



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 12.01.2024

Pronounced on: 31.01.2024

CORAM :

THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.666 of 2019
and
C.M.P.No.12321 of 2017
and CMP. No.5586 of 2023

Rajeswari

...Appellant

Vs.

Francline Rajendran

...Respondent

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, against the Judgment and Decree dated 27.02.2019 in A.S. No.11 of 2016 on the file of the Principal Sub Judge, Pondicherry reversing the Judgment and Decree passed by the first Additional District Munsif, Pondicherry dated 18.08.2016 in O.S. No.1480 of 2008.

For Appellant : Mr.C.A.Diwakar



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S.A.No.666 of 2017

For Respondent : Mr.N.Manokaran

JUDGMENT

The unsuccessful defendant is on Second Appeal, challenging the reversal findings of the First Appellate Court in a suit for declaration, possession and injunction.

2. The parties are described as per the litigative status before the trial Court.

3. The case of the plaintiff was that he had purchased the suit “A” scheduled property under the sale deed dated 26.12.1990 and that he was put in possession and was enjoying the same. As the plaintiff was residing in France, he used to visit the “A” scheduled property whenever he came to Pondicherry. The plaintiff, on 22.06.1996, through one Albert came to know that the defendant had started construction on the western side of the suit property and also construction materials were stored in the suit property. The plaintiff thereafter, approached the Taluk Office seeking sub-



division and by mid-July, 1996, the plaintiff was shocked to find that the defendant had already started construction by encroaching into the western side of the “A” schedule property. The alleged encroached portion has been described as “B” Schedule, in the plaint. According to the plaintiff, the defendant has no right over the “B” Schedule property and therefore, he instituted the suit seeking the relief of declaration, possession and permanent injunction.

4. The defendant filed a written statement denying any encroachment into the plaintiff's property, more specifically, Schedule “B” property. According to the defendant, the plaintiff's property is distinct and nothing to do with defendant's property and the defendant has raised construction only within the boundaries of her property and not in excess of the same. Moreover, the defendant has stated that there is no Plot Number allotted to the properties and admittedly, the defendant was owning a property adjacent to the property owned by the plaintiff and further the defendant contended that the property description was also not very clear and specific and there was also mismatch between the plaint property and property described in sale deed dated 26.12.1990.



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5. Before the trial Court, the plaintiff examined his Power Agent, one Albert and one Chinnasamy as P.W.1 and P.W.2 and Exhibits A1 to A9 were marked on the side of the plaintiff. On the side of the defendant, the defendant examined herself as D.W.1 and marked Exhibits B1 to B49. During trial, an Advocate Commissioner was also appointed and he filed his report after inspecting the suit property in terms of the warrant issued by the trial Court and he was examined as C.W.1 and Exhibits C1 to C3 were marked as Court documents.

6. The trial Court found that the layout under which the plaintiff and defendant had purchased the property was unapproved and the plaintiff did not establish the allegation of encroachment alleged to have been made by the defendant. The trial Court also took note of the findings of the Advocate Commissioner that neither the plaintiff nor the defendant had proved ownership of Plots bearing Nos.83 or 86. The Commissioner had specifically mentioned that in the absence of the ownership details of Plot No.83 at the hands of one Vaithianathan, it cannot be said that the defendant



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has encroached into the plaintiff “B” schedule property.

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7. In this context, the plaintiff had taken out Application in I.A. Nos. 198, 199, & 200 of 2016, seeking reopening the case after it was posted for arguments, in order to receive additional documents viz., the sale deed of the neighboring plot owner, Vaithianathan and also to recall P.W.1 for the purposes of marking the said document. The trial Court by a separate and common order, even before pronouncing Judgment in the suit, dismissed all the three Applications on 11.04.2016. Thereafter, the trial Court has proceeded to dismiss the suit, holding that the plaintiff had not been able to establish the allegation of encroachment made by the defendant into schedule “B” property.

8. Aggrieved by the dismissal of the suit, the plaintiff preferred A.S. No.11 of 2016 before the learned Principal Sub Judge, Pondicherry. In the said memorandum of grounds of First Appeal, apart from several other grounds, the plaintiff has also raised a ground with regard to the sale deed in favour of the neighboring plot owner, Vaithianathan dated 07.02.1991. On a re-appreciation of oral and documentary evidence, the First Appellate



Court found that the schedule of property described in the plaint clearly revealed the identification of suit property with proper boundaries and that the same was also confirmed by the report of the Advocate Commissioner alongwith the competent surveyor vide Ex.C1. The First Appellate Court held that the schedule “A” property belonging to the plaintiff was comprised in Plot Nos.84 and 85 and “B” schedule property fell under Plot No.85 and in the light of the same, reversed the findings of the trial Court and decreed the suit as prayed for.

9. The defendants, aggrieved by the said judgment and decree of the First Appellate Court has preferred the above Second Appeal. On 17.08.2023, the Second Appeal has been admitted on the following substantial questions of law.

"i. Was the Court below not required to have drawn adverse inference under Section 114 (g) of the Evidence Act as the plaintiff chose not to lead evidence and subject himself to cross examination?

ii. Whether the advocate commissioner was right in receiving a copy of the unapproved & unsigned layout to identify the suit property when there is absolutely no pleading



of the suit property having been purchased as a plot forming part of a layout bearing plot numbers?

iii. Whether the 1st appellate Court was right to place the burden on the defendant to prove that she has not encroached into the plaintiff's property ignoring the categorical finding of the advocate commissioner that plaintiff's land cannot be identified, the evidence of P.W.2 that the plaintiff's property was not be measured?

iv. Whether the 1st appellate Court was right in relying on the doctrine of priority when there is no pleading nor evidence that the appellant had purchased the very same property as that of the plaintiff?"

10. I have heard Mr.C.A.Diwakar, learned counsel for the appellant and Mr.N.Manokaran, learned counsel for the respondent, on the above substantial questions of law. I have also perused the Judgments of the Courts below and I have carefully gone through the pleadings, oral and documentary evidence adduced by the parties, including the report of the Advocate Commissioner which was available for the benefit of the trial Court as well as the First Appellate Court.

11. The learned counsel for the appellant would first and foremost



contend that the plaintiff did not enter the witness box and further even the General Power of Attorney executed by the plaintiff in favour of his Power Agent did not relate to the suit property and therefore, adverse inference ought to be drawn against the plaintiff and consequently, the plaintiff was to be non suited for any of the reliefs prayed for in the suit.

12. The learned counsel for the appellant would further state that the suit property was also not properly identified by the plaintiff as there is reference to Plot numbers and reliance have been placed on such plot numbers by the First Appellate Court when admittedly, the properties sold in favour of both the plaintiff and defendant did not contain any Plot numbers and it was admittedly an unapproved layout. He would therefore contend that it was for the plaintiff to independently prove and establish the ownership of the suit property and also the factum of encroachment said to have been made by the defendant.

13. He would take me through the plaint to fortify his contentions that there is absolutely no pleading with regard to Plot numbers and the learned counsel for the appellant would also place reliance on the following



decisions, *Man Kaur (dead) by LRS vs. Hartar Singh Sangar* reported in (2010) 10 SCC 512 and *Kesari Hanuman Goud Vs. Anjum Jehan and others* reported in (2013) 12 SCC 64. In *Man Kaur's case*, (referred supra) the Hon'ble Supreme Court has summarised the legal position with regard to the persons who are entitled to give evidence with regard to matters involving personal knowledge. The Hon'ble Supreme Court has held, in the said judgment, that a power of attorney holder cannot depose and give evidence in the place of the principal, for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

14. In *Kesari Hanuman Goud's case*, (referred supra), the Hon'ble Supreme Court has held that a Power of Attorney holder cannot depose in the place of the principal and the word 'act' employed in Order 3 Rules 1 and 2 of the Code of Civil Procedure confined only to 'act' or 'acts' done by the power of attorney holder, in exercise of power granted to him by virtue of the instrument and that he cannot depose for the acts done by the principal and not by him, or in respect of a matter which only the principal



can have personal knowledge.

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15. Per contra, Mr.N.Manokaran, learned counsel for the respondent would formulate his submissions around the report of the Advocate Commissioner. The learned counsel would take me through the report to establish that the Commissioner had expressed his inability to give a finding with regard to the encroachment only because of the non availability of the sale deed of Vaithianathan, one of the plot purchasers. However, he would invite my attention to the Interlocutory Application filed even before the trial Court seeking to mark the sale deed in favour of the said Vaithianathan, with necessary Applications to reopen the evidence and to examine the Power Agent, P.W1, in order to mark the said sale deed.

16. He would further contend that though the trial Court dismissed the said Applications and the same was also not challenged by way of Revisions before this Court, in view of the specific ground raised by him in the memorandum of grounds of First Appeal and in view of the mandate under Section 105 (2) of the Code of Civil Procedure, the plaintiff was entitled to canvass the rejection of the Interlocutory Applications filed



before the trial Court, though not challenged by way of revisions.

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17. He would also invite my attention to the provisions of Order 47 Rule 27 CPC, in support of his Application in CMP. No.5586 of 2023 to mark the sale deed dated 07.02.1991 in favour of Mr.Vaithianathan as additional evidence in the Second Appeal. He would take umbrage under the language employed under Order 41 Rule 27 CPC, where the Court is empowered to take additional evidence on file, for "substantial cause". With regard to the said submissions, I am of the view that unless there is a specific challenge to the order passed in the Interlocutory Applications, in the memorandum of grounds of appeal, it would not be open to the appellant to take benefit of Section 105(2) CPC. The only ground that has been raised by the plaintiff in the memorandum of grounds of first appeal with regard to the said sale deed of Mr.Vaithianathan being sought to be produced is ground 13. The same is extracted for easy reference.

'13. The Learned Trial Judge failed to appreciate the recitals of the certified copy of sale deed of Vaithiyanathan dated 07.02.1991 and in fact totally ignored it at all'

18. I am unable to countenance the submissions of Mr.N.Manokaran,



learned counsel for the respondent, that there is a specific challenge to the order passed by the trial Court in the Interlocutory Applications. The said ground does not imply the same and it is only a general ground that the trial Court has not appreciated the recitals of the sale deed which was sought to be marked and that the recitals have been totally ignored. This would not in my opinion, amount to a challenge to the order of the trial Court in the Interlocutory Applications. Thus, I find that Section 105(2) of CPC will not come to the rescue of the plaintiff and the plaintiff is precluded from challenging the order passed by the trial Court, having not challenged the same either by way of Revisions to this Court or by laying a specific challenge to the same by raising appropriate grounds in the memorandum of grounds of first appeal.

19. The same exercise has been undertaken before this Court as well by filing CMP. No.5586 of 2023, seeking to mark the very same document. The said Application is opposed by the appellant who has filed his counter, stating that Interlocutory order passed by the trial Court has already become final and moreover, the Courts below had also found that the production of the sale deed would not even make any difference and therefore, there is no



necessity to allow the Application at the stage of Second Appeal.

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20. No doubt under Order 41 Rule 27 of CPC, the appellate Court is entitled to receive additional evidence, oral and documentary, if the appellate Court requires such document to be produced to enable it to pronounce judgment or for any other substantial cause. However, on the facts of the present case, even the trial Courts had adverted its attention to the said sale deed which was sought to be produced by the plaintiff and held that the production of the sale deed would not have made any difference to the case of the parties. In any event, the plaintiff having not challenged the order passed by the trial Court in the Interlocutory Applications, refusing to permit the said sale deed to be marked as an Exhibit on the side of the plaintiff and also not specifically challenging the said order by way of specific grounds in the First Appeal, I do not deem it a fit case to hold that for a substantiate cause, the additional evidence has to be allowed.

21. The next point is regard to the competency of the Power Agent to speak for the Principal viz., plaintiff in the instant case. One thing that



requires to be borne in mind is that the suit was initially filed by the plaintiff in her personal capacity and only for letting in evidence, the power of attorney Agent was given the task of representing the plaintiff. The plaintiff has very specifically pleaded about her personal knowledge of several facts which led to the filing of the suit. The only reference to the power agent is found in Paragraph 4 of the plaint, where the plaintiff states that on 22.06.1996, his friend viz., one Mr.Albert, informed him that preparations were about to start the constructions in the western side of suit property, by some third parties, who had stored some materials in the suit property. It is this person, Albert who has represented the plaintiff and deposed as P.W.1. Admittedly, the plaintiff has not chosen to enter the witness box to depose about the facts pleaded by her in the plaint and also to various material circumstances which were purely within her knowledge.

22. The learned counsel for the respondent, Mr.N.Manokaran, would submit that the law with regard to the competency of a power of attorney giving evidence on behalf of the principal developed much later and during the relevant point of time, when the suit was being tried, the parties did not



have the benefit of the march of law and therefore, the fact that the power agent deposed in the place of the principal could not be held to be fatal to the case of the plaintiff.

23. He would also draw my attention to certain passages in the decision of the Hon'ble Supreme Court in *Man Kaur's case*, (referred supra) and would contend that there was sufficient scope for the Court to take a lenient view with regard to the evidence adduced by the power of attorney agent. He would also state that there is no cross examination on this point specifically viz., the competency of the power of attorney agent and he would therefore, pray that the substantial question of law cannot be put against the plaintiff in order to defeat the suit claim.

24. Per contra, Mr.C.A.Diwakar, learned counsel for the appellant would take me through the cross examination of P.W.1 and also the written arguments filed by the parties before the trial Court as well as the first Appellate Court, where a specific issue with regard to the competency of the power of attorney has been raised. In fact, P.W.1 was confronted in cross examination with regard to the power of attorney and he has stated that the



plaintiff was his friend and the power of attorney, Exhibit A1 was executed only for filing the present case. A specific suggestion has been put to the power agent P.W.1 that in terms of Ex.A1, the plaintiff has not given any power to P.W.1 to depose in the said case. Thus, I am able to see that there is a specific challenge to the competency of the power agent to depose on behalf of the plaintiff.

25. I have also gone through the power of attorney which has been marked as Ex.A1. From the said Power of Attorney, it can be presumed from the signature and affixing of date by the Advocate and Notary Public that the said power of attorney has been executed on 25.03.1996. The suit has been filed by the plaintiff and not by the Power Agent. The suit has been signed by the plaintiff on 22.07.1996, much earlier to the execution power of attorney. However despite the same, there is absolutely reference or whisper about the said suit having been filed by the plaintiff.

26. On the contrary, the power styled as a special power of attorney appears to be executed only in connection with the house property belonging to the plaintiff at Door No.55, Pondicherry and to do all further



incidental acts that may be necessary in connection with the said property. I do not find anything in the said special power of attorney to indicate that the plaintiff authorised P.W.1 to act as his agent and to give evidence in relation to the suit property. Moreover, as already discussed herein above, if really the power of attorney was given for the purposes of the suit, then certainly, there would have been a mention of the filing of the suit or the case number, since admittedly, the suit has been filed a month prior to the execution of the power of attorney. The evidence of P.W.1 that the power of attorney was given only for the purpose of the suit also falls to the ground in view of the recitals in Exhibit A1, Power of Attorney. Thus, I am unable to countenance, the submissions of the learned counsel for the respondent Mr.N.Manoharan. On the contrary, I am compelled to accept the submissions of the learned counsel for the appellant with regard to the said power of attorney Ex.A1, the competency of the P.W.1, to depose on behalf of the plaintiff and also to speak about the facts within the personal knowledge of the plaintiff.

27. As a natural corollary, once P.W.1 is held to be incompetent or to speak for the plaintiff as a power agent, adverse inference would have to be



necessarily drawn against the plaintiff for not entering the witness box and adducing evidence in support of the plaint allegation.

28. Moreover, I find that the First Appellate Court has proceeded to decide the issues with regard to specific plot numbers. The plaint itself does not describe the suit property as having a specific or particular plot number. It is the admitted case of both the plaintiff as well as defendant that the layout was unapproved and specific extents of lands had been purchased by the plaintiff and the defendant and their sale deeds did not contain any Plot Numbers at all. Therefore, the very approach of the first Appellate Court proceeding to decide the issue based on Plot Number is highly improper and perverse.

29. Further, the First Appellate Court has referred to Section 48 of the Transfer of Property Act, 1882 (in short “Act”) regarding priority and held that the plaintiff's purchase was prior in point of time to the defendant's purchase and therefore, it was for the defendant or defendant's predecessors to have verified the availability of the extent intended to be purchased, before proceeding to purchase the property. Applying the said doctrine of priority, the plaintiff's case has been accepted and suit has been decreed,



reversing the findings of the trial Court.

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30. Section 48 of the Transfer of Property Act, reads thus:

'Where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created'

31. The First Appellate Court has unfortunately, applied the said Section to the facts of the present case. Section 48 of the Act would come into play only when the property in question is one and the same and there are divergent rights claimed in and over the suit property. Here, admittedly, the plaintiff and defendant are adjacent property owners, their purchase being distinct and separate. Thus, the First Appellate Court erroneously applied Section 48 of the Transfer of Property Act to hold that in view of the doctrine of priority and the plaintiff having purchased his property earlier, would be entitled to get relief. I am unable to countenance the said approach, muchless, the findings of the First Appellate Court in order to reverse the well considered findings of the trial Court, holding that



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the plaintiff had not established the lay of the property in a manner known to law and that the question of encroachment by the defendant was also not proved and thereby, the plaintiff was not entitled to the decree as prayed for.

32. For the above reasons, I am constrained to interfere with the findings of the First Appellate Court and answer the substantial questions of law in favour of the appellant. In fine, this Second Appeal is allowed. There shall be no order as to costs. Consequently, connected Miscellaneous Petition in CMP. No.5586 of 2023 is dismissed and CMP. No.12321 of 2023 is closed.

31.01.2024

Index : Yes/No
Internet : Yes/No
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To

1. The Principal Sub Judge, Pondicherry.

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2. The Additional District Munsif, Pondicherry.

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P.B.BALAJI, J,

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