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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 08.07.2021
Delivered on : 17. 08.2021

CORAM

THE HONOURABLE Ms.JUSTICE P.T. ASHA

S.A.No.770 of 2008
&
M.P.Nos. 1 of 2008 & 1 of 2009

Lathif Beevi

...Appellant/Respondent/Defendant

Vs

Venkateswaran

...Respondent/Appellant/Plaintiff

Prayer: Appeal filed under Section 100 of the CPC against the Judgement and Decree passed in A.S.No.84 of 2007 and Cross Objections dated 23.04.2008 on the file of the Court of the Principal Subordinate Judge, Mayiladuthurai in partly reversing the Judgement and Decree passed in O.S.No.279 of 2006 dated 31.07.2007 on the file of the Court of the Principal District Munsif, Mayiladuthurai.

For Appellant : Mr.A.Muthukumar

For Respondents : Mr.S.Sounthar

JUDGMENT

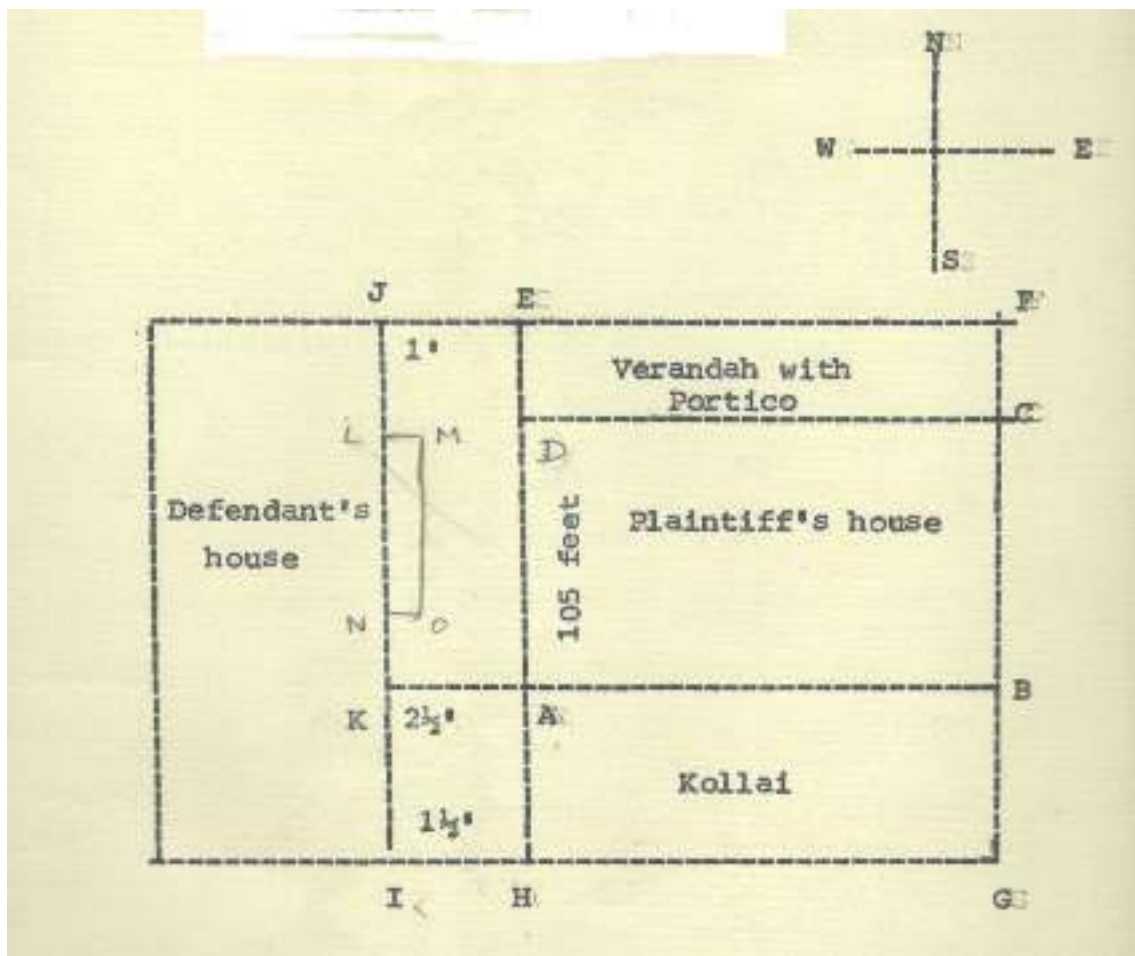
The defendant is the appellant before this Court. The Second Appeal is filed challenging the Judgement and Decree in A.S.No.84 of 2007 on the file of the Principal Subordinate Court, Mayiladuthurai, in and by which the learned Judge had modified the Judgement and Decree of the Principal District Munsif, Mayiladuthurai in O.S.No.279 of 2006. The defendant had also filed a cross objection in the said appeal which was also rejected by the learned Principal Subordinate Judge. The facts in brief which is necessary for disposing of the above Second Appeal is herein below narrated and the parties are described in the same rank as before the Trial Court.



2. The plaintiff would submit that his property is situate on the eastern side of the defendant's property and both the houses face north. The plaintiff had purchased his property measuring an extent of $9 \frac{1}{3}$ cents comprised in R.S.No.119/D-30 on 28.05.1984 as a vacant site with trees from one Lalithambal Ammal. To the east of this property the plaintiff had purchased another extent of 1164 Sq.ft under a sale deed dated 08.12.1988 from one Mumtaj Begum. Once again it was a vacant site that was purchased by the plaintiff.

3. After the purchase of the two properties the plaintiff had constructed a terraced building and the same was allotted Door No.26 and the tax is also being paid by the plaintiff. The construction had been completed in the year 1995.

4. The defendant was already having her house to the west of the plaintiff's property and between the two properties there was a vacant space that had been left out which resembled a lane. The plaintiff had filed a plan along with the plaint and which is shown herein below:





5. The portion which has been described west of the points HADE and east of the points JKI is the lane portion in dispute. At the point LMON the defendant has put up the sunshade to the length of 12 feet was projecting into the lane from her eastern wall. This sunshade has been put up very recently and despite several request made to the defendant to remove the same the defendant kept prevaricating. By reason of this sunshade the breadth of the pathway has reduced considerably.

6. Further, the land in question is not uniform in breadth. At the point IH it measures 1.5 feet and at the point KA it measures 2.5 feet and as it travels northwards at point JE it measures only 1 feet. By putting up this sunshade, the defendant is now stating that the plaintiff should enjoy the lane only to the breadth of 1 feet at IH, an extent of 1.5 feet at KA and 0.5 feet at JE and the rest would fall to the share of the defendant.

7. On 22.07.2006, the defendant had taken the help of a Surveyor to measure the lane portion and the other portion. However, she did not take any steps to fix the boundary line. The plaintiff's father had protested that the surveyor was not taking measurement accurately, however the defendant went ahead with the measurements. The attempt of the Surveyor was to show that the defendant had right to the area beyond IKJ lane towards the east. The surveyor went away without fixing survey stones however, on the same evening the defendant and her sons and husband had come and planted survey stones with the help of their men at the point IKJ line by force. The plaintiff's father had protested but however they did not pay any attention to it.

8. The plaintiff's father had installed rain water storage tank in the portion described as KAHI in the year 2003. The defendant is now trying to remove the same. The threat was being given out from 22.07.2006 and there is every likelihood of her giving effect to the threat. The plaintiff is in the enjoyment of his property since 1984. The sunshade put up by the defendant at the point LMNO is an encroachment into the lane and has to be removed. The plaintiff therefore sought for the relief of a permanent injunction restraining the defendant from interfering with his peaceful possession and enjoyment of the suit property and for a mandatory injunction directing the defendant to remove the projection at points LMNO.

9. The defendant had filed a written statement inter alia contending that the plaint plan does not reflect the true lie of



the land and the plaintiff has come to the Court with false allegation. The defendant would submit that her house had been put up over 40 years ago and the sunshade was not a recent one as contended by the plaintiff. The defendant would contend that her husband was constantly out of the country and she being pardharnashin woman the plaintiff had taken advantage of the same. He had dug a pit and fixed a platform with a water tank storage two years prior to the filing of the suit and despite the defendant's request had not removed it.

10. The defendant contended that the lane portion described as JEIH belonged exclusively to her and plaintiff had no right to the same. This defendant had permitted the plaintiff to use the lane only to white wash and repair his western wall. The defendant reiterated that the sunshade was over 40 years old and therefore mandatory injunction sought for by the plaintiff should be rejected. The defendant also alleged that the plaintiff has come to the Court with a false case. The defendant therefore sought for the dismissal of the suit.

11. Pending the suit, an Advocate Commissioner had been appointed to note down the physical features of the suit property and its measurements. The Advocate Commissioner had visited the property with the Surveyor of the Revenue Department and submitted a report and plan. The Advocate Commissioner had submitted a report inter alia contending that the portion which is described as JEIH in his plan is in the possession of the plaintiff. It was originally comprised in R.S.No.119/D/30 which is now S.R.No.727/15. The area in possession of the plaintiff is only an extent of 4657 Sq.ft and not 5164 Sq.ft as contended by him.

12. He would also submit that the lane in question has not been measured properly. The Advocate Commissioner has also stated that he has not measured the suit property as per the sale deed in favour of the plaintiff. The Surveyor's report would describe that on perusing the revenue records / village records it is seen that out of the 2.5 feet lane, 1.1 feet lies with the plaintiff and 1.4 feet with the defendant. The surveyor had observed that both the parties own the land.

13. Ultimately, the suit was dismissed. Challenging the same the plaintiff had filed A.S.N.84 of 2007 on the file of the Principal Subordinate Court, Mayiladuthurai. The learned Judge modified the Decree and Judgement of the Trial Court by granting a decree for permanent injunction restraining the defendant from interfering with the plaintiff's peaceful possession and



enjoyment of the property. The plaintiff had examined himself as P.W.1 apart from examining The plaintiff had examined one Ramaiyan and Krishnamoorthi as witnesses PW2 and PW3 and marked Ex.A.1 to Ex.A5. The defendant's husband had deposed as D.W.1 and one Pakirisamy as D.W.2 and she had marked Ex.B.1 alone. The Advocate Commissioner's report and plan were marked as Ex.C.1 and Ex.C.2. The Surveyor's report and plan were marked as Ex.C.3 and Ex.C.4.

14. Challenging the said Judgement and Decree the defendant is before this Court.

15. The suit was admitted on the following substantial questions of law:

"(i) When P.W.1 admits that the plaintiff did not measure his property at the time of purchase and measurements were incorporated in Ex.A1 and Ex.A2 as per parent title deeds and patta issued to him is only for a lesser extent, whether the plaintiff has proved his title to the suit lane?

(ii) When the surveyor has categorically stated in his report that the plaintiff has got only 8 1/3 cents on field and not 9 1/3 cents and in the absence of any objections to the said report, whether the Lower appellate court erred in law in not considering the title of the plaintiff to the suit lane?

(iii) Whether the lower appellate court erred in law in Placing reliance upon the Advocate Commissioner's report for granting the relief of decree for permanent injunction when the title of the plaintiff was not proved?"

16. Mr.A.Muthukumar, learned counsel appearing on behalf of the defendant would submit that since the plaintiff had not challenged the decree with reference to mandatory injunction the only issue now before this Court is whether the plaintiff is entitled to a decree for permanent injunction. He would submit that the plaintiff had not produced the patta in respect of his properties despite stating that he would produce the same. Therefore, the plaintiff has not been able to prove that the suit lane belongs to him.

17. He would further submit that the defendant had purchased the property under Ex.B.1 on 20.06.1984 and there was already a building in existence. In fact, the description of the property



would show the existence of the house. The Surveyor's plan and report which were marked as Ex.C.3 and Ex.C.4 clearly shows that although the defendant had purchased 9 1/3 cents of land however the patta was only issued for 8 1/3 scents. Likewise, the plaintiff has been allotted patta only for an extent of 7.5 cents. The plaintiff's property is enclosed within a compound wall.

18. The Surveyor has reported that when the property has been measured as per the village records the plaintiff is entitled to 1.1 feet in the suit property and the defendant to an extent of 1.4 feet at the northern end.

19. He would submit that the Advocate Commissioner's report also shows a common enjoyment. However, the Advocate Commissioner has not measured the lands as per the deeds. That apart, the plaintiff has not produced the patta or the original documents and therefore an adverse inference should be drawn from the non-production. The production of patta was very vital to the case however the same has not been done.

20. Mr.S.Sounthar, learned counsel appearing on behalf of the plaintiff would submit that a mere perusal of the Advocate Commissioner's plan, Ex.C.2 would clearly demonstrate that the points ABDE proceeds in a straight line and the point marked as B and P1 is clearly a protrusion into this stretch. He would therefore submit that the area marked as ASEP in Ex.C.2 falls within the plaintiff's property.

21. He would further make a submission that there has been no objection filed by the defendant to the Advocate Commissioner's report stating that the plaintiff was prima facie entitled to the suit property. Both the Surveyor as well as the Advocate Commissioner has found that the portion is jointly being enjoyed by the plaintiff as well as the defendant and therefore the defendant cannot have any grievances to the Judgement that has been passed.

22. By way of reply, Mr.A.Muthukumar, learned counsel appearing on behalf of the defendant would submit that the plaintiff has not sought for a declaration and simply sought a prayer for mandatory injunction alone. He would also submit that the patta and the sale deed do not correlate and the Advocate Commissioner is not competent to talk about either the location or title. It is also his contention that the Advocate Commissioner has not considered the title documents filed on the side of the plaintiff and consequently the report itself is



flawed and the Judgement and Decree based on the Advocate Commissioner and the Surveyor's plan and report are erroneous.

23. Heard the learned counsels and perused the records.

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24. Though the suit has been filed for the relief of mandatory injunction and permanent injunction the Appellate Court had dismissed the suit with reference to relief of mandatory injunction and has only granted the decree for permanent injunction. The plaintiff has not challenged the Judgement and Decree and it is the defendant who is now before the Court challenging the decree for permanent injunction. Therefore, the Decree insofar as it related to the relief of mandatory injunction has attained finality.

25. In his plan and report, the Advocate Commissioner has categorically stated that the portion described as ABCDEIH belongs to the defendant and the live trees found thereon belongs to the plaintiff. This report has not been objected to by the defendant. The Commissioner has found that from point A to point B there is a compound wall. This stretches on the same line right upto the point E. Further, from the deposition of D.W.1, the husband of the defendant it is clear that the plaintiff is in possession of the suit property, the witness has admitted so in his cross examination. He has also admitted that the no objection has been filed to the Advocate Commissioner's report. The witness has also admitted that the construction put up in the lane on the southern end by the plaintiff was in the year 1994. This is also not been objected to by the defendant. The witness has also admitted that it is over 12 years since the plaintiff had put up a wall in the suit land.

26. Therefore, the Appellate Court had granted a decree for injunction taking into account the fact that the plaintiff is in possession of the same and on account of the admission of the defendant's husband himself. The Surveyor's report based on the measurements in the revenue record would state that 1.4 feet of the lane fell to the share of the defendant and 1.1 feet fell to the share of the plaintiff in the northern side and further down the entire lane would fall within the share of the defendant. However, the Advocate Commissioner's report showing the well defined demarcation and the admission of D.W.1 would show that possession is with the plaintiff. The Advocate Commissioner's report shows the lie of the land as it now stands which clearly shows that the same is in the possession of the plaintiff.



Therefore, the substantial questions of law are answered against the appellant / defendant and the Second Appeal stands dismissed. Consequently, connected Miscellaneous Petitions are also closed. No costs.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

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To

1.The Principal Subordinate Judge, Mayiladuthurai.

2.The Principal District Munsif, Mayiladuthurai.

+1 CC to Mr.A.Muthukumar, Advocate sr 41209

+1 CC to Mr.S.Sounthar, Advocate sr 41143.

S.A.No.770 of 2008

GPL(CO)
SP(23/11/2021)