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S.A.No.104 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.06.2024

CORAM:

THE HONOURABLE Mr.JUSTICE V.LAKSHMINARAYANAN

S.A.No.104 of 2019
and CMP.No.2319 of 2019

Kandasamy (Died)

1.Subramani

2.Thanammal

3.Murugan

Alamelu (Died)

4.Elangiyam

5.Ammasai

6.Shanmugam

7.Anbumani

8.Agilandam

... Appellants / Defendants

Vs

Muthusamy

... Respondent / Plaintiff

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code praying to set aside the judgement and decree passed in A.S.No.3 of 2012 dated 29.11.2013 passed by the learned Subordinate Judge, Mettur in reversing the judgment and decree made in O.S.No.68 of 2002 dated 23.03.2011 passed by the learned District Munsif, Mettur, Salem District.



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For Appellants : Mr.M.R.Jothimanian

For Respondent : Ms.Saraswathi Muthiah

JUDGMENT

The suit has been pending for the past 31 years. Originally, the suit was presented as O.S.No.23/1993 on the file of Sub Court, Sankari. Subsequently, it was transferred to Sub Court, Mettur and renumbered as O.S.No.225/1999. Finally due to increase in the pecuniary jurisdiction, it was transferred to District Munsif at Mettur and renumbered as O.S.No.68/2002. The appellants before me are the defendants in the suit.

2. The suit in O.S.No.23/1993 (subsequently renumbered as O.S.No.68/2002) was presented for declaration of title and for permanent injunction with respect to 'B' schedule mentioned property. The gist of the plaint is as follows :

- a) The plaintiff claims that he had purchased plaintiff 'A' schedule property from one Chetty Gounder on 05.03.1986. The 'B' schedule mentioned property is a ridge/bund that segregates the



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property of the plaintiff and the defendants. The defendants' property is situated on the southern side of the said ridge.

- b) According to the plaintiff, the ridge has a breadth of 4 ft., and runs to an extent of 60 ft. abutting 'A' schedule mentioned property. He claimed that the ridge was used in common by the plaintiff's vendor and the defendants. He would further plead that the ridge was jointly owned by him and his brother Manickam.
- c) On 13.01.1993, when the defendants tried to obliterate the ridge utilising men and money power, the plaintiff was constrained to file a suit.
- d) According to plaintiff, his brother Manickam developed difference of opinion with him over family issues and therefore, he did not join him in the present suit.
- e) It is further pleaded that the defendants are resisting his declaration of title over the 'B' schedule ridge that runs along the 'A' schedule property. Since the plaintiff claims exclusive right over the 'B' schedule property, he presented the suit for declaration of title of his right over the 'B' schedule property and for permanent injunction.



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WEB COPY 3.1 Summons were issued to the defendants and they entered appearance through a counsel. The defendants filed a written statement admitting that their property is situated to the southern side of the suit property, but denied that there existed a ridge on the southern side of the suit property and it belonged to the plaintiff. They would state that the question of ridge in existence does not arise at all, as there existed nothing and since there was no ridge, the issue of obliterating the same does not arise. It is also contented that since the plaintiff attempted to trespass into their property, they filed a suit in O.S.No.98/1993 on the file of District Munsif, Mettur, for a relief of permanent injunction and had also obtained an interim injunction against the plaintiff in I.A.No.348/1993.

3.2 Their further plea is that in the said suit in O.S.No.98/1993, an Advocate Commissioner has been appointed to visit the suit property and to submit a report. The Advocate Commissioner had visited the property on 14.08.1993, but the plaintiff and his brother obstructed the Commissioner from proceeding with the work and therefore, the Commissioner returned the warrant to Court, seeking a direction for police protection.



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WEB COPY 3.3 Having denied the existence of ridge in the paragraph above, the defendants would go on to take a stand that it is the duty of the Court to find out whether the bund, that is said to have existed between their property and plaintiff property, belonged either to the plaintiff or to the defendant.

3.4 Pending the suit, as the first defendant had passed away, his legal heirs were impleaded as defendants 5 to 10.

4. On the basis of these pleadings, the learned District Munsif framed the following issues :

- 1) *Whether the plaintiffs are entitled for the relief of declaration that the 'C' schedule property exclusively belongs to the plaintiff?*
- 2) *Whether the plaintiffs are entitled for the relief of permanent injunction?*
- 3) *Whether there is no ridge existing in south of the suit property?*
- 4) *Whether the bund situated south of suit property and north of defendants land was constructed by the defendants?*
- 5) *To what other relief the plaintiff is entitled for?*

Subsequently, Issue No.1 was modified as the plaint was amended and the 'C'



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schedule property was described as 'B' schedule property, and consequently,

the modified issue reads as follows :

- 1) Whether the plaintiffs are entitled for the relief of declaration that the 'B' schedule property exclusively belongs to the plaintiff?*

5. The matter went to trial. Pending the suit, an Advocate Commissioner was appointed in I.A.No.98/1993. The Advocate Commissioner visited the suit property after giving notice to the plaintiff and the defendants. He inspected the property on 07.02.1993. At the time of inspection, on the side of plaintiff, the plaintiff counsel and the plaintiff were present. On the side of defendants, defendants 1 to 3 were present. After giving a notice of inspection to the parties, the Advocate Commissioner proceeded to inspect the suit property in terms of the warrant on 07.02.1993.

6. At the time of inspection, neither the Village Administrative Officer incharge nor the Surveyor was available, hence the Commissioner proceeded to inspect the property on his own. The Commissioner submitted a report stating that there existed a ridge/bund of 4 feet and 3 inches running east-west and to a length of about 100 ft, which not only runs between the



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properties of the plaintiff and the defendant, but it continues to run through the lands of other parties. This ridge is about 5 feet in height on the west.

On the western side of the ridge lies the defendants' property which is about 1^{1/2} feet lower than the bund/ridge. Similarly, the plaintiff's property is about 2^{1/2} feet lower than the bund. He also submitted a plan along with his report. The report and plan were not objected by the plaintiff or the defendants.

7. During the course of trial, the plaintiff examined himself as P.W.1. He has marked Ext.A1 to Ext.A10. On the side of the defendants, the second defendant Subramani examined himself as D.W.1 and also examined one Kalaiyarasan on his side as D.W.2. On the side of the defendants, no documents were marked. The Advocate Commissioner's report and plan were received as Ext.C1 and Ext.C2. Through the official witnesses, Ext.X1 to Ext.X3 came to be marked, which are the adangal, chitta and FMB.

8. On the basis of the oral and documentary evidence let in by the parties, the learned District Munsif came to a conclusion that the ridge separating the plaintiff and defendants' property exists. Since the plaintiff had not proved exclusive right over the property, the learned Judge dismissed



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the suit for declaration of title, however, in order to protect the interest of both parties, he made it clear that the defendants cannot take advantage of the decree and obliterate the ridge.

9. Feeling aggrieved by the judgment and decree of the trial Court, a regular appeal was presented by the plaintiff before the Subordinate Court, Mettur. This appeal was taken on file in A.S.No.3 of 2012. Vide judgment and decree dated 29.11.2012, the learned Appellate Judge came to the conclusion that as the defendants have not proved their right and interest over the property and have not substantiated their claim, the suit presented by the plaintiff deserves to be decreed, and allowed the appeal. He cast the burden of proof on the defendants to prove the case of the plaintiff and held that since the defendants have not discharged that burden, the plaintiff is entitled to a decree.

10. Against the said reversal, the present second appeal has been presented before this Court by the defendants. The second appeal was admitted on 30.01.2019 on the following substantial question of law :

"Whether the lower Appellate Court is correct in law in



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overlooking the admission of the plaintiff that ridge/bund is situate south of his lands and that the same has been used by the public for a very long time while reversing the well considered judgment and decree of the District Munsif, Mettur in O.S.No.68 of 2002?"

11. Notice was ordered in the second appeal. The appellants and respondents have entered appearance through their respective counsel. I heard Mr.M.R.Jothimanian for appellants and Ms.Saraswathi Muthiah for respondent.

12. I have to remind myself that in a suit for declaration of title and injunction, it is the duty of the plaintiff to prove that he or she, as the case may be, is the owner of the property over which a declaration was sought for. The fact that the defendant did not prove his/her case does not mean that the plaintiff is entitled to a decree. Even in an extreme case where the defendant has remained exparte, the plaintiff is not automatically entitled to a decree. The plaintiff would have to substantiate his/her case to the satisfaction of the Court that the decree should enure in his/her favour. These are the fundamental principles of civil law, that the burden of proof is always on the



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plaintiff, and for the onus to shift on the defendant, there must be some evidence on behalf of the plaintiff to show that the property belongs to him.

13. I have to enter another finding with respect to bund itself. The defendants had taken a plea that there is no bund in the property. However, when an Advocate Commissioner was appointed in the suit, he found that there exists a ridge/bund, which segregates the property of the plaintiff and the defendants, whose breadth is 4.3 feet and length is 100 feet. This length of 100 feet includes 60 feet of the property, which is the length of the plaintiff's property.

14. With respect to the report of the Advocate Commissioner, neither the plaintiff, and more importantly, nor the defendants who denied the existence of bund, had filed any objection. In terms of Order XXVI Rule 10 of the Code of Civil Procedure, the report of the Advocate Commissioner can be read as evidence in the suit. Such reading is subject to any objections being filed by any of the parties or subject to the examination of the Advocate Commissioner himself in the witness box. As stated above, neither the plaintiff nor the defendants filed any objections, nor have the



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parties summoned the learned Advocate Commissioner to the witness box to cross-examine him on his report. Therefore, the conclusion I have to arrive at is that the plea of the defendant that there did not exist a bund is a false one. However, as per the report of the Advocate Commissioner, there exists a bund and that being the finding given by an appropriate authority appointed by the Court, I have to necessarily confirm the said finding.

15. Now turning to the position as to whether the plaintiff has proved his title to 'B' schedule pathway, I put it to Mrs.Saraswathi Muthiah, as to the evidence the plaintiff has tendered before the Trial Court in order to substantiate his plea. In addition I made an earnest effort to find out whether 'B' schedule mentioned property vests with her client. Neither the plaintiff nor her counsel or am I able to find any evidence in order to substantiate the claim of the plaintiff that he is the owner of the 'B' schedule mentioned property. The lower Appellate Court also does not come to a positive conclusion that the plaintiff has proved his title to the property and it has decreed the suit only because the defendants had not let in any evidence. Such decree in my view is perverse. Perversity is a principle in law, whereby if the Court comes to a conclusion on the basis of misappreciation



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of evidence or wrong application of law, it is susceptible for interference by this Court in exercise of power under Section 100 of CPC.

16. During the course of evidence, the plaintiff has specifically stated that the ridge is situated on the southern end of his property. As previously held by me, the bund though was denied by the defendants, the same has been found to exist by the Advocate Commissioner, and I have also confirmed the said finding. The defendants had claimed that the property exclusively belonged to them but they are not in a position to prove the same. For the default of the defendants, I am not inclined to sustain the decree granted in favour of the plaintiff. There be no positive evidence on the side of the plaintiffs to substantiate the claim made by him, I am constrained to interfere and set aside the decree of declaration of title and injunction granted by the lower Appellate Court in favour of the plaintiff.

17. I cannot be insensitive to the fact that there is some record to show that the public are using the ridge for the purpose of traversing through and over to their property. Mrs.Saraswathi Muthiah would plea that if the second appeal is allowed and the suit is dismissed, the defendants/appellants will



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take advantage of the same and obliterate the ridge which is there in existence for several decades.

18. In fact as I have pointed out, the lis itself has been pending for four decades. Therefore, while I am not in a position to sustain the decree of the lower Appellate Court with respect to declaration of title, I am in a position to grant a relief of permanent injunction restraining the defendants not to obliterate the ridge. This permanent injunction does not mean that the defendants will not be in a position to use the same. It is clarified that the injunction is granted only with respect to any activities of defendants which might tend to remove the ridge on the field as found in Ext.C2. In terms of Order VII Rule 7 CPC, where larger relief is sought for by the plaintiff and the Court finds that the plaintiff is entitled for a lesser relief, then the decree can be appropriately modified to that effect.

19. In the result, this second appeal is partly allowed and the judgment and decree of the learned Subordinate Judge, Mettur in A.S.No.3 of 2012 dated 29.11.2013 is set aside. The suit is dismissed insofar as plaint prayer 'A' is concerned. The suit is decreed to a limited extent insofar as prayer 'B'



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is concerned. In other words, there shall be a relief of permanent injunction against the defendants, their men, agents and subordinates from interfering with the plaintiff's right to usage of ridge or obliterating thereof. The plan of the Advocate Commissioner filed as Ext.C2 shall form part of the decree.

20. The parties being neighbours, I am not inclined to impose costs. Hence, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

12.06.2024

Index:Yes/No
Speaking order / Non-speaking order
ds

To:

- 1.The Subordinate Judge
Mettur.
- 2.The District Munsif
Mettur.
- 3.The Section Officer,
VR Section, High Court, Chennai.



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V.LAKSHMINARAYANAN,J.

ds

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