

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved :03.11.2020

Pronounced on :10.11.2020

CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.606 of 2010

and

M.P.No.1 of 2010

K.Periyasamy

.. Appellant / Plaintiff

/versus/

1.Venkatachalam

2.Tamilarasi

3.Prakash

4.Raja

.. Respondents /

Defendants 2 to 4 & 1

Prayer: Second Appeal has been filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 21.12.2009 made in A.S.No.7 of 2006 on the file of Subordinate Judge's Court at Namakkal reversing the judgment and decree dated 22.11.2005 made in O.S.No.7 of 2004 on the file of the Principal District Munsif at Namakkal.

For Appellant :Mr.Mr.Mukunth for
M/s Sarvabhuman Asso.

For Respondents:Mr.Saravana Kumar for
Mr.M.Sudhakar for R4
R1 to R3- No appearance

J U D G M E N T

(The case has been heard through Video Conferencing)

The plaintiff is the appellant. Aggrieved by the judgment and decree of the lower appellate Court reversing the judgment and decree of the trial Court granting injunction against the defendants, the present Appeal is filed.

2.The factual background of the appeal in brief:

Periyasamy, the appellant purchased 4 items of property under Ex.A-2 from one Shanmugam on 21/09/2001 in S.No. 301/1 VazavanthiNadu Village, Kollihills, Namakkal District, with proper description of its four boundaries. The suit land is the 4th item property in the sale deed. Alleging that the respondents who have their housing sites on the eastern portion of the appellant's land trying to disturb his peaceful possession and enjoyment of the property, the suit filed for Permanent Injunction.

3.Raja, the fourth respondent herein contested the suit claiming that on the eastern portion of the suit property, this respondent alone has 10 cents of land. His father purchased this land on 11/04/1974 and none other parties have property on the eastern side of the suit property. There was live fence on the Western boundary of his land. The appellant purchased the portion of the land west of the live fence. On the north of his land, respondents 1 to 3 herein had forcible removed the live fence running North-South and had started constructing compound wall. A 40 years old drumstick tree is on the northern boundary of his land. Suppressing the live fence, in the suit schedule the boundary is wrongly described. The 4th respondent land is on the east of the wall constructed by respondents 1 to 3 encroaching his land. This portion is in continuous possession and enjoyment of the 4th respondent in exclusion of others. So, the appellant is not entitled for the relief of Permanent Injunction.

4.Venkatachalam, the first respondent herein, in his written statement, denied any land in site for the appellant. According to him, the sale deed Ex.A-2 is a fabricated document to grab the lands of the respondents. In fact, from out of 10 cents land owned by the fourth respondent father Selvaraj on 07/02/1980 under Ex.B-3, he purchased 2 cents of land on the Northern portion and enjoying it after mutating the revenue records and transferring the patta in his name. Likewise, his sister's husband Ramasamy on the same date under Ex.B-4, purchased 3 cents of land on the northern portion from Selvaraj. After the demise of Ramasamy, his wife and son (3rd and 4th defendant in the suit), 2nd and 3rd respondents herein are in possession and enjoyment after mutation of the revenue records and transfer of the name in the patta. They have laid foundation for constructing shops in their respective portion and it is at verge of completion. After alienating 5 cents out of 10 cents, Selvaraj retaining balance 5 cents and the same has now been in possession and enjoyment of the his son Raja (first defendant in the suit) the fourth respondent herein.

5. With these pleadings, the suit went for trial. The following Issues were framed:-

1. Whether the plaintiff is entitled for the relief of permanent injunction against the defendants ?
2. Whether the title and possession claimed by the 1st defendant over the suit property is correct ?
3. Whether the suit property exist in the site ?
4. Whether the claim of the 2nd and 3rd defendants that they have purchased the suit property and in possession of it is correct ?
5. Whether the defendants are entitled for exemplary costs under Section 35 A of CPC ?
6. What other relief the parties are entitled ?

6. Two witnesses on either side were examined. 6 documents were marked as Ex.A-1 to Ex.A-6 by the plaintiff. 4 documents were marked as Ex.B-1 to Ex.B-4 by the defendants. Advocate Commissioner was appointed and his reports and sketch were marked as Ex.C-1 to Ex.C-4.

7. The trial Court, on considering the Commissioner's Report, sketch and admission of the 2nd defendant in the cross examination that, defendants 1 to 4 together hold 1 ½ cents of land in excess than their title. The first defendant instead of 5 cents he is in possession of 5 ½ cents. The second defendant instead of 2 cents he is in possession of 2 ½ cents. Likewise, the 3rd and 4th defendants instead of 3 cents holding 3 ½ cents. Therefore, held that the excess 1 ½ cents is the property of the plaintiff / appellant. The vacant land on the west to the properties of the defendants is the property of the plaintiff and allowed the suit and granted decree of Permanent Injunction.

8. Aggrieved by the judgment and decree of the trial Court, defendants 2 to 4 filed first appeal. In the first appeal, the first defendant was arrayed as second respondent. The lower appellate Court, reversed the trial Court finding and dismissed the suit. The lower appellate Court differed with the trial Court by holding that the suit property is not found in the

site. The Commissioner's Report and the evidence of PW-1 show that the suit property is the pathway of Indian Bank and to its east the property of the defendants is located. Further, the lower appellate Court has faulted the finding of the trial Court on the excess holding of 1 ½ cents land by the respondents and declaring it as land of the plaintiff/appellant. Even if it is factually correct, the plaintiff/appellant ought to have filed suit for declaration and possession, not a bare injunction suit.

9.The lower appellate Court had reversed the trial Court finding specifically for the reason that, on the date of filing the suit, the plaintiff/appellant was not in possession of the suit portion and the appellant admission in the cross examination that when the respondents 1 to 3 (defendants 2 to 4) removed the live fence and started constructing, he did not object and only the 4th respondent (1st defendant)objected. Therefore, the second appeal is filed the plaintiff being, aggrieved by the dismissal of his suit.

10.Upon hearing the counsel for the appellant, the following Substantial Questions of Law was formulated, for determination.

(a)Whether the learned Appellate Court is correct in law in non-suiting the appellants merely on the basis of Ex.C3 and C4 report and plan of the Advocate Commissioner, which shows the enjoyment of property by the parties totally overlooking the well established principle of law that the Advocate Commissioner can not give a report on the possession of property by litigating parties?

(b)Is not the learned Subordinate Judge in error in overlooking the axiomatic principle of law that in the case of vacant site possession would follow title and title deeds together with the revenue records would prove the possession?

11.The appellant claims title, possession and enjoyment of the suit schedule property, based on Ex.A-2-sale deed, Ex.A-3-patta and Ex.A-4-kist receipt. The suit land is a vacant land. The sale deed is of the year 2001. As per the plaint schedule, the property and its four boundaries are described as below:

Land with total extent of 1326 sq.ft in two piece with linear measurements (1) North -

South 66 feet ; - East -West on North 13 feet, on South 14 feet.(2) on the north of item 1, North-South - on west 58 feet, on east 59 feet. East - west - on North 2 feet, on South 13 feet.

Boundaries: East of Indian Bank and its quarters; South of Jawahar land; West of Jawahar Manickam , Ramasamy, Venkatachalam and Selvaraj; North of 12 feet common pathway.

12.To be noted from Ex.C-1-Commissioner Report, the suit was laid on 06/01/2004. The Advocate Commissioner first inspected the field on 17/01/2004. On that day, he had noticed the on going construction in the portion identified as suit property. Later, with the help of Taluk Surveyor, he measured the field on 25/07/2004 and prepared the sketch Ex.C-2. During his second visit, the entire construction was completed except, plastering. The report and sketch Exs.C-1 and Ex C-2 are dated 04/10/2004. On objection by the first defendant / 4th respondent, warrant was reissued. The Advocate Commissioner again surveyed the field, and filed report Ex.C-3,. In the second report the Commissioner has stated that the incomplete construction noticed in his earlier visit had been completed. Additionally, a thatched shed on the eastern portion has been put up by the first defendant. He had also noticed the survey stone in 'D' point alone available and the found signs of survey stone at 'B' point removed. When he attempted to identify 'A','B' and 'C' point, the learned counsel for the first defendant objected. The sketch prepared by him with the help of survey is marked as Ex.C-4.

13.The case of the appellant/plaintiff is that he purchased the suit property measuring 1326 sqft from Shanmugam with specific boundaries. It is on the east of Indian bank road and west of respondents land. Ex.A-2 dated 21/09/2001 and its parent document Ex.A-1 dated 16/10/1968 are relied to prove this point. The contra case of the respondents/defendants is that, the first defendant father who held 10 cents of land in the survey No. 301 sold 2 cents on the northern side to Venkatachalam (2nd defendant) under Ex.B-3 on 07/02/1980. In this sale deed, the land of Shanmugam (vendor of the plaintiff/appellant) is shown as its Western boundary. Similarly, in the sale deed Ex.B-4 executed on the same day in favour of Ramasamy (the husband and father of defendants 3 and 4) the land of Shanmugam is shown as its western boundary. The plaintiff have no land in the site.

14.From the respective sale deeds, it is clear that Selvaraj the father of the first defendant, who claimed to have purchased 10 cents of land on 11/04/1974(the title deed not filed by the first defendant the son of selvaraj or by the other defendants who claim title through Selvaraj) had sold 2 cents to second defendant Venkachalam and 3 cents to Ramasamy in the year 1980 recognising the land of Shanmugam, who was the vendor of the appellant/ plaintiff on the West of the property he sold. Examining the description of property in the sale deed of Shanmugam in favour of appellant / plaintiff, its Eastern boundary is shown as the properties of defendants and its western boundary is shown as path way to Indian Bank and its residential quarters. Therefore, from the title documents, it is established by the appellant / plaintiff that, his vendor had property in between the Indian Bank pathway and the land of Selvaraj who is the father of the first defendant and vendor of the other defendants 2 to 4.

15.The Commissioner Reports and Sketch Ex.C-1 to Ex.C-4, examined together, reveals that during the first inspection, construction at basement level by 2 to 4 defendants noticed during the first visit, and incomplete construction during the second visit after 6 months. Later, on the third visit the completed construction abutting the Indian Bank path way on the West. When the title deeds of the defendants Ex.B-3 and Ex.B-4 clearly mentions the West of the property is the property of Shanmugam (vendor of the appellant/plaintiff), the lower appellate Court had reversed the well considered judgment of the trial Court on the premise that the plaintiff ought to have sought for possession. In the absence of prayer for possession, injunction relief granted is erroneous.

16.The lower appellate Court has failed to note that, before filing the suit, the appellant/plaintiff had issued pre-suit notice Ex.A-5 = Ex.B-1 dated 17/11/2003. The first defendant had issued reply notice Ex.A-6 = Ex B-2, denying any land in the site for the plaintiff. In the pre-suit notice it is specifically alleged that the first defendant is preventing him from using the suit land. While, the first defendant on receipt of the pre-suit notice replied, the other defendants have approached the Court filing caveat petition expecting suit against them by the appellant/plaintiff and his wife. In the written statement of the first defendant allegation is made against other defendants 2 to 4 about removal of the live fence and encroachment on the northern portion of the 10 cents land. The first defendant had conveniently suppressed the alienation of 5 cents out of 10 cents to the other defendants under Ex B- 3 and Ex B-4 showing the western boundary of the land sold belongs

to Shanmugam. In spite of the fact that the land in west of the defendants is the property of Shanmugam (vendor of the appellant/plaintiff) even according to the defendants sale deed Exs.B-3 and B-4, they have totally denied the existence of suit property in the site in contradiction to their own documents.

17.The lower appellate Court instead of appreciating the pleadings, evidence and the conduct of the defendants which clearly establish that they have encroached upon the suit land of the appellant pending suit, which could be easily seen from the reports of the commissioner, who visited the field on three different dates and noticed the progress of the construction, had erred in holding that the suit property is the Indian Bank pathway and not the portion where the defendants 2 to 4 had put up their construction. The said finding is perverse and contrary to the evidence.

18.As far as the observation of the lower appellate court that the plaintiff ought to have sought for possession and not for bare permanent injunction, again it has failed to note the facts that the land in dispute is a vacant land and on the date of filing the suit, it has been specifically alleged in the plaint that the defendants are trying to prevent the plaintiff and also filed caveat anticipating suit against them. The cause of action arose as per the plaint on 15/11/2003 and the commissioner made his first visit on 17/01/2004 . During his first visit he had noticed 3 feet concrete pillars and foundation at ground level in the portion of the suit land. The portion under construction is marked and shown in the sketch Ex.C-2. The trial Court while properly considering these facts and evidence as on date of filing the suit, allowed the suit, whereas the lower appellate Court has gone wrong in taking note of the illegal construction made pending suit and had reversed the trial Court judgment. The lower appellate Court by allowing the appeal on this ground had given premium to the encroacher pending suit.

19.For the reasons stated, this Court holds that the judgment and decree of the lower appellate Court is erroneous and against the evidence. It is liable to be set aside for being factually and legally perverse. As a result, the Substantial Questions of Law are answered in favour of the appellant/plaintiff.

20.According, this Second Appeal is allowed. The lower appellate Court judgment and decree is set aside. The trial Court judgment and decree is confirmed. No order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS VI)

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Sub Assistant Registrar

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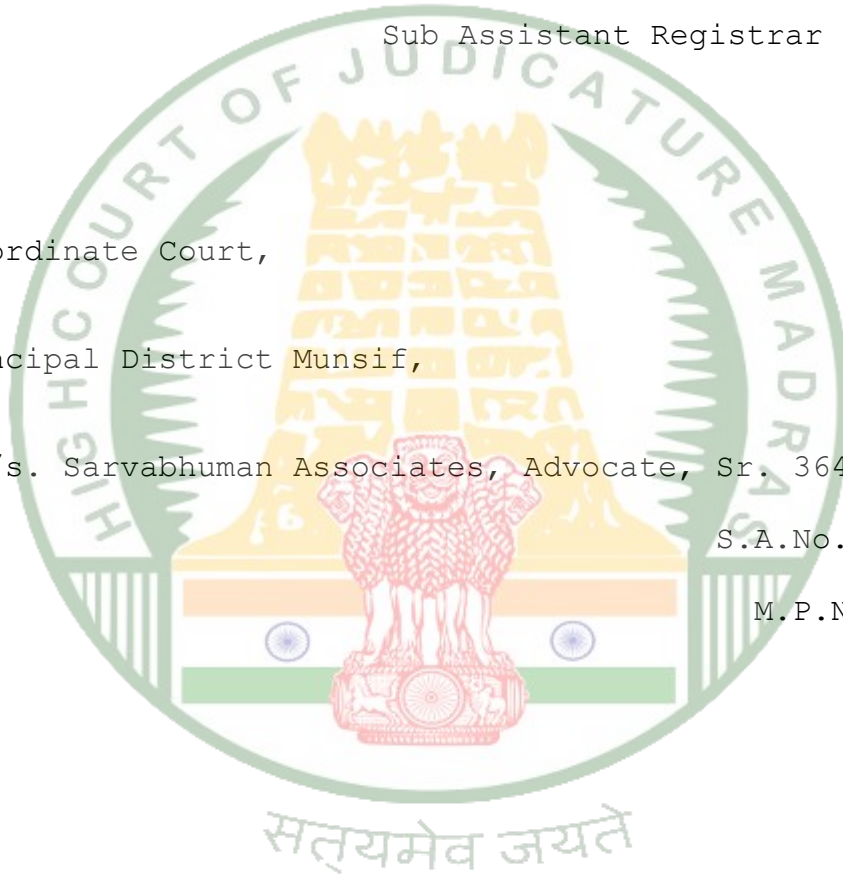
1.The Subordinate Court,
Namakkal.

2.The Principal District Munsif,
Namakkal.

1 cc to M/s. Sarvabhuman Associates, Advocate, Sr. 36419

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