

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.11.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A.No. 390 of 2014

Ganesan ..Appellant/Defendant/Plaintiff

Vs.

Pushparaj ..Respondent/Appellant/ Defendant

Prayer: Memorandum of Second Appeal filed under Section. 100 of C.P.C. against the judgment and decree of Principal Sub-Court, Mayiladuthurai, dated 12.06.2013 made in A.S.No. 68 of 2011 and A.S.No.78 of 2012 reversing the judgment and decree of Principal District Munsif, Mayiladuthurai dated 06.06.2011 made in O.S.No. 6 of 2007.

For Appellant : Mr.S.Sounthar
For Respondent : Mr.A.Muthukumar

J U D G M E N T

The plaintiff in O.S.No. 6 of 2007 whose suit for declaration of title, mandatory injunction and recovery of possession was partly decreed by the Trial Court upon its reversal by the lower Appellate Court resulting in the dismissal of the suit in its entirety has come up with this second appeal.

2. According to the plaintiff, he had purchased an extent of 15 cents in Survey No.53/1A and 52/4 under a sale deed dated 17.03.1983. He was also favoured with a Patta by the Government in respect of an extent of $1\frac{1}{4}$ cents in Survey No.52/4 which was classified as Gramanatham. Therefore, according to the plaintiff, he is entitled to $16\frac{1}{4}$ cents in Survey Nos. 53/1A and 52/4. It is also not in dispute that 52/4 is on the North of Survey No.53/1A. According to the plaintiff, the defendant, who is the Eastern owner had encroached upon his property by putting up a wall measuring about $1\frac{1}{2}$ feet in width and 25 feet in length on the North Eastern side of his property. Claiming that the said encroachment happened during the year 2005 when the plaintiff was away from India, the plaintiff sought for the aforesaid reliefs.

3. The suit was resisted by the defendant contending that the wall has been put up only within his land and it does not encroach upon the plaintiff's land in Survey No.52/1A. The defendant further contend that the disputed wall is situated within the boundaries of Survey No.52/5. Therefore, according to the defendants, the claim of encroachment is false to the knowledge of the plaintiff. On the above pleadings, the defendant sought for dismissal of the suit. Pending suit, a Commissioner was appointed, he was also permitted to have assistance of the Revenue Surveyors. Commissioner had visited the property along with Surveyor and the reports of the Surveyor and the Commissioner have been marked as Exs.C1 to C8. Ex.C7 is the report and Ex.C8 is the plan of the Surveyor.

4. Upon a consideration of the evidence on record, the learned Trial Judge concluded that the defendant had encroached upon an extent of 25 feet North South and 9 inches, East West over the plaintiff's property. On the said finding, the learned Trial Judge granted a decree for declaration, mandatory injunction and recovery of possession in respect of 25 feet North South and 9 inches East West. Aggrieved, the plaintiff preferred an appeal in A.S.No. 78 of 2012 while the defendant preferred an appeal in A.S.No. 68 of 2012.

5. The lower Appellate Court heard both the appeals together and upon a re-appreciation of the evidence, the lower Appellate Court found that the defendant had not encroached upon the plaintiff's property. In coming to the said conclusion, the lower Appellate Court relied upon Exs.C7 and C8 (Report and plan of the Surveyor), which clearly demonstrated that the disputed wall is situated East of the Boundary of the land in Survey No.52/5 i.e., within the defendant's property. On the said conclusion, the lower Appellate Court rejected the claim of the plaintiff that there has been an encroachment by the defendant over his land and dismissed the appeal filed by the plaintiff in A.S.No. 78 of 2012 while allowing the appeal filed by the defendant in A.S.No. 68 of 2011. Consequently, the suit in O.S.No.6 of 2007 stood dismissed. Aggrieved the plaintiff has come up with this second appeal. The following question of law was framed at the time of the admission:-

"a) Whether the lower Appellate Court erred in deciding the title dispute between the parties based on the Surveyor's report and plan, when the Surveyor did not measure the property with reference to the title deed, but the same was measured based on revenue document ?"

6. The report of the Surveyor has been marked as Ex.C7. A perusal of the Ex.C7 shows that the Surveyor has done a meticulous job by finding out the Survey shows from the Eastern

extremity of the land of the defendant and has measured the property. The survey in the report has observed that the plaintiff is entitled to 47 square metres in Survey No.52/4 and 450 square metres in Survey No.53/1A-1. On the measurement of the property of the plaintiff, the Surveyor found that the shortage in extent is only about 20 centimetres. According to a Surveyor, this shortage of 20 centimetres could be ignored. The Surveyor also measured the defendant's property and found that the defendant is in possession of only the extent that he is entitled to as per the revenue documents.

7. Mr.S.Sounthar, learned counsel appearing for the appellant would strenuously contend that the property should have been measured as per the sale deeds of the parties. Admittedly, after the purchase of the property by plaintiff as well as the defendant, the revenue records have been mutated and sub-divisions have been effected. Neither of them have objected to the measurement or extent shown in the revenue records. Of course, as per the sale deed, the plaintiff is entitled to 16 $\frac{1}{4}$ cents and defendant is entitled to 8 cents in Survey No.52/5. As per the revenue records, area in occupation of the defendant is shown as 9 $\frac{1}{2}$ cents. Therefore, the defendant is shown to be in possession of land in excess of what he has purchased.

8. The Trial Court, upon a consideration of the evidence come to the conclusion that the defendant has encroached upon the plaintiff's property. While the plaintiff sues for declaration and mandatory injunction, it is for him to demonstrate by tangible evidence that the defendant had encroached upon the particular portion of his property. A perusal of the Commissioner's plans and as well as the Survey plans filed before the Trial Court would show that there is no encroachment by the defendant over the plaintiff's property. The plaintiff would assume encroachment on the ground that the defendant is in possession of excess land than what he is entitled to.

9. The Trial Court has also based its conclusion that the defendant has encroached upon 9 inches by 25 feet in the plaintiff's land only based on the fact that the defendant is found be in possession of the excess land than what he is entitled to. The lower Appellate Court has rightly set aside the conclusion of the Trial Court because encroachment cannot be based on assumptions. Once the plaintiff is found to be in possession of the land that he is entitled to the fact that and there is negligble difference in the extent would not automatically mean that the defendant has encroached upon the plaintiff's property. In the absence of proof of encroachment, a decree for mandatory injunction cannot be granted. I find that the lower Appellate Court was justified in accepting the

measurements taken as per the revenue documents. It is seen that the plaintiff himself has not objected to the sub-division of the property and he has also obtained Patta based on the sub-division.

10. Hence, the question of law is answered against the appellant to the effect that when the sub-divisions have been effected as per law and they are not challenged. The lower Appellate Court was right in going by the measurement based on the revenue documents to come to the conclusion that the plaintiff has not proved the encroachment. In view of the answer to the question of law, this appeal fails and it is accordingly dismissed. However, there shall be no order as to costs.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

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To:-

1. The Principal Subordinate Judge, Mayiladuthurai

2.The Principal District Munsif, Mayiladuthurai.

Copy to

The Section officer

VR Section

High Court, Madras 104.

+1 CC to Mr.S.Sounthar, Advocate sr 94907

+1 Cc to Mr.A.Muthukumar, Advocate sr 94870.

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SV(CO)

SP(19/08/2020)