

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 10.02.2017

PRONOUNCED ON : 14.02.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.746 of 2011

and

M.P.No.1 of 2011

Mohamed Aliyar

...

Appellant

Vs.

Noorjahan
rep.by her Power Agent
S.L.M.Sekka Maraicar

...

Respondent

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 11.02.2011 made in A.S.No.38 of 2010 passed by the learned Subordinate Judge, Mannargudi, reversing the judgment and decree dated 24.11.2009 made in O.S.No.30 of 2007 passed by the learned District Munsif, Thiruthuraipoondi, Tiruvarur District.

For Appellant : Mr.M.Balasubramanian

For Respondent : No appearance

JUDGMENT

Challenge in this second appeal is made by the defendant against the judgment and decree dated 11.02.2011 made in A.S.No.38 of 2010 on the file of the Sub Court, Mannargudi, reversing the judgment and decree dated 24.11.2009 made in O.S.No.30 of 2007 on the file of the District Munsif Court, Thiruthuraipoondi, Tiruvarur District.

2. The second appeal has been admitted and the following substantial question of law is formulated for consideration in this second appeal:-

"Whether the reasonings and conclusions of the first appellate Court in accepting the case of the plaintiff are perverse and misdirected against the evidence on record.

3. The suit has been laid by the plaintiff for permanent injunction.

4. It is the case of the plaintiff that she had purchased 1.84 acres in the suit survey number under the sale deed dated

05.08.1960, which has been marked as Ex.A3. The parent title deed has been marked as Ex.A2. It is the further case of the plaintiff that out of the total extent purchased by her under Ex.A3, she had settled an extent of 92 cents in favour of her daughter on 11.02.1973 and sold an extent of $20 \frac{1}{3}$ cents in favour of one Ayisha Ammal under the sale deed dated 24.05.1991 marked as Ex.B1 and further, sold an extent of 40 cents to one Abdul Kasim by a sale deed dated 31.05.1991 and further, sold an extent of 8 cents to one Surbunisha under the sale deed dated 15.11.1991 and again, sold an extent of 20 cents to one Meharunnisha under a sale deed dated 08.02.1992 and thus, according to the plaintiff, she sold/settled $1.80 \frac{1}{3}$ acres purchased by her under Ex.A3 and further, according to the plaintiff, the remaining extent of $3 \frac{2}{3}$ cents, which is stated to be the suit property, is in her possession and enjoyment and according to the plaintiff, the defendant, without any authority, attempted to encroach into the above said suit property and demolish the structure thereon and hence, the plaintiff has been constrained to lay the suit for permanent injunction.

5. A perusal of the written statement filed by the defendant would go to show that as regards the case of the plaintiff, that she had

purchased 1.84 acres under Ex.A3, no dispute is raised. Similarly, the case of the plaintiff that she had settled/sold various extents to various persons covering to an extent of $1.80 \frac{1}{3}$ acres is also not controverted by the defendant. According to the defendant, the plaintiff has not purchased the property under Ex.A3 with boundaries and therefore, it is also not made clear by the plaintiff, as to what is actual extent conveyed /settled by her under various transactions and in such view of the matter, according to the defendant, it is for the plaintiff to establish that she still has an extent of $3 \frac{2}{3}$ cents in the suit survey number and the same is in her possession and enjoyment and that, according to the defendant, the plaintiff is not in possession and enjoyment of the suit property as described in the plaint and the suit property, as such, does not exist and therefore, the further case of the plaintiff that the defendant attempted to interfere with her possession and enjoyment in respect of the suit property is false and hence, it is stated that the plaintiff, without any cause of action, has laid the suit against the defendant and hence, the suit is liable to be dismissed.

6. It is the further case of the defendant that he had purchased an extent of $11 \frac{1}{3}$ cents in the suit survey number from Ayisha Ammal and it is also stated that Ayisha Ammal had conveyed the other

extent in the suit survey number to the other persons.

7. In the light of the above defence set out by the defendant, it is for the plaintiff to establish that after all the transactions made by her in respect of the property comprised in the suit survey number, she still has an extent of $3 \frac{2}{3}$ cents i.e. the suit property and that, the same is in her possession and enjoyment. Other than marking the 2 sale deeds, as Exs.A2 & 3 as adverted to above and the general power of attorney deed marked as Ex.A1, no other document has been filed by the plaintiff to show that even after the various transactions done by her in respect of the property comprised in the suit survey number, she still has an extent of $3 \frac{2}{3}$ cents in the suit survey number. When the defendant has questioned that the suit property, as such, does not exist or lie in the ground, it is for the plaintiff to establish that the suit property, as such, still exists and that, the same is in her possession and enjoyment. At the best, as rightly argued by the defendant's counsel, the plaintiff should have taken steps to identify the suit property by seeking a commission through advocate commissioner and Taluk surveyor, so as to point out to the court that despite all the transactions made by her, she is still retaining the suit property with her. However, towards that end, the plaintiff has not

taken any step. That apart, the plaintiff having come forward with the suit for the relief of permanent injunction and when the lie of the suit property on ground itself is in dispute and when according to the defendant, the plaintiff is not retaining any extent in the suit survey number, particularly, the suit property, it is for the plaintiff to establish that she still is in possession and enjoyment of the suit property. However, not a scrap of paper has been placed by the plaintiff to show that prior to the filing of the suit, the suit property is in her possession and enjoyment. No Government record, as such, has been filed by the plaintiff to show that she is still retaining the suit property with her. That apart, the plaintiff has also not marked the other documents pertaining to the settlement and other alienations made by her in the suit survey number, so as to enable the court to ascertain whether the plaintiff had conveyed the various extents in the suit survey number before alienations/settlement by demarcating the specific property conveyed under the various deeds. In such view of the matter, when nothing has been placed by the plaintiff, other than her sale deed marked as Ex.A3 and the parent title deed marked as Ex.A2 and when the demarcation of the suit property, as such, has not been made by her to enable the court to hold that still the suit property lies on the ground and further, when the plaintiff has also not established that she

is in possession and enjoyment of the suit property, as such, it is evident that the plaintiff's suit for permanent injunction as such cannot be maintained.

8. For the suit, the cause of action pleaded by the plaintiff is that on 23.03.2007, the defendant attempted to encroach into the suit property and thereby, destroyed the stone pillar put up in the suit property. For establishing the said cause of action, the plaintiff has examined Kamala Basha as PW2, who is her close relative. That apart, as rightly found by the trial Court, PW2 is not a resident of the locality. Further, it is also found that PW2 has admitted that he does not have direct knowledge about the alleged encroachment made by the defendant in the suit property and the removal of the stone pillar put up thereon. Therefore, it could be seen that PW2 does not have any knowledge about the cause of action projected by the plaintiff in the suit. In such view of the matter, barring the evidence of PW2, we have only the interested testimony of the plaintiff, her power agent has been examined as PW1. As adverted to earlier, when according to the defendant, the plaintiff is not having any extent in the suit survey number after the various transactions effected by her in respect of the property comprised therein and when the plaintiff has also not

established by adducing acceptable evidence that the suit property still lie on the ground and further when the plaintiff has failed to establish that she is in possession and enjoyment of the suit property on the date of the suit and further, when the plaintiff has also not established the cause of action, it is clear that the first appellate court has erred in accepting the case of the plaintiff without proper reasoning. It is therefore evident that the judgment and decree of the first appellate court in accepting the plaintiff's case are misdirected against the evidence on record and also on reasonings and conclusions, which are nothing but perverse. In view of the above discussions, the substantial question of law formulated in the second appeal is answered against the plaintiff and in favour of the defendant.

For the reasons aforementioned, the judgment and decree dated 11.02.2011 made in A.S.No.38 of 2010 on the file of the Sub Court, Mannargudi, are set aside and the judgment and decree dated 24.11.2009 made in O.S.No.30 of 2007 on the file of the District Munsif Court, Thiruthuraipoondi, Tiruvarur District, are confirmed. Accordingly, the second appeal is allowed. No Costs. Consequently, connected miscellaneous petition is closed.

Index : Yes/No
Internet: Yes/No

14.02.2017

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To

1. The Sub Court, Mannargudi.
2. The District Munsif Court, Thiruthuraipoondi,
Tiruvarur District.

T.RAVINDRAN,J.

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Pre-delivery Judgment in
S. A.No.746 of 2011
and
M.P.No.1 of 2011

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