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S.A.No.25 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 14.02.2024	Pronounced on: 15.03.2024
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CORAM

THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A. No.25 of 2020

G.Natarajan

...Appellant

Vs.

1.Sakunthala

2.D.Vas (Anglo Indian)

3.Coimbatore City Municipal Corporation,
Rep by the Commissioner, Town Hall,
Coimbatore – 641 001.

...Respondents

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure to set aside the Judgment and Decree dated 27.06.2019 made in A.S. No.37 of 2015 on the file of the II Additional Subordinate Judge, Coimbatore and confirming the Judgment and Decree dated 26.03.2015 made in O.S. No.580 of 1995 on the file of the III Additional District Munsif Court, Coimbatore.

For Appellant : Mr.K.Surendranath



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For Respondents : Mr.S.Mukunth,
Senior Counsel
for M/S.Sarvabhauman Associates
for R1
R2- Exparte
R3- No Appearance

JUDGMENT

The second defendant who suffered concurrent findings before the trial Court as well as the First Appellate Court also, is the appellant.

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

3. The first respondent herein, as plaintiff, filed the suit for a direction to remove the encroachment and unauthorised construction put up by the defendants 1 to 3 in the 'A' schedule property, and for handing over possession of 'B' schedule property to the plaintiff. A relief of permanent injunction restraining defendants 2 and 3 was also sought for to prevent them from putting up any further construction in the suit property.



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4. The second defendant filed a written statement stating that he was the owner of site No.106 and the plaintiff had earlier filed O.S. No.1647 of 1992, against the third defendant and the said suit was dismissed for default. The first defendant also filed a suit in O.S. No.358 of 1994 and succeeded in obtaining the decree against the plaintiff. The first defendant has constructed superstructure in his property, after obtaining approval from the town panchayat. According to the second defendant, there was no encroachment as alleged.

5. The second defendant filed an additional written statement stating that revenue records reflected that the lands as Natham lands and therefore, the plaintiff has failed to establish his title to the suit property. The amendment sought for by the plaintiff was barred by limitation and suit was liable to be dismissed.

6. The trial Court came to a finding that the second defendant had encroached into site No.105, which belong to the plaintiff. Before the trial Court, an Advocate Commissioner was also appointed and the



Commissioner has filed his report, which has been marked as Exhibits C1 to C3. The second defendant has filed his objections and sought for re-inspection, however, the same was rejected by the trial Court and the said order became final. The First Appellate Court also relying on the findings of Advocate Commissioner held that there was an encroachment in site No.105 and proceeded to dismiss the appeal.

7. Aggrieved by the concurrent findings rendered by the Courts below, the second defendant has come up by way of the present Second Appeal.

8. On 21.01.2020, the above Second Appeal has been admitted on the following two substantial questions of law:

“ a) Whether the failure to consider the oral and documentary evidence by both the Courts below is not perverse and contrary to law?

b) Whether the Courts below were right in only relying upon Exs.C1 to C3, to grant a Decree without properly appreciating the evidentiary value of Exs.C1 to C3 and by failing to consider the weighty oral and documentary evidence on record”

9. I have heard Mr.K.Surendranath, learned counsel for the appellant



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and Mr.S.Mukunth, learned Senior Counsel appearing for M/s.Sarvabhauman Associates, learned counsel for first respondent. I have also gone through the pleadings, oral and documentary evidence adduced by the parties before the trial Court and also judgments of the Courts below.

10. The learned counsel for the appellant would submit that there is no dispute with regard to the plaintiff's ownership of site No.105 and the ownership of site No.106 being with the second defendant who had purchased the same from the first defendant. The 'B' schedule portion described in the plaint is the alleged encroached area into site No.105. According to the learned counsel for the appellant, the Advocate Commissioner ought to have taken the approved layout sketch and measured the properties from the boundaries of the layout which would have clearly established that the plaintiff had actually lost land on the other side and falsely claiming encroachment by the second defendant, the suit was filed.

11. The learned counsel for the appellant would also invite my



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attention to Ex.A1 where survey No.572/4 is not mentioned. However, in the plaint, the plaintiff has included survey No.572/4, which never belonged to the plaintiff. The learned counsel would also invite my attention to Ex.B1, which is the proceedings of District Panchayat, where it has been confirmed that the boundaries of site No.105 are correct and that site No.105 is bounded by the four boundaries which have been mentioned in the sale deed in respect of said site No.105. He would therefore, contend that the second defendant was in enjoyment of only the property purchased by him and there was no occasion for any encroachment as alleged by the plaintiff. He would also refer to the Advocate Commissioner's report and the objections filed to the said report by the second defendant as the Advocate Commissioner had not correctly measured the suit property with the help of the surveyor and the measurements given are also incorrect and instead of referring to documentary evidence viz., sale deed and revenue records, the Advocate Commissioner merely referred to site Nos.102, 103, 104 and 105.

12. Further, the learned counsel for the appellant would also state that the suit in O.S. No.358 of 1994 filed by one Parvathi Ammal against the



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plaintiff herein and Banumathi, purchaser of site No.104 and also the Executive Officer of the Kurichi Town Panchayat, had been decreed and the decree has also attained finality. In such circumstances, the present suit is hit by the principles of *res judicata* and the Courts below have not even considered the said plea of *res judicata*. Further according to the learned counsel for the appellant, both the Courts have merely relied on the Advocate Commissioner's report without adverting themselves to the documentary evidence adduced by the parties, especially by the second defendant/appellant. He would therefore, pray for the Second Appeal being allowed.

13. Per contra, the learned Senior Counsel would support the findings of the Courts below and invite my attention to the respective sale deeds of the plaintiff as well as second defendant, marked as Ex.A1 and Ex.B9 respectively. He would also invite my attention to the Ex.B19, the approved layout plan to fortify his contentions that the title of the suit property was clearly established by the plaintiff and he would also take me through the cross examination of the appellant who examined himself as D.W.1,



especially his categorical admission that site No.105, belongs to the plaintiff and that to the North of his site, the plaintiff's site is situated. He would also refer to the approved lay out plan, sanctioned by Deputy Director of Town and Country Planning and state that the construction put up by the second defendant is clearly encroaching into site No.106 and the Advocate Commissioner has also clearly found the construction to be only on the plaintiff's site and he would therefore, pray for the Second Appeal being dismissed.

14. The learned counsel for the appellant would place reliance on the decision of the Hon'ble Supreme Court in the case of *Madhukar and others Vs. Sangram and others*, reported in (2001) 4 SCC 756, where the Hon'ble Supreme Court has held that the First Appellate Court, has a duty to record its findings after dealing with all issues of law and also facts, with the oral as well as documentary evidence, led by parties, in mind. He would place reliance on decision of this Court in the case of *K.Jiji Bai @ Pushpammal Vs. Sureshkumar Kankariya*, reported in 2011 (2) CTC 77, where this Court held that the First Appellate Court, has to be guided by the mandate laid



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down in Order 41 Rule 31 of the Code of Civil Procedure, 1908. For similar ratio, he would also rely on the decision of the Hon'ble Supreme Court in the cases of *U.Manjunath Rao Vs. U.Chandrashekar and Another*, reported in 2017 (6) CTC 764 (SC) and *Murthy and others Vs. C.Saradambal and others*, reported in (2022) 3 SCC 209.

15. The learned counsel for the appellant would also rely on the ratio laid down by the Hon'ble Supreme Court in the case of *Hero Vinoth (Minor) Vs. Seshammal*, reported in (2006) 5 SCC 545, where the Hon'ble Supreme Court has drawn a distinction between mere question of law and substantial question of fact and held that whether the question of law is substantial would have to be decided, striking a judicious balance between indispensable obligations to do justice at all stages and impelling necessity of avoiding prolongation in life of any lis.

16. The learned counsel for the appellant would also place reliance on the decision of Hon'ble Supreme Court in the case of *Special Land Acquisition Officer and Another Vs. Sidappa Omanna Tumari and Others*,



reported in *1995 Supp (2) SCC 168*, where the Hon'ble Supreme Court held that when a report of an expert is produced by a claimant in land acquisition matters, the said report may be accepted by the Court and acted upon only if the report is authentic. He would also place reliance on the decision of the Hon'ble Division Bench of this Court in the case of *Special Tahsildar and Land Acquisition Officer, Nagercoil Vs. Daisy Morayin and others*, reported in *2003-1-L.W.91*, where also, this Court held that the parties would be entitled to lead contra evidence to show that the report of the Commissioner is wrong and examination of Commissioner may not arise in all cases.

17. On an overall reading of the plaint allegations, the defence set out by the second defendant/appellant by way of his written statement, the earlier suit proceedings where the plaintiff was a party, it appears that there has been an encroachment in one side of the layout which has had a trickling down effect. The properties purchased by the plaintiff and the second defendant established their respective titles to the same. However, the issue is with regard to whether the second defendant has encroached into the plaintiff's site or whether the plaintiff has lost land on the other side



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boundary and has chosen to re-claim the same from the second defendant.

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18. No doubt, an Advocate Commissioner was rightly appointed by the trial Court to inspect the suit property and file a report. The Advocate Commissioner has also filed a report along with plan showing the lay of the property. The Commissioner has stated that the properties were measured from site No.115, which is situate on the southern side of the layout. Though the Commissioner has stated that he has physically verified site Nos.114 to 102, downwards, it is seen that he has only verified the boundaries and he has not measured the said sites. His report also does not even mention that the disputed site Nos.104, 105 and 106 were measured. The Advocate Commissioner has also not given the admeasurement to any of the sites excepting for stating that in site 105, *“a building has been put up and at the rear side it is approximately 22 feet North to South and 16 feet East to West by leaving vacant land in the front side”*. However, in the layout plan showing the approved layout, all the sites have been clearly demarcated not only with boundaries, but even the admeasurements of the sites have been clearly set out. If only the Advocate Commissioner had,



with the assistance of surveyor, measured the length and breadth of the properties from the beginning of the layout abutting Chettipalayam Podanur Main Road, the exact problem would have come to light and the Court would have been duly assisted to see whether the encroachment claimed by the plaintiff was true or not. Though the second defendant has filed his objections, the Courts below have not considered the same and given any finding which is mandatory, before calling upon the parties to lead evidence. In fact, in the case of *Vemba Gounder V. Pooncholai Gounder*, reported in *AIR-1996-Madras-347*, this Court has laid down the steps to be followed when there are objections to the Advocate Commissioner's report. I had also occasion to deal with the said issue in CRP.(MD) No.1611 of 2017. The relevant portion of the judgment of this Court in *Vemba Gounder's* case referred herein supra, is as follows:-

“30. The petitioner has filed objections to the report. According to him, even the suit property is not identified by the Commissioner and he has simply copied a survey plan with the help of a surveyor. If that be so, the petitioner should have taken steps to examine the Commissioner or let in evidence to satisfy the Court below that the report is faulty and the same should be scrapped and the same Commissioner should be directed to file another report or a fresh Commission should be issued, with a direction to locate the property as sought for in the application. No such attempt was made by the petitioner. Even though objections were filed in the year 1994, till the dismissal of the present application, the petitioner did not take any steps in this regard. He could have moved the Court below to



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enter a finding regarding the acceptability or otherwise of the report. I am sure, if such an attempt had been made by the petitioner, the Court below would have rendered a finding on the Report already filed by the Advocate-Commissioner. I have already said that when objection is raised on a Report it is the duty of the dial Court to enter a finding regarding the same before asking the parties to let in evidence on the merits of the case. For the purpose of substantiating their Objections to the Report, probably examination of the Commissioner alone may not be sufficient. Parties may also have to be examined. Only after taking such steps and after arguments, when the Court enters a finding on the Report already filed, if he is aggrieved by the finding, the petitioner can insist upon issuing a second Commission or remit the warrant to the same Commissioner, for curing the defects made mention of in the Objections. Merely accusing the trial Court of not following the procedure is not proper.”

19. It is also not in dispute that there was an earlier suit filed by the plaintiff against one Hendri Anthony Douis in O.S. No.1647 of 1992, which was not prosecuted by the plaintiff stating that the said site No.104 was sold to one Banumathi. Thus, it appears that even on an earlier occasion, the plaintiff has complained of encroachment and sought for permanent injunction. From the available pleadings and also evidence adduced by the parties, the Court cannot come to a definite conclusion as to whether the plaintiff's allegation regarding encroachment by the second defendant is factually true or not.



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20. The First Appellate Court also unfortunately, in a very cryptic fashion merely endorsed the trial Court's findings, placing reliance on the Advocate Commissioner's report which was not even tested by the trial Court as required under law. The First Appellate Court has therefore, failed to follow the mandate under Order 41 Rule 31 CPC.

21. For all the foregoing reasons, I am of the considered view that the matter has to be remitted back to the First Appellate Court with a direction to appoint an Advocate Commissioner to inspect the properties, with the assistance of the Government Taluk Surveyor and measure the Sites beginning from the vacant lands situated on the Northern side of the layout abutting Chettipalayam Podanur Main Road and ending with Site No. 107 and file a detailed report with a plan showing the measurements of each of the sites and file a detailed report alongwith a site plan.

22. The First Appellate Court, on receipt of the said report and site plan shall, with reference to the approved layout sketch in L.P (CN) No.9/75, shall hear the parties with regard to the alleged encroachments into



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the suit property and decide the same, in accordance with law, within a period of four months from the date of receipt of the copy of the judgment.

The First Appellate Court, shall decide the remuneration of the Advocate Commissioner to be appointed. This exercise would certainly give a quietus to the dispute, once and for all.

23. In fine, the Second Appeal is partly allowed and the matter is remitted back to the First Appellate Court, namely the II Additional Subordinate Judge, Coimbatore, for fresh consideration, in the manner set out herein above. No costs.

15.03.2024

Index :Yes/No

Internet : Yes/No

Neutral Citation :Yes/No.

Speaking order/Non-speaking order

rkp

To

1.The II Additional Subordinate Judge, Coimbatore.

2.The III Additional District Munsif Court, Coimbatore.



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P.B.BALAJI, J.

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