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(2009) 10 MAD CK 0134

Madras High Court

Case No: Second Appeal No. 1157 of 1995

Ramasamy Gounder, Shanmugasundaram, Arul Selvam (died) and Madhakkal (Mother of Arul Selvam)	APPELLANT
Vs	
Oomathurai Gounder, Muthusamy, Subbammal and Rajendran	RESPONDENT

Date of Decision: Oct. 27, 2009

Acts Referred:

- Evidence Act, 1872 - Section 83

Citation: (2009) 10 MAD CK 0134

Hon'ble Judges: M. Jeyapaul, J

Bench: Single Bench

Advocate: T.M. Hariharan, for the Appellant; No appearance, for the Respondent

Final Decision: Dismissed

Judgement

M. Jeyapaul, J.
The appellants here filed a suit in O.S. No. 2400 of 1987 as against the respondents herein praying for a declaration that item 2 in schedule A measuring 1 cent should the kept in tact without any cultivation and for consequential relief of permanent injunction. The appellants also sought for mandatory injunction for removing the heap of stones in item 2 under schedule A by the respondents.

2. The respondents filed a suit as against the appellants in O.S. No. 1102 of 1987 praying for an order of injunction restraining the appellants herein from making an attempt to use the passage and also for declaration that the respondents are the owners of "kodikkal"

described in item 2 in the said suit and also for permanent injunction restraining the appellants from causing damage or from interfering with the use of the said "kodikkal" by the respondents.

3. By a common judgment, the Trial Court declared the title of the respondents with respect to the second item and granted consequential injunction in O.S. No. 1102 of 1987 but, dismissed the prayer of the respondents for permanent injunction as against the appellants with respect to the first item of the suit property in O.S. No. 1102 of 1987. The Trial Court chose to decree the suit filed by the appellants in O.S. No. 2400 of 1987 as prayed for.

4. Aggrieved by the common judgment passed by the Trial Court, the appellants preferred Appeal Suit in A.S. No. 85 of 1992 as against the judgment pronounced by the Trial Court in O.S. No. 1102 OF 1987 and Appeal Suit in A.S. No. 201 of 1992 as against the judgment pronounced by the Trial Court in O.S. No. 2400 of 1987. Both the appeals stood dismissed by the first appellate court. Hence, these second appeals before this Court at the instance of the appellants herein.

5. It is found that the prayers sought for by the appellants in O.S. No. 2400 of 1987 were granted by the Trial Court. No appeal was preferred by the respondents as against the judgment went in favour of the appellants in O.S. No. 2400 of 1987 or the dismissal of the prayer for permanent injunction sought for by the respondents with respect to the first item of the suit property in O.S. No. 1102 of 1987. Now, the entire dispute revolves around only the water course (kodikkal).

6. The appellants have contended in their pleadings that the water course was put up by them in the year 1951 in their lands in order to drain water to the Government pond lying on the east of the properties of the rival parties. The respondents have contended in their pleadings that the water course lies within their property and they have been enjoying the same for the past 35 years.

7. On the side of the respondents in both the suits, the fourth respondent was examined as PW1, the first respondent was examined as PW2, the second respondent was examined as PW3 and one Subbian a neighbouring land owner was examined as PW4. The respondents have marked seven documents on their side. On the side of the appellants, the first appellant was examined as DW1 and a neighbouring land owner was examined as DW2 and on their side fourteen documents were marked. The advocate commissioner"s report was marked as Ex.C1 and the plan submitted by him was marked as Ex.C2.

8. Both the courts below, having fully relied upon the report of the advocate commissioner in the background of the rough sketch filed by him, in the absence of any indication as to the ownership of the water course in the sale deeds Exs.A1 to A3 marked on the side of the respondents and the sale deed Ex.B1 marked on the side of the appellants, rendered

a finding that the water course lies only within the property of the respondents and therefore, the respondents are entitled to declaration of title and also for permanent injunction.

9. At the time of admission of these appeals, the following substantial question of law was framed:

Whether the judgments of the courts below are vitiated by their failure to consider the entire evidence on record and apply the correct principles of law?

10. There is no representation on the side of respondents 1, 2 and 4 in S.A. No. 1157 of 1995 and respondents 1 to 3 in S.A. No. 1249 of 1995. The third respondent Subbammal who was served with notice in respect of S.A. No. 1157 of 1995 remained absent inspite of notice served on her.

11. Learned Counsel appearing for the appellants would vehemently contend that the courts below simply relied upon the report of the advocate commissioner and plan filed by him and declared the title of the respondents with respect to the water course in dispute. It is his submission that the documents of title viz., Exs.A1 to A3 do not refer to the water course in the property purchased by the respondents. Though the respondents have contended that they purchased the water course under the documents of title, they could not establish the same before the court. It is his further submission that the lie of the land would establish that the water course has been used by the appellants to drain their water to the Government pond lying on the east of the properties of the rival parties. The courts below have lost sight of the fact that the advocate commissioner, even without the assistance of any qualified surveyor, filed only a rough sketch which cannot be taken as a gospel truth to establish the title to the water course in dispute. Therefore, he would submit that the judgments of the Trial Court as well as the first appellate court declaring the title of the respondents with respect to the water course in dispute will have to be set aside.

12. The respondents have contended in the plaint pleadings that the water course has been in existence for the last about 35 years. They purchased the properties including the water course. PW1 in his evidence has deposed that the water course is very much running in his property and the same has been in existence for the past 40 years. The water course also has been maintained all along only by them. It is his further testimony that the property was purchased inclusive of water course by the respondents. PW2, on his part, also would testify that even at the time when the properties were purchased under Exs.A1 to A3, the water course was in existence. There was no water course within the property of the appellants. PW3 also would depose that the water course has been in existence for the past 35 years only in their property. The appellants have their property only in the south of the water course. Therefore, the appellants have no right over the water course, he would depose. PW4 a neighbour would also state that the water course is running very much within the property of the appellants.

13. An Advocate Commissioner was appointed by the Trial Court. The Advocate Commissioner filed his report Ex.C1 and rough sketch Ex.C2. Even at the outset, the advocate commissioner would state that the rough sketch was not prepared according to the exact measurement. The advocate commissioner has noted down the physical features and has submitted a report backed by the rough plan. The water course marked as "ABCD" has got stone revetment. It is found to be a well laid water course. Of course, the advocate commissioner has noted that the portion marked as "XY" was found to be tampered with. Only in respect of measurement, in the absence of any assistance from the Surveyor, we can construe that the plan would not reflect the real measurement of the property. But, we can safely rely upon the sketch filed by the advocate commissioner to decide the lie of the property. It is found that the property of the appellants lies on the south of the marks "FX". The mark "FX" runs parallel to the marks "AB" running on the east of the marks "FX". Both the courts below, having factually analysed the marking found in the rough sketch filed by the advocate commissioner, found that the property lying on the north of "FXBA" should have been owned by the respondents. It is true, as contended by the learned Counsel appearing for the appellants, that neither the sale deeds Exs.A1 to A3 marked on the side of the respondents nor the sale deed Ex.B1 marked on the side of the appellants did disclose the lie of the water course. Therefore, the court will have to bank only the oral evidence let in by the parties and the physical features noted down by the advocate commissioner in the sketch filed by him.

14. The appellants also claim exclusive right over the water course. The lie of the land noted down by the advocate commissioner would indicate that the water course lies only within the property of the respondents and not in the property of the appellants inasmuch as the straight line marked as "FXBA" should have been the boundary line demarcating the property of the appellants and the respondents.

15. When the water course lies very much within the property of the respondents, there is no necessity for the vendors to specifically refer to the water course lying within the property.

16. The learned Counsel appearing for the appellants cited a decision reported in Gurunath Manohar Pavaskar and Others Vs. Nagesh Siddappa Navalgund and Others, wherein it has been held has follows:

9. The High Court although took into consideration the fact that the plaintiffs did not seek for any declaration of title, as noticed hereinbefore, opined that the question of title can be gone into in an appropriate suit. All the courts relied on Ext.P-35 which was allegedly produced by the appellants but were made use of by the respondents, wherein it had been shown that Chalta No. 63 was allotted in respect of CTS No. 4823/A-1, Chalta No. 62-A was allotted in respect of CTS No. 4823/A-17 and Chalta No. 62-B was allotted in respect of CTS No. 4823/A-18.

10. It is one thing to say that there does not exist any ambiguity as regards description of the suit land in the plaint with reference to the boundaries as mentioned therein, but it is another thing to say that the land in suit belongs to the respondents. It was for the plaintiffs to prove that the land in suit formed part of CTS Nos. 4823/A-17 and 4823/A-18. It was not for the defendants to do so. It was, therefore, not necessary for them to file an application for appointment of a Commissioner nor was it necessary for them to adduce any independent evidence to establish that the report of the Advocate Commissioner was not correct. The suit could not have been, therefore, decreed inter alia on the basis of Ext.P-35 alone. In a case of this nature, even Section 83 of the Evidence Act would not have any application.

17. That was a case where the document of title relating to the property in dispute was not produced by the plaintiff who sought for mandatory injunction and also prohibitory injunction. Just by producing a certified map, an attempt was made by the plaintiff therein to establish the title to the property with a view to get an order of permanent injunction and prohibitory injunction. In such a context, the Supreme Court observed that there was no necessity for the defendants, when the title to the suit property was not established by the plaintiffs, to go in for appointment of a commissioner or to attack the report of the advocate commissioner or to let in independent evidence.

18. In the instant case, the respondents have produced, in all fairness, the documents under which they claim their right over the water course. Of course, the appellants also produced their document of title before the court. But, none of the documents, unfortunately, referred to the lie of the water course. In the absence of which, the court will have to analyse the oral evidence and the other evidence available on record to determine the preponderance of probabilities to come to a decision as to who actually is the owner of the subject property.

19. It is the consistent case of the respondents that the water course lies only within the property purchased by them under Exs.A1 to A3. The lie of the water course pointed out by the learned advocate commissioner also wound unerringly indicate that the water course lies only within the property of the respondents. Therefore, there is nothing wrong in relying upon the report of the advocate commissioner and the plan produced by him to buttress the oral evidence let in on the side of the respondents.

20. The Trial Court as well as the first appellate court has rightly analysed the evidence available on record and come to a decision that the respondents are entitled to declaration of title and also for permanent injunction with respect to the water course (kodikkal). No other substantial question of law has arisen in the second appeal. The factual finding rendered by the Trial Court as well as by the first appellate court does not warrant interference.

21. In view of the above, both the second appeals stand dismissed. There is no order as to costs.