



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 08.01.2019	Pronounced on: 10.01.2019
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Coram:

The Honourable Dr.Justice G.Jayachandran

Second Appeal No.452 of 2004

1.C.Kaliappan (Died)

2. Palaniyammal,
W/o.Kaliappan,

3. Velliangirinathan,
S/o.Kaliappan,

4. Packialakshmi,
D/o.Kaliappan,

5. Deivanai,
D/o.Kaliappan,
All are residing at Door No.5A/17,
Ramar Extension, Veerapandi Town,
Gobichettipalayam,

... Appellants

(Appellants 2 to 5 brought on record as LRs of the deceased sole appellant vide order of Court dated 13.12.2018 made in CMP.No.403 to 405 of 2015 in S.A.No.452/2004)

/versus/

1. M.Muruganandam (Died),
S/o.Ramasami,

2. K.Kanakaraj,
S/o.Ramasami,
RR 1 & 2 are residing at Pariyur Village,
Nanjagoundanpalayam Gobi Taluk, Erode District.

3. Padmavathi,
W/o.Muruganandam Pathy Road Pariyur Village,
Gobi Taluk.

4. Minor M.Nireka,
D/o.Muruganandam by mother and guardian,
Padmavathi Pathy Road Pariyur Village,
Gobi Taluk.

5. Minor Sachian Sabariram,
S/o.Muruganandam
Minors 4 & 5 Rep. by their mother and Guardian
Padmavathi Pathy Road, Pariyur Village,
Gobi Taluk.

6. Kunjammal,
W/o.Muruganandam Pathy Road,
Pariyur Village,
Gobi Taluk.

... Respondents

RR3 to 6 Brought on record as LRs of the deceased R1 vide order of Court dated 12.12.2018 made in CMP.No.369 of 2010 in S.A.No.452 of 2004.

PRAYER: This Second Appeal has been filed under Section 100 of Civil Procedure Code, praying against the judgment and decree dated 25.09.2001 in A.S.No.29 of 2000 on the file of the II Additional Subordinate Court, Gobi, preferred against the judgment and the decree dated 24.03.2000 in O.S.No.139 of 1997 before the District Munsif Court, Gobi.

For Appellants : Mrs.R.Meenal

For Respondent : Ms.J.Prithivi
for Mr.S.Kaithamalai Kumaran

J U D G M E N T

The suit is filed for declaration of title and recovery of possession. Having failed before both the Courts below the plaintiff has preferred this Second Appeal.

2. The case of the appellant/plaintiff is that he has purchased 1 acre of land in new Survey No.112/2 along with 1/4th right in the well. On 09.07.1982 from one Kuppaialammal Vagaiyara. When the defendants father and others tried to interfere his enjoyment of drawing water from the well, in which he have 1/4th share, he filed a suit against them in O.S.No.223 of 1983. In the said suit the defendants father has admitted the title of plaintiff in respect of 1 acre of land in the S.No.112/2 but only disputed 1/4th right in the well to draw water. However, the Court rejected the defendants plea and upheld the right of the plaintiff in the well to draw water also the trial Court held that the plaintiff has title over 1 acre of land and 1/4th share in the well. On appeal, the Appellate Court has confirmed the decree of the trial Court vide judgment dated 28.02.1991.

3. In the earlier suit the father of the defendants never denied the title of the plaintiff in respect of 1 acre of land. On the east of 1 acre suit land, the plaintiff father M.P.Ramadass had his property. After the demise of M.P.Ramadass, the defendants are in possession of the said property. Since, the suit property of the plaintiff is adjacent to the property of the defendants, they have slowly encroached upon the plaintiff land to the extent of 23 cents. The Revenue Officials have given the patta to the defendants, to this extent despite objection. Now, out of 1 acre of land, only 77 cents of land is in possession of the plaintiff. The remaining 23 cents is under the enjoyment of the defendants. While the defendants have title only to an extent of 1 acre 15 cents, they are in possession of excessive extent, which has been engulfed from the plaintiffs' land. Hence, the suit for declaration of title and recovery of 23 cents of land in S.No.112/2 Pariyur Village, Gopi Taluk.

4. The defendants have resisted the suit on the ground that the suit is bad for non-joinder of necessary party. The suit property belongs to Late Mr.M.P.Ramadass. He died leaving behind two sons and his wife. While the sons are arrayed as defendants, the wife of M.P.Ramadass has not been impleaded as defendant. The judgment and decree passed in the earlier suit in O.S.No.223 of 1983 and A.S.No.8 of 1989 do not bind these defendants. The defendants father was enjoying the land in his own right from 1979 including the coconut trees planted by him, about 14 years ago. The plaintiff never own any land beyond the row of defendants coconut trees. To the west of the defendants land, the plaintiff property is situated. The defendants have denied the averment of the plaintiff that 23 cents of plaintiff land had been encroached by the defendants. The land was measured by the Revenue Department and patta to correct extent was given by the Tahsildar. If at all, any encroachment in the plaintiff land found, then it must have been done by other persons but not by the defendants. The suit is not been properly valued and Court fees not properly paid.

5. The trial Court based on the pleadings has framed the following issues:-

(i). Whether the suit is not been properly valued for the purpose of Court fees and jurisdiction.

(ii). Whether the suit is bare for non-joinder of necessary party.

(iii). Whether the judgment and decree passed

in O.S.No.223 of 1983 and A.S.No.8 of 1989 will not bind the defendants.

(iv). Whether the plaintiff is entitled for relief of declaration and possession.

(v). Whether the plaintiff is entitled for metes profit.

(vi). What the relief the plaintiff is entitled.

6. Before the trial Court, the plaintiff has examined himself as PW.1. Three Exhibits were marked through him, they are Ex.A.1 sale deed executed to Kuppaialammal Vagaiyara in favour of the plaintiff on 09.07.1983. Ex.A.2, the judgment passed by the Sub Court, Gopi in A.S.No.8 of 1989 and Ex.A.3 the proceedings of the Tahsildar, Gopi Taluk. On behalf of the defendants, the 2nd defendant Kanagaraj has been examined as DW.1. The proceedings of Tahsildar, Gopi Taluk, dated 19.09.1994 and the sale deed executed by Kalinuappan in favour of M.P.Ramadas dated 02.06.1977 were marked as Ex.B.1 and Ex.B.2 respectively.

7. The trial Court, after considering the documentary and oral evidence has held that in the earlier suit in O.S.No.223 of 1983, the dispute was in respect of drawing water from the well, in which the plaintiff claimed $\frac{1}{4}$ th shares. In the said suit, the possession of 1 acre of land by the plaintiff was not an issue heard or decided. Nowhere, the defendants father has admitted in the earlier suit the possession of 1 acre of land by the plaintiff in S.No.112/2. Further, though the plaintiff has admitted within one year of his purchase of the suit property, he came to know about the encroachment by the defendants, he has not filed suit for recovery of possession immediately when the suit property was purchased in the year 1982 and the plaintiff has laid his earlier suit regarding right to draw water in the well in the year 1983, he has not whispered anything about the alleged encroachment or shortage of extend in his possession. Only after the disposal of the earlier litigation, he has laid the present suit for recovery of possession and declaration of title.

8. The trial Court has pointed that the pleadings of the plaintiff does not indicate when and where the defendants have encroached the plaintiff land. He has not taken any steps to appoint a Advocate Commissioner to inspect the disputed property and note down the physical features. When the possession with the defendant is admitted by the plaintiff and the defendants plead adverse possession, the failure of the plaintiff to prove that he had in possession of the property to an extent of 1 acre of land. Through the sale deed dated 09.07.1992 dis-entitle him to get the relief prayed. The suit

for recovery of possession is not sustainable, when the defendants has set up a plea of adverse possession, for more than the prescribed period. Pointing out that in the earlier proceedings, the father of the defendants have not appeared and contested and it was an ex parte decree against the defendants father and it was in respect of drawing water from the well, the finding of the Court, in the earlier proceedings, in respect of the different cause of action and different relief, will not bar the defendants to contest the claim of the plaintiff.

9. As far as, the issue regarding non-joinder of necessary party, the trial Court has held that the suit is bad for not impleaded the wife of Late Mr.M.P.Ramadass who is a necessary party since, the suit is for declaration and recovery of possession which the defendants along with wife of M.P.Ramadass has inherited.

10. On appeal, the Lower Appellate Court has confirmed the judgment of the trial Court. Hence, the present Second Appeal is filed.

11. At the time of admission, this Court has framed the following Substantial Questions of Law.

(i). Whether in law the Courts below are right in overlooking the material and vital admissions of the Second respondent as DW.1 with regard to the appellants title and possession and omitting to pass a decree as prayed for?

(ii). Whether in law the Courts below are not wrong in omitting to see that the stand taken by the father of the respondents in a prior suit would be binding on the respondents in the present suit?

(iii). Whether in law the Courts below are right in holding that the suit was affected by the non-appointment of a Commissioner as the respondents had not questioned the right and title of the appellant and had also conceded the location of the suit property?

12. On perusal of DW.1 deposition, this Court finds that the 2nd defendant has been examined as DW.1 but he has not admitted the possession and enjoyment of 1 acre of land by the plaintiff. He only admits that under the sale deed, the plaintiff has purchased one acre of land. It is the categorical

case of the defendants that they are in possession of the lands which their father purchased and they have not encroached upon the plaintiffs' land. If the plaintiff has lesser extent of land than his title deed, then it should have been encroached upon by other neighbouring land owners and not by the defendants.

13. The plaintiff who claims title through Ex.A.1 admits that while purchasing the property, he has not measured the land to ascertain whether there is one acre of land in the field as per the title deed. So he has not measured the land before and he purchased the property. He admits that the ridge between his land and the defendants land separates their property. The plaintiff has admitted that he came to know about the encroachment in the year 1983 itself. In the earlier suit, seeking right to draw water from the well, he has not sought for recovery of possession. He has consciously omitted to claim recovery of possession which he alleges the defendants and their father encroached. Contrarily, the defendants have consistently pleaded that the land in their possession is their own land and they have not encroached upon the plaintiff portion of land.

14. When the plaintiff wants declaration of title and recovery of possession first of all, he should have identified through evidence, the exact area of alleged encroachment made by the defendants for passing a executable decree. Without identifying the portion encroached, recovery of the same cannot be granted. For the purpose of identifying the encroachment if any, necessarily Commissioner has to inspect and note down the physical features. The appellant as a plaintiff has not made any attempt to get an Advocate Commissioner appointed to identify the alleged encroachment.

15. Ex.A.3 is the proceedings issued by the Tahsildar. The order of the Tahsildar dated 14.11.1996 which has been annexed in the proceedings reveals that based on the objections raised by Kaliappan/plaintiff, the S.No.112/2 was surveyed and the statement of joint pattadars was recorded. There is no indication in the field to identify the exclusive possession and enjoyment by Kaliappan. Therefore, the Tahsildar has suggested that the party has to approach the Court and reconcile the difference in the measurement found in the field and in their document. This order has been passed by the Tahsildar dated 14.11.1996 and communicated to the plaintiffs' counsel on 16.12.1996. Thereafter, the suit has been laid by the plaintiff. When it has been specifically directed by the Revenue Authorities to approach the Court and get the land measured and get patta as per the document and measurement, the plaintiff has filed the suit for declaration but had not made any attempt to appoint Commissioner to measure the land and

identify the exact extent of land being encroached.

16. It is contended by the defendants, the plaintiff himself is not sure who has encroached upon his land and from which side the breach caused. Only if the Commissioner had been inspected the field and noted the physical features by measuring the same with the help of competent surveyor, the factum of encroachment and the situs of encroached could have been ascertained.

17. The plaintiff having failed to identify the portion of land which he has sought for recovery, he cannot challenge the finding of the Courts below that for not declaring title and recovery of possession. Without establishing the factum of encroachment the defendants and the extent of encroachment, the relief sought by the plaintiff cannot be granted.

18. Therefore, the Courts below has rightly dismissed the suit. The substantial questions of law framed at the time of admission is answered accordingly. This Court confirms the finding of the Courts below that the plaintiff has failed to prove his case for declaration and possession. Hence, the judgment of the Courts below needs no interference.

19. In the result, the Second Appeal is dismissed. Concurrent judgment of the Courts below confirmed. There shall be no orders as to costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To,

- 1.The District Munsif, Gobi, Erode.
- 2.The II Additional Subordinate Judge, Gobi, Erode
3. The Section Officer,
V.R Section,
High Court, Madras

+lcc to M/s.R.Meenal, Advocate sr.3131

Second Appeal No.452 of 2004

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nr 13/05/2019