

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :18.02.2020

DATE OF VERDICT : 04.03.2020

CORAM

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

S.A.NO.1100 OF 2005

1.Kumarasamy

2.Arunachalam

3.Sevalaiappan

4.Ramakrishnan ...Appellants/Plaintiffs

Vs.

1.Ramalingam(died)

2.Kittu @ Krishnan

3.Selambayal

4.Kulandaikumar

5.Sulochana

(RR3 to 5 brought on record as LR's
of the deceased R1 Viz., Ramalingam
vide order of court dated 02.12.2019
made in CMP.No.17524, 17525 and
17527 of 2019 in SA.No.1100 of 2005

...Respondents/
Defendants

Prayer :-

This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 20.12.2004, in A.S.No.17 of 2003 on the file of the Principal Subordinate Judge at Gobichettipalayam, reversing the decree and judgment dated 25.02.2003 in O.S.No.85 of 1999 on the file of the District Munsif, Gobichettipalayam.

For Appellants : Mr.A.V.Arun

For Respondents

R1 : died (steps taken)

R2 to R5 : Notice served

JUDGMENT

This second appeal is directed as against the judgment and decree dated 20.12.2004, in A.S.No.17 of 2003 on the file of the Principal Subordinate Judge at Gobichettipalayam, reversing the decree and judgment dated 25.02.2003 in O.S.No.85 of 1999 on the file of the District Munsif, Gobichettipalayam.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

3. The case of the plaintiffs in brief is as follows :-

3.1 The suit is filed for declaration and permanent injunction. The plaintiffs are brothers. The defendants are also brothers. The property of the defendants is situated at eastern side and adjacent to the suit property. In the suit property, the plaintiffs' houses and vacant place are situated. The suit property originally was purchased by their father by the registered sale deed dated 12.02.1968 and it admeasures 2118 sq.ft. While he was alive, he obtained electricity service connection and after his demise, the plaintiffs are in possession and enjoyment of the suit property. The plaintiffs 1, 3 and 4 are residing out of the suit property and on their permission, the second plaintiff is paying property tax and other dues to the authorities concerned and enjoying the entire suit property. Due to misunderstanding between the plaintiffs and the defendants on 21.02.1999, the defendants attempted to trespass into the suit property. Hence, the suit.

4. Resisting the plaintiffs' case, the defendants filed written statement stating that the entire allegations made in the plaint are denied as false and frivolous. Though the plaintiffs claimed title over the property by the sale deed dated 12.02.1968 purchased by their father, they have not whispered about their father's title over the suit property. The plaintiffs' father's vendor one, Arthanari Mudaliar had no title over the suit property. Further, the plaintiffs themselves admitted that the plaintiffs 1, 3 and 4 are not residing in the suit property. One, Arunachala Mudaliar and Senapathi Mudaliar are brothers. One, Arthanari Mudaliar was the son of the said Arunachala Mudaliar, and the said Arthanari Mudaliar gave birth to only one son Murugesha Mudaliar, who is none other than the father of the defendants. Likewise Senapathi Mudaliar gave birth to one son Kolandha Mudaliar. His son was Arthanari Mudaliar and according to the plaintiffs, their father purchased the property from the said Arthanari Mudaliar. Originally the said Senapathi Mudaliar and Arunachala Mudaliar owned the property and there was no partition between them. The defendants' father was in possession and enjoyment of the

property on the eastern side of the property, east to west 45 feet and constructed house. On western side, east to west 45 feet was possessed by the said Arthanari Mudaliar. Therefore, the vendor of the plaintiffs' father had no title east to west 54 feet.

4.1 Further stated that after resurvey, the plaintiffs were issued patta for the property comprised in resurvey No.953/43. The defendants were also issued patta for the property comprised in survey No.953/43. The first item of the suit property east to west on the western side 45 feet only belongs to the plaintiffs and to that extent patta was issued in favour of them. In respect of item 2, no patta was issued in favour of the plaintiffs. In fact, in the patta for the property comprised in resurvey No.953/43 on the western side shown as 953/45. It is a road and only through the said road, the defendants can reach the main road comprised in survey No.953/47. Therefore, beyond the patta, the plaintiffs cannot seek more than the property mentioned in the patta. Now they are seeking 9 feet excess than the patta issued in their favour. Therefore, the plaintiffs are not entitled to seek any relief as prayed for and sought for dismissal of the suit.

5. In support of the plaintiffs' case, P.W.1 was examined and seven documents were marked as Ex.A.1 to Ex.A.7. On the side of the defendants, D.W.1 and D.W.2 were examined and Ex.B.1 to Ex.B.4 were marked. On considering the oral and documentary evidences adduced by the respective parties and the submission made by the learned counsel, the trial Court decreed the suit in favour of the plaintiffs. Aggrieved over the judgment and decree of the trial Court, the defendants preferred an appeal suit in A.S.No.17 of 2003 before the Principal Subordinate Judge at Gobichettipalayam. The first appellate Court on appreciating the materials placed on records, allowed the appeal by reversing the judgment and decree passed by the trial Court. Challenging the same, the plaintiffs have come forward with the present second appeal.

6. At the time of admission of the second appeal, the following substantial questions of law were framed :-

a) Whether the first appellate court is right in reversing the finding of the trial court contrary to the contents of the document under exhibit A1 when there is a bar under Section 92 of the Indian Evidence Act?

b) Whether the evidence of DW2 is acceptable under Order VIII Rule 1 of Code of Civil Procedure in the absence of any plea to

that effect in the written statement?

c) Whether the first appellate court is right in drawing adverse inference against the appellants for not producing the resurvey register, a public document?

7. The learned counsel appearing for the plaintiffs is present and he reiterated the averments set out in the plaint. Though notice was served to respondents 2 to 5, even then no one appeared by person or through counsel.

8. Heard Mr.A.V.Arun, learned counsel appearing for the plaintiffs.

9. This Court considered the rival submissions made by the learned counsel for the plaintiffs.

10. The plaintiffs filed suit for declaration and permanent injunction. There are two items. The suit property was purchased by their father from one, Arthanari Mudaliar by the registered sale deed dated 12.02.1968, which was marked as Ex.A.1. Encumbrance Certificate of the suit property was marked as Ex.A.2. Ex.A.3 to Ex.A.7 are tax receipts and electricity bill receipts stand in the name of the plaintiffs' father. After purchase of the suit property, the plaintiffs' father constructed house in the first item of the suit schedule property and it measures 54 x 32 feet. In respect of the second item of the suit property, it was kept vacant and it measures 13 x 30 feet. The measurements are clearly mentioned in Ex.A.1, since it is a registered one dated 12.02.1968. No attester of the said document needs to be examined. It is an admissible evidence without examining the vendors or vendees as witnesses as such the trial court decreed the suit in favour of the plaintiffs.

11. While pending the appeal suit, the first appellate court appointed an Advocate Commissioner and his reports and plans were marked as Ex.C.1 to Ex.C.3. According to the Commissioner, he inspected the suit property along with the counsel for the defendants and they themselves ensured the property as shown by them and filed his report. According to him, there is no second item of the suit property. Admittedly, no surveyor was appointed to measure the suit property. Though the plaintiffs raised their objection to the Commissioner's report, that was not considered by the first appellate court. On the basis of the Commissioner's report, reversed the findings of the trial court and dismissed the suit filed by the plaintiffs. The first appellate court framed points for determination of the appeal suit as follows:

(a) Whether the appeal is liable to be allowed.

Except the said point, no other issues were framed by the first appellate court.

12. The learned counsel for the plaintiffs pointed that that the first appellate court failed to follow the procedure laid down under Section 96 of CPC and in support of his contention, he relied upon the judgment in the case of Santosh Hazari Vs. Purushottam Tiwari (deceased) by LR's reported in (2001) 3 SCC 179, wherein it is held as follows:

15.A perusal of the judgment of the trial Court shows that it has extensively dealt with the oral and documentary evidence adduced by the parties for deciding the issues on which the parties went to trial. It also found that in support of his plea of adverse possession on the disputed land, the defendant did not produce any documentary evidence while the oral evidence adduced by the defendant was conflicting in nature and hence unworthy of reliance. The first appellate Court has, in a very cryptic manner, reversed the finding on question of possession and dispossession as alleged by the plaintiff as also on the question of adverse possession as pleaded by the defendant. The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind, and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate Court. The task of an appellate Court affirming the findings of the trial Court is an easier one. The appellate Court agreeing with the view of the trial Court need not restate the effect of the evidence or reiterate the reasons given by the trial Court; expression of general agreement with reasons given by the Court, decision of which is under appeal, would ordinarily suffice (See Girijanandini Devi & Ors. Vs. Bijendra Narain Choudhary, AIR 1967 SC 1124). We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate Court for shirking the duty cast on it. While writing a judgment of reversal the appellate Court must remain

conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial Court must weigh with the appellate Court, more so when the findings are based on oral evidence recorded by the same presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate Court is entitled to interfere with the finding of fact (See Madhusudan Das Vs. Smt. Narayani Bai & Ors., AIR 1983 SC

114). The rule is — and it is nothing more than a rule of practice — that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judges notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate Court should not interfere with the finding of the trial Judge on a question of fact. (See Sarju Pershad Ramdeo Sahu Vs. Jwaleshwari Pratap Narain Singh & Ors., AIR 1951 SC 120). Secondly, while reversing a finding of fact the appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first appellate Court had discharged the duty expected of it. We need only remind the first appellate Courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate Court continues, as before, to be a final Court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate Court is also a final Court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate Court even on questions of law unless such question of law be a substantial one.

16. Reverting back to the facts of the case at hand, prima facie we find the first appellate Court did not discharge the duty cast on it as a Court of first appeal. The High Court having noticed failure on the part of the appellant in not discharging the statutory obligation cast on him by sub-section (3) of Section 100 of the Code, on account of the substantial question of law involved in the appeal having not been stated, much less precisely, in the memorandum of second appeal, ordinarily an opportunity to frame such question should have been afforded to the appellant unless the deficiency was brought to the notice of the appellant previously by the High Court Registry or the court and yet the appellant had persisted in his default. That was not done. In our opinion, the following substantial question of law does arise as involved in the case and worth being heard by the High Court:-

Whether on the pleadings and the material brought on record by the defendant, the first appellate Court was right in holding that the case of adverse possession was made out by the defendant and the suit filed by the plaintiff was liable to be dismissed as barred by time under Article 65 of the Limitation Act, 1963, more so when such finding was arrived at in reversal of the findings of the trial Court?

13. The Hon'ble Supreme Court of India held that where view of trial court is upheld, the first appellate court, held, need not to go into detail, but an expression of general agreement should not become a way to avoid the duty cast on such court to apply its mind consciously when giving judgment. Further the first appellate court while reversing a finding of fact must assign its own reasons for the different finding. Apart from being the final court of facts, the first appellate court is also a final courts of law in that its decision on a question of law is no longer assailable before the High Court, unless such a question is a substantial questions of law.

14. In the case on hand, already the trial court had decided the issue in respect of conflict oral evidence adduced before the trial court on the basis of credibility. Therefore, the first appellate court ought not to have interfered with the findings of the trial court on a question of fact unless latter has overlooked some peculiar feature connected with evidence of a witness or such evidence on balance is sufficiently improbable so as to invite displacement by appellate court. Therefore, the findings of the first appellate court are perverse against the

evidence on record as such this Court constrains to interfere with the findings of the first appellate court as perverse and against the evidence on record. Accordingly, the substantial questions of law formulated by this Court are answered in favour of the plaintiffs and as against the defendants.

15. In view of the above discussion, this Second Appeal is allowed and the judgment and decree dated 20.12.2004 passed in A.S.No.17 of 2003 on the file of the Principal Subordinate Judge at Gobichettipalayam are hereby set aside and resultantly, the suit filed by the plaintiffs in O.S.No.85 of 1999 is allowed by restoring the judgment and decree dated 25.02.2003 in O.S.No.85 of 1999 on the file of the District Munsif, Gobichettipalayam. No costs.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal Subordinate Judge
at Gobichettipalayam
2. The District Munsif,
Gobichettipalayam.
3. The Section Officer,
V.R.Section, Madras High Court,
Chennai.

+1cc to Mr.A.V.Arun, Advocate, S.R.No.19809

+1cc to Mr.R.Subramanian, Advocate, S.R.No.19544

S.A.No.1100 of 2005

SR(CO)
CS/10/05/2021

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