



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reserving Judgment
09.03.2021

Date of Pronouncing Judgment
16.03.2021

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THE HONOURABLE MR. JUSTICE RMT.TEEKAA RAMAN

S.A.No.1436 of 2008
and
M.P.No.1 of 2008

Tholan @ Chinnathambi

..Appellant/Defendant

Vs.

Gopal

.. Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of C.P.C., against the decree and judgment of the Subordinate Court, Thirupathur, Vellore District made in A.S.No.74/2005 dated 18.01.2006, modifying the decree and judgment of the Court of the District Munsif cum judicial Magistrate, Vaniyambadi, Vellore District made in O.S.No.30/1998 dated 27.06.2005.

For Appellant : Mr. K. Venkateswaran
for Mr. G. Jawaharlal

For Respondent: Mr. T.R. Rajaraman

J U D G M E N T

Defeated defendant is the appellant herein. The respondent / plaintiff filed O.S.No.30/1998 on the file of District Munsif-cum-Judicial Magistrate, Vaniyambadi for a declaration of his right and title in the suit property and for permanent injunction and also for mandatory injunction in respect of 10 cents of agricultural land.

2. The defendant / appellant filed written statement denying the right of the plaintiff inter-alia contending that the ridges between the properties are not straight as stated in the plaint but there was a curve towards the plaintiff's area and the land of the defendant is on a higher level and he is in possession of the portion measuring 4 cents wherein, he has planted 13 coconut trees for more than 17 years and he has perfected the title to the above said encroached portion by



adverse possession and also disputed the other reliefs. After trial, the suit was decreed and appeal was dismissed. Hence, the second appeal.

3. The above second appeal was admitted on the following substantial questions of law:-

"(i) Is the appellate Court right in law in rejecting the contention of the defendant that he is also entitled for adverse possession in respect of the disputed portion marked ABCD in the plaint when he is entitled to plead inconsistently as a defendant, which is permitted in law, but the appellate Judge erroneously rejected the same stating an erroneous view of law that the defendant cannot blow hot and cold at one and the same time.

(ii) Whether the appellate Judge is right in rejecting the case of the defendant that he has been openly enjoying the disputed land marked ABCD for the past several years adverse to the plaintiff with his full knowledge and the same is also corroborated by the evidence of P.Ws.2 and 3, when he fulfilled the principles of law mentioned in Deva Vs. Sajjan Kumar, reported in AIR 2003 SCC 3907?"

4. The respondent / plaintiff filed a suit for declaration of title to an extent of 0.77.0 hectare in S.No.134/1K in Thekkupattu Village, Vaniyambadi, Vellore District. According to the plaintiff, the defendant has encroached upon 10 cents of the land of the suit property with coconut saplings.

5. The case of the defendant / appellant in brief is that

(i) The defendant property is situated on the southern side of the plaintiff's property and there are agricultural ridges and it is alleged that the defendant has encroached upon the property but he is in possession of the property for more than 75 years and also claimed that he has perfected title by prescription, a plea of adverse possession has been specifically taken.

(ii) Before the trial Court, an Advocate Commissioner was appointed to inspect the suit property and note down the physical feature. Accordingly, he has filed his reports, which have been marked as Exs.C1 and C2, Surveyor map is marked as Ex.C3. On behalf of the plaintiff, P.W.1 was examined and P.W.2 is an ex Village Panchayat Board President. P.W.3 is the Villager and Exs.P1 to P4 were marked. On behalf of the defendant, the defendant examined himself as D.W.1 and no document was marked and Advocate Commissioner report is Ex.C1 and sketch is Ex.C2. While the Thasildar Inspected land, the surveyor attached to the office of the Thasildar took measurements and prepared the map marked as Ex.C3. After



conclusion of the trial, the trial Court has decreed the suit with a declaration that the respondent / plaintiff is the owner of 4 cents of land and also the coconut trees standing thereon and further directed the defendant to deliver the possession of hectare 0.77.0 to the plaintiff and also granted permanent injunction in respect of the said strip of land.

(iii) In the appeal in A.S.No.74/2005, the lower appellate Court has held that the strip of land marked E and F in the plan annexed to the Advocate Commissioner's Report, the plaintiff is entitled for declaration and also for recovery of possession and granted permanent injunction in respect of the land to an extent of hectare 0.77.0.

6. The learned counsel for the appellant / defendant would draw my attention to the evidence of P.W.1, P.W.2 & D.W.1. By placing reliance on the evidence of P.W.2-T.T.Rathinamoorthy, P.W.3-Setu and D.W.1-T.V.Kannan, counsel for the appellant would contend that the defendant is in possession of the property for more than statutory period by planting 13 coconut trees and there is a reference in the evidence of D.W.1 that he has filed objection to the Advocate Commissioner's Report. Both the Courts below had rendered a concurrent finding that the appellant / defendant has encroached the 4 cents of land as per Ex.C2. But he has not encroached the defendant, infact, the defendant is in possession of the property for more than statutory period thereby, he has perfected the title by possession.

7. Heard, the reply by Mr.T.R.Rajaraman, learned counsel for the respondent and he relied upon the judgment of the Hon'ble Supreme Court, reported in (2019) 13 SCC 324.

8. The learned counsel for the respondent also draw my attention to the decree granted by the Lower Appellate Court to the fact that the defendant is in encroached portion of the plaintiff to an extent of 4 cents and hence, the respondent / plaintiff is entitled for recovery of 4 cents along with trees planted thereon. So also, the plaintiff who said to have been found to have encroached upon two cents as described in the Advocate Commissioner's report, should be returned to the defendant.

9. Furthermore, the land in respect of S.No.134/1K was encroached, is admitted by the defendant in the written statement and the evidence of P.W.1, P.W.2 & D.W.1 also to that effect. It is a specific case of the plaintiff that he is entitled for the larger extent of land and reliance placed by the Lower Appellate Court on Ex.C3, wherein, no objection to Advocate Commissioner's Report was filed.



10. After hearing the rival submissions and also perusing the pleadings, it is seen that the respondent / plaintiff seeks the declaration of title to a larger extent viz., the suit property measuring an extent of hectare 0.77.0 and with 13 coconut saplings in S.No.134/1K, Thekkupattu Village, Vaniyambadi. He also seeks relief of recovery of possession of smaller portion in respect of 10 cents of land along with 13 coconut saplings on the southern side of the property.

11. The case of the defendant as could be seen from the written statement and the oral evidence of D.W.1 are to the effect that the defendant land is situated in S.No.134/2D. According to the defendant / appellant, he has not altered the ridges and common ridges and claimed the benefit of adverse possession. The respondent / plaintiff claims the relief of declaration to the suit property on the plea that the suit property was allotted to him under an oral partition marked as Ex.A1. To resolve the dispute, an Advocate Commissioner was appointed and he has inspected the property and filed a report and sketch, which were marked as Exs.C1 and C3, while Ex.C3 is the sketch of surveyor attached to the office of Thasildar.

12. In the written statement, the defendant / appellant has admitted that the land in S.No.134/1K he has encroached upon to an extent of 4 cents. With regard to his possession and enjoyment, he relied upon the evidence of P.W.1, P.W.2 and D.W.1. No doubt that they speak about the encroachment of 4 cents. Exs.C1 and C3, clearly demonstrate that the defendant has encroached upon 4 cents which is described as C, E, F and G in the Advocate Commissioner's plan. However, he has not probablised his defence case that he is in possession hostile to the title of the plaintiff for more than the statutory period.

13(a). Taking note of the pleadings in the written statement of the appellant / defendant, evidence of P.W.2 and D.W.1 coupled with Exs.C1 and C3, both the Courts below have rightly come to the conclusion that the defendant having admitted to have encroached upon the land of the respondent / plaintiff to an extent of 4 cents in the above said S.No.134/1K and in the absence of any evidence to show that he has been in possession, hostile, to the title of the plaintiff for more than statutory period, has rightly come to the conclusion that he is only an encroacher and not perfected his title by adverse possession.

13(b) Furthermore, the evidence of P.W.2 goes to show that he was a Panchayat Board President for the year 1996-2000 and when the dispute with regard to an extent of the land being in enjoyment of the respective parties arose, the Surveyor came and measured the respective lands of the plaintiff and



respondent. However there was no consensus arrived between the parties in putting the survey stone and this dispute resulting in police complaint and the civil suit. No doubt, it is true that on three places in the segregating ridges between the properties there were lopsided, instead of being on a straight line. The location of the respective lands of the parties are not in dispute.

14(a). Before the trial Court, Exs.C1 to C3 also identified the area between C,E,F and G, the defendant has encroached the property of the plaintiff and in I, G, H and A, C, D, a plaintiff has encroached upon the defendant property as rightly observed by the lower appellate Court.

14(b) It remains to be stated that the lower appellate Court, based upon the Advocate Commissioner's Report and the sketch filed by the revenue official, Ex.C3 has rightly come to the conclusion that while the plaintiff has encroached upon the defendant land as stated above and the defendant has encroached upon the plaintiff land as stated above, the same has to be returned to the respective parties.

14(c) Accordingly, passed the order of mandatory injunction directing the respective parties to handover the respective encroached places and such an order passed by the lower appellate Court appears to be in equity.

15. Furthermore, based upon the evidence of D.W.1 coupled with Exs.C2 and C3 and the respective pleadings of the defendant, both the Courts below has rightly come to the conclusion that the defendant / appellant is only an encroacher. He has to return the lands he has encroached and the quantum of the land is 4 cents as pointed out in E, F and A, C, D and G, H, I. Accordingly, granted relief of declaration of title in respect of the total extent of the land for the plaintiff and also granted permanent injunction against the defendant / appellant not to interfere with the suit property and also granted mandatory injunction for recovery of possession to an extent of land of 4 cents encroached by the defendant so also the lands encroached by the plaintiff on the defendant side. Hence I find that the order passed by both the Courts below do not suffer from any irregularity or illegality warranting interference under Section 100 of CPC.

16. As stated supra, the defendant / appellant has not proved his possession beyond statutory period hostile to the title of the plaintiff and accordingly, has rightly appreciated the fact that his possession was not with the knowledge of true owner and accordingly, held that the defendant / appellant is not entitled to the relief of adverse possession and the said finding based upon the consideration of P.W.2 and D.W.1 and



hence all the substantial questions of law are answered in negation, i.e, against the defendant / appellant and in favour of the respondent / plaintiff. The concurrent finding rendered by both the Courts below do not suffer from any irregularity in appreciation of the evidence or illegality in application of the law of limitation in respect of plea of adverse possession and hence the second appeal is devoid of merits.

17. Accordingly, the second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

-s/d-

Assistant Registrar(CS-II)

True Copy

Sub-Assistant Registrar

AT

To

1.The Subordinate Court, Thirupathur,
Vellore District.

2.The District Munsif-cum-judicial Magistrate,
Vaniyambadi, Vellore District.

Copy to

The Section Officer

VR Section

High Court, Madras 104.

+1 CC to Mr.G.Jawaharlal, Advocate sr 17248

+1 CC to Mr.T.R.Rajaraman, Advocate sr 16963.

S.A.No.1436 of 2008 and
M.P.No.1 of 2008

PA(CO)

SP(20/07/2021)