



Second Appeal.No.93 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	22.12.2023
Pronounced on	08.03.2024

CORAM

**THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN
THILAKAVADI**

Second Appeal.No.93 of 2012
and M.P.No.1 of 2012 &
C.M.P.Nos.23474 and 3224 of 2019

Umayal

....Appellant

Vs.

Gnanamani

....Respondent

Prayer: Second Appeal has been filed under section 100 of Civil Procedure Code against the judgment and decree dated 28.04.2011 passed in A.S.No.43 of 2010 on the file of the Sub Court, Panruti, in conforming the judgment and decree dated 02.09.2010 passed in O.S.No.225 of 2002 on the file of the District Munsif Court, Panruti.

For Appellant : Mr.N.Suresh

For Respondent : Mr.S.Kingston Jerold



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J U D G M E N T

This Second Appeal is preferred against the judgment and decree dated 28.04.2011 passed in A.S.No.43 of 2010 confirmed the judgment and decree dated 02.09.2010 passed in O.S.No.225 of 2002 on the file of the District Munsif Court, Panruti.

2. The plaintiff's case is that the suit property originally belong to the father of the plaintiff namely Duraisamy. The said Duraisamy and his son Pakkiri were granted patta by the Government. The said Duraisamy was in possession and enjoyment of the suit property till his death for more than 60 years and after his demise, the plaintiff is in possession and enjoyment of the suit property till today. Thereafter, Pakkiri also died as unmarried. Therefore, the plaintiff is the only legal heir of both Duraisamy and Pakkiri. So, the plaintiff is the only absolute owner of the suit property.

3. While so, the defendant who is an adjacent owner purchased the property from one Munusamy in the year 1992, who was in possession



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of only 15 feet in East-West and 66 feet in the North-South. But the defendant has purchased the property from Munusamy to an extent of East-West 23 feet. The said Munusamy had right only to execute a sale deed in respect of 15 feet East-West. The defendant took Munusamy to the registrar's office with the pretext of getting a patta and obtained a signatures in the document, which has been admitted by Munusamy on 10.08.1992 before a Village Panchayat. The defendant kept quite for more than 4 years and on 07.09.2002, the defendant came with a group of men and started to dig pit on the southern side of the suit property for constructing a compound wall by removing the hut, where the plaintiff resides with her family without any right or whatsoever. Hence, the plaintiff preferred a complaint before Nellikuppam Police Station. Since it is a civil dispute, the Nellikuppam Police refused to interfere in this matter. Hence, the plaintiff was constrained to file the above suit for declaring the title of the plaintiff in the suit property and for permanent injunction, restraining the defendant from trespassing into the suit property.

4. On the other hand, the defendant in her written statement



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would submit that the defendant vendor was in possession and enjoyment of the property east west in the north side to an extent of 7.1 meter, east west in the south to an extent of 8.9 meter, north south measurement in west to an extent of 20.1 meter north south in east 20.2 meter, in T.S.NO.124 (Old S.F.No.135, 2PT and 135,75/2A PT for more than 50 years and hence the Government granted patta for the said property in favour of him on 28.12.1983. The defendant's vendor Munusamy sold the said property to the defendant on 23.08.1991 under a registered sale deed. Thereafter, the defendant is in possession and enjoyment of the said property, the patta was also transferred in his name on 03.06.1994. On 09.02.1992, the defendant obtained approval of house plan from the Nellikuppam Municipality and constructed a house in the said property. The defendant is enjoying the said property as house and back yard of the house with full extent. The plaintiff filed a suit as against the defendant in Sub Court, Cuddalore in O.P.No.76 of 1996 to the extend of east west 23 feet and north south 66 feet in S.F.No.135/7-B with the same boundaries in the suit property. The said O.P.No.76 of 1996 was transferred to the Panruti Sub Court and renumbered as O.P.No.80 of



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1996, the same was dismissed on 24.03.1999. Thereafter, the plaintiff filed an application to restore the O.P.No.80 of 1996 with Section 5 application, which was also dismissed on 07.07.2000. Since the plaintiff failed in her previous attempts and now filed the suit with wrong survey number, wrong extent and with wrong boundaries. The boundaries given for the suit property is also covered the property of the defendants. Hence, the defendant prays for dismissal of the above suit.

5. The plaintiff before the trial Court in order to establish her claim examined P.W.1 to P.W.5 and marked Ex.A1 to A21. On the side of the defendant, the defendant examined himself as D.W.1 and marked Exs.B1 to B7.

6. The trial Court upon considering the evidence on record, dismissed the suit filed by the plaintiff. Aggrieved by this, the plaintiff preferred an appeal before the Sub Court, Punruti in A.S.No.43 of 2010. The said appeal was also dismissed by the learned Sub Judge, Punruti by the judgment and decree dated 28.04.2011. Aggrieved by this, the present



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Second Appeal is preferred by the plaintiff.

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7. At the time of admission, this Court formulated the following substantial question of law:-

1. *Whether the suit can be held to be not maintainable under Order IX Rule 9 of the Code of Civil Procedure, in view of the dismissal of the pauper petition which was dismissed for default, when the earlier pauper suit was not numbered and hence whether both the Courts below were right in dismissing the suit on this ground?*
2. *Whether the Report filed by the Advocate Commissioner during the pendency of the Second Appeal will come to the aid of the plaintiff in establishing her title and enjoyment over the suit property?*
3. *Whether the findings of both the Courts below can be termed as perverse due to improper appreciation of the evidence available on record?*

8. The learned counsel appearing for the appellant would submit



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that the plaintiff is the absolute owner of the suit property. While so, the defendant who is the adjacent owner, purchased the property from one Munusamy in the year 1992. The said Munusamy was in possession of only east west 15 feet and north south 66 feet. But the defendant has purchased the property from Munusamy to an extent of east west 23 feet. The said Munusamy had right only to execute a sale deed only in respect of east west 15 feet. However, the Courts below without considering the oral and documentary evidence produced by the plaintiff, erroneously dismissed the suit. His further contention is that as per Ex.A1 and Ex.A2 patta and Ex.B1 to B19 revenue records, the Courts below ought to have declare the plaintiff's title in the suit property.

9. The learned counsel would further submit that the Courts below having held that the plaintiff is entitled to 5 cents or 2257sq.ft in the suit survey number on the basis of Ex.A1 and Ex.A2 patta ought to have decreed the suit. The Courts below erred in law in holding that the plaintiff is estopped from claiming more extent than what was claimed in the prior pauper suit, which approach is erroneous in as much as the



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pleadings and the cause of actions in both the suits are not the same. He would submit that in the previous pauper suit, the plaintiff claimed title over the property of her father and whereas in the present suit, she claimed title over the properties of her father as well as her brother. It is also submitted that the First Appellate Court erroneously dismissed the application for an appointment of Advocate Commissioner filed by the plaintiff. Moreover, the Courts below lost cite of the fact about the statement given by the defendant's vendor before the Village Panchayat under Ex.A20 and ought to have held that the plaintiff's vendor was entitled to only lesser extent than what was sold under Ex.B2 sale deed. It is also submitted that the first Appellate Court erred in holding that the present suit is not maintainable according to Order 9 Rule 9 of CPC.

10. The learned counsel further argued that at the time of hearing of this Second Appeal, this Court in its order dated 17.12.2021 observed that as per the plaint, the suit property situated in old Survey No.135/2, 2A, 7B. Whereas, in the written statement, it is mentioned that the defendant's property is situated in T.S.No.124. Therefore, the question arises whether the above suit survey number is situated in T.S.No. 123 or



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124. Further, this Court held that the plaintiff relied upon the additional documents such as field measurement book, Ex.A1 and after perusing Ex.A1 and Ex.B1, this Court found that the T.S.No.123 was claimed by the plaintiff and T.S.No.124 was claimed by the defendant, falls under 135/2 PT. Hence, this Court felt that there is need for appointment of an Advocate Commissioner to inspect the suit property along with land surveyor to resolve the lex. Accordingly, a direction was given to the Sub Judge, Punruti for appointing an Advocate Commissioner to inspect and identify the suit property whether the survey number viz., old survey number 135/ 2, 2A and 7B is situated in T.S.No.123 or 124 along with correlation table of old survey number and new town survey number. Accordingly, an advocate commissioner was also appointed to inspect the suit property and filed its report. Hence, prays for remitting the warrant of the commission to the commissioner to visit the suit property again and file the additional report with all necessary details as required by this Court, in pursuant to the order passed in 17.12.2021. The same is resisted on the side of the respondent/defendant.

11. The learned counsel appearing for the respondent/defendant



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would submit that in a suit for declaration of title, burden always lies on the plaintiff to make out and establish a clear case for granting such declaration and the weakness, if any of the case set up by the defendant would not be a ground to grant relief to the plaintiff. He would further contend that the factum of possession or title cannot be established by the report of the Advocate Commissioner. Therefore, it is not necessary for remitting back the case for having a better report from the Advocate Commissioner. The plaintiff has to establish her case with regard to title and possession of the property only on the strength of her oral and documentary evidence. Hence, he would further submit that the Courts below on proper appreciation of facts and circumstances of the case, rightly dismissed the suit filed by the plaintiff which call for no interference.

12. Heard on both sides. Records perused.

13. On perusal of records, it is seen that this Court in the order dated 17.12.2021 has directed the learned Sub Judge, Panruti, to appoint an Advocate Commissioner, to inspect and identify the suit property



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whether the above mentioned survey number viz., old survey no. 135/2, 2A and 7B is situated in T.S.No.123 or 124 along with correlation table of Old Survey Number and New Town Survey Number and to file a report along with the Map and copy of the correlation table in the Old Survey Number and New Town Survey Number. However, the report of the Advocate Commissioner would reveal that, the Advocate Commissioner failed to correlate the Old Survey Number and New Town Survey Number with the aid of correlation table. Therefore, the matter is remitted back to the learned Sub Judge, Panruti, to remit the warrant of commission and Advocate Commissioner to visit the suit property and identify the same along with correlation table of Old Survey Number and New Town Survey Number whether the Old Survey No.135/2, 2A and 7B are situated in T.S.No.123 or 124 and file a report with the Map and copy of the correlation table in the Old Survey Number and New Town Survey Number within a period of four weeks from the date of receipt of copy of this order. The additional remuneration if any for the Advocate Commissioner shall be fixed by the trial Court, payable by the plaintiff.



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14. Upon receipt of the Advocate Commissioner's report, the learned Sub Judge, Panruti is directed to consider the matter afresh by affording sufficient opportunities to both parties to putforth their contentions either by oral or documentary evidence and dispose the suit within a period of three months from the date of receipt of the Advocate Commissioner's report.

15. Accordingly, this Second Appeal is disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

08.03.2024

vsn
Internet:Yes/No
Index:Yes/No
Speaking/Non-speaking order



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K.GOVINDARAJAN THILAKAVADI, J.

mac/vsn

Pre-Delivery Judgment made in

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