



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 19.11.2020

Pronounced on: 23.11.2020

WEB COPY

Coram:

THE HONOURABLE Dr.JUSTICE G.JAYACHANDRAN

S.A.No.1158 of 2010

Vasanthi
W/o Rajamanickam

.. Appellant/Plaintiff

/versus/

1.Rajam

2.Arumugam

..Respondents/Defendants

Prayer: Second Appeal is filed under Section 100 of Civil Procedure Code, praying against judgment and decree dated 20.03.2006 made in A.S.No.76 of 2004 on the file of the Subordinate Court at Chidambaram confirming the judgment and decree dated 14.09.2004 made in O.S.No.40 of 2000 on the file of the District Munsif Court at Portonova.

For Appellant : Mr.T.Girish

For Respondents : Mr.A.Muthukumar

JUDGMENT

(The case has been heard through video conference)

The second appeal is preferred by the plaintiff who lost in both Courts her suit for permanent injunction.

2. The case of the plaintiff:

The property morefully described under 'A' schedule of the plaint was purchased by the plaintiff vide, sale deed dated 06/08/1998. The vendor of the plaintiff purchased this property in two parts under sale deeds dated 02/11/1987 and 18/11/1987. The plaintiff predecessors got the property as per the final decree passed in the partition suit O.S.No.9/1958 on the file of the Sub Court, Cuddalore. The defendants, who are husband and wife living on the south of the suit property as tenants tried to purchase the suit property lying North of the property under their occupation. Since the plaintiff purchased it, they are inimical and hostile to the plaintiff.



3. Alleging that the defendants have encroached upon 5 feet North of the property under their occupation and had put up a temporary bathroom and latrine recently and all attempts to prevent it through the police and the revenue people did not give the desired result, describing the encroached portion as 'B' schedule in the plaint, suit for permanent injunction is filed.

4. The case of the defendants:

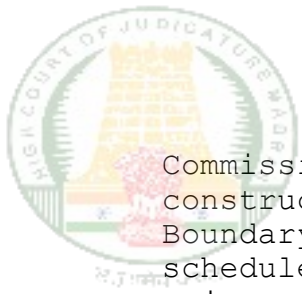
Neither the plaintiff nor her vendor were in possession or enjoyment of the 'B' schedule property. The allegation that the defendants living as tenant on the south of the suit property is denied. The portion of the land which is subject matter of the suit is in possession and enjoyment of the first defendant. His grand father build a titled house in the said property and it is in their enjoyment for nearly 100 years. There is a live fence on the North of this property besides foundation for boundary wall. This wall and live fence remain as the boundary for his property and the plaintiff property for more than 25 years known to the defendants. The plaintiff's vendor Parthiban was enjoying the portion of the property beyond north of the live fence and boundary wall. The bathroom and latrine was constructed nearly 15 years ago and the plaintiff's vendor never objected or claimed any right over it. Therefore, even assuming but not admitting that the plaintiff or her predecessors have any right, the same has been extinguished by the adverse possession of the defendants for more than the statutory period. The building under construction in the portion of the land in their continuous, open and hostile to the real owner cannot be restrained.

5. The issues re-casted based on the pleadings

- 1) Whether the suit property is in the possession of the plaintiff or the defendants ?
- 2) Whether the plaintiff is entitled to permanent injunction as prayed for ?

6. On behalf of the plaintiff, 3 witnesses were examined and 7 exhibits were marked. On behalf of the defendants, 2 witnesses were examined and 28 exhibits were marked. The Advocate Commissioner Reports and Sketches were marked as Ex.C-1 to Ex.C-4.

7. The trial Court, after tracing the title of the plaintiff through Ex A-1 and her vendors title conveyed under Ex.A-2 and Ex.A-3, the boundaries and measurements shown in these documents and in the light of the Commissioner's Report, held that, the plaintiff had not proved the due execution of A-1 through her vendor. Besides from her own pleadings as well from the



Commissioner's Report, the structure in 'B' schedule property constructed by the defendants much before suit is proved. The Boundary wall, live fence and the 24 years old well in the 'B' schedule property dug by the defendants. Its continuous enjoyment by the defendants coupled with the evidence of DW-2 and the receipt Ex.B-25 issued for construction of latrine by the defendants had led to the conclusion that the plaintiff was not in possession of the 'B' schedule property at least from 1989. For the said reasons, the trial Court dismissed the suit filed for bare injunction.

8. On appeal, the first appellate Court after re-appreciating the evidence confirmed the trial Court finding and dismissed the first appeal.

9. In the second appeal, the learned counsel for the appellant submitted that, in spite of the Court decree in the partition deed Ex.A-5 and the sale deeds of her vendors Ex.A-2 and Ex.A-3, the Courts below had erred in doubting the execution of the sale deed and transfer of title in respect of the suit property under Ex.A-1. Out of 1440 sqft of land purchased under Ex.A-1, the disputed portion is 200 sqft described in 'B' schedule. The defendants were not able to prove their title over the said portion of the land. Without evidence or pleading regarding the commencing point of adverse possession, the Courts below erred in holding that the defendants are in possession of the suit 'B' schedule property for more than the time prescribed.

10. Per contra, the learned counsel for the respondents submitted that, according to the plaint, the defendants had encroached 5 feet towards north and started construction. Already the defendants had constructed bathroom and latrine. When it is admitted in the plaint that the already possession is not with the plaintiff, the suit for bare injunction is not maintainable. The plaintiff further could not establish its title or possession over the suit 'B' schedule property. The evidence let by the defendants including house tax receipts of the year 1973, has positively proved the possession with the defendants. Therefore the Courts below have rightly dismissed the suit and there is question of law involved in this case to interfere.

11. Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondents. Records perused.

12. The suit is laid for permanent injunction. In the plaint, it is candidly admitted that the defendants had already encroached upon the 'B' schedule property and had put up the



latrine and bathroom. The Commissioner Reports and the evidence adduced on behalf of the defendants had proved that the said structure is in existence for more than 25 years. That is even before the plaintiff purchased the property in the year 1998. The plaintiff's predecessor in title Parthiban had not objected or attempted to remove the encroachment. From the Commissioners Report, it is clear that there is a live fence and a hedge between 'A' schedule property and 'B' schedule property. North of the hedge the plaintiff is in possession and enjoyment, the land south of the hedge is in possession and enjoyment of the defendants.

13. In the suit for injunction the question for consideration is who is in possession and not who is the title holder. The plaintiff if really aggrieved that her land had been encroached and construction put up by the defendants, ought to have filed suit for appropriate remedy. Without possession, the suit for injunction to protect the possession which does not exist is not sustainable.

14. The lower appellate Court has rightly pointed out that the defendants are in possession of the 'B' schedule suit property for fairly long period. There is no evidence that the defendants occupied the 'B' schedule property immediately before the suit. The prayer is not to enjoin disturbing the peaceful possession but to restrain putting up further construction in the 'B' schedule property. Having admitted the loss of possession to the defendants, the relief claimed is ill conceived. Without prayer for declaration and recovery of possession, relief of bare injunction cannot be granted to the plaintiff.

15. This Court finds no legal or factual error in the reasoning given by the Courts below for dismissing the case. There is no Substantial Question of Law in this case. Therefore, this Second Appeal is dismissed. No order as to costs.

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

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To

1. The Subordinate Court,
Chidambaram.



2. The District Munsif Court,
Portonova.

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

+1cc to Mr.A.Muthukumar, Advocate, S.R.No.37479

S.A.No.1158 of 2010

CNR(CO)
HS(12/08/2021)