

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.08.2015

CORAM:

THE HON'BLE TMT. JUSTICE PUSHPA SATHYANARAYANA

S.A. No. 679 of 2009

and

M.P. No. 1 of 2009

1.P. Shanmugam

2.S. Dharmaraj

... Appellants/Plaintiffs

Vs.

P. Kathirvel

.... Respondent/Defendant

Appeal under Section 100 of the Civil Procedure Code, against the judgment and decree dated 29.11.2005 passed by the Principal Subordinate Judge, Erode, in A.S. No. 75 of 2005 confirming the judgment and decree passed by the First Additional District Munsif, Erode, in O.S. No. 232 of 2002 on 07.03.2005.

For Appellants : Mr. S. Sounthar
for Mr. S.T.S. Murthi

For Respondent : Mr. N. Manokaran

JUDGMENT

The present appeal is filed by the plaintiffs under Section 100 CPC challenging the concurrent findings of the trial Court, viz., First Additional District Munsif, Erode, in O.S. 232 of 2002 by judgment and decree dated 07.03.2005 and confirmation of the same by the Principal Subordinate Judge, Erode, in A.S. No. 75 of 2005 by judgment and decree dated 29.11.2005, as regards their prayer for permanent injunction restraining the defendants from interfering with their peaceful possession and enjoyment of the suit 'A' Schedule property in any manner.

2. Suit O.S. No. 232 of 2002 had been filed by the plaintiffs for relief of permanent injunction in respect of the suit property

consists of 46 cents, viz., the rocky portion indicated in the Commissioner's sketch appended herein. According to the plaintiffs, the first plaintiff and the other co-sharer, viz., his brother Krishna Ramsamy, divided the suit property under the registered partition deed dated 21.5.2001 in which each of them were allotted 23 cents with definite boundaries. Pursuant to the said partition, the plaintiffs claim to be in absolute possession and enjoyment of this portion as indicated in the sketch. According to the plaintiffs, the defendant attempted to trespass into their property and hence, they were constrained to file a suit for permanent injunction.

3. The defence taken by the defendant was that he purchased 4 Acres of punja land from one Krishna Ramasamy, brother of the first plaintiff, with specific boundaries by sale deed dated 04.3.1983 and that from the date of purchase, he has been in enjoyment of the same. According to the defendants, the suit for bare injunction without seeking relief of declaration of title is not maintainable and sought for dismissal of the same.

4. The trial Court, before which the parties examined themselves and marked documents, on consideration of the materials, including the Commissioner's Report and Sketch marked as Exs. C.1 and C.2 respectively, by judgment and decree dated 07.03.2005, while granting injunction in respect of 'B' Schedule property, dismissed the suit for permanent injunction with respect to suit 'A' Schedule property finding that the plaintiffs have no valid title over the same. The appeal filed by the plaintiffs as against the dismissal of suit in respect of 'A' Schedule property, in A.S. No. 75 of 2005 before the Lower Appellate Court / Principal Subordinate Judge, Erode, also met the same fate. Aggrieved by the same, the plaintiffs filed the instant Second Appeal before this Court in S.A. No. 679 of 2009.

5. The point that arises for determination in this Second Appeal is whether the plaintiffs are entitled to the relief of permanent injunction as sought for in the absence of any valid title over the suit 'A' Schedule property.

6. Heard the learned counsel appearing for the parties and perused the records.

7. From the materials available on record, it is seen that earlier, a preliminary decree was passed in O.S. No. 402 of 1972 as per which the first plaintiff Shanmugham and his brother Krishna

Ramasamy, who is not a party in this proceeding, divided orally entitling themselves to a share in S.F. No. 257/B1 and 258/1, which was assigned Re-survey No. 292. Admittedly, at the time of partition, the total extent of the property was 12.50 Acres. It is not in dispute that after partition, the brothers, leaving 20 cents in common, divided the rest of the property among themselves. Subsequently, the said Krishna Ramasamy sold 4 Acres of the land to the present defendant under Ex. A.4 = B. 13 sale deed dated 04.3.1983, which the defendant claims to be in possession and enjoyment of the same.

8. The fact remains that the suit property was the joint family property of the first plaintiff and his brother Krishna Ramasamy. As such, it is clear that both the first plaintiff and the said Krishna Ramasamy will have equal rights over the same. Since Krishna Ramasamy sold his portion of the property, after partition, with definite boundaries, whatever rights the vendor had in the property, would obviously devolve on the purchaser, viz., the defendant.

9. Admittedly, the rocky portion of 46 Cents of land stated to be existing on the southern side of R.S. No. 292, is the disputed portion and the defendant has denied the title and possession of the plaintiff. In order to come to a concrete conclusion, a Commissioner was appointed before the trial Court who had filed his plan and report as Exs. C.2 and C.1 respectively. The commissioner has stated in his report that the suit property is not a fertile land.

10. A perusal of the records would show that earlier there was a partition between the first plaintiff and his children under Ex.A.1 dated 21.5.2001. The first plaintiff, who has deposed as P.W.1, has admitted in his evidence that his brother Krishna Ramasamy neither purchased the suit property nor was in enjoyment of the same. He has also not stated anywhere as to how he alone obtained the suit rock area of 46 Cents, which is an ancestral property, in a partition between brothers. It is also not the case of the plaintiffs that the other sharer, brother of the first plaintiff, relinquished his share. Though the plaintiffs claim to have been allotted 23 cents each by virtue of the partition deed dated 21.5.2001, it is not disputed that the defendant was not a party to the said partition. In such circumstance, the plaintiffs cannot take the recitals in their favour.

11. Per contra, the defendant has proved that he was in possession of the suit property. In order to prove his case, he also took out an application before the trial court for appointing an Advocate Commissioner to inspect the property along with a Surveyor.

12. From the materials available on record, it is seen that the defendant had purchased the suit property from one Krishna Ramasamy, brother of the first plaintiff under Ex. A.4 = Ex. B.13 based on which he claims to be in possession and enjoyment of the suit property besides claiming title. In this connection, learned counsel appearing for the defendant submitted that the defendant purchased the same in the year 1983 itself and till such time the partition took place in 2000, he was using the same for parking and other purposes as it was a rocky and barren land.

13. Furthermore, it is seen that the suit property was mortgaged in which the first plaintiff had attested as he was a party to that. In the mortgage deed dated 27.02.1990, it has been clearly mentioned that the suit rocky portion is in possession of the defendant. Moreover, it is shown as the boundary to the property of the defendant. Therefore, the plaintiffs cannot defend that it is not known to them.

14. Learned counsel appearing for the plaintiffs contended that the defendant is only a subsequent purchaser while the plaintiffs and their ancestors have been in possession and enjoyment of the suit rocky area and hence, the defendant cannot have any right over the same.

15. The said contention of the learned counsel for the plaintiffs is only to be rejected for the simple reason that if the suit property is claimed to be an ancestral property, obviously, vendor of the defendant Krishna Ramasamy, viz., the brother of the first plaintiff, would have the same right over the same as that of the first plaintiff. Even in the partition, not even a whisper has been made in this regard. As pointed out earlier, since Krishna Ramasamy sold his portion of the property, after partition, with definite boundaries, whatever rights he had in the suit property, would derive on the defendant. Therefore, the above contention fails.

16. Assailing the finding of the Courts below, learned counsel for the plaintiffs also contended that when the defendant never claimed title or right for the suit rock portion, the Courts below ought not to have dismissed the suit for bare injunction.

17. In this regard, it would not be out of place for this Court to make a reference to the judgment of the Hon'ble Supreme Court in Anathula Sudhakar vs. P. Buchi Reddy (Dead) by LRs and Others reported in (2009) 2 L.W. 546 where the general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief, are well settled. The same is extracted below:-

- "11.1. Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.
- 11.2. Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.
- 11.3. Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from the defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of the plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction."

18. In this case, the plaintiff pleading that the defendant is only a trespasser making a wrongful claim without title, has filed a suit for injunction. The defendant in his written statement had given the details of his right or title which raises a serious dispute or cloud over the plaintiffs' title, then it is incumbent upon the plaintiffs to amend the plaint and convert the suit into one for declaration of title.

19. At this juncture, it would also be relevant to point out that the appellants / plaintiffs have not filed any objection to the report and plan of the Commissioner. When there is a cloud cast upon the title of the plaintiffs and in the absence of any evidence to establish possession of the suit property, the plaintiffs / appellants, having established the ownership only over the 23 cents of land, cannot claim relief of injunction without the prayer for declaration of title. Admittedly the suit property is used by the defendant for parking his vehicles. Therefore, the plaintiffs cannot have any exclusive right over the same.

20. Yet another contention raised by the learned counsel appearing for the plaintiffs/appellants is that the plaintiffs claim title to the property under Ex. A.1 and that the boundaries would prevail over the extent. Hence, according to the learned counsel, the suit has to be decreed.

21. In this regard, it is pertinent to point out that the extent of the suit property is admitted by both the parties. It is settled principle that only when there is a dispute regarding the extent, the boundaries would prevail. In this case, it is the admitted case of the plaintiff that the defendant / respondent purchased the suit property from the first plaintiff's brother with specific boundaries. The same is also clearly borne out by the documents. There is no varying extent in the document nor is there any dispute by the plaintiffs to apply the principle that boundaries will prevail over extent. In such circumstance, the contention of the learned counsel for the plaintiffs that the boundaries will prevail over extent will not stand good.

22. The plaintiffs having filed only a suit for permanent injunction, though the title has been denied by the defendant, had not sought for the relief of declaration of title. However, the defendant has categorically established his possession of the suit property and also proved his title to the same. The suit for injunction is not maintainable without a relief of declaration. The Courts below have rightly come to the conclusion that the suit rocky portion is in the enjoyment of the defendant within the boundaries and extent purchased by him. In such circumstance, this Court is of the view that no question of law, much less, substantial question of law would arise for consideration in this appeal.

23. It is a settled principle that scope for interference with concurrent finding of fact while exercising jurisdiction under

Section 100 CPC is very limited. Since the Courts below being the final fact finding authorities, have concurrently held that the plaintiffs are not entitled to the relief sought for, and this being a Second Appeal filed under Sec.100 C.P.C. against the concurrent judgments, no substantial question of law would arise for consideration. There are no error of jurisdiction or law or perversity on the face of the records.

In the result, the Second appeal is dismissed confirming the concurrent finding of the Courts below. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

- 1.The Principal Subordinate Judge
Erode
- 2.The First Additional District Munsif
Erode
- 3.The Record Keeper
V.R. Section
High Court
Madras

+1cc to M/s.N.Manokaran, Advocate, S.R.No.45040

S.A. No. 679 of 2009

UG(CO)
CA(14/10/2015)

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