

IN THE HIGH COURT OF JUDICATURE AT MADRAS

**Reserved on:02.02.2017
Pronounced on:10.02.2017**

CORAM

THE HON'BLE DR. JUSTICE G. JAYACHANDRAN

**SECOND APPEAL No.1062 of 2009
and
M.P.No.1 of 2009**

Ponnusamy

.. Appellant

/versus/

1.S.Venugopal

2.Chinnaraj

.. Respondents

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree of the learned Principal Subordinate Judge of Krishnagiri, dated 15.12.2008 in A.S.No.17 of 2007 confirming the judgment and decree of the learned District Munsif of Krishnagiri, dated 27.10.2006 in O.S.No.226 of 2001.

For Appellant :Mr.K.Karthick Asath for
Mr.V.Nicholas

For Respondent :Mr.P.Mani for R1
No appearance for R2

J U D G M E N T

The appeal is directed against the concurrent findings of the Courts below granting decree of declaration, delivery of possession, piece of land encroached by the adjacent land owners, the appellants herein.

2. The suit as laid was on the averment that, the suit land bearing S.No.771/1 with an extent of 0.06.0 Hec., in Naralapalli Village, Krishnagiri is the absolute property of the plaintiff and his brothers which they inherited through their grandfather Munisamy Mudaliar and their father Somu Mudaliar. Patta is in their favour. The defendants, who are the adjacent land owners bearing S.No.771/2 and 771/3 encroaching upon the land, whenever they plough their land, they cut the ridge of the plaintiff land and slowly annexing it with their land. In the past 9 years, they have encroached nearly 5 cents. When it came to the notice of the plaintiff, he objected but, the defendants assaulted him ending up in criminal complaint. The defendants filed a suit in O.S.No.25 of 1997 against the plaintiff seeking injunction ascertaining the land in S.No.771/2 and 771/3. The plaintiff is to encroach into it and the same was later dismissed as withdrawn after the plaintiff filed his written statement.

3. The defendants contested the suit on the ground that the suit was filed only by the plaintiff without impleading his brothers, who are the co-owners. The plaintiff is not the owner of the land in S.No.771/1. His land is in S.No.770. Infact, patta for entire S.No.771 was granted in the name of Munisamy Mudali @ Komali Munisamy Mudali and also confirmed in the subsequent proceedings initiated under Tamil Nadu Minor Inams (Abolition and Conversion into Ryotware) Act, 1963. During the UDR survey "Taking advantage of his grandfather name Munisamy Mudaliar, he was able to get patta as if he is son of "Komali Munisami", who is actually the father of the defendants.

4. The Courts below, after considering the above pleadings and evidence let in by the respective parties, held in favour of the plaintiff and granted decree against the defendants, who is the appellant in this appeal.

5. The learned counsel appearing for the appellant submitted that the Courts below failed to note that under Ex.B-2, the property was assigned to Komali Munisamy Mudaliar in the year 1972 and the plaintiff stealthily got patta in his name for S.No.771/1 behind their back as if he is

in possession of it through his ancestor.

6. The earlier suit O.S.25/97 was in respect of S.No.771/1, so the dismissal of that suit will not affect the case of the defendants in the present suit. Without any authorisation or leave to file this suit on behalf of his brothers, the plaintiff has laid the suit for the said reason. The suit itself is bad for non founder of necessary party, since the Courts below have failed to appreciate this illegality. Hence, the appeal ought to be allowed.

7. This Court before admitting the second appeal issued notice to the respondents to hear whether any question of law substantial to interfere is available in this appeal?. Accordingly, on receipt of the notice, the first respondent through his counsel appeared and submitted that, the suit was laid by the plaintiff for himself and for his brothers Sankaran, Nagappan and Sivalingam. The relief of declaration was sought in favour of all the four owners of the property. Their names are found in patta marked as Ex.A1. Since there was encroached by the defendants, one of the owners has laid the suit against the strangers. There is no legal impediment or bar for one of the co-owners to file suit against strangers to protect the interest of other co-owners. The Courts below have gone

into this point and had negated the said plea. Therefore, there is no substantial question of law to formulate in this appeal.

8. On considering the said submissions, this Court finds that on fact, the Courts below has concurrently held that, the suit land bearing S.No.771/1 is about 2 1/2 feet higher than the defendants land bearing S.Nos.771/2 and 771/3. In the Advocate Commissioner's Report, ridge separating the S.Nos.771/1, 771/2 and 771/3 is noted. The defendants have failed to prove their averment that "Munisamy Mudaliar" in Ex.B2 is their father "Munisamy Mudaliar @ Komali Munisamy Mudaliar" and not the grandfather of the plaintiff Munisamy Mudaliar.

9. On the point of law regarding the plea of non-jointer of necessary party, the plaintiff has placed on record about the co-owners of the suit property and has sought relief of declaration in favour of all the co-owners. The plaintiff has not confined or restricted the relief for himself. It is not the case of the defendants that the brothers of the plaintiff are not the co-owners of the property. Their consistent plea is that the suit property is not at all the ancestral property of the plaintiff. The Courts below have found that through Exs-A1 to A4 revenue documents and through Ex.A5 the plaint filed by the defendants in the earlier suit admitting S.No.771/1 belongs to the plaintiff, they are

estopped under Section 115 of Indian Evidence Act, 1872 to plea contrary to their own admission.

10. This Court finds that there is no error in the findings of the Courts below. No substantial question of law is involved in this case for the Court to interfere under Section 100 of the Civil Procedure Code. Hence, ***the Second Appeal is dismissed.*** No order as to costs. Consequently, connected Miscellaneous Petition is also closed.

10.02.2017

Index:Yes/No

Internet:Yes/No

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To

The Principal Subordinate Judge, Krishnagiri.

The District Munsif, Krishnagiri.

Dr.G.Jayachandran, J.

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Judgment made in
S.A.No.1062 of 2009 and
M.P.No.1 of 2009

10.02.2017