



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 24.08.2016

CORAM:

THE HONOURABLE Ms.JUSTICE R.MALA

S.A. (MD) No.639 of 2015

and

M.P. (MD) No.2 of 2015 & C.M.P. (MD) No.5611 of 2016

Selvadurai

... Appellant / Appellant / 5th Defendant

Vs.

1.T.Vijayakumari

2.T.Kanagaraaj

3.Senthini

... Respondents 1 to 3 / Respondents 1 to 3/
Plaintiffs

4.Dhandapani

5.Raju

6.Batchu

7.Mumtaz

... Respondents 4 to 7 / Respondents 4 to 7
Defendants 1 to 4

Prayer: The Second Appeal is filed under Section 100 of C.P.C., against the judgment and decree dated 19.12.2014 in A.S.No.19 of 2013 passed by the Additional District and Sessions Judge, Dindigul, confirming the judgment and decree dated 13.02.2013 in O.S.No.7 of 2008 passed by the Sub Judge, Palani.

For Appellant

: Mr.A.Arumugam for

Mr.P.Athimoolapandian

For Respondents

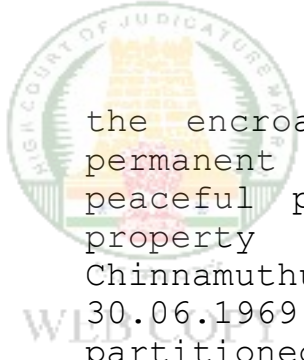
: Mr.G.V.Vairam Santosh for R1 to 3

R4 to R7 dispensed with

JUDGMENT

The Second Appeal is filed against the decree and judgment dated 19.12.2014 in A.S.No.19 of 2013 passed by the learned Additional District and Sessions Judge, Dindigul, confirming the decree and judgment dated 13.02.2013 in O.S.No.7 of 2008 passed by the learned Sub Judge, Palani.

2.The 5th defendant, who lost the legal battle before both the courts, has come forward with this Second Appeal stating that the respondents 1 to 3 has filed the above said suit for declaration of title and also for mandatory injunction to remove

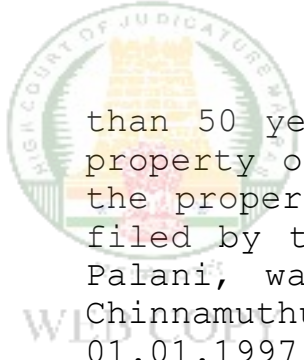


the encroached portion ABCD and EFGH in red colour and also permanent injunction restraining them not to interfere with the peaceful possession and enjoyment of the property. The suit property and other properties originally belonged to one Chinnamuthu Asari acquired by way of registered sale deed dated 30.06.1969. The said Chinnamuthu Asari and his five sons partitioned the properties by way of a partition deed dated 25.09.1974 and Chinnamuthu Asari also executed a Will dated 01.01.1997, allotting item No.2 in Schedule - D property in Survey No.55/3 A to an extent of 10 cents (4368 sq.ft.) out of the total extent of 1 acre 22 cents to his son namely, Thillaimuthu. After the death of the said Chinnamuthu Asari on 18.01.1999 the Will came into effect and hence, the said Thillaimuthu got the Schedule - D property. Thillaimuthu died on 28.07.1999 leaving behind the plaintiffs as his legal heirs namely, T.Vijayakumari (wife), Kanagaraj(son) and Santhini (daughter). However, one Nagarathinam and her family members obstructed the plaintiffs' possession and enjoyment. Therefore, the plaintiffs filed a suit in O.S.No.253 of 2001 before the District Munsif Court, Palani and the suit was decreed in their favour on 11.10.2011. The defendants namely, Thandapani, Raju, Batcha, Mumtaz and A.Selvadurai were in occupation of some portion of promboke land in Dindigul main road on the north of the suit property. Earlier, when the defendants was in occupation of some portion of the suit property, the plaintiffs' father namely, Chinnamuthu Asari filed a suit in O.S.No.808 of 1988 before the District Munsif Court, Palani to evict them. Since the encroachment was subsequently removed, Chinnamuthu Asari did not pursue the suit and hence, it was dismissed.

3.During the year 2004, when the defendants were trying to interfere with the plaintiffs' possession of the suit property, a suit in O.S.No.56 of 2004 was filed before the District Munsif, Dindigul, for declaration and permanent injunction. During the pendency of the said suit, the defendants were evicted from the promboke land by the Government officials and the super structure, which were put up by the defendants, were also removed.

4.In the year 2004, when the defendants trespassed into the suit property and put up two thatched huts with 120 sq.ft., the above said suit i.e., O.S.No.56 of 2004 was filed. However, due to blackmailing by the defendants, the plaintiffs withdrawn the suit with liberty to file a fresh suit for the same cause of auction. The defendants sold the property to the 5th defendant by creating fabricated documents. Hence, the plaintiffs filed the present suit in O.S.No.7 of 2008 for the above said relief.

5.The defendants 1 to 4 were set ex parte and the 5th defendant filed a written statement stating that the suit property and other properties are originally Natham promboke. The defendants 1 to 4 were in occupation of the suit property for more



than 50 years and property tax were assessed in their name. The property of Chinnamuthu Asari is located on the northern side of the property. Earlier, the suit in O.S.No.808 of 1988, which was filed by the Chinnamuthu Asari before the District Munsif Court, Palani, was dismissed for default. After the death of the said Chinnamuthu Asari, the legal heirs created a forged Will dated 01.01.1997 and filed a suit in O.S.No.56 of 2004 for declaration and injunction and after filing a written statement by the defendants, the suit was withdrawn by the legal heirs of the Chinnamuthu Asari. Further, a suit in O.S.No.253 of 2001, which was filed by the plaintiffs, the defendants 1 to 4 are added as parties to the proceedings. As the defendants 1 to 4 were enjoying the suit property for the past 50 years and the tax has been assessed in their name, he prayed for the dismissal of the suit.

6.The Trial Court after framing necessary issues and considering the oral and documentary evidence, decreed the suit. Against which, the an appeal in A.S.No.19 of 2013 has been preferred before the Additional District Judge, Dindigul. The First Appellate Court by a decree and judgment dated 19.12.2014 dismissed the appeal. Against which, the present Second Appeal is filed.

7.At the time of admission, the learned counsel appearing for the appellant would submit that the Chinnamuthu Asari filed a suit in O.S.No.808 of 1988 before the District Munsif Court, Palani, in which, a written statement was also filed. However, on 10.01.1999, the suit was dismissed for default. Without filing a petition for restoration of the suit, the plaintiffs filed another suit in O.S.No.56 of 2004, which is barred under Order 9 Rule 9 C.P.C. For which, the learned counsel for the appellant relied upon the following decisions:

AIR 1965 SCC 295 (Suraj Rattan Thirani and others Vs. Azamabad Tea Co.Ltd and others);

2012(2) CTC 543 (G.Alagarsamy Vs. R.Seenivasan and

2010(2) CTC 631 (Ranjith Ammal vs. Sivasubramanian).

8.The plaintiffs' predecessor namely, Chinnamuthu Asari filed a suit in O.S.No.808 of 1988 against the defendants namely, Raju, Batcha, Mumthaj and Dhandapani and the defendants have categorically stated in their written statement that they have not encroached upon the property of the plaintiff at any point of time and they are living South of the Dindigul road, called as Anna Nagar from the year 1971 by constructing dwelling houses for more than the statutory period and hence, they need not hand over any portion of their houses because the same is poromboke land. On the basis of the admission made by the respondents 4 to 7, Chinnamuthu Asari did not pursue the suit in O.S.No.808 of 1988 and allowed it to be dismissed. Therefore, there is no necessity for restoring the suit in O.S.No.808 of 1988. Hence, the suit is



not hit by Order 9 Rule 9 C.P.C. and there is no quarrel over the proposition laid in the aforesaid citations.

9.The next argument of the learned counsel for the appellant is that when the 5th defendant has categorically questioned the truthfulness of the Will, created by the plaintiff to claim the title to the suit property, the Courts below were wrong in not following the mandatory legal requirements as per Section 68 of the Indian Evidence Act. Admittedly, Chinnamuthu Asari has executed a Will to one of his son namely, Thillaimuthu in respect of the suit property in item No.2 in Schedule - D. The Will has not been questioned by any of the legal heirs of the Chinnamuthu Asari and the attestor of the Will has not been examined. The defendants, neither the legal heirs of the Chinnamuthu Asari nor the beneficiary, are not entitled to question the title. In such circumstances, the argument advanced by the learned counsel for the appellant does not merit acceptance.

10.The further argument of the learned counsel for the appellant is that in the absence of measurement of the property and the boundaries, the decree for mandatory injunction cannot be granted in respect of two pieces of properties. Considering the entire materials on record it is made clear that the defendants have not produced any documents to show that they are in possession and enjoyment of the property of the plaintiff and they encroached upon only the Government poromboke land and enjoying the same for the past 50 years. In such circumstances, both the Courts below were rightly considered this aspect.

11.In view of the above, there is no question of law arise in this Second Appeal that too substantial question of law.

12.In the result, the Second Appeal is dismissed. No costs. Consequently, connected M.P. and C.M.P. are closed.

Sd/-

Assistant Registrar(CS I)

/True copy/

Sub Assistant Registrar

To

- 1.The Additional District and Sessions Judge, Dindigul
- 2.The Subordinate Judge, Palani.
- 3.The Section Officer, VR Section,
Madurai Bench of Madras High Court, Madurai.

+1cc to Mr.G.V.Vairam Santhosh, Advocate Sr.No.47001

+1cc to Mr.P.Athimoolapandian, Advocate SR.No.47080

nbj

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