

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.11.2023

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.828 of 2023
and
C.M.P.No.26195 of 2023

G.Saminathan

... Appellant

Vs.

1. Sundaram
2. Saraswathi
3. Rathinasamy
4. Bagyalakshmi

... Respondents

PRAYER: Second Appeal filed under Section 100 of C.P.C. to set aside the judgment and decree dated 21.06.2023 made in A.S.No.1 of 2023 on the file of the Sub Court, Kangayam, confirming the Judgment and Decree dated 14.07.2016 in I.A.No.1294 of 2015 in O.S.No.218 of 2015 on the file of the District Munsif Court, Kangayam.

For appellant : Mr.N.Manoharan

For respondents : No appearance

JUDGMENT

The plaintiff is the appellant before this Court challenging the judgment and decree passed by the Sub Court, Kangayam, in A.S.No1 of 2023, in and by which, the learned Judge confirmed the order passed in I.A.No.1294 of 2015 in O.S.No.218 of 2015 by the learned District Munsif, Kangayam.

2.The facts are briefly set out hereinbelow and the parties are referred to in the same ranking as before the Trial Court.

FACTS OF THE CASE:

2.1.The suit in O.S.No.218 of 2015 was filed by the plaintiff seeking declaration that the demarcation of boundary line of the suit schedule properties fixed by the survey commission pursuant to the partition deed dated 02.05.1969 is binding on both the parties and permanent injunction restraining the defendants from interfering with the plaintiff's peaceful possession and enjoyment of the suit schedule property.

2.2.The defendants had entered appearance and taken out an application to reject the plaint under Order VII Rule 11 of C.P.C. In the affidavit filed in support of the said application, the first defendant would contend that earlier, a suit in O.S.No.326 of 1993 had been filed by the first defendant, his brother Nallamuthu and his mother Nachammal against the first respondent/plaintiff, his father Govindasamy Gounder and his brother Nataraj for the relief declaration in respect of the property comprised in S.F.No.182 and for permanent injunction and for recovery of possession by removing the encroachment put up in S.F.No.181/2 by the defendants therein. That suit was contested by the plaintiff and his relatives and the same was decreed in favour of the first defendant and his brother and mother on 30.08.1994.

2.3.Challenging the said judgment and decree, an appeal was filed in A.S.No.4 of 1995 by the defendants therein. During the pendency of the said appeal, the said Govindasamy Gounder had executed a settlement deed dated 20.03.1998. Pending the said appeal,

Govindasamy Gounder passed away and his legal representatives *viz.*, wife Pappathi @ Valliyammal and his daughters Muthamil and Padmavathi were impleaded.

2.4. Similarly, the first defendant's mother and brother who had also filed the suit in O.S.No.326 of 1993 died and their legal representatives were brought on record. Ultimately, the appeal in A.S.No.4 of 1995 was dismissed, against which, the present plaintiff and his siblings had filed a second appeal in S.A.No.126 of 1988, in which, the matter was remanded with a specific direction for appointment of an Advocate Commissioner to measure the properties comprised in R.S.Nos.181/1 and 181/2. Accordingly, an Advocate Commissioner was appointed to measure the properties. The Advocate Commissioner measured the properties with the help of the Surveyor and he filed his report. Thereafter, A.S.No.4 of 1995 was decided on 02.11.2012 confirming the rights of the parties.

2.5. As against the said judgment and decree, the present plaintiff

and his siblings had preferred a second appeal in S.A.No.1033 of 2014 which was dismissed by judgment and decree dated 09.01.2015. This Court, while dismissing the appeal, has clearly held that only in the presence of both the parties, the boundary was fixed between S.No.181/1 and S.No.181/2 by the Advocate Commissioner. The Advocate Commissioner submitted his report along with the Surveyor's sketch before the Lower Appellate Court and it was received as additional evidence.

2.6.The learned Judge had also observed that the 'B' schedule property was comprised in S.No.181/2 over which the plaintiff herein did not claim any right or title. Therefore, the learned Judge had directed the plaintiff herein to vacate the portion and hand over the same to the defendants. The 'B' schedule property was stated to be an extent of 0.36 cents. However, during the measurement, it was found that only 0.33 cents was in occupation of the plaintiff. Therefore, this Court had upheld the judgment and decree of the Lower Appellate Court ordering recovery of possession of this 0.33 cents.

2.7. Against this judgment and decree, no further appeal was moved by the plaintiff herein. Therefore, the first defendant would submit that the present suit has been filed with reference to the very same property in respect of which there was already a judgment and decree against the plaintiff herein and therefore, this suit is barred by *res judicata* and further, the plaintiff has suppressed the facts regarding the earlier proceedings and filed the present suit setting out false details.

2.8. The plaintiff had filed a counter, *inter alia*, contending that the issue involved in the earlier suit is not in issue in the present suit. Further, it is the contention of the plaintiff that the earlier suit was with reference to S.F.No.181/1, whereas, in the present suit the property in question is comprised in S.F.No.181/2 and the issue involved in both the suits are totally different. The present suit has been filed only because the defendants had been violating the earlier judgment.

TRIAL COURT:

3.The learned District Munsif, Kangayam, by an order dated 14.07.2016, held that in the light of the earlier litigation where High Court had clearly held that the boundaries were measured and the boundaries fixed already, the present suit claiming declaration with regard to demarcation of the boundary line is nothing but the very same cause of action clothed as a fresh suit. That apart, the suit does not make out any cause of action and therefore, the learned Judge proceeded to allow the application in I.A.No.1294 of 2015.

LOWER APPELLATE COURT:

4.Aggrieved by the same, the plaintiff has filed an appeal in A.S.No.1 of 2023 on the file of the Sub Court, Kangayam. The learned Judge confirmed the order passed by the Trial Court, against which, the present appeal is filed.

5.Heard Mr.N.Manoharan, learned counsel appearing for the appellant.

DISCUSSION:

6.The present suit is a classic example of astute drafting. The plaintiff has clearly described the property with the old survey number. However, a perusal of the same would show that the very same property was the subject matter of the earlier suit in O.S.No.326 of 1993. The relief claimed here has already been granted in the earlier proceedings. In fact, this Court, in judgment and decree in S.A.No.1033 of 2014, has observed as follows:

“Accordingly a new Commissioner was appointed. Though the commissioner measured the property with the help of a Surveyor with reference to revenue records, admittedly no objection was raised by the defendants at all in respect of the manner and method of measurement. Only in the presence of both the parties the Commissioner fixed the boundary between S.No.181/1 and S.No.181/2. The Commissioner submitted his Report along with the Surveyor's sketch drawn to scales to the lower Appellate Court. They were received as additional evidence as Exs.C1 and C2. It is strange to note that there was no objection at all raised by the appellants in respect of the

Commissioner's Report and survey sketch that were received in evidence. Therefore, it is not open for the appellants now to contend, at this length of time, that the measurement was not properly made by the Commissioner with the help of the Surveyor. This contention is liable to be rejected. If it is so done, what remains is the decision arrived at based on the Commissioner's Report and the sketch which clearly shows that the triangular portion described as 'B' schedule property lies only in S.No.181/1. The defendants do not claim any title or right over the land comprised in S.No.181/1. Therefore, the defendants are liable to vacate that portion and hand over the same to the plaintiffs. The extent of 'B' Schedule property has been given in the plaint as 0.36 cents. The Commissioner has found that 0.33 cents is in occupation of the defendants. Therefore, the lower Appellate Court is right in decreeing the suit for recovery of possession only in respect of 0.33 cents in 'B' Schedule as clearly described in the Commissioner's report and the survey sketch."

7.In the light of the above findings of this Court in the earlier

proceedings, it is crystal clear that the present suit is nothing but re-litigation in respect of the very same suit property. Both the Courts below have rightly rejected the plaint. I see no reason to take a contrary view in the findings of the Courts below, particularly, when the second appeal do not contemplate any question of law much less a substantial question of law.

Accordingly, this second appeal stands dismissed. Consequently, connected C.M.P. stands closed. No costs.

20.11.2023

Index : Yes/No
Speaking order/non-speaking order
ssa

To

1. The Sub Judge, Kangayam.
- 2.The District Munsif, Kangayam.
- 3.The Section Officer, V.R.Section, High Court, Madras.

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P.T.ASHA, J.,

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