given effect. Therefore, the plaintiff, in his own land had constructed $1\frac{1}{4}$ feet wall on the southern side of his land. On the south of the 'B' schedule wall, the plaintiff has constructed two shops on the western side and a house on eastern side. He also left out a lane of $3\frac{1}{2}$ feet South-North to have passage to the Eastern portion.

4. While so, the defendant constructed a house to the south of the schedule mentioned property and he is intended to destruct the wall under a false appreciation of facts that the wall had been constructed by the plaintiff in the 6 inches of the defendant's property, as per agreement dated 16.06.1979. Since the agreement has not come into effect and the 'B' schedule wall falls within the limit of the plaintiff's property, declaration of his title and injunction restraining the defendant's, their men and agents from interfering with the peaceful possession and enjoyment of the 'B' schedule wall sought in the suit. Later the prayer for recovery of possession was sought by amendment.

5. The defendant filed written statement stating that the suit is bad for non-joinder of necessary parties. Kamalam, who is alive and the owner of the property is a proper and necessary party. The revocable permission was granted to the plaintiff by Kamalam and Pappammal to put a wall in their property. The wall has become old and therefore, that was removed. The defendant has put up a new wall in their property at their own cost for which the plaintiff can have no objection. Without

providing proper measurements of his land, the suit for declaration has been filed with false averment.

6. The Trial Court has framed the following issues:-

(i).Whether the plaintiff is entitled for declaration in respect of 'B' schedule property?

(ii).Whether the plaintiff is entitled for permanent injunction against the defendant in respect of 'B' schedule property?

(iii).What reliefs the plaintiff is entitled?

7. Pending Trial, the Advocate Commissioner was appointed and he has submitted the report with sketch. From the Advocate Commissioner's report, it was brought to notice that the old wall has been removed and new wall has been put up by the defendant in between the land's of the plaintiff and the defendant. Hence, the following Additional issue was framed by the Trial Court.

Additional Issue:-

(i). Whether the plaintiff is entitled for mandatory injunction?

8. Before the Trial Court, the plaintiff has marked 10 Exhibits and examined 2 witnesses. On behalf of the defendant, 2 witnesses were examined. Two Court Exhibits and two third party exhibits were marked to understand the physical features of the property.

9. The Trial Court has found that the documents relied by the plaintiff namely Ex.A.6 and Ex.A.7 does not carry the linear measurement of the respective properties. These are the documents through which the plaintiff traced his title. In the settlement deed marked as Ex.A.10, the linear measurements of 4 ½ cents of the suit property is mentioned as East-West 150 feet and South-North 20 feet.

10. The Trial Court, after considering the Advocate Commissioner's report and the title documents relied by the parties held that the physical features recorded by the Advocate Commissioner is entirely different from what is mentioned in the plaint schedule. In 'B' schedule property, the wall has been removed and new wall has been constructed. Therefore, new cause

of action has arose. The plaintiff has not sought for amendment to the plaint and therefore, neither declaration nor injunction can be granted. There is no evidence to show that the existing wall has been constructed by the defendant on encroaching upon the land's of the plaintiff. With these findings, the suit was dismissed.

11. Aggrieved by the dismissal order, the plaintiff has preferred Appeal Suit in A.S.No.65 of 2005 before the Additional Sub Judge, Villupuram.

12. The Appellate Court has reiterated the findings of the Trial Court, it has observed that the plea of the plaintiff that B schedule property measures East-West 35 feet and North-South 1 ¼ feet has not been established through acceptable evidence. Only from the Advocate Commissioner's report, the plaintiff has amended the prayer for mandatory injunction to recover the possession.

13. To prove the portion alleged to have been held by the defendant belongs to the plaintiff. No revenue records or title deeds produced and therefore, The 1st Appellate Court confirmed the Trial Court judgment and decree and dismissed the appeal.

14. The Second Appeal is filed against the concurrent finding of the Courts below. The Learned Counsel for the Appellant has contended that the Courts below has erred in denying the title of the appellant/plaintiff in respect of "B" schedule property for want of measurements in Ex.A.1 & Ex.A.2. The Courts below ought to have considered the measurements given by the Advocate Commissioner and it should have taken note of the fact that, the defendant demolished the wall pending suit.

15. After hearing the Learned Counsel for the appellant and the Learned Counsel for the respondent, this Courts finds that there is no merit in this Second Appeal to admit.

16. The case of the plaintiff specifically based on Ex.A.1 & Ex.A.2, the title documents and Ex.A.3 an unregistered unilateral agreement, which the plaintiff himself claims that was not give effect. To grant the relief of declaration, the documents relied by the plaintiff should speak about the title and right over the disputed portion of the property. On looking into the Ex.A.1 & Ex.A.2, we find except the extent of the property and survey number, the linear measurements are not found. Even according to the plaintiff, 13 Cents in S.No.8/8 was divided into three portions. (i). 4 ½ cents held by the father of the plaintiff (ii). remaining two portions 4 ¼ cents each, on southern side held by the defendant and northern side by one Sakthivel.

17. For the first time, the linear measurement found in Ex.A.10, settlement deed which is of the year 2001. In case of this nature, a person who seeks for declaration ought to have measured the property with the help of qualified surveyor of the Department. The report of Advocate Commissioner and his measurement without assistance of qualified surveyor can only be approximate.

18. As pointed out by the Courts below, pending suit, the physical feature of the 'B' schedule property had lost. Proper relief with proper documents not been pleaded and placed before the Courts by the appellant, who is the plaintiff in the suit.

19. When the burden of proof is on the plaintiff to prove his title, stray answer by the defendant regarding the unregistered unilateral agreement will not confer any right or title to the plaintiff in respect of 'B' schedule property. Therefore, this Court finds no substance in the Appeal to formulate any substantial questions of law. Hence, the Second Appeal is dismissed. No costs.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

bsm

To

1.The 1st Additional Subordinate Judge, Villupuram.

2.The Additional District Munsif, Villupuram.

Copy To

The Section Officer,
V.R.Section, High Court, Madras.

PA(CO)
CS/26/04/2021

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