

IN THE HIGH COURT OF JUDICATURE AT MADRAS**RESERVED ON : 01.02.2017****PRONOUNCED ON : 09.02.2017****CORAM****THE HONOURABLE MR. JUSTICE T.RAVINDRAN****S. A.No.585 of 2011****and****M.P.No.1 of 2011**

Srinivasan

...

Appellant

Vs.

Lakshmanan

...

Respondent

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 13.08.2010 passed in A.S.No.6 of 2010 on the file of the Sub Judge, Rasipuram reversing the judgment and decree dated 05.08.2009 passed in O.S.No.175 of 2006 on the file of the District Munsif Court, Rasipuram.

For Appellant : Mr.P.Mani
For Respondent : Mr.P.Valliappan

JUDGMENT

In this second appeal, the plaintiff has impugned the judgment and decree dated 13.08.2010 passed in A.S.No.6 of 2010 on the file of the Sub Court, Rasipuram, reversing the judgment and decree dated 05.08.2009 passed in O.S.No.175 of 2006 on the file of the District Munsif Court, Rasipuram.

2. The suit has been laid by the plaintiff for declaration, permanent injunction, possession and mandatory injunction.

3. As regards the relief of mandatory injunction is concerned, it is found that the same has been not pressed by the plaintiff even before the trial court. The defendant is the Paternal uncle's son of the plaintiff. It is also found that the families of the plaintiff and the defendant had effected partition of the properties belonging to them under the partition deed dated 05.06.1956. The plaintiff has filed a plan along with the plaint, which has been marked as Ex.A8. Now, according to the plaintiff, in the plaint plan, the portion shown as "P" is the first item of the suit properties and inasmuch as the defendant, without any authority, attempted to interfere with his possession and enjoyment in respect of the above said first item of the suit properties shown as "P" in the plaint plan Ex.A8, he has been necessitated to seek the relief of permanent injunction.

4. Further, according to the plaintiff, the defendant had trespassed into a portion of the first item of the suit properties illegally on 02.06.2006 and it is stated that the portion shown as "DO" in Ex.A8

is illegally occupied by the defendant and as regards the said occupied portion, the plaintiff seeks the relief of declaration and possession from the defendant.

5. The first item of the suit properties is stated to be an extent of 4 cents in survey No.61/3. It has been admitted by the defendant that in the partition effected on 05.06.1956 under Ex.A1, the extent of 4 cents had been allotted to the plaintiff's father. However, it is contended by the defendant that the said extent as described in the plaint is not in the possession and enjoyment of the plaintiff. As seen from the evidence adduced by the respective parties in the matter, it is found that in the first item of the suit properties, an extent of 2 cents had been acquired by the Highways Department and the same has been admitted by the plaintiff examined as PW1. He has clearly admitted that while widening Salem - Trichy main road, an extent of 2 cents in the first item of the suit properties shown as "P" in the plaint plan had been acquired. It is therefore evident that as pleaded by the plaintiff as on the date of the suit, the plaintiff is not in the possession and enjoyment of the 4 cents stated to be in the first item of the suit properties.

6. Prior to the institution of the suit, it appears that the plaintiff has sent a notice marked as Ex.A5. On a comparison of the description of the property found in Ex.A5, it is found that it is quite contradictory to the description of the property found in the plaint. Accordingly, it is also found that while sending his response to Ex.A5, under Ex.A6, the defendant has also pointed out that wrong measurements had been given in the notice Ex.A5 and according to him, as per the partition effected amongst the parties under Ex.A1 and as per the plan attached to the partition deed, the property allotted to the plaintiff is only located to the north of the common pathway, which runs to a length of 684 links, width of 6 links and therefore, it is contended that the lie of the property has not been properly given by the plaintiff. As regards the plan attached to the partition deed Ex.A1, the same has been marked as Ex.B1 by the defendant. That Ex.B1 plan has been attached to the partition deed Ex.A1 is admitted by the plaintiff.

7. As rightly found by the first appellate court and also as seen from the evidence adduced by the plaintiff himself during the cross examination, it is found that in between the properties of the plaintiff and the defendant shown as P1 and D1 in the plaint plan Ex.A8, there

is a permanent dividing stone, which had been in existence even before the partition had been effected under Ex.A1. As further admitted by the plaintiff, it is found that only from the said dividing stone, the common pathway of length 684 links, width 6 links proceeds towards north and on the above said admission of the plaintiff, the first appellate court has rightly on a comparison of the features noted by the advocate commissioner and depicted in Ex.C2(C2) and shown in plan "B" it is found that the plaintiff's property is situated only to the north of the above said pathway i.e. after 137.4 metres, which is admittedly equivalent to 684 links.

8. As adverted to earlier, the existence of the common pathway of a length of 684 links is not in issue. Further, it is also found that as between the parties and their predecessor in interest, various suits had been levied with reference to the properties of the parties concerned and in one such case levied in O.S.No.187/1982, a plan had been marked and the same had come to be exhibited in the present suit as Ex.B2. In Ex.B2 also, as seen by the first appellate Court, the existence of the above said common pathway has been depicted from point S to D and on a comparison of the same with B plan shown by the advocate commissioner in Ex.C2(C2), it is found that even before

the common pathway ends i.e. at the point "D" shown in Ex.B2, the defendant east west compound wall is located and therefore, as rightly found by the first appellate court, the case of the plaintiff that the defendant encroached the portion "DO" shown in Ex.A8 on 02.06.2006 as such cannot be accepted.

9. As rightly found, it has not been established by the plaintiff that the above said portion had been unlawfully encroached by the defendant as pleaded in the plaint. On the other hand, it is found from the above features found on ground and also confirmed by the advocate commissioner in Ex.C2(C2) B plan as well as further, buttressed by Ex.B2 plan filed in O.S.No.187 of 1992, it is found that no encroachment of the plaintiff's property has been made by the defendant and on the other hand, it is found that the defendant has been enjoying the property as allotted to the parties concerned under Ex.A1 partition deed effected during the year 1956. The plaintiff is not shown to have preferred any objection to the commissioner report and plan. Therefore, when the plaintiff has not established the unlawful encroachment of the "DO" portion by the defendant and further, when it is also not established by the plaintiff that the so called "DO" portion lie within the property allotted to the plaintiff's family

under Ex.A1, it could be seen that the relief of possession sought for by the plaintiff cannot be maintained.

10. As seen from the commissioner's plan Ex.C2 (C2), it is found that even in respect of 2 cents available in the first item of the suit properties on ground, a portion of the same had been trespassed and in the occupation of the Arunthathiyer Arumugam and in such view of the matter, it has not been explained by the plaintiff as to when he had not given correct description of the first item of the suit properties and also not established that he is in possession and enjoyment of the same and further, not established that the defendant had unlawfully intruded into a portion of the same and on the other hand, when it is found that others have occupied and been enjoying a portion in the said property, it could be seen that the plaintiff's case cannot be entertained and the reliefs sought for could not be granted.

11. In the light of the above discussions, it is found that the first appellate court rightly on the proper appreciation of the evidence on record by giving convincing reasons has rejected the plaintiff's case. No infirmity is attributed or found in the same.

In conclusion, no substantial question of law is found to be involved in this second appeal. Accordingly, the second appeal fails and the same is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

09.02.2017

Index : Yes/No
Internet: Yes/No
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To

1. The Sub Court, Rasipuram.
2. The District Munsif Court, Rasipuram.

T.RAVINDRAN,J.

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Pre-delivery Judgment in
S. A.No.585 of 2011
and
M.P.No.1 of 2011

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