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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.11.2021

PRONOUNCED ON : 01.12.2021

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A. No.1294 of 2010
and M.P. No.1 of 2010

Shanmugham ... Appellant / Plaintiff

versus

Manga Varathammal ... Respondent/Defendant

PRAYER: Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 16.08.2010 made in A.S.No.10 of 2010 on the file of the Sub Court, Panruti, reversing the judgment and decree dated 23.12.2009 made in O.S.No.519 of 1995 on the file of the District Munsif, Panruti.

For Appellant : M/s.Nilophar
for M/s.R.Meenal

For Respondent : M/s.V.Srimathi

J U D G M E N T

The present appeal is directed against the judgment and decree dated 16.08.2010 passed in A.S.No.10 of 2010 on the file of the Sub Court, Panruti, reversing the judgment and decree dated 23.12.2009 passed in O.S.No.519 of 1995 on the file of the District Munsif, Panruti.

2. The appellant / plaintiff has filed the suit before the learned District Munsif, Panruti, in O.S.No.519 of 1995, seeking the relief of declaration, declaring that the plaintiff, is the absolute owner of the suit property and for permanent injunction, restraining the defendant and her men, agents and servants from interfering with the peaceful possession and enjoyment of the 1st item of the suit properties by the plaintiff and for recovery of the 2nd item of the suit properties from the defendant and for costs.



(iv) Only after the inspection and measurement by the learned Advocate Commissioner and Surveyor, the plaintiff found the correct measurement in respect of the 2nd item of the suit property, found the possession of the defendant. The defendant is not entitled to be in possession of the 2nd item of the suit properties. Hence, the suit.

7. The case of the defendant, is as follows:

(i) The entire extent of Survey No.142 is 1 acre and 46 cents. Out of the total extent, in the year 1937 vide a Sale Deed, an extent of 16 cents was purchased by the defendant's father-in-law, namely, Govindasamy Padachi. Subsequently, the very same Govindasamy Padachi has purchased an extent of 30 cents from Venkata Varadhan, who is the son of Narayanasamy. The oral sale was reduced in writing as a Sale Deed from Venkata Varadhan's wife Govindammal in favour of Ukkaravel and Ramarathnam. They are the sons of the plaintiff's husband's brother.

(ii) Afterwards in the available extend, the above said Venkata Varadhan Naidu has sold an extent of 33 cents in favour of Savithiri Ammal, another 33 cents in favour of Arumuga Padaaychi. The defendant has purchased an extent of 20 cents from the said Venkata Varadhan, thus, an extent of 1 acre 37 cents have been sold in favour of various persons.

(iii) Subsequently, in the middle of the suit survey number running from East to West, a road had been formed. Therefore, the land possessed by Venkata Varadhan was divided. The road that has been laid in the suit property is an extent of 9 cents. The defendant is in possession of the suit property, which was purchased by her and she is paying tax. The defendant also granted patta. The property purchased by the defendant was sub-divided as R.S.No.56/15C. The allegation in the plaint that this defendant is trying to take forcible possession, is an absolute false hood.

(iv) The defendant has constructed a house in the suit properties and has also raised trees in the property purchased. The plaintiff raised live fence in the boundary. Therefore, there is no question of trespass. Hence, the suit filed by the plaintiff, is liable to be dismissed.

8. Based on the above said pleadings, the learned District Munsif, Panruti, framed necessary issues and tried the suit. On the side of the plaintiff, plaintiff himself examined



as P.W.1. On his side, he examined one Ilayaperumal as P.W.2 and marked 1 document, as Ex.A.1. On the side of the defendant, she herself examined as D.W.1. On her side, she examined one Venkata Varadhan as D.W.2 and marked 19 documents, as Ex.B.1 to Ex.B.19. Apart from those documents, the Report and Plan submitted by the learned Advocate Commissioner were marked as Ex.C.1 and Ex.C.2.

9. Having considered the materials placed before him, the learned District Munsif, Panruti, vide judgment and decree dated 23.12.2009, concluded that, the plaintiff is entitled the relief of declaration and recovery of possession as prayed for. In the appeal filed by the defendant in A.S.No.10 of 2010, the learned Subordinate Judge, Panruti, reversed the findings and held that the plaintiff, is not entitled the relief prayed for in the suit.

10. Feeling aggrieved over the said findings of the Court below, the plaintiff, is before this Court with the present Second Appeal. The Second Appeal was admitted on file after formulating the following substantial questions of law;

"(i). Whether in law the lower appellate court was right in failing to see that as the respondent had admitted to the purchase of 33 cents by the appellant, she was estopped from denying his title for a portion of the land ?

(ii). Whether in law the lower appellate court was right in dismissing the appellant's claim for recovery of item 2 when the suit was filed within 9 years from the purchase of her property by the respondent and as there was no bar of limitation ?

(iii). Whether in law the lower appellate court was right in misinterpreting the evidence and arriving at a perverse conclusion, warranting interference under Section 100 CPC vide AIR 2001 SC 1273"

11. The learned counsel appearing for the appellant would contend that, initially, the vendor of the plaintiff Venkata Varadhan Naidu, is having only 80 cents, which was situated on the North of the East-West road. Among 80 cents, she sold 33 cents in favour of one Anammal and another 33 cents in favour of the plaintiff. In the said circumstances, she is entitled to sell 14 cents alone to the defendant. Instead of that, on 22.03.1986, she sold 20 cents in favour of the defendant. Since the plaintiff purchased the property prior to the said sale effected in favour of the defendant, he cannot claim more than 14 cents, which was found available from the total extent, also



possessed by the vendor of the plaintiff. Only during the pendency of the suit, the defendant forcibly entered into the plaintiff's possession and took "B" Schedule property. The First Appellate Court without considering the same, dismissed the suit filed by the plaintiff, which is erroneous one.

12. Per contra, the learned counsel for the respondent / defendant would contend that, the property now sold in favour of Anammal, plaintiff and defendant, are having old Survey No.140/2. After made purchase by those persons, sub-division was effected and the property purchased by Anammal was assigned with Survey No.506/15A and the property purchased by the plaintiff was assigned with Survey No.506/15B and the property purchased by the defendant was assigned with Survey No.506/15C. After made purchase, in order to widening the road, the Government entered into the plaintiff's land and put up a road. Due to the same, the extent purchased by the plaintiff was diminished.

13. He would further contend that the plaintiff now took a different stand that the quantum of equivalent area taken by the Government was encroached by the defendant. He further added that immediately after made purchase, the plaintiff put up a live fence and therefore, it cannot be said that during the pendency of the suit, the defendant forcibly entered into the "B" Schedule property. Further case of the defendant is that, in respect to the property situated on the Western side of live fence indicated by the learned Advocate Commissioner in his report, the defendant is not having any objection for allowing the suit.

14. On considering the said submissions with the relevant records, it is not in dispute that one Anammal, plaintiff and defendant had purchased the property from Venkata Varadhan. Further, in the centre of the total extent, owned by the vendor of those plaintiff etc. a road has been formed and thereby, the total extent in old Survey No.147 was divided into two. It is also admitted on either side that, their properties are situated abutting the newly formed road.

15. In the meantime, on going through the report and plan submitted by the learned Advocate Commissioner, the trial Court after appointing the learned Advocate Commissioner directed to survey the suit property with the help of Surveyor. On measurement, it was found out that, Anammal, is having 32 cents and the plaintiff is possessed 28.25 cents. On the other hand, only 19 cents were available in the hands of the defendant.



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16. In this occasion, in the report filed by the learned Advocate Commissioner, he categorically stated that, in the suit "A" schedule property, there was variety of country trees in the age of 15-22 years. Similarly, in the land purchased by the defendant also, there was variety trees in the age of 16 years.

17. Now, on going through the plan submitted by the learned Advocate Commissioner, it is apparent that there was a live fence found available between the plaintiff and defendant property. In this occasion, it is the case of the plaintiff that, on the East of live fence, the suit "B" schedule property was available. In respect to the live fence, while at the time of giving evidence as P.W.1, the plaintiff has admitted that, the live fence was put up by the defendant. Being the reason that, the trees found in the live fence was more than 10 years, there is no chance to put up the live fence by the defendant, without the knowledge of the plaintiff.

18. If the story putforth by the plaintiff, is found correct, definitely he would object the plaintiff for putting up the live fence, after encroaching his field. In this regard, the First Appellate Court has rightly held that, after admitting the live fence, amending the plaint or recovery of possession will show that the plaintiff, is approached the Court below with unclean hands. If the defendant encroached the "B" schedule property as alleged by the plaintiff, definitely he would amend the plaint immediately after returning from the Hospital. But, here it is a case, after the receipt of the report filed by the learned Advocate Commissioner and the plaintiff filed the petition for amending the plaint. It is also one of the reasons that, the plaintiff has not approached the Court below with clean hands.

19. The plaintiff further admits in his cross examination that after effecting the sub-division, the patta has been issued only to the extent of 28.5 cents. In this regard, he gave evidence as after knowing the fact that, patta was issued for an extent of 28.5 cents, he has not filed any objection before the Tahsildar stating that his property is having an extent of 33 cents.

20. It is the further evidence given by the plaintiff that before filing the suit, he measured the property and found that he possessed 28.5 cents. If it is true at the time of filing the suit in the year 1995 itself, he would definitely mention about the encroachment made by the defendant. Instead of that, he gave evidence as during the time he was taking treatment in the



Hospital, the defendant forcibly entered into the "B" schedule property. In respect to the said evidence in order to substantiate the same, he has not produced medical records and show that, he was taking treatment in the Hospital. Either in the plaint or in the evidence, he did not say anything about the date, on which, the defendant has encroached his property.

21. Therefore, in the absence of any evidence in respect to the encroachment, giving evidence as the plaintiff during the pendency of the suit encroached the property, is unbelievable. In fact, the plaintiff was residing in the suit schedule property and therefore, it is very easy to tell about the date, on which, the defendant encroached the "B" schedule property. Accordingly, I am of the opinion that previously the suit "B" schedule property, is not in the enjoyment of the plaintiff.

22. More than that, while at the time of giving evidence as D.W.2, the vendor of the plaintiff and defendant gave evidence as after made purchase by those persons, while at the time of widening the road, some of the area, which was purchased by those persons was taken away and included in the road. He has further stated before the trial Court that, after made purchase both the plaintiff and defendant put up a live fence and the same, was still alive. Therefore, the said evidence is very clear that, the plaintiff has not encroached any area. In otherwise, by way of filing the present suit, the plaintiff is attempted to get back the property, which was took over at the time of widening the road. The First Appellate Court has rightly held that the plaintiff herein has not proved the case.

23. Accordingly, in the light of the discussions stated supra, I am of the considered opinion that, the substantial questions of law, are all answered in favour of the defendant and thereby, the Second Appeal is dismissed. The judgment and decree dated 16.08.2010 passed in A.S.No.10 of 2010 on the file of the learned Subordinate Judge, Panruti, is hereby confirmed. The Second Appeal is dismissed. Consequently, connected Miscellaneous Petition is closed. However, there is no order as to costs.

SD/-
ASSISTANT REGISTRAR

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SUB ASSISTANT REGISTRAR



To

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- 1.The Sub Judge,
Panruti.
- 2.The District Munsif,
Panruti.

Copy to

The Section Officer,
VR Section,
High Court, Madras.

+lcc to Mrs.R.meenal, Advocate Sr.62560
+lcc to Mr.V.Raghavachari, Advocate Sr.62420

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and M.P. No.1 of 2010

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