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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 24.04.2018

PRONOUNCED ON : 07.06.2019

CORAM :

THE HONOURABLE MR.JUSTICE **S.S.SUNDAR**

Second Appeal (MD) No.93 of 2013

and

M.P.(MD) No.1 of 2013

Instine : Appellant / Respondent / Defendant

-Vs-

Raj : Respondent / Appellant / Plaintiff

Prayer: Second Appeal filed under Section 100 of the Code of the Civil Procedure, to set aside the judgment and decree dated 27.01.2012, passed in A.S.No.85 of 2011 on the file of the Sub Court, Thoothukudi, reversing the judgment and decree dated 10.03.2011 passed in O.S.No.64 of 2008 on the file of the District Munsif Court, Sathankulam.

For Appellant : Mr.C.Dhanaseelan

For Respondent : Mr.M.P.Senthil

JUDGMENT

The defendant in the suit in O.S.No.64 of 2008 on the file of the District Munsif Court, Sathankulam, is the appellant in this appeal.

2.The respondent in this appeal, as plaintiff, filed the suit in O.S.No.64 of 2008 before the District Munsif Court, Sathankulam, for permanent injunction restraining the defendant/appellant from interfering with his peaceful possession and enjoyment of the suit property.

3.The case of the plaintiff, as pleaded in the plaint, is as follows:

3.1.The suit property was allotted to the brother of defendant in a partition among the first defendant and his brothers. The property allotted to the brother of the defendant, by name, Alagesan was sold by him to the plaintiff on 13.10.2000. On the date of sale, the plaintiff was put in possession and he is in possession and enjoyment of the suit property. On the western side of the suit property, the defendant's house is located. With an intention to encroach into the suit property, the defendant has made an attempt to construct a compound wall unauthorizedly on



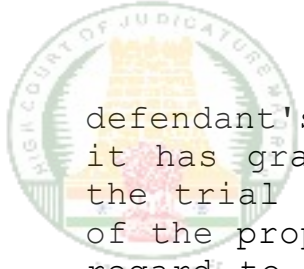
24.08.2008. The defendant's attempt was thwarted on that day. However, the defendant is interfering with plaintiff's enjoyment by denying the right of the plaintiff and that, therefore, the plaintiff is afraid of encroachment by defendant in the suit property. Hence the suit is filed.

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4.The suit was contested by the defendant denying the averments made in the plaint. It is admitted by the defendant that the suit property and adjacent property belonged to the father of defendant, by name, Thiru.Athikan. It is further stated in the written statement that after the death of the defendant's father, the defendant and his two brothers entered into a registered partition deed on 01.10.1999. It is contended by the appellant that within the property that was allotted to the defendant, the defendant put up a north-south compound wall on 26.08.2008, i.e., on the eastern portion of his house. It is further stated that the compound wall was demolished by the plaintiff and his men and that therefore, the defendant was constrained to give a police complaint. It is also stated by the defendant that the suit property is a vacant land and that the suit is nothing but a counter blast to the criminal complaint lodged by the defendant against the plaintiff. After the written statement was filed, the plaintiff amended the plaint to include the prayer for declaration of title and for a mandatory injunction directing the defendant to remove the foundation constructed by defendant on the western portion of suit property.

5.Sum and substance, the partition in the defendant's family and the allotment of a share to his brother, Alagasen, who is the plaintiff's vendor is not in dispute. The suit property is an extent of 5.86 cents in N.S.No.801 in Pallakurichi Village. Under the partition deed under Ex.A1 the total extent of 17.596 cents was divided into 3 plots, each measuring 35 ft. east-west and 73 ft. north-south with an extent of 2555 sq.ft. The plaint was subsequently amended to include a prayer of mandatory injunction to remove the compound wall constructed by the defendant on the western side of the suit property. To the amended plaint, the defendant/appellant filed additional written statement denying the allegations. The defendant also alleged that the plaintiff has removed the boundary stones and the constructions made by the defendant within his property.

6.Before the trial Court, the plaintiff examined himself as PW-1 and marked Ex-A1 to Ex-A3. Ex-A1 is the partition deed between the plaintiff and his brothers, dated 01.10.1999. Ex-A2 is the sale deed executed by the defendant's brother, by name, Alagesan, in favour of the plaintiff. The defendant also marked the certified copy of the partition deed and the complaint, that was given before the Police Station in Thattankulam. The defendant has examined himself as DW-2. Since the trial Court accepted that the suit property has been purchased by the plaintiff from the



defendant's brother, which was allotted to him in the partition, it has granted the declaratory relief to the plaintiff. However, the trial Court further found that the plaintiff is in possession of the property purchased by him and that the dispute is only with regard to the property, which was in excess on ground. Since the compound wall constructed by the defendant was found to be not within the property of the plaintiff as per sale deed, the trial Court refused to grant any further relief to the plaintiff. The trial Court after considering the title deeds and revenue documents found that the total extent of land available in S.No.957/6 is 20.50 cents and that the measurement taken under Ex.A1 namely 105' x 73' as against the available 115' x 77' has led to the dispute. The trial Court also found that the plaintiff has not proved his possession and enjoyment of the disputed property and that he is in possession of the property purchased under Ex.A2 if measurement is taken from the east. Since the plaintiff has not proved his enjoyment with reference to boundaries, it was further held that he cannot seek either permanent injunction or mandatory injunction. Aggrieved by the judgment and decree of the trial Court, the plaintiff preferred an appeal in A.S.No.85 of 2011 before the Sub Court, Thoothukudi. The lower appellate Court, however, allowed the appeal and decreed the suit *in toto*, thereby granted the relief of declaration of title and permanent injunction and mandatory injunction directing the defendant to remove the compound wall constructed by him in the suit properties. Since the total property had been divided from west to east, under Ex.A1 the lower appellate Court accepted the case of plaintiff and held that the excess land within the suit survey numbers should be treated as the property of temple which lies on the eastern side. It is an admitted fact that the temple has its boundary indicating that the temple has no further land on the western side of its boundary line. Aggrieved by the judgment and decree of the lower appellate Court reversing the findings of the trial Court, the above second appeal has been filed.

7. At the time of admitting the Second Appeal, the following substantial questions of law were framed:

"a) Whether the relief of mandatory injunction granted by the lower Appellate Court is legally sustainable on the reason the same has been granted beyond the scope of the description given to the suit scheduled property?

b) Whether the lower Appellate Court is legally correct in discussing about the area of possession and enjoyment of the respondent/plaintiff beyond what has been purchased by him in Ex.A2 and described as suit schedule property, when the plaintiff has no case that he enjoyed a different area than the



one purchased by him under Ex.A2 and has perfected title to it?

c) Whether the finding of the first Appellate Court in relocating the shares of the parties to Ex.A1 partition deed is legally sustainable when there is no such relief claimed in the suit?

d) Whether the conclusion of the lower Appellate Court that the excess area in Survey No.957/6 when comparing with the total area mentioned in Ex.A1 would be the property of Muthumalaiamman Temple is perverse and unwarranted? and

e) Whether the relief of the mandatory injunction granted on the basis of the above said finding that the excess area belongs to Muthumalaiamman Temple is legally sustainable?"

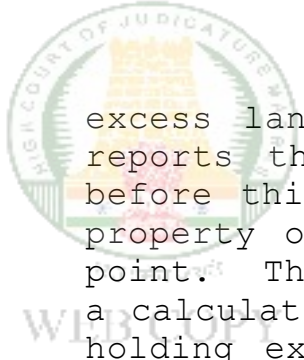
8. In this case, it is seen that a Commissioner was appointed by the trial Court to measure the suit property and to file a report along with the plan. The Commissioner measured the property of the plaintiff after taking into account the temple property on the eastern side of the suit property. Measuring the property from the boundary of the temple property, the Advocate Commissioner found that the demolished portion of the compound wall, constructed by the defendant is not within the suit property. It was thereafter another application was filed by the plaintiff himself to re-issue warrant to the same Commissioner to measure the property from west. By measuring the property from west, the Commissioner has once again filed the second report and plan indicating that the suit property is entirely a new property when measured from west. Even before this Court, the Commissioner was appointed to measure the entire property. The Commissioner's report and plan submitted before this Court also would show that the confusion in the measurement appears to be because of the excess land. It is admitted that the entire property lying in natham survey No.801 in Pallakurichi Village has now been given survey No.957/6. The total extent of the property as per revenue records is admittedly 8.3 ares which is more than 20 cents. There is no claim from any third party in respect of any portion comprised in new survey No.957/6. It appears that the plaintiff's vendor and the two brothers of the plaintiff's vendor including the defendant partitioned the properties under Ex.A1, dated 01.10.1999 showing the total extent of property as 17.596 cents with 105 ft. east-west and 73 ft. south-west. Because of the fact that the actual extent of property that was divided among the three brothers was in excess in terms of extent and measurement, there is bound to be variation in the location of



suit property when measurement is taken from east and west independently. For the entire property road is shown as the western boundary and the property of the temple and its land is shown as the eastern boundary. The land belong to the temple falls within survey No.957/11 and there is no claim by the temple in respect of any portion of land which falls in Survey No.957/6. In such circumstances, it will be proper and appropriate to consider the claim of plaintiff in the light of the sale deed under Ex.A2, dated 13.10.2000 under which the plaintiff purchased the suit property. The document Ex.A2 would show that the defendant's brother one Alagesan has sold the property allotted to him in the partition deed under Ex.A1 dated 01.10.1999. It is true that under Ex.1-partition the parties were allotted 1/3 each starting from west to east. The eastern 1/3 measuring 2555 sq. ft. (5.865 cents) was allotted to the plaintiff's vendor. As per the partition deed east-west 35 ft. and north-south 75 ft. was allotted to the plaintiff's vendor. The property allotted to the plaintiff's vendor was also described with reference to the boundaries on four sides. While the property allotted to defendant was shown as the western boundary and the Muthumalaiamman Temple is shown as the eastern boundary, the plaintiff who has purchased the eastern 1/3 share cannot insist that the property purchased by him should be identified after taking measurements from west. The property purchased by the plaintiff is within the four boundaries. Since Muthumalaiamman temple is the eastern boundary of the property purchased by plaintiff it will be appropriate only if the property is measured from the eastern boundary as the boundary of defendant is in dispute.

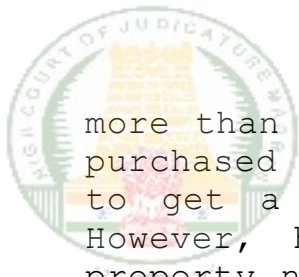
9.The plaintiff has not filed the suit for fixing the boundaries as per the partition deed. The plaintiff has not impleaded yet another brother of defendant who was allotted the western 1/3 share. Without his presence, the western boundary of defendant's brother cannot be assumed as taking measurements from the west without impleading the owner of the 1/3 share in the western end of the whole property of defendant's father, is improper.

10.Considering the nature of dispute in the present case, the first impression any one can get is that the plaintiff has come forward with the present suit knowing full well that he is in enjoyment of the property allotted to his vendor in the partition under Ex.A1 dated 01.10.1999. The two reports of the Advocate Commissioner filed before the lower Court and the Commissioner's report filed before this Court would clearly show that the plaintiff is in enjoyment of the property purchased by him under Ex.A2, dated 13.10.2000. After seeing that the defendant and his brother are in enjoyment of more than the property allotted under the partition deed dated 01.10.1999, the plaintiff has come forward with this vexatious suit with an intention to share the



excess land available in Survey No.957/6. It is seen from the reports that were submitted before the lower Court as well as before this Court that the north-south measurement of the entire property of the defendant's father is more than 73 ft. at every point. The learned Counsel appearing for the appellant submitted a calculation memo pointing out that the plaintiff is found to be holding excess land as per the Commissioner's report Exs.C1 and C2. Even by the Commissioner appointed by this Court, the excess area held by the plaintiff appears to be more than 0.8 cent. The north-south measurement of the property of the plaintiff is 86 ft. and 81 ft. respectively (maximum and minimum). In the said circumstances, the case of the plaintiff, if accepted, it will lead only to unjust enrichment by the plaintiff at the cost of other sharers. Since one of the sharers namely the defendant's elder brother is not made as party in the suit it is impermissible to consider the plea of plaintiff that the suit property should be identified on ground by taking measurement from the west that is from the property that is now available to the defendant's elder brother by name Govindaraj.

11. In the present case, the suit property itself has been described as falling on the western side of Muthumalaiamman temple. It is not the case of the plaintiff that there is a dispute regarding the eastern boundary of suit property. In such circumstances, granting relief in favour of plaintiff would be contrary to the description of the suit property given in the sale deed and plaint. The plaintiff cannot succeed in the suit by laying an inequitable claim based on his knowledge regarding the availability of excess land. The lower appellate Court failed to see that the plaintiff is only a purchaser of one of the sharers who was allotted specific extent with measurement taken from the temple boundary. Without even impleading the elder brother of defendant, no relief can be given in favour of the plaintiff as it may affect the right, title and interest of the other sharer who was allotted the property on the western side. The plaintiff filed a suit for declaration and consequential injunction in respect of a property which is identifiable on ground with reference to four boundaries and measurements. The plaintiff is entitled to 35 ft. east-west from the eastern boundary namely the temple land. The Advocate Commissioner appointed in this case has given a report and plan indicating in unmistakable terms that the plaintiff is in enjoyment of the lands which is more in extent than that was given to his vendor under Ex.A1 and himself under Ex.A2. The Commissioner report and plan also indicate that the property if measured from the eastern side boundary, there is no encroachment by defendant. Hence, this Court accept the finding of the lower Court that the construction of wall put up by the defendant lies well within the boundary of defendant and that no portion of the property of plaintiff purchased by him under Ex.A2 is encroached by the defendant. As per the report, the property available within the compound wall constructed by the defendant is



more than the area purchased by the plaintiff. The plaintiff has purchased a specific extent of 5.865 cents and he may be entitled to get a declaration of his right in respect of that extent. However, he is not entitled to claim the ownership over the property now earmarked by the plaintiff as his property by taking measurements from the west. This Court is in agreement with the findings of the trial Court that the plaintiff is not entitled to get permanent injunction or mandatory injunction. The plaintiff's right title in respect of a property with 35 ft. east-west from Muthumalaiamman temple alone is declared. The plaintiff is entitled to get consequential injunction in respect of the eastern 1/3 share allotted to his vendor in the partition by taking measurements from the eastern side.

12.As a result, this Second Appeal is allowed. The judgment and decree of the lower Appellate Court in A.S.No.85 of 2011 is set aside. The judgment and decree of the trial Court is modified by granting a decree of declaration of title and consequential injunction restraining the defendant from interfering with the plaintiff's right and enjoyment in respect of the suit property which should be located by taking measurements from the eastern side and by taking the temple as the eastern boundary. In the suit, the plaintiff is not entitled to relief of mandatory injunction, as the construction put up by the defendant namely the compound wall lies beyond the suit property and well within the property of defendant. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar ()

// True Copy //

Sub Assistant Registrar (CS)

cmr/SRM

To

- 1.The Subordinate Judge, Thoothukudi.
- 2.The District Munsif, Sathankulam.
- 3.The Section Officer,

Vernacular Records,

Madurai Bench of Madras High Court, Madurai. (+ 2 copies)

+ 1 CC TO Mr.C.Dhanaseelan, ADVOCATE IN SR No.67475

+ 1 CC TO Mr.M.P.Senthil, ADVOCATE IN SR No.67558

Judgment made in
Second Appeal (MD) No.93 of 2013