



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATE: 30.11.2021

CORAM

THE HON'BLE MRS.JUSTICE V. BHAVANI SUBBAROYAN

S.A. (MD) No.145 of 2011

Saidhan Beevi

Appellant/ Respondent/ Plaintiff

vs.

Hawla Beevi

Respondent/ Appellant/ Defendant

Second Appeal filed under Section 100 of CPC against the Judgment and Decree dated 24.07.2009 made in Appeal Suit No.166 of 2007 on the file of the Additional Subordinate Judge, Kumbakonam reversing the judgment and decree dated 28.09.2006 passed in Original Suit No.98 of 2005 on the file of the Additional District Munsif at Valangaiman at Kumbakonam.

For Appellant : Mr.Gomathi Sankar
for Mr.M.V.Krishnan

For Respondent : Mr. H.Lakshmi Sankar
for Mr.T.V.Sivakumar

JUDGMENT

This Second Appeal is directed against the Judgment and Decree dated 24.07.2009 made in Appeal Suit No.166 of 2007 on the file of the Additional Subordinate Judge, Kumbakonam reversing the judgment and decree dated 28.09.2006 passed in Original Suit No.98 of 2005 on the file of the Additional District Munsif at Valangaiman at Kumbakonam.

2. For the sake of convenience, the parties are referred to as, as described before the trial Court.

3. The plaintiff, who succeeded before the Trial Court, but failed before the first appellate court, has filed the present Second Appeal.

4. The case of the plaintiff, in brief, as per the averments made in the plaint, reads as follows:-

(i) The plaintiff is the absolute owner of the suit property. The suit property was purchased by the mother of the plaintiff namely, Hathoon Beevi, under a registered deed, dated 19.10.1956. The plaintiff's father Abdul Kareem Rowther also purchased the property and both Abdul Kareem Rowther and his wife Hathoon Beevi settled the properties owned by them under a registered settlement deed, dated 19.05.1989 in favour of the plaintiff. Item No.2 in the settlement deed, is originally measuring 150 feet east to west and 24 feet north to south. Out of which, a portion of the property viz., 8-1/2 x 150 feet has been taken by the Government for the



purpose laying a road. Therefore, the remaining property viz., 150 x 16-1/2 feet was settled on the plaintiff under the settlement deed, dated 19.05.1986 and the plaintiff is enjoying the same till date.

(ii) The defendant is the adjacent southern side owner and she has nothing to do with the suit property. The defendant is trying to encroach a portion of the suit property viz., 40 feet x 16-1/2 feet, by construction a compound wall at a height of 6 feet blocking the way of the plaintiff. The husband of the plaintiff gave a police complaint against the defendant. Hence, the plaintiff filed the suit for mandatory injunction directing the defendant to remove the offending construction.

5. The defendant had filed a written statement *inter alia* contending that the suit is not maintainable both under law and on facts. The plaintiff's property covered in R.S.No.76/6, which has been reclassified as 662/8. The defendant's property covered in R.S.No.79/4 has been reclassified as R.S.No.662/7. From the survey plan it has been seen that the western boundary of the eastern side owners of 662/8,9,10, 11 and 12 formed a straight line wherein all the respective eastern side owners have put up their respective compound wall. The defendant's property lies on the west of compound wall of R.S.No.662/8,9,10,12 and 12. The plaintiff's alleged possession of 16-1/2 and 40 feet over the property is in the possession of the defendant, which is covered in R.S.No.662/7 is not all correct. The defendant did not raise any wall after filing of the suit. The wall is in existence for the past more than 30 years. The said wall form a straight line along with the existence of other adjacent owners western boundary walls. The will be evidence from the report of the Advocate Commissioner and the Survey Plan Field. The plaintiff after suit has constructed a RCC building in his backyard within the eastern compound wall of the defendant. So, the plaintiff cannot claim any right either over the place where the wall exists nor beyond the said wall. The suit is false, frivolous and vexatious.

6. During the trial, on Abdulkadar, the plaintiff's husband, was examined as PW1 and 3 documents were marked as Exs.A1 to A3, on the side of the plaintiff. The defendant examined one Mukthar Neeza, son and power agent of the defendant as DW1 and no documents were marked on the side of the defendant. Advocate Commissioner's Report marked as Exs.C1 to C4.

7. On analysis of the oral and documentary evidence, the trial Court has allowed the suit. Aggrieved by the same, the defendant has preferred an appeal in A.S. No.166 of 2007, on the file of the learned Additional Sub Judge, Kumbakonam.

8. The first appellate court, upon considering the oral and documentary evidence of the parties, had reversed the findings of the trial Court. Aggrieved by the Judgment and decree passed by the



first appellate Court, the present Second Appeal has been filed the plaintiff.

9. At the time of admission, this Court has formulated the following substantial questions of law, for determining the issues.

(i) Whether the recitals in the registered documents Exhibits A1 to A3 cannot be controverted by oral evidence under Section 92 of the Evidence Act?

(ii) Whether on the finding that the defendant put up the wall on the suit property after the suit, the learned Subordinate Judge ought to have confirmed the decree for mandatory injunction granted by the Trial Court?

(iii) Whether having rightly rejected the application for additional evidence in appeal and adversely commenting on the defendants attempt to blame the trial judge, the learned Subordinate Judge ought to have rejected the defendant's contentions as untenable and baseless?

10. The learned counsel appearing for the plaintiff / appellant would submit that the defendant is the adjacent land owner and she has nothing to do with the suit property. The defendant had not let in any documentary evidence to show her claim to the suit property, whereas, when the plaintiff clearly proved his title to the suit property, based on the recitals in the documentary evidence in Exs.A1 to A3, which cannot be controverted by oral evidence under Section 92 of the Indian Evidence Act. The first appellate Court failed to see that the power agent was not competent to depose on facts of which he had no personal knowledge.

11. Adding further, the learned counsel appearing for the appellant / plaintiff would contend that to upturn a well considered judgment of the trial court, the first appellate court, dealing with an Appeal under Section 96 C.P.C., should assign reasons indicating as to where the trial court has gone wrong and what should have been the right approach. This exercise must be done by the first appellate court, when it intends to upturn a well considered judgment. Suffice to state that the first appellate has not done this important duty, keeping in mind the rigor of Section 96 C.P.C. which is a statutory right available to the aggrieved person. Hence, the learned counsel prayed for setting aside the Judgment made by the first appellate Court and allowing the Second Appeal.

12. The learned Counsel appearing for the Respondent / Defendant would submit that the first appellate court upon considering the materials adduced on either side and after hearing the submissions came to a right conclusion, by reversing the Decree and Judgment of the trial Court. The well considered Judgment of the first appellate court need not be interfered with and prayed for dismissal of the second appeal.



13. This Court paid its anxious consideration to the rival submissions made and also perused the materials placed on record.

14. It is seen from the records that Ex.A1 is the registered deed, dated 19.10.1956, executed in favour of the plaintiff's mother Hathoon Beevi, by one Abdulkadhar; Ex.A2, dated 19.05.1986 is the settlement deed executed to the plaintiff by her parents and Ex.A3, dated 28.10.1987 is the House Tax receipts in the name of plaintiff. P.W.1 admitted that there is no survey number in Ex.A1. It is also admitted by P.W.1 during cross examination that the boundary recital for the western side of the suit property is stated to be Vannankulam, which is situated on the further west of a school on the western side of the suit property and P.W.1 has not certainty with regard to the western boundary of her alleged property, derived under the documents Ex.A1 and Ex.A2. According to the plaintiff, the suit property was situated in the Old.S.No.79/4 and in the new Survey No.662/8. Though the burden is upon the plaintiff that the property derived by the plaintiff under Ex.A1 and Ex.A2 is coming within the measurement of the said survey number. As per the Advocate Commissioner's Report and Surveyor plan and report, the property in R.S.No.662/8 measures east to west only 130 feet and north to south 16-1/2 feet.

15. It could be further seen that the vendor of the plaintiff's mother though sold some property in the said sale deed has not mentioned the survey number of the property. The boundary recitals on the western side is also uncertain, as which refers to Vannankulam, which is far beyond the suit property. In order to substantiate her case, the defendant taken Advocate Commissioner to note down the physical features and the same was also corroborated through the evidence of P.W.1 in the cross-examination. Further, P.W.1 admitted with respect to the existence of borewell, compound wall on the northern side and absence of pending on the southern side, during his cross-examination, which are relied on by the defendant to substantiate his case of actual possession in the property in R.S.No.662/7.

16. It is a consistent case of the defendant that there exist a compound wall for nearly 30 years. The facts and circumstances are not giving any probabilities to show the defendant has raised altogether new compound wall in that place. The plaintiff has not taken an Advocate Commissioner to show that the new compound wall is attempted to be put up by the defendant. On a reading of the report of the Commissioner make it clear that the said compound wall is old with brick and lime and in a dilapidated state. Though objections were filed to the report of the Advocate Commissioner, this aspect was not challenged. Admittedly, the plaintiff has not filed any reply to the additional written statement denying the plaintiff's claim of existence of the compound wall for more than 30 years. Hence, this Court has no hesitation in agreeing with the clear conclusion reached by the first appellate Court that the plaintiff's claim is not consistent and therefore this Court is not inclined to



interfere with the findings of the first appellate Court. Accordingly, the substantial questions of law are answered in favour of the defendant.

17. In fine, the Second Appeal is dismissed confirming the Judgment and Decree dated 24.07.2009 passed in Appeal Suit No.166 of 2007, by the learned Additional Subordinate Judge, Kumbakonam, in reversing the judgment and decree, dated 28.09.2006, passed in Original Suit No.98 of 2005 by the Additional District Munsif at Valangaiman at Kumbakonam. However, there shall be no order as to costs.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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Note: In view of the present lock down owing to COVID 19 pandemic, a web copy of the order may be utilised for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the Advocate/litigant concerned.

To

1.The Additional Subordinate Judge, Kumbakonam

2.The Additional District Munsif at Valangaiman at Kumbakonam.

3.The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai. (2 COPIES)

+1 CC to M/s.T.V.SIVAKUMAR, Advocate (SR-36701[F] dated 01/12/2021)

+1 CC to M/s.M.V.KRISHNAN, Advocate (SR-36687[F] dated 01/12/2021)

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RD(17.12.2021) 5P 7C