

Basheer Unnissa Begum And Syed Mohammed Rowther vs T. Sundaram (Deceased), T. Sankaran, S. Rani, S. Jocklin Mary, S. James Paulraj (Minor) And S. Prabhu Rajan (Minor) on 25/6/2002

JUDGMENT

A. Ramamurthi, J.

1. The unsuccessful defendants in the courts below are the appellants.

2. The case in brief is as follows:- The plaintiff filed a suit for declaration of title to 'B' schedule property and also for recovery of possession after removal of the construction put up in the property and for permanent injunction restraining the 1st defendant from putting up any further construction and with a claim of future damages. 'A' schedule property originally belonged to one Chinnathai Ammal, maternal grand mother of the plaintiff and she had settled the same in favour of the plaintiff and his mother Gunabushanammal. Subsequent to the settlement, they were in possession of A schedule property. The plaintiff's mother died and thereafter, the plaintiff became absolutely entitled to A schedule property. The 1st defendant had purchased the property west of 'A' schedule property. In spite of the objection raised by the plaintiff, the 1st defendant had trespassed upon a portion of A schedule property on the western side and put up construction and the trespassed portion is shown as 'B' schedule property. The defendants have no right in B schedule property and hence the suit.

The defendants resisted the suit stating that B schedule property does not belong to the plaintiff and the plaintiff and his mother were entitled only 2380 sq. ft. The 1st defendant had purchased a vacant site measuring 45' x 35' just north of the plaintiff's property from one Sakkubai and Shanmugam and constructed a shed as early as 1975 and the plaintiff did not object the same. The 1st defendant had not trespassed in the property belonging to the plaintiff. Separate patta has been issued to the 1st defendant and her property has been subdivided as T.S.102/2. Sankaran, brother of the plaintiff is entitled to the property as a co-owner and the suit is also bad for non-joinder of necessary parties and it is also barred by time.

The trial court framed 9 issues and on behalf of the plaintiff, P.Ws.1 to 3 were examined and Exs.A-1 to A-41 were marked and on the side of the defendants, D.Ws.1 to 3 were examined and Exs.B-1 to B-18 were marked. The trial court decreed the suit in favour of the plaintiff and aggrieved against this, defendants 1 and 2 preferred A.S.No.159 of 1981 on the file of VI Additional Judge, City Civil Court, Madras and the learned Judge, after hearing the parties, partly allowed the appeal and confirmed the title of the plaintiff relating to the suit property, but remanded only for the purpose of ascertaining the monetary compensation payable to the plaintiff instead of directing delivery of possession after removal of the superstructure. Both sides were given liberty to adduce evidence. Aggrieved against this judgment and decree, defendants 1 and 2 preferred second appeal before this Court and aggrieved against the order of remand, the plaintiff preferred C.M.A.No.396 of 1982 on the file of this Court. Pending the appeals, the plaintiff died and his legal representatives were brought on record.

3. The second appeal was admitted on 19.11.1982 on the following substantial question of law:

Whether the lower appellate court committed material error in misconstruing Exs.C-1 and C-2 on the question of alleged trespass on the suit 'B' schedule property by the defendants 1 and 2 (appellants herein) ?

4. The second appeal as well as Civil miscellaneous appeal were heard together earlier by this Court and on 19.09.1991, the second appeal was allowed

with costs and the judgments and decrees of the courts below were set aside and the suit was dismissed and the civil miscellaneous appeal was also allowed for statistical purpose and the order of remand made by the learned VI Additional Judge, City Civil Court, Madras was set aside. Aggrieved by these orders, the legal representatives of the deceased plaintiff preferred Civil Appeal Nos.1625 and 1626 of 1992 on the file of Apex Court and the Court passed an order on 26.07.2001 as follows:-

"This Court on number of occasions have held that the High Court while entertaining a second appeal is required to formulate substantial question of law and that the High Court does not acquire jurisdiction to decide the appeal on merits unless substantial question of law is so formulated. In this case what we find is that the High Court without formulating any substantial question of law, has decided the appeal. We also do not find any recital of any substantial question of law in the judgment. It is only on this short question, the judgment under appeal deserve to be set aside. We, accordingly, set aside the judgment under challenge. The case is remanded to the High Court to decide the appeal strictly in conformity with the provisions of Section 100 of the Code of Civil Procedure.

The appeals are allowed. There shall be no order as to costs".

5. Heard the learned counsel for the parties.

6. 'A' schedule property was settled on the plaintiff and his mother Gunabooshanammal @ Gunammal by his maternal grandmother Chinnathai Ammal under a registered settlement deed, Ex.A-1 dated 20.02.1950. The plaintiff as well as his mother filed another suit in O.S. No. 1801 of 1963 on the file of City Civil Court, Madras, against Pavalakodi, plaintiff's maternal aunt, when she trespassed into the property. The suit was decreed on 31.07.1965 and Ex.A-2 is the copy of the judgment. Pavalakodi preferred A.S.No.302 of 1965 and it was dismissed as per Ex.A-3. The plaintiff is said to have executed the decree and took delivery of the property on 27.06.1968 and Ex.A-31 is the delivery receipt. The plaintiff's mother died in 1972 and he became the absolute owner. The 1st defendant appears to have purchased the land on the west with building. During March 1977, the plaintiff noticed that the husband of the 1st defendant had collected building materials on the western side of A schedule property and they carried on construction in spite of the objections. The 1st defendant had encroached upon a portion measuring 45' x 35' on the western side of A schedule property, which is described as B schedule property and that is the subject matter of dispute between the parties.

7. The defendants / appellants in the second appeal, on the other hand, contended that the property given to the plaintiff under Ex.A-1 had specific measurements on all sides with a total area of more than 2380 sq. ft. However, the earlier suit filed by the plaintiff in O.S. No.1801 of 1963 was only for an extent of 2380 sq. ft. and in execution of the decree, the plaintiff also took possession only such an extent. As such, the plaintiff is not entitled to claim more than that. The 1st defendant had purchased vacant site measuring 45' x 35' from Sakkubai and Shanmugam under Ex.B-3 dated 25.06.1975 for a sum of Rs.10,000/= and constructed a shed in 1975 measuring 600 sq. ft. and leased out to one Senthil Kumar under a lease deed dated 31.10.1975. The plaintiff never objected to the construction of the shed. The vendors of the 1st defendant had purchased a larger extent including the extent of 45' x 35' sold to the 1st defendant from one Narayanan, who in turn purchased from Pavalakodi and her minor children under a sale deed dated 21.08.1957 (Ex.A-34). The said Pavalakodi had purchased it from her mother Chinnathai Ammal under a sale deed dated 22.06.1953 (Ex.A-32). The 1st defendant had not trespassed to any property belonging to the plaintiff and the surveyor measured the land and issued patta as T.S.102/2. The 1st defendant and her predecessors-in-title have perfected title by adverse possession also.

8. The learned Senior Counsel for the appellants / defendants mainly contended that the lower appellate court erred in holding that B schedule property form part of the property settled on the plaintiff under Ex.A-1 without considering the material points. It also erred in assuming that the respondents claim only 2380 sq. ft. as per Ex.A-1 and the claim has been admitted by the defendants, without considering the main facts that the respondents under the guise of claiming title to 2380 sq. ft. has claimed title to 4300 sq. ft. as per the plaint plan. It also failed to note that Exs.A-1, A-31, C-1 and C-2 all refer to only 2380 sq. ft. Even in the plaint, the plaintiff claims only 2380 sq. ft., whereas now the decree is granted for 4300 sq. ft. Ex.A-1 does not prove title to the plaintiff to an extent of 4300 sq. ft. It is also not the case of the respondents that the measurements given under Ex.A-1 are wrong and the boundaries alone should prevail. The 1st appellate court also failed to note that the measurements in Ex.A-1 and the actual measurements on land as taken by the Advocate Commissioner tally on all sides except on the western side. P.W.1 himself admitted that on the western side he has claimed only 36 feet leaving the balance of Pavalakodi. The absence of Lucy Peter's house in Exs.A-1 and A-31 as one of the northern boundaries would show that B schedule property is not included under Ex.A-1. The boundary description in Exs.B-1 and B-2 probabilises the case of the appellants. The defendants and their predecessors-in-title have perfected title by adverse possession.

9. The plaintiff having come forward with a specific case seeking the relief of declaration and recovery of possession relating to B schedule property, should positively establish that B schedule property is part of A schedule property and he has got title to the same. No doubt, the appellants/defendants have admitted the title to the plaintiff over the property only to an extent of 2380 sq. ft. and not 4300 sq. ft. Only in the plaint plan, the total extent of A schedule property is given as 4300 sq. ft., which includes B schedule property. There is also no pleading in the plaint to prove that the measurements and total area given under Ex.A-1 are not correct and, as such, the boundaries alone will prevail. A perusal of Ex.A-1 clearly indicates that four boundaries are specifically given with exact measurements on all sides and the total extent is given only as 2380 sq. ft. In fact, the Commissioner had also measured the property with the help of the documents and came to the conclusion that the boundary description tallied on three sides except on the western side. Unfortunately, both the courts below relied upon the documents filed on the side of the appellants/defendants and picked holes only to grant a decree in favour of the plaintiff for a larger extent. Samiyar land is said to be the land situated on the western side of Ex.A-1. According to the plaint sketch, 'A' schedule property measures 20 feet north-south on the east, 133 feet east-west on the south, 36 feet north-south on the west, 60 feet, 10 feet and 45 feet east-west on the north. As per the plan, the northern boundary is not in a straight line. After running to a length of 60 feet east-west from Velacherry Road, the boundary runs diagonally from south-east to north-west to a length of 10 feet and then again from east to west to a length of 45 feet.

10. The lower appellate court also referred to the description of property under Ex.A-1 and observed that since Samiyar land as well as the vacant land of the settlor have been described as western boundary, it is clear that the land extending upon the land of the Arch Bishop was settled on the plaintiff and his mother. The entire approach by the first appellate court is not proper and correct. The description of the property as seen from Ex.A-31 reads as follows:

"A piece of vacant land together with a thatched shed bearing qt present Municipal Corporation No.95, Velachery Road, Guindy, Madras, bounded on the North by the land belonging to Ambrose Ammal. On the South by Velachery Road, and on the East by a land in part by the house of Layodiammal and on the West by premises No.94, belonging to Devadoss and the premises belonging to Pavalakodi now in the possession of Ramanujam and Narayanan, measuring 2380 sq. ft...."

It is not in dispute that plaint A schedule property is situate on the west

of Velacherry Road. There is nothing on record to show that the settlor had retained any land in between the Samiyar's land and the land settled as per Ex.A-1. There is absolutely no evidence on the side of the plaintiff to support his case that he is the owner of B schedule property. If the measurements given under Ex.A-1 are correct, the total extent must be around 2240 sq. ft., which is less than the extent mentioned in the document. If that be so, it is not known how the plaintiff can lay a claim for 4300 sq. ft. Based on the measurements, the Commissioner appointed by the trial court measured the suit property as well as the adjacent properties with the help of a Surveyor and submitted report and plan. The Commissioner has washed in blue colour the land belonging to the plaintiff under Ex.C-2. The measurements are also given. When the measurements of three sides tally with the measurements in the document and the points are fixed with reference to undisputed portions, there cannot be any doubt that the western boundary of the plaintiff's property is that fixed by the Commissioner. The Commissioner had also indicated that the plaintiff had encroached a portion of the Government land on the road side. Excluding the encroached portion of the road side, the plaintiff is having around 2000 sq. ft. in his enjoyment in the blue marked portion. Simply because the plaintiff is having only a lesser extent than what is found in the document, it cannot be presumed or concluded that B schedule property also should belong to him. Further more, there cannot be any presumption under law that the appellants / defendants had trespassed into B schedule property. The measurements tally almost with those given in Ex.A-36, in which the 1st defendant claims to have purchased the property. The Commissioner was in possession of Exs.A-1 and A-32 to A-36 at the time when he took measurements. In fact, the Commissioner had not been examined in the case by the plaintiff to disprove the contents in the report or in the plan.

11. It is the specific case of the plaintiff that the house and the site, which were on the south of Ex.A-1 had been sold under Ex.A-40 as early as 14.01.1948 by the settlor and her grandsons, namely, Prakasam and Devadoss. If that be so, there was no reason why the settlor should still describe the property as her own in 1950 under Ex.A-1. There is no reasonable explanation on the part of the plaintiff in this regard. Two properties were described to be situated on the west, one belonging to Samiyar and another belonging to the settlor. There is absolutely no record to show that settlor had retained any property at that time. The reference to the Samiyar site is made only for the purpose of identification. There is absolutely no reason as to why specific measurements given under Ex.A-1 should be ignored and a larger property should be declared in his favour. Unfortunately, the courts below relied on a proposition that boundaries will prevail over the extent and this has been wrongly applied to this case. Only if the boundaries are unambiguous, it can be applied. When specific measurements are given in the property conveyed and followed by the subsequent documents without any modification, there is no warrant for applying the Rule blindly.

12. P.W.3 claimed that he knew the plaintiff and his mother and according to him, the property of Samiyar as well as the property of Chinnathai Ammal were situated on the western side. Even assuming that the 1st defendant had failed to prove her title to B schedule property, that will not help the plaintiff to get a decree. The learned counsel for the respondents in the appeal also contended that there is a concurrent finding of the courts below and it cannot be lightly interfered with in the second appeal.

13. The substantial question of law raised is that the first appellate court committed material error in misconstruing Exs.C-1 and C-2 on the question of alleged trespass on B schedule property by the appellants. It is not a case of reappraisal of evidence. When the plaintiff himself has not come forward with any pleading that the total extent has been given wrongly in Ex.A-1 as well as other documents, the finding given by the courts below is only in the nature of a special pleading. As adverted to, when the boundaries on three side tally and the Commissioner had also measured the property with the help of a qualified Surveyor based upon the documents of the parties, I am of the view that the

plaintiff had miserably failed to establish that B schedule property forms part of A schedule property. Further more, the appellants/defendants have put up construction as early as 1975 and the plaintiff was not taking any serious steps to prevent the same. It is only under such circumstance, the first appellate court instead of granting the relief of mandatory injunction, remanded the matter to the trial court for the purpose of ascertaining the monetary compensation payable to the plaintiff. Now, aggrieved against the remand order, the plaintiff has come forward with the appeal.

14. The learned senior counsel for the appellants/ defendants stated that the courts below ignored the documents of title filed by the parties and gave a special pleading in favour of the respondent/plaintiff and, as such, the finding is a perverse one and hence, interference is called for. Similarly, the decree in the earlier suit obtained by the plaintiff followed by delivery of possession was only for 2380 sq. ft. When the courts below failed to consider material evidence and placed reliance upon irrelevant matters, it has to be necessarily interfered with.

15. The learned senior counsel for the appellants/defendants also placed reliance upon the decision reported in Thakar Das ..vs.. Mir Zamin (AIR 1931 Lahore 349) for the following principle:

"Where in the sale deed in respect of certain land the length as well as breadth is clearly stated, and the legitimate inference to be derived from the way in which the area is described and worded is that the parties were not left in any doubt as to the measurements, the area of the land sold must be presumed to have been agreed upon between the parties, and it is not necessary to discuss the question of boundaries".

This principle is applicable to the case on hand.

16. The learned counsel for the respondents relied on Hari Singh ..vs.. Kanhaiya Lal that mere lack of details in pleading

cannot be reason to set aside concurrent findings of facts. There is no dispute about this principle, but it has no application to the case on hand.

17. Reliance is also placed on Hamida and others ..vs.. Md. Khalil that where first appellate court has reached findings of fact based on evidence on record, held, High Court in second appeal would not be justified in taking a different view merely on basis of reappreciation of such evidence, without framing a substantial question of law.

This decision is not applicable to the case on hand.

18. Reliance is placed on Pakeerappa Rai ..vs.. Seethamma Hengsu , wherein it was held that under section 100 of Civil Procedure Code, in a second appeal, when there is erroneous finding of fact, even if grave in nature, it could not be interfered with in second appeal. There is no dispute about this principle, but it has no application to the case on hand.

19. Reliance is also placed on Veerayee Ammal ..vs.. Seenii Ammal that High Court in second appeal on appreciation of

evidence cannot take a different view and assume jurisdiction by terming issue as substantial question of law. This decision is also not applicable to the case on hand.

20. It is, therefore, clear from the aforesaid decisions and discussion that although there is a concurrent finding, there are enough material for this Court to interfere with in the second appeal. As adverted to, the courts below have failed to consider the description of property as well as the extent given in

the documents. Further more, the report and plan filed by the Commissioner also tally with the three boundaries description referred to under Ex.A-1. When the plaintiff himself has not come forward with any plea in the plaint ignoring the measurements given under Ex.A-1 and took a stand that boundaries alone will prevail, it is not open to the courts below to ignore the measurements given in the documents and grant a decree in favour of the plaintiff for 4300 sq. ft. It is settled position of law, when the courts below failed to rely upon material evidence and documents and gave its own reasons without any material, the finding will be a perverse one, calling for interference by this Court. Hence, I am of the view, an interference is called for in the second appeal and, as such, the judgments and decrees of the courts below are liable to be set aside. So far as the Civil Miscellaneous Appeal is concerned, aggrieved against the order made by the first appellate court, the plaintiff has come forward with the appeal. When the suit filed by the plaintiff itself is to be dismissed as the plaintiff had failed to establish title to B schedule property, no relief of mandatory injunction can be granted and, as such, the order of remand also has to be consequently set aside.

21. For the reasons stated above, the Second Appeal is allowed, and the judgments and decrees of the courts below are set aside and the suit is dismissed. Consequently, the Civil Miscellaneous Appeal is allowed for statistical purposes and the order of remand made by the first appellate court is set aside for the reasons stated supra. However, there will be no order as to costs.