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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.09.2020

PRONOUNCED ON : 28.09.2020

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.1272 of 2009
(Heard through video conferencing)

Mari Kounder

... Appellant/Defendant

Vs

Mohanraj

...Respondent/Plaintiff

Prayer:- This Second Appeal has been filed under Section 100 C.P.C., against the judgment and decree dated 16.06.2009 passed by the learned Principal District Judge, Villupuram in A.S.No.5 of 2009 confirming the judgment and decree passed by the learned Principal Subordinate Judge, Tindivanam in O.S.No.50 of 2006 dated 30.10.2008.

For Appellant : Mr.J.Lakshmi Narayanan, for
Mr.P.Rajendran

For Respondent : Mr.S.Kaithamalai Kumaran

JUDGMENT

The defendant in the suit is the appellant before this Court. Having lost the suit before the Courts below, the present second appeal is filed. The suit laid by the plaintiff / respondent for declaration of title and for consequential injunction restraining the defendant / appellant and his agents from disturbing the plaintiff's peaceful possession and enjoyment of the suit property.

2.The case of the plaintiff is that, the suit schedule property consisting of three items originally belonged to one Natesa Mudaliar. In the year 1966, the same was purchased by the grand mother of the plaintiff Saraswati Ammal, vide sale deed dated 25.10.1966. Subsequently, during re-survey, the suit schedule properties; Item No.1 was re-numbered as R.S.No.110/13;



Item No.2 was re-numbered as R.S.No.110/12 and Item No.3 was re-numbered as R.S.No.110/11. Again, the suit schedule properties; Item Nos.1 to 3 were sub-divided as 596/18; 596/19 and 596/12 respectively.

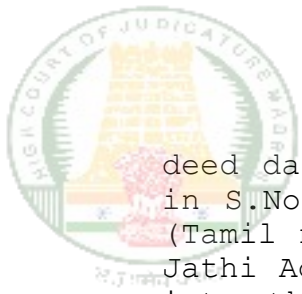
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3.Out of three cents of land in S.No.314/14, in one cent of land, a house was constructed by Saraswati Ammal and the same was under her enjoyment. The plaintiff on 15.02.2006, settled this property along with other properties to her son Mohanraj. In the said settlement deed, instead of giving the total extent of the land, erroneously linear measurement of the house alone was mentioned. When this came to the notice, a rectification deed was registered on 11.06.2006. The constructed house and the garden portion are shown in Item No.3 of the suit schedule property.

4.The plaintiff wanted to demolish his old house, settled in his favour by Saraswati Ammal and to construct a new house. The defendant trying to interfere and making attempts to forcibly take the possession of the property. Hence the suit for declaration and consequential injunction.

5.The defendant in his written statement denied the allegations and averments found in the plaint. According to the defendant, initially, the property in S.No.314/14 measuring three cents bounded on the East of vacant land belonging to C.Vinayaga Mudaliar, West of Dakshinamoorthy Mudaliar house, South of Drowpathi Amman Koil Lane, North of second Item property comprised in it, the plot measuring 36 feet East to West and 32 feet South to North and the house constructed in it. S.No.314/15 measuring two cents out of seven cents bounded on the East of C.Vinayaga Mudaliar farm, West and North of Dakshinamoorthy Farm, South of first item property. 1/6th share in the Well situated in three cents of S.No.314/16 (inclusive of right of the usual pathway for bringing water), belong to S.Sabapathy Mudaliar of Kallalampoondi. The said properties were purchased by Chinnaamy Reddiar, from Sabapathy Mudaliar vide registered sale deed dated 24.03.1958 and was in his possession and enjoyment. After the demise of Chinnaamy Reddiar, his son Lakshmi Narayanan took possession of it and was in enjoyment of the aforesaid properties. Vide registered sale deed dated 21.06.1983 he sold the said property to Irusammal, w/o Mannangatti Mudaliar and the defendant.

6.The linear measurement as found in the sale deed executed by Natesa Mudaliar in favour of Saraswati Ammal under the sale



deed dated 25.10.1966, the measurement of the land and building in S.No.314/14 was shown as East-West 15 Jathi Adi (Ihjp mo) (Tamil measurement - near about 10.46 inches) and South West 33 Jathi Adi (Ihjp mo). While so, after encroaching upon six feet into the land of the defendant, the plaintiff trying to seek declaration over and above their title. The present measurement of Saraswati Ammal house on East West is 21 feet. Whereas, the title deed shows East West 15 feet only. When this was pointed out to Saraswati Ammal, a panchayat was convened and in the said panchayat, it was agreed by the parties that in exchange for the encroachment of six feet by Saraswati Ammal in S.No.314/14, the defendant will take one cent of land in S.No.314/16 owned by Saraswati Ammal.

7.Accepting this oral exchange on 01.10.1983, the parties were enjoying their respective portion of the land. The defendant has put up construction in S.No.314/14 and the bore well in S.No.314/16 and cultivating the land.

8.In respect of passage, the defendant has contended that Saraswati Ammal house is constructed in S.No.314/14 it bears door No.5. The Western wall of Saraswati Ammal house is the boundary of the defendant land and the house bearing D.No.3. In between this wall and East of defendant's house '8' feet passage is present. It is a passage for the use of defendant to have access to the cattle shed in S.No.314/15. The plaintiff has no right over the said passage.

9.The plaintiff has constructed a toilet in Item No.3 of the suit property 30 years ago. To that toilet, the access is not through this passage. They used only the street to have access to their property. Relying upon the Commissioner's report and sketch, the defendant has contended that the plaintiff has no right to seek the remedy in respect of the passage since, they neither had title or easement right over the passage.

10.The Trial Court framed the following issues:-

"1.Whether the plaintiff is entitled for the relief sought for in the case ?;

2.Whether the settlement deed executed by Saraswathi Ammal in favour of the plaintiff is valid ?;



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3. Whether the defendant is in occupation and possession of the suit property ? And

4. To what other relief is the plaintiff is entitled for?"

11. Two witnesses were examined on the side of the plaintiff and four exhibits were marked through them. Two witnesses were examined on the side of the defendant and seven exhibits were marked through them. The Advocate Commissioner's report and sketch were marked as Exs.C.1 and C.2 respectively.

12. The trial Court, on analysing the title deeds and the measurements found in the title documents of the respective parties, rejected the contention of the defendant that, as a result of panchayat in the year 1983 there was an oral arrangement wherein, they have exchanged the property in S.No.314/14 for the property in S.No.314/16. The trial Court held that such exchange is not proved by the defendant. Further, relying upon the Commissioner's report and the Re-survey number, the trial Court has held that to reach the third item of the suit schedule property, the plaintiff has to use the passage in dispute and it has been used by them for substantial time. The Trial Court has also held that the defendant though claim absolute ownership of the suit land but has not produced any document in his name or his predecessors name to prove ownership. Hence, the suit was decreed as prayed for.

13. On appeal, the First Appellate Court confirmed the trial Court judgment and decree and dismissed the First Appeal with costs. The Second Appeal against the concurrent finding of the Courts below is filed on the ground that the Courts below erred in rejecting the plea of the defendant regarding six feet passage by shifting the burden of proof on the defendant the existence of passage is not mentioned in Ex.A.1 sale deed only in the settlement deed and rectification deed created subsequently there is reference about the passage. This will not confer any title or right over the property. This the Courts below gravely erred by overlooking this vital fact.

14. The appellant has further contended that the Courts below have conferred title on the plaintiff based on the Advocate Commissioner's report and sketch and not based on any title documents. The learned counsel for the appellant has filed a detailed written arguments and judgments in support of his case.



15.Per contra, the learned counsel for the respondent would submit that the Courts below, on facts, have gone into the records and have held that the plaintiff have title over the suit schedule property and they are in possession and enjoyment of the same. The contra contention raised by the defendant regarding exchange of property in S.No.314/14 to the property in S.No.314/15 found to be not proved. While so, the judgments and decrees of the Courts below based on the documents of the year 1996 and 2006 are relevant and sustainable.

16.The learned counsel would also submit that the Commissioner who has inspected the spot and submitted the report with measurements has described the physical feature of the suit property. No serious objection was raised by the defendant except saying the Commissioner omitted to say that the house in S.No.592/12 was demolished. The shortage of land on lie than what in the defendant title deed was not mentioned by the Commissioner. They have not produced any contra evidence to the facts found in the Commissioner report. Therefore, in the second appeal, the findings of facts by the Courts below cannot be agitated.

17.The arguments of the learned counsel on either side heard. Records perused.

18.The plaintiff case is based on the title deeds - Exs.A.1, A.2 and A.3. The case of the defendant as found in their written statement clearly show that in the year 1983 itself, they were aware of the fact that the mother of the plaintiff had constructed a house over and above the measurements in the title deed. If it is so, they should have sought for recovery of possession or should have properly documented the alleged oral exchange of property. The present suit for declaration and injunction is filed in the year 2006, after 23 years of the alleged oral exchange. Further, the measurements as found in the Commissioner's report and sketch indicates that the passage has been used for access to the third item of the suit schedule property. The existence of the passage is reflected in the documents relied by the plaintiff, to establish the fact that the said passage is in exclusive possession and enjoyment of the plaintiff. To prove the contrary, the defendant ought to have adduced evidence and the burden to prove is on the defendant who has pleaded possession contrary to the recital in the documents. The Courts below rightly held that having pleaded the title over the disputed passage, the burden shifts on the defendant. The preponderance of probabilities in this case through the document as well as the evidence and the Commissioner's report indicates



that the passage in dispute have been used by the plaintiff to have access to reach the third item of the suit property.

19.While the plaintiff claims the defendant is trying to encroach upon the suit land, the defendant is arguing that six feet was encroached by the plaintiff in S.No.314/14 and that was mediated and settled by an exchange of one cent in S.No.314/16. There is no iota of evidence for the alleged encroachment or exchange pursuant to panchayat. The case has been decided by the Courts below on the proved facts based on the title deeds produced by the plaintiff and the admission of the defendant who has candidly admitted that three cents of land in S.No.314/14 is held by the plaintiff prior to 1983. Therefore, the judgments relied by the appellant in K.Mohammed vs. P.S.M.Ahamed Abdul Khader and others (2009 AIR SCW 4739); Anil Rishi vs. Gurbaksh Singh (AIR 2006 SC 1971) and in Chinnasamy vs Perumal (2000 (1) CTC 148) are not factually applicable to the facts of the case in hand.

20.This is the case where the plaintiff through the title deed of the year 1966 - Ex.A.1 has established his right over the suit property. He has proved the title with cogent and acceptable evidence.

21.For the said reasons, this Court holds that there is no material to interfere with the concurrent finding of the Courts below. There is no substantial question of law involved in this case. Hence, the Second Appeal is dismissed with costs.

Sd/-

Assistant Registrar(CCC)

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Sub Assistant Registrar

jbm



To

1. The Principal District Judge,
Villupuram.

2. The Principal Subordinate Judge,
Tindivanam.

Copy to:

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

+1CC to Mr.S.Kaithamalai Kumaran, Advocate, Sr.No.32102

Pre Delivery Judgment made in
S.A.No.1272 of 2009

BR (CO)
K.RK. (31.08.2021)