



S.A.(MD).No.233 of 2018

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THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 31.10.2023

CORAM:

THE HONOURABLE MRS.JUSTICE S.SRIMATHY

S.A.(MD).No.233 of 2018

and

C.M.P.(MD)No. 6197 of 2018

P.Selvaraj

... Appellant

/Vs./

Suganthi

...Respondent

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and Decree dated 22.11.2017 passed in A.S.No.16 of 2016 on the file of the II Additional Subordinate Judge, Nagercoil confirming the Judgment and decree dated 15.03.2016 passed in O.S.No.83 of 2014 on the file of Principal District Munsif Court, Nagercoil.

For Appellant : M/s.Palani Velayutham
J.Sankarapandian

For Respondent : Mr.C.Dhanasalan

JUDGMENT

The defendant in the suit had filed the present second appeal against the Judgment and Decree dated 22.11.2017 passed in



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A.S.No.16 of 2016 on the file of the II Additional Subordinate Judge, Nagercoil confirming the Judgment and decree dated 15.03.2016 passed in O.S.No.83 of 2014 on the file of Principal District Munsif Court, Nagercoil.

2. The defendant is the Appellant and the Plaintiff is the Respondent herein. For the sake of convenience, the rank of the parties shall be referred as plaintiff and defendant as stated in suit.

3. The plaintiff had filed a suit in O.S.No.83 of 2014 for recovery of possession of 'C' schedule property with future mesne profits, to mark the boundaries of 'A' and 'B' schedule properties after surveying through Taluk Surveyor and for permanent injunction from evicting the plaintiff from the suit property. The suit was allowed. Aggrieved over the same the defendant had preferred an appeal and the Appellate Court has dismissed the appeal. Aggrieved over the concurrent findings, the present second appeal has been filed by the defendant in the suit.



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4. The case of the plaintiff is that the 'A' schedule property admeasuring 3.75 cents in R.S.No.456/20 belongs to the plaintiff through gift deed dated 14.07.1981 marked as Ex.A.1 and Patta was issued which is marked as Ex.A.3. On the east of the 'A' schedule property the defendant's property is situated in R.S.No.456/8 admeasuring 305 square feet which is shown as 'B' schedule property, which the defendant had inherited under partition deed dated 25.07.2005. An old building is there in the 'A' schedule property, in which the donor Saraswathi who is aged about 80 years is living. The plaintiff is living in Nagercoil and taking advantage of the same the defendant had encroached upon the 'A' schedule property and the encroached and trespassed a portion shown as 'C' schedule property, which came to the knowledge of the plaintiff on 05.07.2013, when the plaintiff's husband had visited the place and requested the defendant to vacate the encroached portion. When the defendant failed to do so the plaintiff had preferred a police complaint on 28.03.2014, which was not entertained. Thereafter the plaintiff has filed a suit in O.S.No.83 of 2012.



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5. The case of the defendant is that there is no necessity to encroach the 'A' schedule property and the defendant had put up shed in his area and not in plaintiff's property. The police complaint was found false and the police advised and warned the plaintiff. The defendant is trying to construct permanent building in 'C' schedule property is concocted story. Just to disturb the peaceful possession and enjoyment and to harass and engulf the defendant's right over the 'B' schedule property the present vexatious suit is filed. The defendant has right over the property situated in R.S.No.456/8 / old S.No.1993E admeasuring 305 square feet through registered partition deed dated 25.07.2008. The defendant's grandfather namely Athinarayanan Nadar had right over 6 cents in old S.No.1993E as per the judgment in O.S.No.406 of 1921 on the file of the I Additional District Munsif, Nagercoil in the year 1957. As per the Commission report dated 22.01.1960, old S.No.1993E was divided into six plots. In which Plot No.6 having 4.82 cents was allotted to the defendant's grandfather and Plot No.5 having 3.664 cents was allotted to the plaintiff's vendor's vendor. And the defendant's ancestors were enjoying the same from 22.01.1990. The grandfather Athinarayanan Nadar had two sons namely Ponnusamy Nadar and Late Aathiswamy and



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the said property was divided between them and each inherited 2.41 cents, the western portion to the defendant's father Ponnusamy Nadar and eastern portion to Late Aathiswamy. After the demise of the defendant's father Ponnusamy Nadar again the land was partitioned among the three legal heirs of the Ponnusamy Nadar each having 305 square feet of land in R.S.No.456/8 through partition deed dated 25.07.2005. The defendant being one of the legal heirs was allotted 305 square feet on the western portion. The partition deed (same deed) is marked as Ex.A.2 and Ex.A.8. The contention of the defendant is that when the land was partition between Ponnusamy Nadar and Late Aathiswamy, each was allotted 2.41 cents, but on ground the only 2.06 cents are available. Hence the 'C' schedule property belongs to the defendant. Further due to expansion of street the plaintiff would have lost some portion of the property. The defendant had not encroached the plaintiff property at all and prayed to dismiss the suit.

6. After perusing the pleadings, evidence and the Advocate Commissioner report the Trial Court had come to the conclusion that the plaintiff is entitled to 3.664 cents as per the plaintiff's vendor document



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and the defendant's father is entitled to 2.41 cents as per defendant's grandfather document. But as per Advocate Commissioner report, on ground the plaintiff is having only 3.623 cents and on ground the defendant and siblings are having only 2.06. The Trial Court had taken the Advocate Commissioner's report wherein it is stated that while surveying the land in R.S.No.456/20 only 3.623 cents is available and not 3.75 cents. Likewise, while surveying the land in R.S.No.456/8 only 2.06 cents is available and not 2.41 cents. Based on the report and documents the Trial Court had allowed the suit and the Appellate Court had confirmed the same. Aggrieved over the said Judgment and Decree, this Second Appeal is preferred before this Court.

7. At the time of admission, the following substantial questions of law were framed:

" (i). *Whether the findings recorded by the Court's below on Ex.C.1 and C2 for decreeing the suit claim is legally and factually sustainable?*

(ii) *Since report of the Commissioner has not been scrapped on an application made, whether any objection to eschew the same on the ground of it's untrustworthiness can now be raised by the Appellants in Second Appeal and if so it's effect?*

(iii) *Whether the Courts below right in interpreting Section 120 of Evidence Act holding that husband can give*



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evidence on behalf of his wife while the facts of this case are different?

(iv) Whether the documents of title deed stand in the name of plaintiff is not legally proved when she failed to examine herself as a witness?

8. The first substantial question of law, whether it is legally and factually sustainable to grant decree based on Ex.C.1 and C.2 Commissioner Report and Plan respectively. It is seen that while deposing the D.W.2 has categorically admitted before the Trial Court that he is not claiming any right over the land in S.No.456/20 which belongs to the plaintiff and he is claiming right over the property only in S.No. 456/8. The Trial Court has analyzed the description of property in Ex.A2 and has held that the defendant's property in R.S.No.456/8 for 305 square feet only, whereas the plaintiff property in R.S.No.456/20 for 3 ³/₄ cents. Further the Trial Court had held that the Advocate Commissioner had stated in the report that in R.S.No.456/20 the available extent is 3.623 cents and 0.670 is encroached by the defendant and the defendant had put up temporary shed in the said place with coconut leaves. And also held that the Advocate Commissioner had measured the property in R.S.No.456/7, 456/8, 456/20 and has fixed the boundary stones and had



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identified the 'A' schedule property. A specific finding is rendered by the Trial Court that the 'A' schedule property is in a specific sub division i.e. in R.S.No.456/20 and hence non-identification of R.S.No.456/8 would not invalidate the report and plan. Further the plea of expansion of road and the plaintiff had lost some portion of the plaintiff's property was negated since the defendant had not produced any evidence to prove there was expansion of road. After hearing the arguments and after perusing the judgments of both the Courts, this Court is of the considered opinion that the finding that the property was sub divided as R.S.No. 456/8 and R.S.No.456/20 with definite measurement, then the plaintiff would be entitled to 3.623 cents is absolutely right and the same is available only if the 'A' schedule property and 'C' schedule property are added together. In such circumstances both the Courts are right in coming to the conclusion that the defendant had encroached.

9. Further the Appellate Court held that the defendant had submitted a memo to the Advocate Commissioner to measure defendant's three cents property, but the defendant has not submitted any document to show he is entitled to three cents of property. The defendant and his



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siblings had divided the property admeasuring 2.41 cents alone and there was never ever three cents property. Hence the memo of the defendant claiming three cents property is misleading. Further while measuring the property in R.S.No.456/8 the available land on the ground is only 2.06 cents, hence the defendant was under the impression that the plaintiff had taken the remaining 0.35 cents. But the plaintiff is entitled to 3 $\frac{3}{4}$ cents according to the plaintiff document. Even the defendant had stated in the written statement that the plaintiff vendor's vendor is entitled to Plot No. 5 admeasuring 3.664. In such circumstances the plaintiff is entitled to 3.664 cents. Therefore, the Courts below have come to the conclusion based on the documentary evidence and which is supported by the Advocate Commissioner's Report and Plan. The Courts below have not come to the conclusion solely based on Advocate Commissioner's Report and plan. Accordingly, the first substantial question of law is answered in favour of the plaintiff / respondent.

10. The second substantial question of law raised is that report of the Commissioner has not been scrapped on an application made, whether any objection to eschew the same on the ground of it's



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untrustworthiness can now be raised by the Appellants in Second Appeal and if so it's effect? The defendant had filed objection to the Commissioner Report but the same was considered by the Trial Court and had rejected the same. Infact, the Trial Court had rendered a finding that the Commissioner Report is reliable. The defendant has attempted to file another petition for appointing another Advocate Commissioner before the Appellate Court, the Appellate Court has rejected an application.

11. It is a settled principle without prayer to eschewing the available report, second application cannot be entertained. Moreover, the defendant cannot raise the same in the appellate stage and more so in the second appeal stage. Further this Court has rendered a finding that the Trail Court has come to the conclusion based on the documents of the parties and the Commissioner Report had supported the said finding. And the Courts below have not come to the conclusion solely based on Advocate Commissioner's Report and plan. Therefore, the second substantial question of law fails and the same is held against the defendant / appellant.



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12. The third and fourth substantial questions of law could be dealt with as single by reframing as whether the husband can give evidence on behalf of his wife and on such circumstances whether it amounts to proving of the title deed. It is seen from the records that the defendant had not raised specific plea before the Trial Court objecting the deposition of the husband. Further it is seen that the husband of the plaintiff has relied on the documentary evidence namely gift deed, patta and the partition deed of the defendant and has deposed. Under section 120 of Evidence Act the husband cannot depose on behalf of wife if the said fact is within the personal knowledge of the wife. In the present case there is no such facts which is within the personal knowledge of the wife. The defendant has stated that husband should not depose on behalf of wife but has not specifically stated which fact is within the personal knowledge of the wife. And the said objection is only bare objection without any specific plea. Hence, the third and fourth substantial question of law is held against the defendant / appellant. Therefore, the second appeal is liable to be dismissed.



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13. Accordingly, this Second Appeal stands dismissed by confirming the Judgment and Decree, dated 22.11.2017 passed in A.S.No.16 of 2016 on the file of the II Additional Subordinate Judge, Nagercoil confirming the Judgment and decree, dated 15.03.2016 passed in O.S.No.83 of 2014 on the file of Principal District Munsif Court, Nagercoil. No Costs. Consequently, connected miscellaneous petition is also closed.

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Index : Yes / No

NCC : Yes / No

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TO:

1. The II Additional Subordinate Court,
Nagercoil.
2. The Principal District Munsif Court,
Nagercoil.
3. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SRIMATHY, J.

KSA

Judgment made in
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Dated:
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