

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.07.2019

PRONOUNCED ON : 06.08.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A. No. 184 of 2016

1. C.Krishnan
2. D.Kaveriammal
3. D.Venkateswaran
4. D.Shanmughasundaram Appellants/Plaintiffs

Vs.

1. M.Easwaramoorthi
2. M.Duraisamy @Krishnan
3. M.Shanmugham
4. B.Bhaskar ... Respondents/Defendants

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 20.01.2015, made in A.S.No.50 of 2014, on the file of the I Additional Sub Court, Erode, confirming the judgment and decree dated 11.03.2014, made in O.S. No.695 of 2010, on the file of the II Additional District Munsif Court, Erode.

For Appellants : Mr.R.Sankaranarayanan Senior Counsel
for M/s. C.Prabhakaran

For Respondents: Mr.M.V.Venkataseshan

JUDGMENT

In this second appeal, challenge is made to the judgment and decree dated 20.01.2015, passed in A.S.No.50 of 2014, on the file of the I Additional Subordinate Court, Erode, confirming the judgment and decree dated 11.03.2014, passed in O.S. No.695 of 2010, on the file of the II Additional District Munsif Court, Erode.

2. The second appeal has been admitted on the following substantial question of law:

Whether the Courts below are right in refusing the consequential relief of injunction especially when the main relief of declaration is granted on admission by the other side?

3. Considering the scope of the issue involved between the parties in the lis lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4. The plaintiffs have levied the suit against the defendants for the reliefs of declaration, permanent injunction and mandatory injunction. In brief, according to the plaintiffs, the first plaintiff and one Doraisami are the sons of Chinnappa gounder and Doraisami died leaving behind the plaintiffs 2 to 4 as his legal heirs and the suit properties were purchased by Chinnappa gounder on 02.02.1956 measuring an extent of 4.07 acres and it is put forth that after the same, the LBP canal irrigation scheme project was implemented and the Government had taken the lands for boothies over the suit properties and accordingly, the second item of the suit properties is situated on the eastern side and the first item is situated on the western side of the field boothies and the defendants owned land in R.S.No.1198 situated on the southern side of the suit properties and in the middle of September 2010, the defendants attempted to encroach into the suit properties about 4 feet east-west from their northern boundary into the land of R.S.No.1199/2A and hence, according to the plaintiffs, they had been necessitated to lay the suit against the defendants for appropriate reliefs.

5. The defendants 1 to 3 resisted the plaintiffs' suit contending that the rough plan annexed with the plaint is not true and it does not depict the real features of the suit properties and admitted that they are the owners of the land comprised in R.S.No.1198 and that they had partitioned their properties and enjoying the same and pleaded that the alleged encroachment said to have been committed by them in September 2010 in the plaint schedule in R.S.No.1199/2A is false and according to them, no encroachment has been made by them and further put forth that there are old standing trees in the southern boundary of R.S.No.1199/2A towards east west and further, put forth the case that the suit property belonging to the plaintiffs is 3 feet higher than the land belonging to the defendants and also stated that immediately on the southern boundary, east west live fence, LBP branch channel is running east west to some extent and turn towards south to reach third parties lands and on the south of the abovesaid branch channel, new coconut saplings are implanted by the third defendant and therefore, prayed for the dismissal of the plaintiff's suit in toto.

6. The fourth defendant also pleaded that the defendants 1 to 3 are the owners of R.S.No.1198 and contended that they had derived the same by way of a partition deed dated 17.12.1980 and that the extent of one acre lying in old G.S.No.1142/1 was allotted to the first defendant and that he has been in the possession and enjoyment of the same and that the first

defendant had subsequently plotted out the said one acre land into the house sites and obtained the plan and the first defendant along with his children executed the power of attorney deed in favour of the fourth defendant on 12.06.2007 and on the basis of the same, the fourth defendant had constructed various types of residential buildings and alienated the same from 2008 onwards and live fencing is situated between the properties belonging to the plaintiffs and the defendants and there is no question of encroachment on the part of the defendants and accordingly, prayed for the dismissal of the plaintiffs' suit.

7. In support of the plaintiffs' case PW1 was examined, Exs.A1 to A8 were marked. On the side of the defendants, DW1 was examined, no document was marked. CWS 1 and 2 were examined, Exs.C1 to C4 were also marked.

8. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Courts below were pleased to declare that the plaintiffs are the owners of the suit properties, however, declined the reliefs of mandatory and permanent injunction prayed for by the plaintiffs and accordingly, disposed of the plaintiffs' suit. Aggrieved over the same, the plaintiffs have preferred the present second appeal.

9. As regards the ownership of the suit properties, considering the documents projected by the plaintiffs in toto and as analysed by the Courts below and furthermore, when the defendants have not disputed the ownership of the plaintiffs in respect of the suit properties, in such view of the matter, it is found that the Courts below are justified in granting the relief of declaration in favour of the plaintiffs qua the suit properties.

10. According to the plaintiffs, after their predecessors in interest had acquired title to the suit properties by way of Ex.A2 sale deed, it is stated that LBP project was launched and accordingly, the Government had acquired land for field boothies and thereby, the same resulted in the division of the suit properties into two parts and in the resurvey proceedings, it is found that the suit properties had been assigned as lying in R.S.Nos.1199/2A and 1199/4A. It is admitted that the defendants own lands lying in R.S.No.1198 situated on the southern side of R.S.1199/2A. It is also not in dispute that the plaintiffs' land in R.S.No.1199/2A is 3 feet in height than the defendants land in R.S.No.1198.

11. Now, according to the plaintiffs, during the month of September 2010, the defendants encroached upon the southern side portion of their lands in R.S.No.1198/2A to an extent of 4 feet width by scratching and thereby, added the same with their lands and hence, the need for seeking the appropriate reliefs on the part of the plaintiffs. Opposing the abovesaid case of the

plaintiffs, it is contended by the defendants that they had acquired the land by way of partition and since then, they had been enjoying the properties without committing any encroachment in the plaintiffs' properties as alleged and accordingly, prayed for the dismissal of the plaintiffs' suit.

12. As analysed by the Courts below, the case projected by the plaintiffs is that the defendants had encroached about 4 feet east west from the northern boundary into the lands of the plaintiffs in R.S.No.1198/2A in or about in the month of September 2010 and they had depicted the alleged portion in red colour in the rough plan. Therefore, according to the plaintiffs, the cause of action for the suit arose in the middle of September 2010. It is found that on date of filing the suit on 26.10.2010 itself the Advocate Commissioner had been appointed for the local investigation of the properties and he had inspected the properties and filed his report and accordingly, it is seen that the Advocate Commissioner had inspected the suit properties on the same date and submitted his interim report and plan marked as Exs.C1 to C2.

13. As admitted by the parties and as well as could be gathered from Exs.C1 and C2, the plaintiffs land is found to be higher in level than the defendants land and that apart, it is found that there is a live fence with Margosa tree, Palmirah tree, Cactus, Kiluval tree and Thorn trees between the plaintiffs southern boundary in R.S.No.1198/2A and the defendants northern boundary in R.S.No.1198 and the same has been shown in red colour by the Advocate Commissioner in his report marked as Ex.C2. Therefore, it is found that the abovesaid live fence is the southern boundary of the plaintiffs land and the land lying low to the abovesaid fence is the defendants property and the difference in height is 3 feet and in such view of the matter, when admittedly the defendants land is found to be lying low in level by 3 feet than the plaintiffs land, if any encroachment is attempted to be made by the defendants into the plaintiffs properties, it could be done by scratching, spading, pulling down or razing down the plaintiffs properties in R.S.No.1198/2A to some extent and only thereby they could have annexed the plaintiffs land with their land. Accordingly, if by way of the abovesaid methods, the defendants had encroached into the suit properties and annexed any portion of the plaintiffs properties in R.S.No.1198/2A as sought to be projected by the plaintiffs, necessary aspects or materials pointing to the same would have been available on ground and the soil condition also would be new on the Southern border of the plaintiffs properties. Furthermore, considering the availability of the live fence in the southern boundary of the plaintiffs property, if any encroachment had been committed by the defendants, as claimed by the plaintiffs, resultantly, the same would have necessitated the uprooting of the trees put up in the live fence and therefore, the roots of the trees in the live fence would have been pulled down and the same could have

been easily detected on the inspection of the suit properties and if the abovesaid case of the plaintiffs is true, the features pointing to the same would have been brought to the knowledge of the Advocate Commissioner by the plaintiffs when he had visited the suit properties on the date of the filing of the suit. On the other hand, it is seen that no such features had been noted by the Advocate Commissioner in the plaintiffs properties particularly in the southern boundary of the plaintiffs properties in R.S.No.1199/2A and accordingly, the plaintiffs had also not endeavoured to invite the attention of the Advocate Commissioner to note down such materials and features and accordingly, the resultant conclusion would be that inasmuch as no such intrusion had been made by the defendants into the plaintiffs properties in R.S.No.1199/2A and consequently, no features were available with reference to the same in the plaintiffs properties. Accordingly, it is found that the plaintiffs had also not endeavoured to bring the same to the notice of the Advocate Commissioner at the time of the inspection of the suit properties.

14. During the course of evidence, it is seen that the plaintiffs would put forth the case that the defendants had often and periodically scratching the land belonging to the plaintiffs and committed the encroachment and thereby, the plaintiffs had been forced to enjoy the lesser extent of land. However, when it is the specific case of the plaintiffs that only in the middle of September 2010, the defendants had encroached into the suit properties belonging to them, their case projected during the course of evidence that the defendants had periodically and often endeavoured to encroach into the suit properties would go to show that as determined by the Courts below, a new case has come to be projected by the plaintiffs during the course of trial.

15. It is seen that the Advocate Commissioner had also inspected the suit properties for the second time and filed his report and plan marked as Exs.C3 and C4 and the plaintiffs would rely upon the second report and plan of the Advocate Commissioner for sustaining their case. It is found that the second investigation has been made with the assistance of the surveyor. Now, according to the plaintiffs, the Advocate Commissioner and the Surveyor had clearly brought out by whom the encroachment had been committed in R.S.No.1198/2A in Exs.C3 and C4 and accordingly, has been projecting their case on the basis of Exs.C3 and C4 as well as the evidence of Cws 1 and 2. However, according to the defendants, the Surveyor who had measured the suit properties had not followed proper procedures to determine the alleged encroachment said to have been made by them and he has not fixed the junction point and had failed to measure the whole of the properties in the suit survey number and measure the properties in dispute and accordingly, contended that neither Exs.C3 and C4 nor the evidence of Cws 1 and 2 would be useful to sustain the plaintiffs case.

16. As rightly held by the Courts below, CW1 surveyor has admitted that he has not measured the junction point of the lands belonging to the plaintiffs and also admitted that he has not determined the plaintiffs southern border by measuring the properties belonging to the defendants and also admitted that he has not determined the northern boundary of the plaintiffs land by measuring the properties belonging to the third parties lying to the north of the plaintiffs properties. Similarly, the Advocate Commissioner, CW2, would also admit that he had not measured the defendants property in toto and also not measured the entire properties comprised in R.S.No.1199 and would state that he had measured R.S.No.1199/2 and pleaded ignorance as to whether encroachment could be measured only by measuring the entire extent available in R.S.No.1199. When it is noted that the Advocate Commissioner had been directed to inspect the suit properties with the help of a qualified surveyor and note down the physical features of the suit properties and take the measurements of the same, with the help of the documents and when it is further seen that the Advocate Commissioner has not complied with the abovesaid directions and when it is further noted that the Advocate Commissioner had admitted that he had not measured the suit properties based on the title deeds of the respective parties and the Advocate commissioner had endeavoured to measure the suit properties as per the resurvey proceedings and furthermore, when it is noted that he has admitted that the measurement in the old survey numbers and the lands comprised in the resurvey numbers would be different, in such view of the matter, when according to the plaintiffs, they own only 4.7 acres of land and the length and breadth measurements of the suit properties had not been spelt out in the title deeds and when the Advocate Commissioner and the Surveyor had measured the properties belonging to the plaintiffs based on the re survey proceedings and not on the basis of their title deeds and when it is admitted that the encroachment would differ in the new and old records, it is found that the first appellate Court is justified in not placing reliance upon the oral evidence of CW1 and CW2 and the report and plan marked as Exs.C3 and C4.

17. As above noted, when there is admittedly the live fence consisting of various trees above pointed out in between R.S.No.1199/2A and 1198 and the existence of live fence had not been disputed by the plaintiffs and when it is seen that the live fence found therein consists of various trees and had been in the existence from the days of the plaintiffs predecessors in interest, in such view of the matter, when no features are available on ground as regards any disturbance caused to the live fence and the trees standing therein by the so called encroachment said to have been caused by the defendants as abovenoted and the same has also not been endeavoured to be brought home by the plaintiffs during the first inspection, it is found that the plaintiff has projected a new case during the trial as if they had left out 2 feet land to the south of the

live fence for the purpose of maintaining the live fence and the same had been encroached by the defendants.

18. When according to the plaintiffs, the defendants had encroached about 4 feet in R.S.No.1199/2A and when further according to the plaintiffs, the defendants had been scratching their lands and committed encroachment, when the plaintiffs had not put forth any case that they had an extent of 2 feet land on the south of live fence for enabling them to maintain the fence, in such view of the matter, it is seen that the plaintiffs had been advocating a new case one after another, however not based on acceptable and reliable materials and accordingly failed to establish that the defendants had indeed committed any encroachment in their properties.

19. In the light of the abovesaid discussions, considering the issues involved between the parties qua the properties belonging to the plaintiffs and the defendants as well as the materials placed on record, when there is no basis for accepting the case of the alleged encroachment on the part of the defendants into the plaintiffs land as put forth by the plaintiffs and the plaintiffs have miserably failed to establish that they are deprived of their extent of land by the encroachment committed by the defendants and when the existence of live fence is found in between the plaintiffs properties and the defendants property from the days of their ancestors and the Commissioner's report and plan marked in the case do not support and lend assistance to the plaintiffs case and on the other hand, only support the defence version and the plaintiffs also found to have developed their case one way or the other, during the course of trial, without any foundation or pleadings, in such view of the matter, as rightly determined by the Courts below, as regards the claim of the relief of permanent injunction prayed for by the plaintiffs, there is no cause of action for the same to the plaintiffs and as above discussed, the plaintiffs have also miserably failed to establish that they are entitled to obtain the relief of mandatory injunction against the defendants. In such view of the matter, the Courts below have rightly declined the abovesaid reliefs as prayed for by the plaintiffs on a proper appreciation of the materials placed on record and the same centering on the factual matrix and the reasonings and conclusions of the Courts below not suffering from any irrationality or perversity, in my considered opinion, no substantial question of law is involved in the second appeal. Be that as it may, the substantial question of law formulated is accordingly answered against the plaintiffs and in favour of the defendants

20. The plaintiffs counsel, in support of his contentions, placed reliance upon the decision reported in (2019) 4 MLJ 648 (Chinnammal @ Kalammal Vs. P.N.Natarajan). The principles of law outlined in the abovesaid decision are taken into consideration and followed as applicable to the case at hand.

21. In conclusion, the second appeal fails and is accordingly, dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

1. The I Additional Subordinate Judge,
Erode.
2. The II Additional District Munsif,
Erode.

Copy to

The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.M.V.Venkataseshan, Advocate Sr.66990

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srg 13/11/2019

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