

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.07.2019

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.847 of 2005
and CMP.No.11903 of 2005

1.Saminathan (Died)

.. Appellant/Respondent/Plaintiff

2.Ramamirtham

3.Senthil Rajan

.... Appellants

(Appellants 2 and 3 are brought on record as legal heirs of the deceased sole appellant Vide order dated 20.06.2019 made in CMP.Nos.21776 to 21778 in S.A.No.847/2005)

Vs

1.Rajangam (Died)

2.Subramanian

..Respondents/Appellants/Defendants

(Second respondent is recorded as legal heir of the deceased first respondent Vide order dated 20.06.2019 made in S.A.No.847/2005 as per memo dated 20.06.2019)

Prayer :- Second Appeal filed under Section 100 of the Civil Procedure Code, preferred against the judgment and decree of the Additional Sub Court, Mayiladuthurai dated 25.02.2005 made in A.S.No.206/2003 partly allowing the judgment and decree of the Additional District Munsif Court, Mayiladuthurai, dated 18.06.2003 made in O.S.No.474/2001.

For Appellants : Mr.S.Sounthar

For Respondent : Mr.A.Muthukumar [R2]

JUDGMENT

The plaintiff is the appellant herein. The suit is laid for bare injunction. The suit was decreed by the trial Court and in an appeal preferred by the defendants, he tasted partial success with regard to one item of the suit property, and hence the plaintiff has come before this Court in this appeal.

2. There are two items of suit properties. The first item is in Survey No.26/13B measuring an extent of 6 cents, and the second item is in Survey No.27/15 measuring an extent of 10.5 cents. It is stated that item No.1 is the backyard of item No.2. And it is an admitted case that in Item No.2 of the suit property, there is a house wherein the plaintiff lives.

3.1 According to the plaintiff, both the items of suit property belonged to a certain Veerappa Padayachi. He had a daughter named Alamelu and the first defendant as his children. The plaintiff is the son of Alamelu and the contest in this case is between the nephew and his maternal uncle (first defendant). The second defendant is the son of the first defendant.

3.2. The plaintiff alleges that on the demise of Veerappa Padayachi, Alamelu came to occupy both the items of suit properties, put up a construction in Item No.2, and had been enjoying the property, and in continuation of Alamelu's possession, the plaintiff, (Alamelu's son) came to be in possession and enjoyment of the suit properties, and when he faced threat to his peaceful possession and enjoyment of the suit properties from the defendants, he moved the suit for injunction.

4. Before the trial Court, parties have adduced oral and documentary evidences. On the basis of the evidences before it, the trial Court found the plaintiff to be in lawful possession and granted a decree for permanent injunction that the plaintiff should not be dispossessed except by due process of law.

5. Aggrieved by this decree, the defendants preferred the first appeal. The first appellate Court, however, segregated the suit property into southern and northern halves, confirmed the decree of the trial court as regards the southern half where the plaintiff has his house. This southern half portion is described as Item No.2 in the plaint. So far as northern portion is concerned, since it lies vacant, the first appellate court held that this portion is not shown to be under enjoyment of the plaintiff and dismissed the suit. This northern portion is shown as Item No.1, which has become the subject matter of this appeal.

6. The appeal was admitted on the following substantial questions of law :

- a) Whether the judgment of the lower appellate Court is liable to be set aside in its failure to frame proper points for consideration as required by Order 41 Rule 31 of C.P.C.?

b) Whether the judgment of lower appellate Court with regard to suit items, one is liable to be set aside as perverse in view of its failure to consider Ex.C.1 and C2 in the light of appellant's side exhibits?

c) Whether the lower appellate Court as a final Court of facts erred in not considering oral evidence of P.Ws. 1 to 3?

7. The learned counsel for the appellants argued that both items 1 and 2 lie contiguously in north-south direction, that it came to be described as two different items in the plaint, essentially because they fall under two different survey numbers. However on lie, they lie as one contiguous piece of land. He then proceeded to rely heavily on Exts.C1 and C2, which indicate that the northern portion described as Item No.1 in the plaint is enclosed within the boundaries that encompasses both Item No.1 and 2 on the west, north and the east. There is nothing on lie to indicate that the item Nos.1 and 2 are divided by any fence or is there any line of demarcation. Indeed, argued the learned counsel, the Commissioner has indicated couple of facilities in Item No.1 that compliment the use of item No.2.

8. The learned counsel for the respondents however contended that there is no pleading that there has been a fence, and nor is there any pleading in the plaint about the facilities which the plaintiff enjoyed and that there is no pleading in the plaint that the plaintiff has some facilities available in Item No.1 nor is there any pleading that these facilities are incidental to his occupation and enjoyment of Item No.2. He, however conceded that the defendants had pleaded that the plaintiff has been in permissive occupation of a small portion of Item No.2 property.

9.1 Exts.C-1 and C-2, the Commissioner's report and plan forms the pivot of the appellant's argument. The Commissioner's report and plan indicate that both the properties lie contiguously, and they appear as a single plot of property. While plaintiff's house is there in item 2, there is a garbage pit in Item No.1, besides a shed. Since only the plaintiff is in physical possession of Item No.2, it is inconceivable that this garbage pit in Item No.1 could be used by any other. After all, the same Commissioner's report indicate that there is a fence that encompasses Item No.1 and 2 on the west, north and the east. As rightly argued by the learned counsel for the appellant, there is nothing on lie to divide Item No.1 and 2 on ground, which preponderates the probability that Item Nos.1 and 2, both are under the possession of the plaintiff. Here the first appellate Court has erred egregiously in creating an

artificial dividing line between item 1 and 2, and this is contrary to evidence on records. Hence the substantial questions of law raised are decided in favour of the appellant/plaintiff.

9.2 Necessarily, an injunction shall lie as regards Item No.1 as well. Having stated thus, the defendants would be at liberty to institute such appropriate action in accordance with law for recovery of possession of the suit property from the plaintiff.

10. In conclusion, this appeal is allowed and judgment and decree dated 25.02.2005 made in A.S.No.206/2003 on the file of Additional Sub Court, Mayiladuthurai, is hereby set aside. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

// True Copy//

Sub Assistant Registrar

ds

To:

- 1.The Additional Sub Court
Mayiladuthurai.
- 2.The Additional District Munsif Court
Mayiladuthurai.
- 3.The Section Officer
VR Section, High Court, Madras.

+1cc to Mr.A.Muthukumar, Advocate, SR.No.58811.

+1cc to Mr.S.Sounthar, Advocate, SR.No.58015.

S.A.No.847 of 2005

RV(CO)

CSR: 06.02.2020



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