

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 01.11.2010

CORAM

THE HONOURABLE MR. JUSTICE A. SELVAM
SA(MD)No.280 of 2010 and MP(MD)No.2 of 2010

Uthaman

.. Appellant/Applicant/Plaintiff

Vs.

Sivaprasadam

.. Respondent/Respondent/Defendant

Second Appeal filed under section 100 of CPC against the Judgment and decree dated 29.10.2008 passed in Appeal Suit No.151 of 2007 by the Sub Court, Sivagangai confirming the Judgment and decree dated 07.02.2007 passed in Original Suit No.85 of 2005 by the Principal District Munsif Court, Sivagangai.

For Appellant : Mr.S.Srinivas Raghavan
For Respondent : Mr.S.Natarajan

JUDGMENT

Challenge in this second appeal is to the Judgment and decree passed in Original Suit No.85 of 2005 by the Principal District Munsif Court, Sivagangai and in Appeal Suit No.151 of 2007 by the Sub Court, Sivagangai.

2. The appellant herein as Plaintiff has instituted Original Suit No.85 of 2005 on the file of the trial Court for the relief of permanent injunction, wherein the present respondent has been shown as defendant.

3. It is averred in the plaint that the plaintiff has purchased the suit property under a registered sale deed dated 02.11.2004 and the same is comprised in Survey No.444/24 and patta for the suit survey number stands in the name of the plaintiff in patta No.123. The defendant is having his house on the southern side of the suit property and now the defendant has been making arrangements to disturb the peaceful possession and enjoyment of the plaintiff. Under the said circumstances the present suit has been instituted for the relief sought for in the plaint.

4. In the written statement filed on the side of the defendant it is averred that it is false to say that the plaintiff has purchased the suit Survey No.444/24 under a registered sale deed dated 02.11.2004. Along with the written statement a plan has been annexed with wherein it is stated that the house of the plaintiff is situate in survey No.444/24 and the house of the defendant is situate in Survey No.444/25. In between two houses Survey No.444/25 is situate and the same is nothing but a street. The plaintiff has encroached a portion which has been described as 'abcd' in the plan and the same is nothing but forms part of Survey No.444/25. Under the said circumstances, the suit filed by the plaintiff is liable to be dismissed and the defendant has made a counter claim with regard to the suit 'A' schedule property and the same is nothing but Survey No.444/25 and therefore the counter claim made on the side of the defendant may be decreed.

5. On the basis of the rival pleadings raised on either side the trial Court has framed necessary issues and after analysing both the oral

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and documentary evidence has dismissed the suit and decreed the counter claim as claimed on the side of the defendant. Against the Judgment and decree passed in Original Suit No.85 of 2005, the plaintiff as appellant has preferred Appeal Suit No.151 of 2007 on the file of the first appellate Court.

6. The first appellate Court after hearing both sides and upon reappraising the evidence available on record has dismissed Appeal Suit No.151 of 2007 and thereby confirmed the Judgment and decree passed in Original Suit No.85 of 2005. Against the concurrent Judgments passed by the Courts below the present second appeal has been preferred at the instance of the plaintiff as appellant.

7. As agreed by the learned counsels appearing for both sides, the present second appeal is disposed of on merits at the stage of admission.

8. On the side of the appellant/plaintiff, the following substantial questions of law have been raised for consideration:

(a) Whether the Courts below are justified in their failure to declare title on the basis of the conveyance deed and the established principle of law that possession follows title?

(b) Whether the findings of the Courts below which are rendered without appreciating the evidence on record are sustainable?

(c) Whether the Courts below are justified in finding that the suit property is a pathway without tracing the classification of the property by taking recourse to prior revenue records?

9. The crux of the case of the plaintiff is that the plaintiff has purchased the suit property under a registered sale deed dated 02.11.2004 and the same is comprised in Survey No.444/24 and on the southern side of the suit property the defendant is having his house and now the defendant has been making arrangements to disturb the peaceful possession and enjoyment of the plaintiff and therefore, the present suit has been filed for the relief of permanent injunction.

10. The consistent case of the defendant is that the house of the plaintiff is situate in Survey No.444/24 and the house of the defendant is situate in Survey No.444/26. In between two survey numbers, Survey No.444/25 is situate and the same is nothing but a street and the plaintiff has encroached a portion which has been shown as 'abcd' in the plan annexed with the written statement. Under the said circumstances the suit filed by the plaintiff is liable to be dismissed and the counter claim made on the side of the defendant with regard to 'abcd' portion is liable to be decreed.

11. As stated earlier, the trial Court has dismissed the suit and passed an executable decree in respect of the counter claim made on the side of the defendant. The first appellate Court has also concurred with the decision taken by the trial Court.

12. The learned counsel appearing for the appellant/plaintiff has attacked the concurrent judgments and decrees passed by the Courts below on the following grounds:

(a) The present suit has been instituted for the relief of permanent injunction in respect of Survey No.444/24 and the defendant has made a counter claim with regard to Survey No.444/25 and the same is nothing but a street and since Survey No.444/25 is not the suit property, counter claim cannot be claimed and the Courts below have failed to look into the same.

(b) Even though the plaintiff has preferred Appeal Suit No.151 of 2007 and the present second appeal in respect of the relief sought for in Original Suit No.85 of 2005 and since one suit has been filed, non-filing of an appeal with regard to counter claim would not be a bar to maintain the present second appeal.

13. In order to controvert the argument advanced by the learned counsel appearing for the appellant/plaintiff, the learned counsel appearing for the respondent/defendant has contended that in the property description, the house of the defendant has been shown as southern boundary. The house of the plaintiff is situate in Survey No.444/24. The house of the defendant is situate in Survey No.444/26. In between two survey numbers, Survey No.444/25 is situate and the same is nothing but a street, wherein the plaintiff has made encroachment and the same has been shown as 'abcd' in the plan annexed with written statement. Since Survey No.444/25 has also been included as suit property, the counter claim made on the side of the defendant is legally maintainable and further with regard to decree passed in respect of counter claim no appeal has been preferred and therefore, the same has become final and altogether the present second appeal is not legally maintainable.

14. On the basis of the divergent submissions made by either counsel, the Court has to look into the first contention urged on the side of the appellant/plaintiff.

15. It is an admitted fact that in the body of the plaint it has been clearly stated that the suit property is comprised in Survey No.444/24. Further in the property description it has been shown that the house of the defendant is situate immediately on the southern side of Survey No.444/24. At this juncture, the Court has to look into Ex.A4. Ex.A4 is nothing but a copy of Field Map Plan wherein it has been clearly stated that in between Survey Nos.444/24 and 444/25, Survey No.444/25 is situate. It is also an admitted fact that Survey No.444/25 is a street. Since in the property description of the plaint, the house of the defendant has been shown as southern boundary, it is needless to say that Survey No.444/25 has also been included in the present suit. Therefore, the first contention urged on the side of the appellant/plaintiff is not factually correct and the same cannot be accepted.

16. Now the Court has to look into the second point. The second point is that since a separate decree has been passed by the trial Court in respect of counter claim and since no appeal has been preferred, the present second appeal is not maintainable.

17. The learned counsel appearing for the appellant/plaintiff has drawn the attention of the Court to the decision reported in AIR 1953 SC 419 (*Narhari and others v. Shanker and others*), wherein the Honourable Apex Court has held that "it was not necessary to file two separate appeals in this case. The question of 'res judicata' arose only when there were two suits. As there was one suit and both the decrees were in the same case and based on the same Judgment and the matter decided concerned the entire suit the principle of 'res judicata' did not apply. Further, the High Court ought to have given the appellant benefit of Section 5 of the Limitation Act, as there was conflict of decisions regarding this question."

18. At this juncture, the Court has to look into the provision of Order VIII Rule 6A (2) of the Code of Civil Procedure, 1908 and the same reads as follows:

"Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final Judgment in the same suit, both on the original claim and on the counter-claim."

19. Even a cursory look of the said provision it is made clear that in a suit if a counter-claim is made, the same is nothing but a cross suit.

20. The learned counsel appearing for the respondent/defendant has befittingly drawn the attention of the Court to the following decisions:

(a) In AIR 1993 Supreme Court 1292 (*Premier Buses Limited v. Morela State Road Transport Corporation*), the Honourable Apex Court has held that "where an appeal arising out of connected suit is dismissed on merits the other cannot be heard, and has to be dismissed. When no appeal is filed, as in this case, from the decree in connected suit it has the same effect of non filing of appeal against a Judgment or decree. Thus the finality of finding recorded in the connected suit, due to non filing appeal precludes the Court from proceedings with appeal in other suit."

(b) In AIR 1997 Supreme Court 3760 (*Ram Prakash v. Charan Kaur and another*), the Honourable Apex Court has held that "findings of appellate Court in one suit allowed to become final in absence of appeal."

(c) In 2009 2 SCC 526 (*Harbans Singh and others v. Sehl Hari Singh and others*), the Honourable Apex Court has held that "if there are two suits, an appeal has been preferred against the result of one suit and no appeal has been filed in respect of other suit, decision rendered therein has become final."

21. From the cumulative reading of the decisions mentioned supra and also the provision of Order VIII Rule 6A (2) of the Code of Civil Procedure, 1908 it is made clear to the Court that in the instant case as pointed out earlier, a separate decree has been passed with regard to counter claim made on the side of the defendant. But no appeal has been preferred. Since in the present suit, Survey No.444/25 has also been included as 'suit property' since a counter claim has been made on the side of the defendant with regard to mandatory injunction in respect of Survey No.444/25 and since a decree has been passed to that effect and since the plaintiff has not preferred any appeal with regard to the decree passed in respect of counter claim, it is

needless to say that the present second appeal is not legally maintained. Under the said circumstances the entire contention urged on the side of appellant/plaintiff goes out without merit and the substantial questions law raised on the side of the appellant/plaintiff are not legally sustainable and altogether the present second appeal deserves to be dismissed at the stage of admission.

22. In fine, this second appeal deserves dismissal and accordingly dismissed without cost at the stage of admission. Connected Miscellaneous petition is also dismissed. The Judgment and decree passed in Original S. No.85 of 2005 by the Principal District Munsif Court, Sivagangai, upheld. Appeal Suit No.151 of 2007 by the Sub Court, Sivagangai are confirmed.

Sd/-

Assistant Registrar(Crl. Side)

Sub Assistant Registrar

To

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1. The Subordinate Judge, Sivagangai.
2. The Principal District Munsif, Sivagangai.

+lcc to Mr. Srinivasa Raghavan, Advocate SR.No.43856
+lcc to Mr. S. Natarajan, Advocate SR.No.43946

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