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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 22.10.2019

CORAM:

THE HONOURABLE MS.JUSTICE P.T.ASHA

S.A(MD)No.412 of 2019

and C.M.P(MD)No.8161 of 2019

S.Arvind @ Arvind Subramanian ... Appellant/Appellant/Defendant

Vs.

1.J.H.A.Mohammed Habeeb
2.J.H.A.Kajah Mohideen
3.J.H.A.Abubuckker ... Respondents/Respondents/Plaintiffs

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 29.04.2019 passed in A.S.No.167 of 2014 on the file of the Court of the Principal Subordinate Judge, Trunelveli, confirming the judgment and decree dated 17.03.2014 passed in O.S.No.94 of 2011 on the file of the I Additional District Munsif Court, Tirunelveli.

For Appellant : Mr.S.C.Herold Singh

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J U D G M E N T

The unsuccessful defendant in the courts below is the appellant before this Court. The Second Appeal is filed challenging the judgment and decree in A.S.NO.167 of 2014 on the file of the Principal Subordinate Judge, Tirunelveli confirming the judgment and decree passed in O.S.No.94 of 2011 on the file of the I Additional District Munsif, Tirunelveli.

2. The suit is filed for permanent injunction restraining the defendants from interfering with their peaceful possession and enjoyment of the suit property which was in extent of 10890 sq.feet in S.F.No.1282/2B Melapalayam Village, Tirunelveli District.

3. The facts in brief based on which the suit has been filed are that the suit schedule property, originally belonged to the defendant. On 13.11.1995, the defendant had sold the property to the plaintiffs' vendor and thereafter, the plaintiffs, by sale deed dated 16.08.2000, had purchased an extent of 25 cents in Survey No.1282/2B and the southern half was purchased by his brothers. The plaintiffs would further contend that they are in joint possession of the northern extent of 25 cents purchased by them. North-west of the plaint schedule property, the defendant's property is situate in Survey No.1282/2A. It is the case of the plaintiffs that on 08.02.2011, the defendants had trespassed into the suit property and dug a foundation pit. That with a great deal of difficulty the said attempt was stopped by the plaintiffs. Therefore, the plaintiffs

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have come forward with the suit in question.

4. The defendant had filed written statement inter alia contending that Survey No.1282 consisted of a total extent of 88 cents out of this an extent of 60 ¾ cents was sub divided as 1282/2. Retaining 10 ¾ cent on the west, the remaining 50 cents was sold by the defendant in favour of Balasubramanian and Seenivasan. The defendant was not aware of the sub division as 1282/2B. The defendant would also submit that he is not aware about the sale in favour of the plaintiffs. Thereafter, the defendant has executed a settlement deed in respect of the property comprised in Survey No.1282/2A in favour of his wife and as power of agent of his wife, he has been maintaining the property. He would also contend that the suit is bad for non-joinder of necessary parties. He would deny the fact that on 08.02.2011, the defendant attempted to trespass into the suit property by digging the foundation pit. The plaintiffs would contend that in 1997 one Ayyasamy had attempted to trespass into the property and survey was carried out and the boundary stone had been fixed. As per the order of the Assistant Collector in the year 1995 the plaintiffs would contend that the Commissioners had not measured the property on the basis of the survey stone and sought to have the suit dismissed.

5. The first plaintiff had examined himself as P.W.1 and marked Exs.A1 and A2. On the side of the defendants, D.W.1 and D.W.2 were examined and Exs.B1 to B6 were marked and the Commissioner's report and plan was marked as EX.C.1 to C.4.

6. The learned I Additional District Munsif, Tirunelveli, on consideration of evidence on record proceeded to decree the suit. Aggrieved by the same, the defendant had filed A.S.No.167 of 2014 on the file of the Principal Sub Court, Tirunelveli. The learned Subordinate Judge, confirmed the judgment and decree of the trial court and aggrieved by the same, the defendant is before this Court.

7. The learned counsel for the appellant would argue that the judgment of the courts below solely rests upon the Commissioner's report. The Commissioner has not properly measured the property by reasoning of which, the courts below have passed the erroneous order. He would at length submit that the measurements given by the Commissioner in his report was not correct and the same has been accepted by the Commissioner during cross-examination. He would therefore pray that the judgment and decree of the courts below be set aside.

8.Heard the learned counsel and perused the papers.

9. The defendant as one has himself admitted that during the dispute with his neighbour a survey of his property had been conducted and survey stones had been fixed. A reading of the Commissioner's interim report as well as final report would indicate

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that the measurement of the property had been arrived at only from the survey stones that the Surveyor had found abutting the road and in the property of the defendants. The appellate court has discussed this in detail in the judgment. It is also to be borne in mind that the defendant was the original owner of the suit schedule properties and it is only through the defendant the plaintiff is now claiming the right over the property. The learned Commissioner has also found that there has been an encroachment at the points C and D in plan Ex.C.1, which is clearly situated in Survey No.1282/2B. However, it is seen that the pit has been closed later which is evident from the latter Commissioner's report. The Commissioner in his earlier report had deferred the measurement on account of the fact that there was a pit, the measurements could not be taken. Thereafter the defendant appears to have filled up the pit and the land had been levelled by using JCB. The second inspection has been done thereafter. Therefore, I do not find any infirmity in the judgment and decree passed by the courts below. The defendant has not made any substantial question of law warranting interference by this Court.

10. In fine, this Second Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-III)

// True Copy //

Sub Assistant Registrar(CS)

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To,
1.The Principal Subordinate Judge, Trunelveli,
2.The Judge, I Additional District Munsif Court, Tirunelveli.

+1CC TO MR.S.C.HEROLD SINGH, Advocate Sr. No. 93830

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