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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:18.04.2022

CORAM

THE HONOURABLE MRS. JUSTICE R.HEMALATHA

S.A.No.650 of 2010

and

M.P.No.1 of 2015

1.Thangaraj

2.Krishnamoorthy

...Appellants/Plaintiffs

Vs.

1.Sengottian

2.Kaliappa Gounder

3.Ganesan

4.Viswanathan

...Respondents 1 to 4/Defendants 1 to 4

Prayer: Second Appeal filed under Section 100 of CPC, 1908 against the decree and judgment dated 29.09.2006 passed in A.S. No.25 of 2006, on the file of the Additional District Court, Fast Track Court No.IV, Bhavani, upholding the decree and judgment dated 08.01.2004 passed in O.S. No.486 of 1999, on the file of the I Additional District Munsif Court, Bhavani.

For Appellants : Ms.D.Sathya
for Mr.T.Murugamanikam

For Respondents : N/A

JUDGMENT

The appellants are the plaintiffs in O.S. No.486 of 1999, on the file of the I Additional District Munsif Court, Bhavani, Erode District. They filed the suit for declaration of their title to the suit properties and for a permanent injunction restraining the defendants from interfering with their peaceful possession and enjoyment of the suit properties and for costs.

2. The first plaintiff is the son of the first defendant and the second plaintiff is the son of the second defendant in the suit.

3. For the sake of convenience, the parties are referred to as per their ranking before the trial Court and at appropriate places, their rank in the present appeal would also be indicated.



4. The case of the plaintiffs in nutshell is as follows :

Item No.1 of the suit properties is an ancestral property. On 09.12.1987, the grandfather of the plaintiffs (father of the defendants 1 & 2) executed a registered Will in favour of the plaintiffs bequeathing Item No.1 of the suit properties. In Item No.2 of the suit properties, there is a natural stream running east to west as shown in the plaint plan. About 40 years ago, the said stream measuring 148' x 4' slowly deviated from its original path and started flowing on the eastern side. The grandfather of the plaintiffs and the defendants 1 & 2 levelled the land in such a manner making the stream flowing through their property (Item 1). They have been in possession and enjoyment of Item No.2 of the suit properties and thus the plaintiffs are also entitled to use Item No.2 of the suit properties. According to the plaintiffs, the defendants 3 to 5, who are strangers and owners of the adjacent lands have lost their right over the stream which flows through Item No.1 of the suit properties. They are now attempting to interfere with the plaintiffs' peaceful possession and enjoyment of Item No.2 of the suit properties. They also attempted to trespass into the entire properties on 07.08.1999, which was successfully prevented by the plaintiffs. Therefore, they filed a suit for declaration and permanent injunction.

5. The defendants 1 & 2 remained absent and were set ex parte. The fifth defendant died during the pendency of the suit and her legal heirs were already on record as defendants 3 & 4. The defendants 3 & 4 in their written statement had contended that the suit stream (Item No.2) marked as A, B, C & D in the plaint plan is in the land of the defendants 3 to 5 and that the plaintiffs do not have any right / title over the same. It is further contended that the defendants 3 to 5 did not attempt to interfere with the plaintiffs' possession over Item No.1 of the suit properties. However, it is their contention that in an earlier suit in O.S.No.6/1990 filed by the plaintiffs' grandfather and the defendants 1 & 2 in the present suit against the defendants 3 to 5 a taluk surveyor was appointed by the Court who measured the natural stream and found that it is in R.S.Nos.222/2 & 222/3, which absolutely belonged to the defendants 3 to 5. The appeal filed by the plaintiffs' grandfather and defendants 1 & 2 in A.S.No.78/1998 was also dismissed and therefore, the present suit is barred by res judicata. They therefore, prayed for the dismissal of the suit.

6. The trial court after framing necessary issues and after full contest, dismissed the suit vide its decree and judgment dated 08.01.2004. The appeal filed by the plaintiffs also failed. Both the courts below concurrently held that



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i. There is no dispute as regards Item No.1 of the suit properties.

ii. The plaintiffs claim title to both the suit properties by way of a Will dated 09.12.1987 (Ex.A1) executed by Marappa Gounder, grandfather of the plaintiffs, bequeathing Item No.1 of the suit properties in favour of the plaintiffs. There is no mention about Item No.2 of the suit properties in the Will. Therefore, the plaintiffs cannot now contend that they are entitled to suit Item No.2 of the suit properties also.

iii. In the absence of any documentary evidence to substantiate the contention of the plaintiffs that the suit stream passes through the land of the plaintiffs, the evidence of P.W.1 & P.W.2 cannot be accepted.

iv. The suit in O.S.No.6/1990 on the file of the Additional District Munsif Court, Bhavani, Erode District, filed by the plaintiffs' grandfather and the defendants 1 & 2 for a declaration of their right over the present Item No.2 of the suit properties, was dismissed and the appeal in A.S.No.78/1998 was also dismissed and this is evidenced by Ex.B1 to Ex.B3. Therefore, the present suit is barred by the principles of res judicata.

7. It is seen from the records that the fourth respondent died on 01.05.2015 and the petition to bring on record the legal heirs of the deceased fourth respondent was filed in M.P.No.1/2015, is still pending. However, since the matter has not been admitted so far, this court wanted the counsel for the appellants to argue the case on merits.

8. In the Memorandum of grounds, the appellants have raised the following substantial questions of law.

i & ii. When the plaintiffs are not parties to the earlier suit, whether the decision rendered in that suit would be hit by the principles of res judicata?

9. Heard Ms.D.Sathya for Mr.T.Murugamanikkam, learned counsel for the appellants. No representation on behalf of the respondents.

10. The main contention of the learned counsel for the appellants is that when the plaintiffs have let in evidence to show that Item No.2 of the suit properties which is a natural stream deviated from its original path and the plaintiffs' grandfather levelled his land in such a manner to make the stream flow into his land and has been in possession and



enjoyment of the same, both the Courts below did not consider the same and dismissed the suit merely on the ground that the present suit is barred by res judicata though the plaintiffs were not parties to the earlier suit in O.S.No.6/1990.

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11. The Item 2 of the present suit was shown as part of Item 1 in the earlier suit. Ex.B1 is the Commissioner's Report filed in O.S.No.6/1990, while Ex.B2 is the judgment passed in O.S.No.6/1990. A perusal of Ex.B1 & Ex.B2 shows that the plaintiffs claim with regard to the flowing of the stream in their land was negatived by both the trial Court and the first appellate Court. The decree and judgment in A.S.No.78/1998 was marked as Ex.B3. The contention of the learned counsel for the appellants is that since the plaintiffs were not the parties to the suit in O.S.No.6/1990, the present suit filed by them cannot be said to be barred by the principles of res judicata. This contention cannot be accepted for the simple reason that the plaintiffs claim title to suit properties only through the Will executed by their grandfather. Moreover, in the earlier suit, it was contended by the grandfather of the plaintiffs and the defendants 1 & 2 that the natural stream started flowing through their land 80 years prior to the filing of the said suit. On the contrary in the present suit it is stated that 40 years prior to the filing of the suit, the natural stream started flowing through the land of the plaintiffs. This aspect was also considered by both the Courts below. Moreover, a perusal of Ex.B2 shows that the suit Item 1 & 2 were shown as a single property whereas in the present suit they are shown as two different properties. According to both the Courts below, this had been deliberately done by the plaintiffs only to show that the decree and judgment passed in O.S.No.6/1990 would not bind them.

12. In the instant case, the plaintiffs claim title to the suit Item No.1 only through the Will (Ex.A1) and there is no mention about the suit Item No.2 in the Will (Ex.A1). Therefore, they cannot now contend that their grandfather was in possession and enjoyment of Item No.2 of the suit properties for more than 40 years. All these aspects have been considered by both the Courts below and concurrently held that the plaintiffs did not establish any of their contentions in the present suit.

13. All the observations made by both the Courts below are based on sound principles of law and by no stretch of imagination they can be said to be perverse. There is no substantial question of law involved in the present appeal. Therefore, the second appeal deserves to be dismissed.

14. In the result,



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i. The second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

ii. The decree and judgment dated 29.09.2006 passed in A.S. No.25 of 2006, on the file of the Additional District Court, Fast Track Court No.IV, Bhavani, and

iii. the decree and judgment dated 08.01.2004 passed in O.S. No.486 of 1999, on the file of the I Additional District Munsif Court, Bhavani, are upheld.

-s/d-

Assistant Registrar(CS VIII)

//True Copy//

Sub-Assistant Registrar

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To

1. The Additional District Court,
Fast Track Court No.IV,
Bhavani.
2. The I Additional District Munsif Court,
Bhavani.

Copy To:

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

+1cc to M/s.V.Rajesh, Advocate, S.R.No.26009

S.A.No.650 of 2010
and
M.P.No.1 of 2015

SSN(CO)
RN(30/05/2022)