

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.08.2016

CORAM

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

Second Appeal No.1948 of 2003
and C.M.P.No.17793 of 2003

1. Palaniappa Gounder
2. Sivakumar
3. Raja

..Appellants/Defendants

-Vs-

R.Senkottaian

..Respondent/Plaintiff

Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 23.11.2001 passed by the Subordinate Judge at Bhavani in A.S.No.44 of 2001 concurring with the judgment and decree dated 29.06.2001 of the 2nd Additional District Munsif Bhavani made in O.S.No.419 of 1997.

For Appellants : Mr.R.Swaminathan

For Respondent : Mr.P.M.Duraisamy

J U D G M E N T

The appellants are the defendants in a suit for demarcation of boundary line between the properties at S.Nos.676 and 677 of Anthiyurk Village, Bhavani Taluk; for a direction to the defendants to deliver possession of the property encroached by them in S.No.677 and for costs.

2. The case of the plaintiff is that he purchased the property at S.No.677 on 04.02.1985 with which the defendants have no manner of right and however, they trespassed into the western portion of the said property and obliterated the boundary in between S.No.677 and 676.

3. The defendants contested the suit by stating that they have not encroached in any portion of the plaintiff's property and they have not obliterated the boundary in between S.Nos.676 and 677. They also further pleaded that the plaintiff is not the

owner of the property at S.No.677.

4. Before the trial Court, the plaintiff examined himself as P.W.1 and marked Exs.A1 to A13. The defendants examined D.Ws.1 to D.W.4 on their side and marked Exs.B1 to B10. The Commissioner was appointed by the Court, who in turn, filed Exs.C1 to C4. One more document as Ex.C5 was also filed. The trial Court, after considering the rival pleadings of the parties and the evidence let in by them, decreed the suit by holding that the defendants have encroached upon the plaintiff's land at S.No.677 to an extent of 79 cents. Accordingly, the trial Court, while ordering demarcation of the properties at S.No.676 and 677, also granted a decree for recovery of possession of 79 cents from the defendants. The defendants preferred an appeal before the appellate Court and the Appellate Court, permitted the defendants to mark additional documents under Exs.B11 to B15. However, the Appellate Court dismissed the appeal and confirmed the decree of the trial Court. Hence, the present Second Appeal is filed before this Court. This Court, while admitting the Second Appeal framed the following substantial questions of law.

1. Whether the resurvey records could be the basis for granting the relief of possession in the particular facts of the case?

2. Would the plaintiff, who has not even averred, much less proved any definite misconduct with reference to time, manner etc., on the part of the appellants-defendants that let to the alleged trespass without proof of title and prior possession would be said to have failed to "lay a foundation for this species of relief"?

3. Would not partition as per the record/title of the parties be the nature of decree in case parties allege obliteration of boundary?

4. Would a suit for fixing the boundaries between R.S.Nos.676 and 677 or in short localise the respective properties be maintained, more so without a prayer for the relief of declaration of title and for a further relief of record of possession?

5. Mr.R.Swaminathan, learned counsel appearing for the appellants submitted that when the defendants pleaded adverse possession by denying the title of the plaintiff, without amending the plaint by including the prayer for declaration, the present suit filed as such is not maintainable. In support of

his submission, learned counsel relied on the decision of the Honourable Supreme Court reported in 2006(1) LW 988 (L.C.Hanumanthappa, rep. by its LRs. vs. H.B.Shivakumar).

6. Per contra, learned counsel appearing for the respondent/plaintiff submitted that the facts and circumstances of the above case before the Honourable Supreme Court are totally different and distinguishable one, wherein the parties who were given liberty to amend the plaint after remanding the matter by the appellate Court have not taken steps to amend the plaint and therefore, the Honourable Supreme Court has pointed out that without seeking the relief of declaration, the suit for permanent injunction is not maintainable. The learned counsel, on merits, reiterated the findings rendered by the Courts below.

7. Heard both sides.

8. In this case, the plaintiff claims title to the property at S.No.677 by marking Ex.A1 dated 04.02.1985. Though the defendants have chosen to state in their written statement in one single line that they dispute the title of the plaintiff in S.No.677, they have not chosen to say as to what is their stand in respect of that Survey Number. However, they have chosen to file some documents before the appellate Court in respect of S.No.676. Though the learned counsel for the appellants sought to contend that the defendants have pleaded adverse possession, I do not think any such pleading is available in their written statement. Needless to say the plea of adverse possession, if made, the presumption is that the defendants are accepting the title of the plaintiff and however, they claim their possession as hostile to the plaintiff continuously for more than 12 years. No such plea is made in this written statement. Therefore, I do not think that the learned counsel for the appellants is justified in contending that the defendants having pleaded adverse possession, the plaintiff ought to have sought the relief of declaration by amending the plaint. Therefore, I do not find that the above decision relied on by the learned counsel appearing for the appellants is relevant to the present case. In any event as the plaintiff has come forward with a suit for demarcation of the properties at S.Nos.676 and 677, the question of considering the encroachment would arise only after such demarcation is made. Therefore, the Courts below were not justified in holding that there is an encroachment to an extent of 79 cents, even before the demarcation is completed.

9. Therefore, I find that the judgment and decree of the Courts below can be sustained only in respect of the relief of the demarcation of the properties. After such demarcation, if

it is found that any extent of land is in occupation of the defendants, the plaintiff is at liberty to work out his remedy in the manner known to law to recover such possession. Accordingly, the second appeal is allowed in part by decreeing as follows:

The demarcation of the property at S.Nos.676 and 677 shall be done with the help of the concerned surveyor/ revenue officials. After demarcation of the properties and earmarking the boundaries as per the document of title filed by the plaintiff and the defendants in respect of their respective property, if any encroachment is found to have been made by either of the parties, it is open to either of the parties to work out their remedies as against such encroachment in the manner known to law.

No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

vsi

To

1. The Subordinate Judge, Bhavani
2. The II Additional District Munsif, Bhavani

Copy to:

The Section Officer,
VR Section
High Court, Madras.

- 1 cc to Mr.R.Swaminathan, Advocate, sr.49082
1 cc to M/s.P.M.Duraiswamy, Advocate, sr.48565

Second Appeal No.1948 of 2003

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kra 22.09.2016