



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 10.11.2021

CORAM

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THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

S.A(MD)No.13 of 2014

and

M.P(MD)No.1 of 2014

1.M.Rajadurai

2.P.Ganesan

3.P.Ramalingam

4.R.Paulrajpandi ... Appellants/Respondents 1 to 4/
Defendants 1 to 4
(Appellants for themselves and on behalf
of Hindu Community people of
Salaipudur and Nambiyanvilai in a
representative capacity)

.Vs.

1.P.Sundarapandi ... 1st Respondent/Appellant/Plaintiff

2.S.Subramanian ... 2nd Respondent/5th Respondent/
5th Defendant

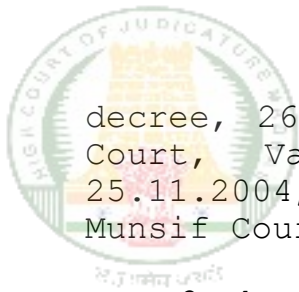
PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree, dated 26.07.2012 passed in A.S.No.82 of 2008, on the file of the Subordinate Court, Valliyoor, reversing the judgment and decree, dated 25.11.2004, passed in O.S.No.183 of 2001 on the file of the Principal District Munsif Court, Valliyoor.

For Appellants : Mr.V.Meenakshi Sundaram
for Mr.D.Nallathambi

For Respondent-1 : Mr.David Ganesan
for M/s.Jeyapaul Associates

JUDGMENT

<https://hcservices.ecourts.gov.in/hcservices/> This second appeal has been directed against the Judgment and

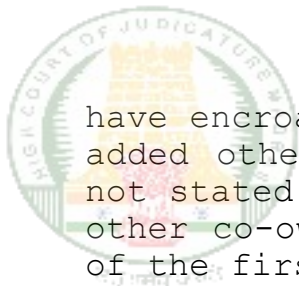


decree, 26.07.2012 passed in A.S.No.82 of 2008, by the Subordinate Court, Valliyoor, wherein, the judgment and decree, dated 25.11.2004, passed in O.S.No.183 of 2001 by the Principal District Munsif Court, Valliyoor, are reversed.

2.The first respondent herein as plaintiff, has instituted a suit in O.S.No.183 of 2001, on the file of the trial Court for the relief of declaration and permanent injunction, wherein, the appellants 1 to 4 and the second respondent have been shown as defendants 1 to 5.

3.In the plaint, it is averred that the suit property was purchased by the plaintiff's father on 09.08.1974 and after his demise, the suit property and other properties were allotted to the share of the plaintiff on 17.08.1986, in particular, the land in Survey No.1329 measuring a total extent of 1.77 cents and in that, 3 cents were allotted in common to all the three brothers totalling 6 cents, was allotted for the pathway and out of the remaining 1.68 cents, the middle portion of 56 cents was allotted to the plaintiff and one-third share in the Well and pump-set and the common pathway was also allotted to the plaintiff and this property is shown as plaint first schedule property. The defendants does not have any right over the same and they are the executive committee members of Pathirakali Amman kovil of Salaiputhur and Nambiyanvilai. The Pathirakaliamman Kovil situated South of the suit property and during March, the defendants built a compound wall on the Northern side of the Temple and while doing so, they encroached upon the Southern most portion on the eastern side and built a compound wall running East-West. The defendants encroached an extent of 123 feet East-West Southern most portion on the Eastern side about 8 feet width and 2 feet width on the Western side and built a compound wall and this is shown as the second schedule property. The defendants initially agreed to remove the encroachment in the second schedule property and subsequently refused. Hence, the plaintiff has filed a suit for declaration declaring that the plaint schedule property belongs to the plaintiff and for recovery of possession of the plaint second schedule property. The second schedule property is the part of the first schedule property.

4.In the written statement filed on the side of the defendants, it is averred that the suit is not maintainable either in law or on facts and the same is liable to be dismissed. There is no pathway on the North of the Temple as alleged by the plaintiff. The Temple is 100 years old and the compound wall is aged about 45 years. The defendants have not encroached into the plaintiff's property and built a compound wall. Though the defendants have been added in their representative capacity, their right has not been properly mentioned in the suit. The plaintiff's father did not purchase the plaint schedule property, but on the other hand, the plaintiff's father purchased only 1.77 cents and no pathway was also stated in



have encroached into the plaintiff's property, the plaintiff has not added other co-owners in the suit as party and the plaintiff also not stated in the plaint that he has filed the suit on behalf of the other co-owners also and the second schedule property is not a part of the first schedule property. Hence, the suit has to be dismissed.

5. Before the trial Court, on the side of the plaintiff, the plaintiff was examined as P.W.1 and one Subbiah Nadar was examined as P.W.2 and Exs.A.1 to A.3 were marked. On the side of the defendants, D.W.1 and D.W.2 were examined and no documents were marked. On the side of the Court, Ex.C.1-Commissioner's report and Ex.C.2-Commissioner's plan were marked.

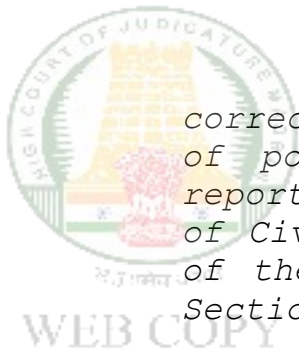
6. On the basis of the rival pleadings raised on either side, the trial Court has framed necessary issues and after analysing both the oral and documentary evidence, had dismissed the suit. Against the Judgment and decree passed by the trial Court, the plaintiff as appellant, has preferred an Appeal Suit in A.S.No.82 of 2008, on the file of the first appellate Court.

7. The first appellate Court, after hearing both sides and upon re-appraising the evidence available on record, has allowed the appeal and thereby set aside the Judgment and decree passed by the trial Court. Against the Judgment and decree passed by the first appellate Court, the present second appeal has been preferred at the instance of the defendants 1 to 4 as appellants.

8. At the time of admission, the following substantial questions of law were framed for consideration:

"(a) When it very clear from the documentary evidence Ex.A1 and Ex.A2 that the plaintiff / respondent No.1 is only entitled to 1/3 share in the suit second schedule property and the same was established before the trial Court, the approach of the lower Appellate Court granting a decree for declaration and recovery of possession in favour of the plaintiff / first respondent in respect of suit second schedule is totally against the documentary evidence Ex.A1 and Ex.A2 and the same goes to the root of the matter and thus the judgment and decree of the lower Appellate Court warrants interference under Section 100 of C.P.C.?"

(b) It is a settled proposition of law that an Advocate Commissioner cannot be appointed to collect evidence and cannot be allowed to give report having findings on the point involved on the suit and Ex.C.1 and Ex.C.2 (Commissioner report and plan) in the present suit have a finding that the appellants encroached the suit second schedule property, whether the lower Appellate Court is



correct in granting a decree for declaration and recovery of possession based on Ex.C.1 and Ex.C2 (Commissioner report and plan) which is against the spirit of Order 26 of Civil Procedure Code and hence the judgment and decree of the lower Appellate Court warrants interference under Section 100 of C.P.C?

(c) Whether the lower Appellate Court is correct in granting a decree for declaration and recovery of possession reversing the judgment of the trial Court, when the evidence of P.W.2 clearly states that there is no pathway (suit schedule property) as on field and hence the judgment and decree of lower Appellate Court overlooking the oral evidence more particularly P.W.2 on record warrants interference under Section 100 of Civil Procedure Code?"

9. Heard the learned counsel appearing for the appellants and the learned counsel appearing for the first respondent and perused the records carefully.

10. The learned counsel appearing for the appellants/defendants 1 to 4 would submit that the first Appellate Court has failed to note that Exs.C.1 and C2, viz., Commissioner's report and plan, is only a supportive piece of evidence and the same cannot be a basis for deciding the dispute between the parties. The first Appellate Court has decreed the suit and granted a decree for declaration and recovery of possession based upon the Commissioner's report and plan, in which, the Advocate Commissioner recorded a finding that there is an encroachment by the appellants, which is against the spirit of Order 26 of the code of Civil Procedure. It is a settled proposition of law that an Advocate Commissioner cannot be appointed for collecting evidence and he cannot file a report giving a finding on the point involved in the suit, the approach of the first Appellate Court in granting a decree for declaration and recovery of possession by reversing the judgment of the trial Court may not be correct. When the trial Court found that the plaintiff is not entitled for the entire suit second schedule property and he is having only one third share, the approach of the first Appellate Court granting a decree of declaration in respect of the suit second schedule property, is without any evidence. From the evidence of P.W.2, it is very clear that when there is no pathway in the field, the decree of the first Appellate Court for declaration and for recovery of possession is against the evidence of record and the Judgment and Decree passed by the first Appellate Court are liable to be set aside.

11. The learned counsel appearing for the first respondent / plaintiff would submit that the first Appellate Court, after analysing the documents available on record, has rightly allowed the



Appeal in favour of the first respondent / plaintiff and prayed for allowing the Second Appeal.

12. On going through the materials available on record and also the points raised by the learned counsel for the appellants, it is seen that the Advocate Commissioner in his report has stated that the defendants have encroached about 50 feet on the Western side and 3.2 meters on the Eastern side of the common pathway and in the map also, no proper measurement has been given by the Advocate Commissioner to show the said encroachment. Based on the Advocate Commissioner's report, the first Appellate Court has reversed the Judgment and Decree of the trial Court and rendered a judgment in favour of the first respondent / plaintiff, which has to be looked into by the first Appellate Court once again. Therefore, the Judgment and decree passed by the first appellate Court are liable to be set aside and the matter is liable to be remanded back to the first appellate Court. Since the matter is liable to be remanded back to the file of the first appellate Court, the substantial questions of law formulated in the present second appeal need not be decided.

13. In the result, the Second Appeal is allowed and the Judgment and decree passed by the first appellate Court are set aside and the matter is remanded back to the first appellate Court for fresh consideration and the first appellate Court shall appoint an Advocate Commissioner afresh and to direct the Advocate Commissioner to measure the property, as per the documents produced by the plaintiff and the defendants, with the help of the Head Surveyor, the Revenue Inspector and the Village Administrative Officer and the Revenue Officers are directed to be present in the said place on the date of measuring the property and also to direct the Advocate Commissioner to measure the property and to note down the physical features with the help of the Surveyor and to issue a fresh sketch, after marking the boundaries and the alleged pathway. The Commissioner has to issue notice to all the parties concerned well in advance and to proceed only in the presence of the parties, namely, the plaintiffs and defendants, who are disputing the suit properties. The measurements of the disputed properties have to be submitted as a report by appropriate map and sketch within a period of two months.

14. After receipt of the report of the Advocate Commissioner, the first Appellate Court has to decide the Appeal Suit based on the Advocate Commissioner's report, without taking into consideration of the report by the earlier Advocate Commissioner, which has already been filed before the Court in the Appeal suit, and decide the same on merits. No further evidence to be let in by both parties. The first Appellate Court shall proceed further only based on the fresh Advocate Commissioner's report and on the admitted facts and



from the date of receipt of a copy of this Judgment. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS III)

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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 utilized 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 Subordinate Judge,
Valliyoore.
- 2.The Principal District Munsif,
Valliyoore.
- 3.The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.D.NALLATHAMBI, Advocate (SR-34179[F] dated 11/11/2021)

+1 CC to M/s.J.ASHOK, Advocate (SR-34157[F] dated 11/11/2021)

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MGJ(12.01.2022) 6P 7C