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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 17.12.2021

DELIVERED ON : 11.01.2022

CORAM:

THE HONOURABLE MR.JUSTICE R. PONGIAPPAN

S.A.No.861 of 2010

and

M.P.No.1 of 2010

Sevanan

.. Appellant/Defendant

Vs

B.K.Bhojan

.. Respondent/plaintiff

Prayer: The Second Appeal is filed under Section 100 of C.P.C. against the Judgment and Decree dated 11.07.2008 made in A.S.No.64 of 2007 on the file of the Court of the Subordinate Judge, Udhagamandalam confirming the judgment and decree dated 11.10.2007 made in O.S.No.7 of 1999 on the file of the District Munsif Court at Coonoor.

For Appellant : Mr.Srinath Sridevan

For Respondent : Mrs.S.T.P.Kuilmozhi

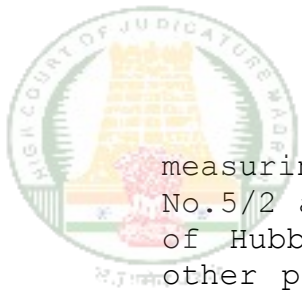
JUDGMENT

The second appeal is focused as against the judgment and decree dated 11.07.2008 passed in A.S.No.64 of 2007 by the learned Subordinate Judge, Udhagamandalam, confirming the judgment and decree dated 11.10.2007 passed in O.S.No.7 of 1999 by the learned District Munsif, Coonoor.

2. For the sake of convenience, hereinafter the parties are referred as per their litigative status before the trial Court.

3. The laconic averments found in the plaint are as follows:

3.1. The plaintiff is the absolute owner of the property



measuring an extent of 0.18 acres of land and a house in Survey No.5/2 and another extent of 0.80 acres of land in Survey No.5/3 of Hubbathalai Village. The property was purchased along with other properties by a registered sale deed dated 05.01.1967. At the time of purchase, the plaintiff had totally purchased an extent of 0.98 acres of land in S.No.5 at Periya Bikatty of Hubbathalai Village and later the suit property had been subdivided as S.No.5/2 with an extent of 0.18 acres and S.No.5/3 with an extent of 0.80 acres. Ever since the date of purchase, the plaintiff has been in peaceful possession and enjoyment and had cultivated the said land with tea. The defendant, who is a total stranger to the suit property originally tried to encroach and put up a house construction. In this regard, the plaintiff filed a suit in O.S.No.77 of 1998 before the District Munsif, Coonoor. The defendant had originally attempted to put up a construction in S.No.5/3, wherein, the plaintiff owns an extent of 0.80 acres of land with tea adjoining to his residential house. During the pendency of the suit in O.S.No.77 of 1998, the defendant almost completed his construction in the suit property, illegally without any rights whatsoever. Since the suit survey number was wrongly stated in the earlier suit in O.S.No.77 of 1998, the plaintiff came to know of the said mistake later and was compelled to withdraw the said suit and to file this present suit.

3.2. The defendant has full knowledge of the earlier suit filed by the plaintiff. The defendant taking advantage of the advocates Boycott continued with putting up of construction in the suit property without any right or title. During the second week of November, the defendant also went to the extent of uprooting the nearby Tea bushes and caused damages and nuisance and the plaintiff preferred a complaint with the Aruvankadu Police Station on 16.11.1998. Hence, in order to restrain the activities of the defendant, it would be necessary to get an order of perpetual injunction restraining the defendant from interfering with the plaintiff's peaceful possession and for mandatory injunction to demolish the building, which was unauthorisedly constructed by the defendant. Hence, the suit.

4. The contentions raised by the defendant in the written statement are as follows:

4.1. The plaintiff's alleged sale deed has got nothing to do with the suit property and will not bind on the defendant and his right in the property in Survey No.5/3 of Hubbathalai Village in Patta No.537. The alleged sub division is not valid. The defendant has got property in Survey No.5/3 and has every



right and title derived by way of inheritance and succession. The plaintiff is a nuisance monger having the habit to file a false suit. He filed a suit in O.S.No.77 of 1998, which is an abuse of process of law and therefore, the same was withdrawn by the plaintiff himself. The plaintiff has not even chosen to state the actual relationship between the defendant and him. The plaintiff's father and the defendant's grandfather are direct brothers, which was suppressed by the plaintiff with an intention to grab the property owned and possessed by the defendant as absolute owner. The defendant had acquired right, title, possession, enjoyment and ownership to an extent of 31 ¼ cents of land in Survey No.5/3 by way of inheritance and succession from his ancestors and the said extent of 31 ¼ cents was allotted to him by way of an oral partition several years back and since then he has been in exclusive possession and enjoyment of the said extent. As an absolute owner thereof, the defendant has put up a residential house in an area of about 2 ¼ cents having obtained proper plan approval from concerned authorities. The construction of the house itself was completed much before the filing of the false suit by the plaintiff in O.S.No.77 of 1998 itself and hence the present suit itself is frivolous one and unsustainable.

4.2. The defendant's name has been properly included in the revenue records based on his right, title, possession and enjoyment. The defendant is the original owner of an extent of 30 ¼ cents together with a house out of 7.48 acres, the house thereon bearing Door No.1/56C of Hubbathalai Village and the defendant has not done any act against the plaintiff at any point of time. Hence, the suit filed by the plaintiff is liable to be dismissed.

5. Based on the above averments, the trial Court framed necessary issues and tried the suit. Before the trial Court, on the side of the plaintiff, P.W.1 was examined and seventeen documents were marked as Exs.A1 to A17. Similarly, on the side of the defendant two witnesses were examined as D.W.1 and D.W.2 and five documents were marked as Exs.B1 to B5. Apart from those evidence, one S.Babu was examined as C.W.1 and four documents were marked as Exs.C1 to C4.

6. Having considered the materials placed before him, the learned District Munsif, Coonoor came to the conclusion that the plaintiff is entitled for the relief of perpetual injunction and mandatory injunction and accordingly, the suit was decreed in favour of the plaintiff. In the appeal, the learned Subordinate Judge, Uthagamandalam confirmed the findings arrived at by the



trial Court. Aggrieved over the same, the plaintiff is before this Court with the present second appeal.

7. At the time of admission, this Court had formulated the following Substantial Questions of Law:

(i) Whether the suit for mandatory injunction without a prayer for recovery of possession is maintainable when the plaintiff himself has admitted that the defendant was in possession trespassing into a portion of the suit property even before the filing of the suit?

(ii) Whether the Courts below have committed an error in granting the relief of mandatory injunction and permanent injunction when there is a bona fide dispute, without considering whether such a question of title can be conveniently gone into in the suit for injunction?

8. Heard the learned counsel appearing on either side and perused the materials available on record.

9. It is not in dispute that the suit property and three other properties were purchased by the plaintiff vide sale deed dated 05.01.1967. The xerox copy of the sale deed and the original sale deed have been marked before the trial Court as Exs.A1 and A16, respectively. In view of the said sale deed, in Survey No.5 of Hubbathalai Village, Periya Bikkaty, Coonoor Taluk, the plaintiff had purchased 0.98 acres, in other words, the total extent of Survey No.5 is 7.48 acres. After the purchase was made, Survey No.5 was sub-divided, wherein, the property, which was purchased by the plaintiff was included in Survey No.5/3. Further more, during the survey, S.No.5/3 was converted into S.No.7/9. In this regard, the Correlation Certificate issued by the Zonal Deputy Tahsildar, Coonoor dated 04.07.2005 was marked as Ex.A15.

10. It is also not in dispute, prior to the filing of the present suit, the plaintiff herein filed a suit against the defendant for the same relief in O.S.No.77 of 1998. During the pendency of the said suit, the plaintiff herein filed an application, wherein he sought the relief to withdraw the said suit with liberty to file a fresh suit on the same cause of action. The said application filed by the plaintiff is ordered in his favour and thereafter the suit filed in O.S.No.77 of 1998 was dismissed with liberty to file a fresh suit on the same



cause of action.

11. In this occasion, it is the case of the plaintiff that after the sub-division was made in S.No.5, the neighbouring land owner, who is the defendant, encroached the land measuring an extent of 0.03 acres and unlawfully constructed a house and therefore, it would be necessary to grant a decree for perpetual injunction and mandatory injunction. On the other hand it is the case of the defendant that in S.No.5/3, the defendant is also having the land measuring an extent of 31 $\frac{1}{4}$ cents and therefore, without demarcating the land purchased by the plaintiff, it cannot be said that the defendant has encroached the land, which was purchased by the plaintiff vide Ex.A1.

12. Now on going through the concurrent judgment rendered by the Courts below, it seems both the Courts below mainly relying on the report given by the Surveyor, which were marked as Exs.C2 and C3 and also by relying on the reports submitted by the Advocate Commissioner (Exs.C1 and C4), came to the conclusion that the defendant herein encroached the portion of the land, which belongs to the plaintiff and thereafter, allowed the suit and granted a decree in favour of the plaintiff.

13. In this regard, the learned counsel appearing for the appellant/defendant would contend that the demarcation of land purchased by the plaintiff is the only solution to resolve the dispute between the plaintiff and the defendant. Now on considering the said submission with the relevant records, initially on going through the sale deed stands in the name of the plaintiff (Exs.A1 and A16) in Survey No.5, the property measuring an extent of 0.98 acres was purchased by the plaintiff without mentioning the four boundaries. Further, the recital found in the said sale deed disclosed the fact that the total extent of S.No.5 is 7.48 acres. In this occasion, in respect of the land possessed by the defendant, the plaintiff at the time of giving evidence as P.W.1, gave evidence as in suit survey number viz., S.No.5/3, by succession, the defendant derived title to an extent of 31 $\frac{1}{4}$ cents. Further, he has stated that, his father and the grandfather of the defendant are brothers. After stating as above, he gave further evidence as in S.No.5/3 totally 26 members are owning the lands. Therefore, the said evidence given by P.W.1 is sufficient to hold that in S.No.5/3 (suit property) apart from the plaintiff, 25 members including the defendant are owning the lands. Since the property purchased by the plaintiff is not having any four boundaries, to find out the four boundaries of the property purchased by the plaintiff, it would be necessary to demarcate S.No.5/3 depending upon the



title having by the respective owners.

14. Here it is a case, the report filed by the surveyor and the report filed by the Advocate Commissioner were marked as Exs.C2 and C4, respectively. Now on going through the report submitted by those officers, it seems during the relevant point of time they measured the property to an extent of 0.03 acres alone in S.No.7/9. The whole report submitted by those officers disclosed the fact that they have not measured the entire extent pertains to S.No.5/3. It is very difficult to understand that without measuring the total extent, in the absence of any evidence in respect of the property owned by the plaintiff, how the surveyor came to the conclusion that the defendant had encroached the suit schedule property. In fact, on going through the schedule of property referred in the suit, the present suit has been filed for the total extent of 0.80 acres with a residential building bearing Door Nos.A/56 and B/56. Since the sale deed pertains to the said land did not have the four boundaries, it would be necessary to survey the entire property after giving notice to all other persons, who are all owning the land in the said Survey Number. Therefore, I am of the considered view that the report given by the surveyor is no way helpful to determine the alleged encroachment made by the defendant. As rightly pointed out by the learned counsel appearing for the defendant, demarcating the entire property is the only solution to resolve the issue raised in this suit. In other words, granting a decree by placing reliance on the report submitted by the surveyor is totally erroneous. The trial Court without considering those aspects granted a decree, which is liable to be set aside.

15. More than that here it is the case, the defendant denied the title now claimed by the plaintiff. Therefore, it would be necessary for the plaintiff to file a suit for the relief of declaration also. But here it is the case, the plaintiff has not asked the relief of declaration, which is also raised a ground in support of the defendant's case.

16. In conclusion, the Judgment and Decree dated 11.07.2008 passed in A.S.No.64 of 2007 on the file of the Subordinate Court, Udhagamandalam, confirming the Judgment and Decree dated 11.10.2007 passed in O.S.No.7 of 1999, on the file of the District Munsif Court, Coonoor is set aside. It is open to the plaintiff to file a suit for demarcation and to find out the correct portion, which was purchased by him in S.No.5/3 of Hubbathalai Village.



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With the above direction, the second appeal is disposed of. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-V)

//True Copy//

Sub Assistant Registrar

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To

1.The Subordinate Judge,
Udhagamandalam.

2.The District Munsif,
Coonoor.

+1cc to Mr.Srinath Sridevan, Advocate SR.No.2677

+1cc to Mr.S.T.P.Kuilmozhi, Advocate SR.No.2172

S.A.No.861 of 2010

NMI (CO)
GN(11/02/2022)