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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 30.11.2021

PRONOUNCED ON : 08.12.2021

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A.No.189 of 2010
and M.P.No.1 of 2010

1. R.Selvaraj
2. R.Jagadeesan

... Appellants/Respondents 1 to 2 /Plaintiffs

Vs.

1. K.Krishnasamy ... 1st Respondent/appellant /1st Defendant
2. Deputy Inspector of Survey,
Mettupalayam.
3. Firka Surveyor,
Mettupalayam.
4. Village Administrative Officer,
Odanthurai Village,
Mettupalayam Taluk.
5. Inspector of Survey,
Tirupur.
6. Divisional Inspector of Survey,
Tirupur.
7. District Revenue Officer,
Coimbatore.

... Respondents 2 to 7 /
Respondents 3 to 8 /Defendants 2 to 7

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Code of Civil Procedure, against the Judgment and decree dated 29.04.2008 made in A.S.No.136 of 2006 on the file of the learned I Additional District Judge, Coimbatore, partly reversing the judgment and decree dated 24.04.2006 made in O.S.No.334 of 2004 on the file of the learned II Additional Subordinate Judge, Coimbatore.



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For Appellants : Mr.V.Ayyapparaja
for Mr.R.Bharath Kumar

For Respondents: Mr.S.Mukunth (for R1)
for M/s.Sarvabhauman Associates

Dr.S.Suriya (for R2 to R7)
Additional Government Pleader

J U D G M E N T

The present second appeal is directed against the judgment and decree dated 29.04.2008 passed in A.S.No.136 of 2006 on the file of the learned I Additional District Judge, Coimbatore, modifying the judgment and decree dated 24.04.2006 passed in O.S.No.334 of 2004 on the file of the learned II Additional Subordinate Judge, Coimbatore.

2. The appellants/plaintiffs have filed a suit before the learned II Additional Subordinate Judge, Coimbatore, seeking the relief of permanent injunction restraining the 1st defendant, his men and agents, or anybody, claiming through him from in any way interfering with the plaintiffs' peaceful possession and enjoyment of the suit property and for costs. The learned II Additional Subordinate Judge, Coimbatore, by judgment and decree dated 24.04.2006, decreed the suit.

3. Being dissatisfied with the findings arrived at by the learned II Additional Subordinate Judge, Coimbatore, the 1st defendant preferred an appeal in A.S.No.136 of 2006 on the file of the learned I Additional District Judge, Coimbatore, praying to set aside the judgment and decree dated 24.04.2006 passed by the learned II Additional Subordinate Judge, Coimbatore.

4. By judgment and decree dated 29.04.2008, the learned I Additional District Judge, Coimbatore, partly allowed the suit and confirmed the decree passed by the trial Court, in respect of suit survey Nos.254/5 and S.F.No.231 of Odanthurai Village, Mettupalayam Taluk and set aside the findings arrived at by the trial Court in respect to suit Survey No.230. Feeling aggrieved over the same, the plaintiffs are before this Court with the present Second Appeal.

5. For the sake of convenience hereinafter, the parties are referred to, as described before the trial Court.

6. The averments made in the plaint, in brief are as follows:

(i) The suit property comprises of a total extent of 6.13



acres, out of which, an extent of 3.36 acres is comprised in SF No.245/5, an extent of 2.47 acres is comprised in SF No.231 and an extent of 30 cents comprised in SF No.230.

(ii) The plaintiffs are the absolute owners of the portion comprised in S.F.Nos.254/5 and 231. The property comprised in S.F.No.230 is a poramboke land. The plaintiffs have been paying the necessary B-Memo charges in respect of S.F.No.230 for the last 30 years. To the north of S.F.No.254, the east-west channel is situated and the channel is called 'Marudavali Channel'. The Channel proceeds along the other survey fields such as S.F.Nos.255, 258 and 259. The plaintiffs are having the right, title and interest in respect of S.F.Nos.231 and 254/5 in the capacity of absolute owners. While at the same time, they are having the right in respect of S.F.No.230, as an occupier of the poramboke land.

(iii) The 1st defendant herein is having agricultural lands situated to the west of the suit property. He has no property to the immediate vicinity of the suit property in all the four directions. For the last around eight months or so, the 1st defendant has been adopting an inimical attitude against the plaintiffs. He has been very keen to disrupt the plaintiffs' peaceful possession and enjoyment of the suit property. Without any rhyme or reason, he started writing to survey authorities on the ground that the plaintiffs are unrighteously enjoying the poramboke lands by paying the B-Memo charges. He needs to survey the suit property. Over the last few months, the 1st defendant has been accelerating his illegal attempts to somehow interfere with the peaceful possession by hook and crook. On account of the persistent complaint by the 1st defendant, a survey of the suit property was undertaken by the defendants 2 to 4. These authorities, who are having complete access to the plan pertaining to the village and all the survey fields covered therein, inspected the suit property on 19.06.2004.

(iv) During the time of survey, the plaintiffs as well as the 1st defendant were present. At the end of the survey the boundaries with regard to the patta lands situated in S.F.Nos.231 and 254/5 were clearly marked. It is the contention of the 1st defendant that the plaintiffs had encroached a greater extent of land in S.F.No.230 than what they were actually occupying. Therefore, with reference to the extent of land available with the plaintiffs in SF No.230, the entire property was measured.

(v) Thus, the controversy sparked by the 1st defendant was set at rest by virtue of the inspection held on 19.06.2004 and afterwards minutes of the inspection was drawn and it was signed by all the parties in the presence of witnesses. The defendants



2 to 4 fixed boundary stones at the appropriate places. The plaintiffs thereafter put up a fence enclosing S.F.No.254/4 comprising an extent of 3.36 acres and the extent enjoyed in S.F.No.231.

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(vi) When the entire matter has been set at rest, the 1st defendant had purportedly petitioned the 7th defendant, who directed the inspection by the 6th defendant. The plaintiffs were not heard by the 7th defendant, with regard to the petition submitted by the 1st defendant. All of a sudden, the plaintiffs received a communication dated 19.07.2004 issued by the 5th defendant, which stated that the 6th defendant would be undertaking an inspection of the suit property on 20.07.2004 at 10.00am and such inspection was at the instance of the 7th defendant. The said notice was received by the plaintiff on 20.07.2004, prior to two hours to the purported inspection. When the entire matter had been set at rest by virtue of the earlier inspection held on 19.06.2004, the second survey is not necessary. On the date of proposed second inspection, the 2nd plaintiff was out of station. He was not given any notice.

(vii) In spite of the objections of the plaintiffs, the 5th defendant appears to have made inspection of the suit property. The 5th defendant had merely issued notice to the plaintiffs with regard to the alleged survey. During the survey, without proper verification, three boundary stones, which were fixed during the inspection held on 19.06.2004 by the defendants 2 to 4 were uprooted.

(viii) Under the guise of inspection, the 1st defendant trespassed into the suit property along with the officials without proper authority and on the strength of the illegal inspection, which took place on 20.07.2004 the 1st defendant had attempted to remove the fence put up by the plaintiffs in S.F.No.254. Hence, the plaintiffs have been obliged to come forward with the present suit.

7. The case of the 1st defendant as averred in the written statement, in brief, is as follows:

(i) It is false to state that plaintiffs are in absolute possession and enjoyment of the suit property. The Maruthavazhi channel, which includes the cart track in question is meant for all the local land owners called, 'Thalaimadai Aayakkattu Vivasaigal Association or Maruthavazhi Vaikal Aayakkattu Farmers of the area'. Every land owners of that area have the right of access to reach their respective lands. It is the only common way to all the members of the Association, including both plaintiffs and the 1st defendant.



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(ii) The cart-track starts from the western end of Mettupalayam to Narippallam public road towards north on the east of S.F.Nos.235 & 232 and passes on the east of the plaintiffs' land in S.F.Nos.231 & 254. Marudhavazhi channel is situated in S.F.Nos.142 and 230 and reaches the lands in S.F.Nos.255 to 2189 and 293.

(iii) There is no dispute over the title of the plaintiffs with respect to the lands in S.F.Nos.231 and 254/5 and the title documents referred by them are pertaining to the same only. The averments made that the plaintiffs have been paying the necessary B Memo charges in respect of S.F.No.230 for the last more than 30 years and that they are in absolute possession and enjoyment of the total extent of 6.13 acres, including S.F.No.230, are false.

(iv) The government is the only absolute owner of the property in S.F.No.230. B-Memo does not confer any legal right or title to the plaintiffs. The B-Memo was also cancelled during Zamabandhi proceedings on 19.05.2004. The plaintiffs are the recent encroachers in respect to S.F.No.230. The dispute is only with respect to the enjoyment of S.F.No.230. In fact, the Association of Farmers have represented the Tahsildar of Mettupalayam for eviction of unlawful encroachment made by the plaintiffs on 02.05.2003, thereby the lands of the area were measured in the presence of plaintiffs and others under an order passed in Na.Ka.No.7513/2003. Later, Tahsildar passed an order of eviction and gave notice dated 06.10.2003 under the said Na.Ka.Number, directing the Revenue Inspector to remove the encroachment. Even after the orders passed by the Tahsildar on 06.10.2003, the encroachments were not removed completely. So the defendant and his members gave a representation dated 02.02.2004 to District Collector, Coimbatore. Again the survey Notice dated 14.06.2004 was issued by the concerned VAO to the plaintiffs and defendant members, thereby the properties including the poromboke land in S.F.No.230 were measured on 19.06.2004 in the presence of the plaintiffs and the defendants.

(v) The plaintiffs preferred an appeal before the District Collector for taking proper measurements and for removal of entire encroachments. Again a notice dated 19.07.2004 was issued to all the parties concerned for inspection of survey on 20.07.2004, thereby the properties were again measured and survey stones were planted in the presence of all parties.

(vi) In the meantime, the plaintiffs put up a north-south barbed wire fence on the east of their property by encroaching the way of access, which caused obstruction to the free movement of the bullock carts at various points situated on the East of S.F.Nos.231 and 254. Under the guise of interim order obtained



in I.A.No.340 of 2004, the plaintiffs tried to obliterate the entire stretch of way for planting the Banana plants. Subsequent to that due to the intervention of police, the plaintiffs have now stopped their misdeeds. The well beaten cart-track is available upto the northern boundary of S.F.No.232. Beyond that point, the cart-track is narrowed down by putting the north south barbed wire fence and leaving the waste water from their lands purposely to make it as sluggish and impossible to use as cart-track. There are no merits in the suit, hence, the suit is liable for dismissal.

8. The case of the defendants 2 to 7, as averred in the written statement filed by the 7th defendant, in brief, is as follows:

(i) The plaintiffs have not complied with the mandatory provisions of Section 80 of Code of Civil Procedure, before filing the suit and as such the suit is not maintainable. The property comprised in SF No.230 of Odanthurai Village, is a channel poramboke, under the control of PWD and Revenue Department. After admitting that the properties comprised in S.F.No.230, is a poramboke land, the suit filed by the plaintiffs cannot be maintained.

(ii) The other allegations levelled in para Nos.1 to 12 of the plaint are false and baseless. There is no cause of action for the plaintiffs to file the present suit against the 1st defendant. The suit lacks bonafides and is devoid of merits. On 09.12.2003, the 1st plaintiff filed an application before the Tahsildar, Mettupalaym Taluk, stating that the entire encroachments made in S.F.No.230, must be removed. In the said application, he had admitted that there is encroachment made by him and others have also made encroachments and in case of removal of encroachment made by others, his encroachment can also be removed.

(iii) In the meanwhile, Firka Surveyor inspected the properties in S.F.No.230 and measured in the presence of the Village Administrative Officer, Odanthurai Village. In the inspection, it was found that out of total extent of encroachment of land made in SF No.230, the plaintiffs are found to cultivate bananas in the extent of 10 cents of land. Based on that, reports were sent by the Firka Surveyor as well as VAO, Odanthurai Village, stating that there is encroachments made by the plaintiffs. On 19.06.2004, the plaintiffs gave statement before the 2nd defendant, in which they have accepted the measurements made. However, not satisfied with the same, the 1st defendant again presented the petition and the thereby, the second survey was conducted.



(iv) While the facts are as above, the plaintiffs have completely suppressed the entire real facts and filed the present suit with false averments. Hence, the suit filed by the plaintiffs is liable to be dismissed.

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9. Based on the above averments, the trial Court framed the necessary issues and tried the suit. On the side of the plaintiffs, two witnesses were examined as PW1 and PW2 and twelve documents were exhibited as Ex.A1 to Ex.A12. Similarly, on the side of the 1st defendant, three witnesses were examined as DW1 to DW3 and eleven documents were marked as Ex.B1 to B11. Apart from those documents, the petition without date and the order passed by the Tahsildar for eviction dated 06.10.2003 were marked as Ex.X1 and Ex.X2.

10. Having considered the materials placed before her, the learned II Additional Subordinate Judge, Coimbatore, vide judgment and decree dated 24.04.2006 concluded the suit that the plaintiffs are entitled to the relief of permanent injunction, as prayed for. In the appeal filed by the 1st defendant, the findings arrived at by the trial Court was modified, wherein, the permanent injunction granted in favour of the plaintiffs in respect to S.F.No.230 alone, was set aside.

11. Aggrieved over the said findings of the first appellate Court, the plaintiffs are before this Court with this present second appeal. When the second appeal is taken up for admission, this Court formulated the following substantial questions of law.

"1. Whether the finding of the appellate Court is vitiated by failure to consider in the absence of any evidence on the side of the respondents regarding the existence of cart track and usage in S.F.No.230?

2. Whether the appellate Court is right in overlooking the evidence in Ex.A7 and Ex.A8, establishing unambiguous and continuous possession of the appellant in respect of lands in Survey No.230?

3. Whether the appellate Court is right in restricting the relief of injunction in respect of S.F.No.230 in the absence of proof of alleged encroachment?

4. Whether the appellate Court is correct in reversing the well considered judgment of trial Court when the trial Court has only considered the oral and documentary evidence adduced by the parties?"



12. Heard Mr.V.Ayyapparaja, the learned counsel appearing on behalf of the appellants/plaintiffs, Mr.S.Mukunth, the learned counsel appearing on behalf of the 1st respondent/1st defendant and Dr.S.Suriya, learned Additional Government Pleader appearing for respondents 2 to 7 / defendants 2 to 7 and perused the materials available on record.

Substantial Question of Law Nos.1 to 4:

13. The learned counsel appearing for the appellants/plaintiffs would contend that though the suit pertains to the second appeal, is filed as against seven defendants, the prayer sought for by the plaintiffs is only against the 1st defendant. During the time of second survey, without any information, the survey stones planted during the first survey, were unearthed. Further, he would submit that since the property pertains to the suit is situated in the Mettupalayam Taluk, the Surveyor attached to Tiruppur Sub Division surveyed the property for the second time and unearthed the survey stones. Therefore, the boundary fixed in the second survey is not in accordance with records maintained by the revenue authorities.

14. More than that after demarcation and after passing an order of eviction against the plaintiffs, it is necessary for the revenue authorities to conduct the second survey with the help of surveyors attached with other sub divisions. The further submission of the appellants' counsel is that S.F.No.230, is in the possession and enjoyment of the plaintiffs for more than the statutory period. In order to show the enjoyment and possession of the plaintiffs, the revenue authorities issued a B-Memo and accordingly, the defendants 2 to 7 recognised the possession of plaintiffs in S.F.No.230. he first appellate Court without considering the said aspect, vacated the interim injunction granted by the trial Court in respect to S.F.No.230 and therefore, it is necessary to set aside the findings arrived at by the first appellate Court in respect to the said survey number.

15. Per contra, the learned counsel appearing for the 1st respondent/1st defendant, would contend that even after giving the evidence by PW1, as he is not having any objection to use the cart-track situated in S.F.No.230 by others, the plaintiffs attempted to prevent the neighbouring land owners in using the cart-track. He would further submit that for the relief of injunction, the plaintiffs have to make out their case as they are having the right over the disputed land and also they have to prove that they alone are in the possession of the disputed land. He further adds that after admitting the fact that the suit Survey No.230, is a poromboke land, prayer seeking the



relief of injunction is quite contrary, in view of the evidence given by PW1. Therefore, in this appeal, no substantial question of law has arisen and thereby, the second appeal filed by the plaintiffs is liable to be dismissed.

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16. I have considered the submissions made on either side.

17. It is not in dispute, the plaintiffs are the absolute owners of property in S.No.254/5, comprising an extent of 3.36 acres and S.F.No.231, comprising an extent of 2.47 acres situated in Odanthurai Village, Mettupalayam Taluk. Also, admitted on either side that the land in S.F.No.230 of the same village is a government poromboke. However, the plaintiff described the suit property in the plaint, as follows:

"DESCRIPTION OF PROPERTY

In Mettupalayam Taluk, Odanthurai Village, SF.254/5 comprising an extent of 3.36 acres, S.F.No.231 comprising an extent of 2.47 acres, in S.F.No.230 (poromboke land) comprising an extent of about 30 cents, thus totalling 6.13 acres in the complete possession and enjoyment of the plaintiffs."

18. From the above, as far as in respect to S.F.Nos.254/5 and 231, the first appellate Court granted the relief as prayed for by the plaintiffs. Though the said finding is as against the 1st defendant, challenging the said judgment and decree, the 1st defendant has not preferred an appeal, by filing a Second Appeal. Hence, the decree granted by the first appellate Court, in respect to S.F.Nos.254/5 and 231, has become final.

19. In this connection, the plaintiffs are having the grievances that the first appellate Court, refused to grant permanent injunction, in respect of S.F.No.230. In the said situation, it is the case of the plaintiffs that in respect to S.F.No.230, the plaintiffs have paid B-Memo charges regularly and due to the same, the S.F.No.230 is only in the possession of the plaintiffs for more than the statutory period.

20. Though the learned counsel for the appellants/plaintiffs has contended as above, while at the time when the 1st plaintiff was examined as PW1, during his cross examination, he gave evidence as B-Memo is a receipt for the penalty issued by the Government for encroaching the land belongs to the Government. He has further stated that in 2003 itself, the B-Memo issued by the revenue authorities in respect to the encroachment is S.F.No.230 was cancelled. He has specifically stated that he is not having any objection to remove the obstruction made in S.F.No.230.



21. Therefore, the said evidence given by PW1 is quite clear that the plaintiffs are not having any objection to use the said land as a cart-track. In fact, on 09.12.2003, he sent a letter to the revenue authorities, wherein the 1st plaintiff has stated that he is not having any objection to remove the encroachments. In the said circumstances, after noting the fact that S.F.No.230 is a government poromobokke, it is not clear, without any authenticity for their action, how suit has been filed by the plaintiffs in respect to S.F.No.230. If the suit filed by the plaintiffs is allowed in entirety, it would cause much prejudice to the neighbouring land owners.

22. At this juncture, it is necessary and useful to see the judgment dated 06.02.2009 made in Civil Appeal No.1509 of 2009, [Balkrishna Dattatraya Galande vs. Balkrishna Rambharose Gupta and another], wherein our Hon'ble Apex Court has held as follows:

"In a suit filed under Section 38 of the Specific Relief Act, permanent injunction can be granted only to a person who is in actual possession of the property. The burden of proof lies upon the first respondent-plaintiff to prove that he was in actual and physical possession of the property on the date of suit."

23. Applying the principles set out in the above referred judgment, here it is a case, in respect to S.F.No.230, the plaintiff himself admitted that at the time of filing the suit, the said survey number is not under his possession, further, after giving undertaking to remove the encroachment, the question of possession does not arise. In general, in a suit for permanent injunction to restrain the 1st defendant from interfering with the plaintiffs' possession, the plaintiffs will have to establish that as on date of the suit, they were in lawful possession of the suit property and 1st defendant tried to interfere or disturb such lawful possession.

24. Here it is a case, the plaintiffs after admitting the fact that S.F.No.230 of Odanthurai Village, Mettupalayam Taluk, is a government porombokke, without showing any substantial evidence for their possession, asking the relief of permanent injunction, in respect to the said property, cannot be sustained.

25. In this regard, the first appellate Court after moulding the relief sought by the plaintiffs, granted the relief of permanent injunction in respect to S.F.Nos.254/5 and 231 only and dismissed the suit as far as S.F.No.230. Accordingly, the findings arrived at by the first appellate Court does not



warrants interference. Further, the findings arrived at by the first appellate Court is upon the factual aspects and therefore, I am of the considered opinion that no substantial question of law has arisen in this appeal.

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26. In view of the above discussion, the present second appeal is dismissed. The judgment and decree dated 29.04.2008 made in A.S.No.136 of 2006 on the file of the learned I Additional District Judge, Coimbatore, partly reversing the judgment and decree dated 24.04.2006 made in O.S.No.334 of 2004 on the file of the learned II Additional Subordinate Judge, Coimbatore, is confirmed. No Costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The I Additional District Judge,
Coimbatore.
2. The II Additional Subordinate Judge,
Coimbatore.
3. The Section Officer,
V.R. Section,
High Court, Madras-104

+1cc to Mr.R.Bharath Kumar, Advocate, S.R.No.65570
+1cc to M/s.Sarvabhauman Associates, Advocate, S.R.No.64635
+1cc to the Government Pleader, S.R.No.65230

S.A.No.189 of 2010

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