

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.03.2020

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.786 of 2008

Ekambaram

...Appellant/Plaintiff

Vs

1. Girija
2. K.A. Sambamurthy
Rice Mill
3/48-F, Main Road,
Kaduvangudi Village,
Kollumangudi Post,
Nannilam Taluk,
Tiruvarur District.

...Respondents/Defendants

PRAYER: Second Appeal is filed under Section 100 of CPC praying to prefer this Memorandum of Second Appeal in this Hon'ble Court against the Judgment and Decree passed in A.S.No.18 of 2007 dated 21.09.2007 on the file of the Court of Sub-Ordinate Judge, Tiruvarur in confirming the Judgment and Decree passed in O.S.No.110 of 2003 dated 13.04.2007 on the file of the Court of District Munsif cum Judicial Magistrate, Nannilam.

For Appellant : Mr. A. Muthukumar

For Respondents : Mr. Srinath Sridevan

Judgment

The unsuccessful plaintiff in both the Courts below is the appellant before this Court challenging the concurrent judgment and decree which is against him.

2. The brief facts necessary for disposing off this Second Appeal is as follows and for the ease of reference the parties are referred to in the same array in the suit. The suit O.S.No.110 of 2003 on the file of the District Munsif cum Judicial Magistrate, Nannilam which is the subject matter of this Second Appeal is one for an injunction restraining the defendants from removing the live fence and the trees therein or cutting it.

3. The plaintiff had come forward with the above suit on the basis that the properties comprised in S.No.79/2 and 79/3 of Kuduvangudi Village, Nannilam Taluk belonged to the Arulmughu Kailasanatha Swamy Temple which in turn belonged to Maruthuvam Pillai and his family.

4. The plaintiff and his family had taken on lease a total extent of 55 cents in the above Survey Numbers (28 cents in S.No.79/2 and 27 cents in S.No.79/3) 70 years ago and have been in possession and enjoyment of the same. In this property, the plaintiff had put up a live fence measuring 2 feet in width and 250 feet in length, totally measuring 500 sq.ft. The live fence consists of various indigenous trees like Poovarasu, Vembu, Vedaranyam, Kongai, Kalyana Murungai, Nochi, etc. This property is the suit property.

5. It is the case of the plaintiff that the Arulmighu Kailasanatha Swamy Temple possessed property south of the suit property also. This property was taken on lease by the first defendant's husband Venkatasubramania Iyer who was running a rice mill there. After his demise, his wife, the first defendant had leased out the property to the second defendant. The first defendant's husband had also taken the property on lease from the aforesaid temple. The plaintiffs case is that the defendants have no right in the suit property.

6. It is the plaintiffs contention that in the year 1992 difference of opinion arose between the plaintiff and the first defendant's husband in respect of properties comprised in S.No.79/2, 79/3, and 79/16 constraining the plaintiff to file a suit for bare injunction in O.S.No.572 of 92 on the file of the District Munsif Court, Mayiladuthurai which was later transferred to the file of the District Munsif cum Judicial Magistrat, Nannilam. Likewise, the first defendant's husband had filed O.S.No.610 of 92 originally on the file of the District Munsif's Court, Mayiladuthurai later transferred to the file of the District Munsif cum Judicial Magistrate, Nannilam. The plaintiff's suit was dismissed and the first defendant husband's suit was decreed. The appeals A.S.No.108/94 and 151/1995 filed by the plaintiff was also unsuccessful. Thereafter the first defendant's husband had initiated execution proceedings in EP.No.154/96 and on 12/08/1998 has taken possession through Court.

7. Whiles, the plaintiff would contend that in view of the long standing animosity between the plaintiff and the defendants, in the guise of measuring the suit property they attempted to illegally trespass into the suit property. On 18.07.2003 the plaintiff issued a legal notice and despite receipt of the same the defendant did not sent a reply. On 03.10.2003 they attempted to remove the fence. Hence the above suit has been filed.

8. The defendant had countered the above suit, at the outset, denying the various allegations contained in the plaint as false and baseless. The defendant would contend that the suit in question was a second round of litigation in respect of the very same property. She would contend that the plaintiff had filed a suit O.S.No.113 of 1994 on the file of the Court of District Munsif, Nannilam for an injunction against the first defendant's husband in respect of 20 cents in R.S.No. 79/2 and 40 cents out of 47 cents in R.S.No.79/16. The above properties were taken on lease from the temple Trust by the first defendant's husband in the year 1973 i.e; on 25.05.75 which was renewed on 12.04.1988. The first defendant would further submit that since the demised premises was about 225 feet long, a fence was not put up by her husband. All of a sudden the plaintiff had put up a fence inside the property of the defendant and started digging up pits in the said place in the year 1992. This was objected to by the first defendant's husband who demanded possession of the encroached portion. Immediately, the plaintiff had filed the suit O.S.No.113 of 1994 before the District Munsif, Nannilam for a bare injunction. Thereafter the first defendant's husband had filed O.S.No.118 of 94 on the file of District Munsif, Nallilam for recovery of possession. Ultimately after a detailed trail, the suit filed by the defendant's husband was decreed and the suit filed by the plaintiff was dismissed. The said judgment and decree was confirmed in A.S.No.108 of 94 and A.S.No.151 of 1995 and there was no further appeal by the first defendant. Thereafter, the first defendant had filed an Execution Petition and had taken possession of the property. The decree was only with reference to the first item of the property in O.S.No.118 of 94.

9. While the defendant was making arrangement to measure the property, a notice dated 18.07.2003 was issued to the Revenue Officers by the plaintiff. The plaintiff, taking advantage of a mistake that in the Survey number wherein S.No. was shown wrongly as S.No.79/16 instead of S.No.79/3. The application to amend the same is pending and taking advantage of this error the present suit is filed once again for the very same property as described in O.S.No.113/1994. The suit

property as described by the plaintiff is wrong and false and made purposely with an intent to confuse.

10. The present suit is filed with a slight modification in the Survey numbers; however the judgment and decree in A.S.No.108 of 1994 and A.S.No.151 of 1995 have become final. The suit is bad for nonjoinder and has been under valued.

11. The Trial Court after hearing both parties had dismissed the suit. Challenging the same, the plaintiffs had filed A.S.No.18 of 2007 on the file of the Sub Court, Thiruvarur. The learned Sub-Judge also confirmed the Judgment and Decree of the Court below and challenging the same, the appellant is before this Court.

12. Mr. A. Muthukumar, learned counsel appearing on behalf of the plaintiff would contend that the finding of the Lower Court that the suit in question was already the subject matter of the earlier suit is absolutely wrong and the dismissal on the ground of res judicata is per se absurd. He would contend that the Trial Court did not take any steps to have a Commissioner or Surveyor appointed to measure the property to scale. He would draw the attention of the Court to the fact that neither the plaintiff nor the defendants had taken any steps in this regard. He would state that the earlier suit was dismissed simply on the ground of erroneous mentioning of the survey number and not on merits. He would therefore contend that the matter can be heard afresh as there is no question of res judicata operating.

13. Per contra, learned counsel appearing on behalf of the defendant would contend that the earlier suits O.S.Nos.113 of 1994 and 118 of 1994 relate only to the suit property and the suit of the plaintiff was dismissed and that of the defendant was decreed. Therefore the judgment and decree in the earlier suits attracts the principles of Res judicata. Admittedly, even in the earlier round of litigation the plaintiff was assenting a right over the property. The plaintiff's title having been negatived in the earlier round of litigation, the plaintiff is only attempting to make a back door entry by filing the present suit.

14. Heard the counsel and perused the papers. Admittedly, the first defendant's husband had filed a suit for recovery of possession and the same was in respect of a larger extent of the property which is a subject matter of the earlier suit. The

right of the plaintiff to the suit property had been decreed possession was also taken through the Court. Therefore it is clear that the first defendant and her husband were in possession and enjoyment of the suit property and the allegations of the plaintiff that the defendant had attempted to trespass into the property is nothing but a falsity and the Courts below have rightly turned down the plea. The plaintiff has not made out any question of law much less a substantial question of law. The Second Appeal is dismissed. No costs.

Sd/-
Assistant Registrar (CO)

//True copy//

Sub Assistant Registrar

mrn

To,

1. The Sub-Ordinate Judge,
Tiruvarur

2. The District Munsif cum Judicial Magistrate,
Nannilam.

Copy To
The Section Officer,
VR Section, High Court, Madras

+1cc to Mr.Srinath Sridevan , Advocate SR.No.20275

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S.A.No.786 of 2008

SJ (CO)
GMY (26/08/2020)

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