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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.02.2021
PRONOUNCED ON : 05.02.2021

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No. 1399 of 2008

and

M.P.No.1 of 2008

V. Parasuraman
S/o. Vellai Gounder

...Appellant/Defendant

Vs.

K. Parasuraman
S/o. Kanni Gounder

...Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of CPC, 1908 against the judgment and decree dated 18.12.2007 made in A.S. No.11/2005 on the file of the Sub-Court, Aarani, reversing the judgment and decree dated 07.12.2004 made in O.S. No.167 of 1988 on the file of the District Munsif Court, Polur.

For Appellant : Mr.M.Sriram

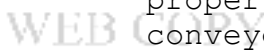
For Respondent : Mr.V.Raghavachari

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 18.12.2007 passed in A.S. No.11/2005 on the file of the Subordinate Court, Aarani, reversing the judgment and decree dated 07.12.2004 passed in O.S. No.167 of 1988 on the file of the District Munsif Court, Polur.

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

3. The defendant in OS.No.167 of 1988 is the appellant in the Second Appeal.



5. The case of the plaintiff, in brief, is that the suit property originally belonged to the defendant and the defendant conveyed the same to one Manickam by way of the registered sale deed dated 20.01.1970 and pursuant to the same, Manickam had been in the exclusive possession and enjoyment of the suit property and subsequently Manickam, out of love and affection, settled the suit property in favour of his daughter Chandrammal by way of the registered settlement deed dated 30.06.1980, which was duly accepted by Chandrammal, the settllee, and pursuant to the same enjoyed the suit property in her own right and the plaintiff purchased the suit property from Chandrammal under the registered sale deed dated 09.10.1987 and following the same, the plaintiff is in the exclusive possession and enjoyment of the suit property by paying the kists, etc., and the plaintiff and his predecessors in title have been openly and continuously enjoying the suit property uninterruptedly for more than a statutory period and also perfected their right to the same by way of the adverse possession and while so, the defendant, all of a sudden, attempted to tress-pass into the suit property with his men and also despite the protest put forth by the plaintiff, tress-passed in the suit property and put up a basement unlawfully in the suit property and hence, according to the plaintiff, he has been necessitated to institute the suit against the defendant for appropriate reliefs.

7. In support of the plaintiff's case P.Ws.1 to 3 were examined and Exs.A1 to A10 were marked. On the side of the defendant D.W.1 was examined and Ex.B1 was marked. C.Ws.1 and 2 were examined and Exs.C1 to C5 were marked.



8. On a consideration of the oral and documentary evidence adduced in the matter and the submissions put forth by the respective parties, the trial court was pleased to dismiss the plaintiff's suit and on appeal by the plaintiff, the first appellate court, on a consideration of the materials placed on record and the submission put forth by the respective parties, was pleased to set aside the judgment and decree of the trial court and by way allowing the appeal preferred by the plaintiff, decreed the suit in favour of the plaintiff as prayed for. Impugning the judgment and decree of the first appellate court, the present second appeal has been laid by the defendant.

9. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration.

- 1) Whether the Lower Appellate Court is justified in not considering the well settled principle of law that the plaintiff can succeed or fail in his own pleadings and not on the basis of any mistake committed by the defendant?
- 2) Whether the Lower Appellate Court is justified in exceeding its jurisdiction by appointing the Advocate Commissioner suo motto when the earlier two Advocate commissioner's reports filed in the trial court were not scrapped or set aside as envisaged under Order XXVI of CPC?

10. On a consideration of the materials placed on record, both oral and documentary, and the submissions put forth by the respective parties, it is noted that the defendant, as such, is not disputing the plaintiff's claim of title to the suit property by way of the sale deed dated 09.10.1987. In fact, the defendant has admitted that it is he who had alienated the suit property to the plaintiff's predecessor in interest, namely, Manickam, by way of the sale deed 20.01.1970, the registration copy of which has been marked as Ex.A1. On a perusal of Ex.A1 as well as the averments contained in the written statement, it is found that, out of 30 cents owned by the defendant in the suit survey number, he has alienated 6 cents to Manickam under Ex.A1 lying to the north of the portion retained by him. It is seen that thereby the defendant has clearly admitted that it is he who had alienated the suit property to the plaintiff's predecessor in interest. According to the plaintiff, Manickam had settled the property purchased by him under Ex.A1 to his daughter Chandrammal by way of the settlement deed dated 30.06.1980, the copy of which has been marked as Ex.A2. The defendant, in the written statement, has not controverted the abovesaid settlement deed. It is thus



found that Chandrammal had acquired the title to the suit property under Ex.A2. Equally, the plea put forth by the plaintiff that Chandrammal, pursuant to Ex.A2 settlement deed, had been in the exclusive possession and enjoyment of the suit property has also not been challenged by the defendant in the written statement. Thus it is noted that, under Ex.A2, Chandrammal has acquired a valid title to the suit property. It is the case of the plaintiff that he had purchased the suit property from Chandrammal by way of the sale deed dated 09.10.1987, which has been marked as Ex.A3. That the plaintiff had purchased the suit property under Ex.A3 sale deed from Chandrammal is not contested by the defendant in the written statement as well as during the course of evidence. That the plaintiff and the defendant were in the joint possession of their respective properties in the suit survey number could also be gathered from the Manivari thoraya patta marked as Ex.A5. All the abovesaid documents projected on the part of the plaintiff and considering the defence version as above pointed out, when the defendant has not, as such, challenged the claim of title of the plaintiff to the suit property, as above discussed, it is evident that the first appellate court is wholly justified in upholding the plaintiff's claim of title to the suit property and accordingly granting the relief of declaration in favour of the plaintiff qua the suit property.

11. The suit property has been described as comprising of 6 cents within the specific boundaries in dry Survey Number 139/16 out of the total extent of 0.30 cents. The defendant, in the written statement, has not challenged the lie of the suit property as described in the plaint schedule. Therefore, it is found that the lie and the identification of the suit property has not been controverted by the defendant in any manner.

12. Now according to the plaintiff, all of a sudden, the defendant without any right attempted to tress-pass into the suit property unlawfully and despite his protest, also encroached into the suit property and put up the basement illegally and therefore, according to the plaintiff, by way of the abovesaid acts, the defendant has created a cloud on the title of the plaintiff qua the suit property and hence, according to the plaintiff, he has been necessitated to lay the suit against the defendant for appropriate reliefs.

13. In the trial court, it is noted that two advocate commissioners were appointed to identify the lie of the suit property. However, as held by the trial court as well as the first appellate court, both the commissioners have failed to localize the lie of the suit property despite the clear description of the suit property in the plaint as well as the admission of the plaintiff's title to the suit property by the



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defendant as above pointed out. In such view of the matter, it is found that the reports filed by the advocate commissioners appointed by the trial court were found to be of no use to adjudicate the issues involved in the matter between the parties.

14. From the materials placed on record it is found that the suit in O.S.No.167 of 1988 has been disposed of originally by the District Munsif Court, Polur, by way of the judgment and decree dated 07.12.2004 and the appeal has been preferred against the same in A.S. No.62 of 1993 on the file of the Subordinate Court, Thiruvannamalai. It is also noted that in the above appeal, the first appellate court has remitted the matter back to the trial court, particularly, directing the trial court to identify the property purchased by the plaintiff in the suit survey number and the extent of encroachment put up by the defendant in the same by appointing a suitable commission. It is noted that, despite the abovesaid direction of the first appellate court, no effort has been initiated and taken by the trial court to identify the lie of the suit property. As above pointed out, the commissioners appointed during the course of trial were unable to identify the lie of the suit property despite the clear description of the suit property by the plaintiff in the plaint. Therefore, as rightly concluded by the first appellate court in the judgment under appeal, the trial court has failed to adhere to the direction of the first appellate court rendered in A.S. No.62 of 1993 and failed to give a suitable direction to the commissioner to identify the suit property by resorting to the appropriate revenue records as well as taking the assistance of the qualified surveyor. In such view of the matter, it is seen that when the first appeal has been preferred in the matter again by the plaintiff in A.S. No.11 of 2005, the appellate court was pleased to appoint a commission in the appeal after hearing both the parties and directed the advocate commissioner to locate the suit property described in the plaint and also to note the extent of tress-pass in the suit property with specific details and plan and if necessary take the help of the surveyor. Following the same, the advocate commissioner appointed by the appellate court, after soliciting the assistance of the qualified surveyor, proceeded to the spot and with the help of the revenue records, etc., was pleased to identify the lie of the suit property and filed his report and plan in the appellate court. The same has been taken into consideration by the appellate court for adjudicating the issues involved between the parties.

15. Considering the commissioner's report and plan filed in the appellate court and though the abovesaid documents have not been specifically exhibited by the appellate court in the



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appeal, be that as it may, when the commissioner's report and plan form part of the appeal and when it is further noted that the Advocate Commissioner had been appointed after hearing both the parties as well as the commissioner had inspected the suit property in the presence of both the parties, in such view of the matter, in my considered opinion, the appellate court is found to be justified in relying upon the commissioner's report and plan filed in the appeal. In such view of the matter, the contention put forth by the defendant's counsel that the appellate court is not justified in suo moto relying upon the commissioner's report and plan filed in the appeal, particularly, without scrapping the commissioners' report and plan filed in the trial court, as such, does not merit acceptance. When, as above pointed out, despite the direction of the first appellate court at the first instance to the trial court to identify the suit property and encroachment put up thereon by appointing a suitable commission, the trial court has not endeavoured to take up the follow up action in the proper perspective and when the commissioners appointed in the trial court were unable to identify the lie of the suit property with the help of the revenue records and the qualified surveyor, in such view of the matter, left with no other option, the appellate court, when it had again come to consider the matter, thought it fit to appoint the advocate commissioner on its own and accordingly, after giving notice to both the parties proceeded to appoint the advocate commissioner for identifying the suit property as above pointed out. In the light of the abovesaid developments, the arguments of the defendant's counsel that the appellate court erred in relying upon the commissioner's report and plan filed in the appeal without scrapping the commissioners' report filed in the trial court, as such, cannot be countenanced. Moreso, when the advocate commissioner appointed in the appellate court had conducted the inspection in the presence of both the parties, therefore, the question of law put forth by the defendant/appellant on that score deserves no acceptance.

16. Considering the commissioner's report and plan filed in the appellate court, it is seen that the commissioner was able to identify the lie of the suit property with the help of the qualified surveyor and the revenue records and accordingly noted the lie of the suit property i.e. 6 cents in the plan submitted by him and outlined the 6 cents in three colours showing an extent of 4.760 cents in the suit survey No.139/16C in brown colour, which is stated to be the vacant site with thorn trees and the same is stated to be in the possession and enjoyment of the plaintiff as informed to him by the plaintiff and the abovesaid fact has also been admitted by the defendant/appellant to the commissioner. It is thus noted that, by way of the commissioner's report and plan, out of 6 cents in the suit



property, an extent of 4.760 cents shown in brown colour in the commissioner's report and plan remains in the possession of the plaintiff. Further according to the Advocate Commissioner, the portion shown in yellow and red colour is totally measuring an extent of 1.24 cents. The defendant has encroached the same and put up the teraced construction and residing therein and accordingly based on the abovesaid commissioner's report and plan and furthermore, considering the fact that the defendant has not challenged the claim of the plaintiff to the suit property as described in the plaint, in such view of the matter, the first appellate court is found to have accepted the plaintiff's case and thereby granted the reliefs in favour of the plaintiff by setting aside the judgment and decree of the trial court.

17. On a reading of the judgment rendered by the trial court, it is noted that the trial court, despite the defendant's admission of the plaintiff's title to the suit property, proceeded to dismiss the plaintiff's suit on the basis of the commissioners' reports filed in the trial court. According to the trial court, as the commissioners appointed by the trial court had failed to identify the location of the suit property properly, no relief could be granted to the plaintiff. However, as above discussed, when the trial court has failed to adhere to the direction of the appellate court rendered in A.S. No.62/93 to localize the suit property properly, not following the abovesaid direction, had erroneously placed reliance upon the commissioners' reports filed in the trial court for coming to the conclusion that the plaintiff has no title at all to the suit property as such and thereby dismissed the plaintiffs' suit in entirety. The abovesaid approach of the trial court, in my considered opinion, does not merit acceptance in any manner. In such view of the matter only, it is seen that the first appellate court has rightly proceeded to appoint the commission in the appeal after hearing both the parties and as above pointed out, the advocate commissioner appointed by the appellate court, with the aid of the qualified surveyor and the revenue records, was able to identify the suit property and also noted the extent of the encroachment made by the defendant in the suit property.

18. Taking into consideration the abovesaid factors in toto, it is found that the first appellate court, on a proper appreciation of the materials available on record in the proper perspective, both on factual matrix as well as on the point of law, rightly granted the reliefs in favour of the plaintiff by setting aside the judgment and decree of the trial court and therefore, in my considered opinion, no substantial question of law is involved in the second appeal. Be that as it may, the substantial questions of law formulated in the second appeal,



for the reason aforesated, are accordingly answered in favour of the plaintiff and against the defendant's.

19. The plaintiff's counsel in support of his contentions placed reliance upon the decision of the Apex Court reported in (2003) 2 SCC 330 (Pratibha Singh and another v. Shanti Devi Prasad and another). The principles of law outlined in the abovesaid decision are taken into consideration and followed as applicable to the case at hand.

20. For the reasons aforesated, the judgment and decree dated 18.12.2007 passed in A.S. No.11/2005 on the file of the Subordinate Court, Aarani, reversing the judgment and decree dated 07.12.2004 passed in O.S. No.167 of 1988 on the file of the District Munsif Court, Polur, are confirmed. Resultantly, the second appeal is dismissed with costs. Consequently, connected miscellaneous petition is closed

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

bga

To

1. The Subordinate Court, Aarani,
2. The District Munsif Court, Polur,

Copy to :

The Section Officer,
VR Section, High Court, Madras

+1CC to Mr.V.Raghavachari, Advocate, Sr.No.6371

S.A.No.1399 2008

SSI (CO)
K.RK. (09.09.2021)