



S.A. No. 279 of 2013

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.08.2022

CORAM:

THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

S.A. No. 279 of 2013

and

M.P.No. 1 of 2013

Arabi @ Peruma @ Kaveriammal (died)

2. T. Nagarajan,
S/o. Tirupathi

3. Mari,
W/o. Nagarajan

4. R.Thirupathi,
S/o. Late Rangan
(4th appellant brought on record as
legal representative of the deceased
1st appellant vide order of court
dated 12.07.2019 made in C.M.P.
No.9223, 9224 & 9227 of 2019
in S.A.No. 279 of 2013)

... Appellants

Vs.

Kaveri,
D/o. Kannu Gounder

... Respondent



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PRAYER: Second Appeal filed under Section 100 of Code of Civil Procedure, to set aside the judgment and decree of Subordinate Judge's Court of Dharmapuri dated 28.08.2012 in A.S.No.31 of 2010 confirming the judgment and decree of the District Munsif Court at Dharmapuri dated 24.11.2010 in O.S.No.176 of 2001.

For Appellants : Mr.P.Valliappan

For Respondent : Mr.S.Saravanakumar for
Mr.I.Abrar Md. Abdulla

JUDGMENT

The appellants herein are the plaintiffs in the suit in O.S.No. 176 of 2001 on the file of District Munsif Court, Dharmapuri filed against the defendant/respondent herein for the relief of permanent injunction and other consequential relief sought for with regard to their peaceful possession and enjoyment of 'B' schedule property and also not to put up any construction in the suit property.

2. For the sake of convenience, the parties are referred as per the ranking in the suit.



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3. The defendant contented that 'B' schedule property is not belong to the plaintiffs, but the defendant claimed 'B' schedule property is belonged to her, in which the plaintiffs have no right or possession. Originally, the suit was filed by one Kaveriammal and two others, all are co-sharers of 'A' schedule property and claimed 'B' schedule property is the portion of 'A' schedule property. With regard to 'A' schedule property, they have not claimed any relief, only with regard to 'B' schedule property, the suit was filed. During the pendency of the proceedings, Kaveriammal died leaving behind her legal heirs and already the legal heirs are parties on record in the suit. The Trial Court framed two issues. The plaintiffs, to prove their title and possession, they have filed sale deeds and partition deed, Ex.A1 to A4 and also Commissioner's report, Ex.C1 and C2 and contented that 'A' schedule property absolutely belong to them and in respect of 'B' schedule property, which forms part of 'A' schedule also belong to them and they have left out vacant portion on the eastern and southern side of their building for their convenient enjoyment, but the defendant, who is having the property on the southern portion of 'B' schedule of property attempted to put up a



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construction, thereby causing interference and the same was proved with the help of Commissioner's report, Ex.C1 and C2. But, the contention of the defendant is that the plaintiffs had put up a construction in their entire property, which was said to have been purchased by them as per the documents Ex.A1 to A4, which is not belong to them nor which form part of 'A' schedule, on the other hand, the plaintiffs claimed 85 ft. on the southern side and 3.5 ft. on the eastern side and they have attempted to encroach the same as if it belongs to them and it was shown as 'B' schedule, thereby, the defendant denied the plaintiffs claim over the 'B' schedule property.

4. On considering rival submissions of both sides, the trial judge concludes that the plaintiffs put up construction in their entire property and they failed to prove that 'B' schedule property is belong to them, besides, the Commissioner's report also not supporting the case of plaintiffs for the reason that the properties were not measured properly along with defendant's property and dismissed the suit with the findings that the plaintiffs failed to prove their exclusive possession of 'B' schedule property.



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5. Aggrieved over that, the plaintiffs preferred an appeal in A.S.No.31 of 2010 before the Sub-Court, Dharmapuri, wherein the lower appellate independently analysed the facts and evidence, concludes that originally, the plaintiffs 1 to 3 put up construction in the entire extent covered in Ex.A1 to A4 and the said fact was also admitted by P.W.1 during cross-examination. Furthermore, on analysing the Commissioner's report, Ex.C1 and C2, the appellate judge also concludes that as per the physical feature drawn by the Commissioner, the construction was put up in the entire 'A' schedule property and concludes that there is no vacant space on the eastern and southern side of the plaintiffs property as they claimed in 'B' schedule and the alleged vacant site also not in possession of plaintiffs. Accordingly, the appeal was dismissed by confirming the trial court findings. Challenging the concurrent findings of the court below, the plaintiffs filed this Second Appeal and the same was admitted on the following substantial question of law :-

“a) Whether the Lower Appellate Court is correct in law in holding that the suit for bare injunction is not maintainable in the absence of a prayer for declaration especially when the



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title has not been disputed by the respondent and when it is axiomatic in law that even in a suit for injunction, title can be incidentally looked into?

b) When the measurements in Ex.A1 to A4 registered sale deeds and partition deed would decisively prove the entitlement of the appellants over the suit properties, are the courts below correct in law in non-suiting the appellants?

c) When it is axiomatic in law that possession follows title in respect of a vacant site are the courts below correct in law in dismissing the sit for permanent injunction in respect of 'B' schedule property, regarding which the appellants had produced title documents indicating that the 'B' schedule property is a vacant space for maintaining the 'A' schedule property?

d) Whether the courts below are correct in law in misconstruing Ex.C1 to C4 – Commissioner's report and plan and Ex.X1 and Ex.X2, blue print and proceeding for approval of blueprint, as if the same are against the case of the



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appellants?

e) Whether the respondent is estopped from disputing the right of the appellants, in the backdrop of the dismissal of their appeal confirming the rejection of their counter blast suit in O.S.No. 254 of 2006, which was filed for bare injunction?

6. Furthermore, the appellate judge also observed that since the defendant denied the plaintiffs claim over the 'B' schedule property, the plaintiffs ought to have taken steps to claim a relief of declaration with regard to 'B' schedule, without which, the suit as such is not maintainable in law. Challenging the said findings, the plaintiffs filed this Second Appeal contending that without proper appreciation of the facts and evidence, both courts below erroneously dismissed the plaintiffs claim even though they proved their possession and enjoyment of 'B' schedule property. Hence, they prayed to set aside the same by allowing this appeal.

7. The plaintiffs claimed right over the 'A' schedule property through



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sale deeds and partition deed Ex.A1 to A4 absolutely and also contended that 'B' schedule property is forming part of 'A' schedule property and the same is under their enjoyment, but the defendant attempted to put up construction by encroaching the same. Hence, they have filed the suit. Further, the plaintiffs also contended that after their purchase, they have put up a construction, at that time, they have left vacant portion on the southern and eastern side of their property and the same is shown as 'B' schedule herein. In order to maintain the building, the said portion was left out by them and the same is enjoyed for their purpose for many years, but the defendant attempted to put up construction. Hence, they have filed the suit, but the defendant claimed that on the southern side, building constructed by the plaintiffs in 'A' schedule property has been purchased by her through sale deeds Ex.B1 to B3. On earlier occasion, this defendant filed a suit in O.S.No.254 of 2006 for permanent injunction against these plaintiffs contending that they have attempted to encroach the property. Accordingly, the Commissioner also visited and measured the property with the assistance of Surveyor and Village Administrative Officer. So, the fact reveals that already the dispute with regard to 'B' schedule property between



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the parties. But, as pointed by the defendant's counsel, the plaintiffs have not chosen to file a suit for declaration and they have filed a suit for bare injunction contending that 'B' schedule property absolutely belong to them, even though the defendant denied the title and possession of plaintiffs.

8. The learned counsel for plaintiffs argued that even in a bare injunction suit, the Court can incidentally decide the title of the property based upon the title deeds produced on the side of plaintiffs. Further, he has relied on the following authority :-

I. This Court in the case of ***Syed Dhasthakeer vs. Navab John*** reported in **2012 (6) CTC 892**, held as follows :-

“held. The first question projected as substantial question of law is the suit for bare injunction without a prayer for declaration is not maintainable in the light of the decision of Apex Court reported in anathula Sudhakar v. P. Buchi Reddy (dead) by LR.s and others, 2008 (6) CTC 237 (SC). The said contention, according to the considered view of this Court is untenable. There is a provision in the Specific Relief Act directing refusal of grant of declaration in cases where consequential reliefs could have been claimed, but omitted to



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be prayed for. The same is found in Section 34 of the Specific Relief Act, 1963. So far as the provisions dealing with the permanent injunction are concerned, there is no such provision mandating refusal of the grant of injunction on the sole ground that declaration has not been prayed for.”

II. Further, this Court in the case of ***State of Tamil Nadu, by the District Collector, Salem and others vs. T.Krishnasamy Chettiar (deceased) and others*** reported in ***2017 (3) MWN (Civil) 68***, also held in para 16 as follows:-

“16. D.W.1 in his deposition, admits that the title in favour of the plaintiff. Therefore, as pointed out above by the Hon'ble Supreme Court, such admission operate as estoppel against its maker. While so, when there is no dispute with respect to title of the plaintiff, Suit for bare injunction is maintainable.”

It is true that the court can incidentally decide the title of the party in a bare injunction suit, but whether the said proposition is applicable to the facts of the present case is to be decided. As discussed above, with regard to 'B' schedule property, the plaintiffs claimed absolute right and exclusive



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possession of the property, but the defendant denied their title, on the other hand, they claimed that the said 'B' schedule property belong to her. As per the admission made by P.W.1 during cross-examination, which reads as follows :-

'கட்டிடம் நான்கு பக்கமும் சமமாக உள்ளது என்றால் சரியல்ல. மேற்கு பக்கம் 47 அடி கிழக்கு பக்கம் 40 அடி, வடக்கிலும் தெற்கிலும் 43 3/4 அடி.'

'வா.சா.ஆ.3 மற்றும் 4 பாத்தியப்பட்ட நிலம் முழுவதிலும் கட்டிடம் கட்டி உள்ளேன் என்றால் சரிதான். நாங்கள் கட்டிடம் கட்டியுள்ள பகுதியின் தெற்கு பக்கம் எனக்கும் என் மனைவிக்கும் பாத்தியப்பட்ட நிலம் இல்லையென்றால் சரிதான். எதிர்வாதிக்கு பாத்தியப்பட்ட நிலம் உள்ளது என்றால் சரிதான்.'

So, P.W.1's evidence clearly establish that there is no vacant space left on the eastern and southern side of the suit property. The courts below rightly appreciated this aspect and arrived a finding that the plaintiffs had not left out any vacant space on the eastern and southern side of their property. Even the measurement as per the Sale Deeds and partition deed Ex.A1 to A4 also not establish that 'B' schedule property is forming part of 'A' schedule property. Though the Commissioner was appointed, but he has not measured the property with the help of Surveyor nor the defendant's property is measured. Therefore, both oral and documentary evidence would



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establish that the plaintiffs have failed to prove their right and title as well as possession of 'B' schedule property. When that being so, the plaintiffs bound to prove their title against independent evidence with correct identification of the property. Therefore, in respect of 'B' schedule property, title and possession of plaintiffs could not be decided incidentally as argued by the plaintiffs. The authority relied on by the plaintiffs are not applicable to the facts of the present case. Therefore, the findings of the courts below that the suit as such is not maintainable in law and the bare injunction suit is not maintainable without the relief of declaration are correct in law. Accordingly, question of law (a) is answered.

9. With regard to the measurement found in Ex.A1 to A4, the Courts below rightly analysed the measurement found in the sale deeds as well as on ground in paras 20 and 21 of the trial court judgment as well as in paras 11 and 12 of lower appellate court judgment and rightly arrived a conclusion that the plaintiffs put up building in the entire extent, which are covered under Ex.A1 to A4. Furthermore, the Commissioner's report also establish that the building was constructed in the entire extent of the plaintiffs



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property. Hence, the courts below rightly concludes that the plaintiffs not proved the possession of 'B' schedule property forming part of 'A' schedule property covered under Ex.A1 to A4 registered documents. Accordingly, the question of law (b) is answered.

10. As discussed above, the plaintiffs failed to establish that 'B' schedule of property is under their enjoyment nor they proved title over the suit property. In the written statement, the defendant totally denied the plaintiffs' right over 'A' and 'B' schedule property and also contended that 'B' schedule property is belonged to her by way of purchase and the same is under her enjoyment. In fact, in the year 1992, the terrace building was put up by the plaintiffs in their property. But, as per the Commissioner's report, in the 'B' schedule property, the defendant put up the cement pillar in order to make construction. Hence, the cause of action arose and the suit was filed. But, it was not proved on the side of plaintiffs that 'B' schedule property is under their possession and enjoyment. P.W.1 himself admits that the construction was put up in their entire property and if any vacant space is left out, they alone bound to prove the same, but they failed to do



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so. Hence, the courts below rightly appreciated the documents Ex.C1 and C2 Commissioner's preliminary report and rough plan and also Ex.X1 and X2, blue print and proceedings of blue print plan approval and rightly arrived the conclusion that there is no space left out by the plaintiffs as shown in the 'B' schedule property. Accordingly, the question of law No. (d) is answered.

11. With regard to the earlier suit in O.S.No.254 of 2006, neither the plaintiffs nor the defendant claimed right based upon the earlier suit proceedings and it is not the case of plaintiffs that filing of earlier suit in O.S.No.254 of 2006 is estopped from claiming right over 'B' schedule property. The plaintiffs bound to prove their right and title independently, but they failed. Hence, the findings of the earlier suit have no effect on the case in hand. Accordingly, the question of law No.(e) is answered.

12. In the result, the courts below rightly appreciated the oral and documentary evidence and dismissed the claim of plaintiffs with regard to



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'B' schedule property for the reason that the plaintiffs failed to prove their exclusive right and enjoyment of property, which needs no interference by this Court. Accordingly, this Second Appeal stands dismissed and the findings of the lower appellate judge in A.S.No.31 of 2010 and the trial judge in O.S.No.176 of 2001 are confirmed, thereby, suit is dismissed. No costs. Consequently, the connected Miscellaneous Petition is closed.

03.08.2022

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To

The Sub-Judge,
Dharmapuri.

T.V.THAMILSELVI, J.

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Pre-delivery judgment in
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