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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 20.10.2021

Pronounced on : 25.01.2022

CORAM:

THE HONOURABLE MRS. JUSTICE S.KANNAMMAL

S.A.No.681 of 2019
and
C.M.P.No.12798 of 2019

1.C.Kamalam
2.N.Arjunan

... Appellants/Defendants

Versus

1.T.Gandhimathi
2.G.Jothi
3.M.Sakthi

... Respondents /Plaintiffs

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgement and Decree dated 31.01.2019 passed in A.S.No.36 of 2015 on the file of the I Additional Sub Court, Erode reversing the Judgement and Decree dated 27.04.2015 passed in O.S.No.62 of 2010 on the file of the II Additional District Munsif Court, Erode.

For Appellants : Mr.N.Manokaran

For Respondents : Mrs.V.Srimathi

JUDGMENT

[The Case has been heard through video conference]

This Second Appeal has been filed against the Judgement and Decree dated 31.01.2019 passed in A.S.No.36 of 2015 on the file of the I Additional Sub Court, Erode, reversing the Judgement and Decree dated 27.04.2015 passed in O.S.No.62 of 2010 on the file of the II Additional District Munsif Court, Erode.

2. The appellants are the defendants and the respondents are the plaintiffs. The plaintiffs filed Original Suit in O.S. No.62/2010 praying for permanent injunction restraining the defendants, their men and agents making any encroachment in the suit property and from interfering with plaintiffs' peaceful



possession and enjoyment of the suit property in any manner.

3. The plaintiffs/respondents averred in the plaint that,

i) The first plaintiff herein is the wife of late Thangavel and mother of plaintiffs 2 and 3 herein.

ii) The property described in the suit schedule, hereinafter referred to as ''suit property'', is situate at Nathagoundenpalayam, hamlet of M.S.Mangalam Village, Erode Taluk, within the jurisdiction of this Honourable Court. The suit property originally formed part of old survey number 414/4 part of Natham Poramboke land. More than 80 years back, Thangavel the husband of first plaintiff when he was a young boy along with his parents occupied the suit property/vacant land when it was part of Natham Poramboke land, put up a tiled shed there with backyard on the southern side to reach the house during non auspicious time, living in the same treating the same as their property. While so living, Thangavel married the first plaintiff herein 43 years back and is living in the suit property giving birth to the plaintiffs 2 and 3 herein. Parents of Thangavelu died long back leaving the plaintiffs herein and the plaintiffs herein alone are in possession and enjoyment of the suit property converting the old tiled shed that had been put up in the suit property as a terraced building, son Thangavel and his family members the plaintiffs 1 to 3 herein were enjoying the same. Subsequently Thangavel also died 30 years back leaving the plaintiffs herein as his legal heirs and that the plaintiffs herein are in possession and enjoyment of the suit property as its absolute owners. In the resurvey, the suit property has been assigned the resurvey number 652/4 and under path No.57, the same was granted to the first plaintiff herein on 29.11.1991 by the Special Tahsildar, Natham Landless, Erode and that the same is produced herewith. Subsequently the house tax receipts for the house tax paid by the plaintiffs herein from the year 1989 upto this M.S.Mangalam Panchayat Board are produced herewith. The plan is filed along with this plaint.

iii) While putting up the terraced building in the suit property demolishing the old tiled building, for the purpose of keeping the southern east-west wall of their house without any damage and periodical repairs and painting, the plaintiffs have left 2 feet broad vacant site on the south of southern east-west wall as shown in red colour in the plan filed along with this plaint and that the plaintiffs are effecting periodical repairs and painting of the southern east-west wall of their house that is suit property by going over their vacant site left on the south of southern east-west wall of their house. Hence, the defendants herein have absolutely no manner of right or interest



over their vacant site marked in red colour in the plaint plan that lies on the south of their southern east-west wall of their house. Therefore, the plaintiffs are the absolute owners of the suit property and are in possession and enjoyment of the same.

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iv) The second defendant herein is the son-in-law of the first defendant herein. The defendants are owning the property that lies on the south of suit property and that the entrance to the defendants property also has been provided only on the southern side of defendants house. Hence the defendants have absolutely no manner of right or interest over the 2 feet vacant site left by the plaintiffs on the southern side of their southern east-west wall of their house marked in red colour in the plaint plan. With some ulterior motive and to encroach the 2 feet broad vacant site belonging to the plaintiffs that lies on the southern side of their east-west wall of their house, the defendants herein on 15.01.2010, with the help of their people, unlawfully attempted to enclose the same along with their property by putting up permanent constructions and at the timely help of plaintiffs relatives, the plaintiffs were able to throw away the defendants from the said unlawful attempt. The second defendant's son co-brother is employed in Tamilnadu Police Department and with his help the defendants are making arrangements to encroach upon the suit property/the red marked portion and they may at any moment trespass into the southern portion of the suit property unless they are checked by means of permanent injunction from encroaching upon southern portion of the suit property and hence the plaintiffs herein have been driven into the necessity of filing this suit for permanent injunction to restrain the defendants from trespassing upon any portion of the suit property.

4.In the Written statement, the second defendant/appellant denied the averments. It is stated that in the Advocate Commissioner's report filed in I.A.No.98 of 2010 in O.S.No.62 of 2010 it is reported that there is no gap as claimed by the plaintiffs.

5.The trial Court, upon framing necessary issues and after perusing the entire plaint, written statement, Commissioner's Report and on hearing the submissions on both sides, dismissed the Original Suit filed by the plaintiffs. Aggrieved by the same, plaintiffs/respondents filed appeal suit in A.S.No.36 of 2015, before the I Additional Subordinate Court, Erode. The first Appellate Court considering the arguments raised on both sides and on analysis of the trial Court judgment passed the judgment on 31.01.2019 allowing the appeal filed by



the plaintiffs, by raising the points to be determined as under :

1) Whether the plaintiffs are in possession and enjoyment of the suit property?

2) Whether the suit is bad of non-joinder of necessary parties?

3) Whether the cause of action is true?

4) Whether the plaintiffs are entitled for the relief of permanent injunction as prayed for?

5) To what other relief ?

6. The first Appellate Court answered the above points after discussion and allowed the appeal, filed by the plaintiffs. Challenging the said judgment, the appellants/defendants filed the present Second Appeal before this Court.

7. The following substantial questions of law were raised in this Second Appeal :

1) Whether the First Appellate Court is right in giving undue credence to Ex.A15(FMB) dated 21.09.2011, which is a lis pendens document for reversing the well considered judgment of the trial Court ?

2) Has not the First Appellate Court erred in misquoting a part of Ex.C1, particularly when the entire physical features which have been delineated in Ex.C1 to Ex.C4 would expose and exemplify the falsity in the case pleaded by the plaintiffs ?

3) Whether the judgment of the first Appellate Court is perverse in law and on facts when the plaintiffs themselves have neither discharged the burden proving the existence of the disputed suit lane nor their legal entitlement in and over the said portion ?

8. Learned counsel for the appellants raised the following grounds :

(i) The respondents/plaintiffs are the owners of R.S.N.652/4 and the appellants/defendants are the owners of R.S.No.652/7. The subject matter of suit property measuring 2 feet is part and parcel of R.S.No.652/7 and not connected with R.S.No.652/4. The suit was filed on 28.01.2010, whereas the first appellate Court has relied upon the FMB (Ex.A15) dated 21.09.2011 to reverse the well considered judgment of the trial Court.



(ii) The first Appellate Court has committed an error in relying upon the lis pendens document (Ex.A15) for the purpose of deciding the civil litigation between the parties herein. The plaintiffs have caused mischief to the property of the defendants and filed the above suit with false and untenable allegations. The plaintiffs have not approached the Court with clean hands. They have withheld the truth and misled the Court for an oblique motive. In view of the mischief committed by the plaintiffs, the help of the surveyor was obtained and the property was measured under Ex.B3 dated 17.03.2010. The said fact has been withheld in the plaint and a bogus cause of action dated 15.01.2010 has been alleged for filing the suit. The revenue authorities never reserved any space for maintenance of the wall as alleged by the plaintiffs. In fact, the suit property is a natham poramboke, in which, the plaintiffs cannot maintain a claim in the absence of the Government. The Advocate Commissioner in his report and plan marked as Ex.C1 to Ex.C4 has categorically stated that the suit lane is not in existence as alleged by the plaintiffs.

(iii) The physical features noted in Exs.C1 to Ex.C4 would show that the disputed suit lane is not in existence in R.S.No.652/4. Therefore, in the absence of any evidence to prove the existence of the disputed suit lane, the suit filed by the plaintiffs is liable to be dismissed. The claim of the plaintiffs for leaving the disputed lane has been falsified from the fact they have not provided any access to get into their house in R.S.No.652/4. The first defendant has left 2 ½ feet space from the tiled house constructed and it cannot confer any right on the plaintiffs in and over the disputed portion of the suit property. Unfortunately, the first Appellate Court has misquoted a portion of Ex.C1 and Ex.C2 for reversing the well reasoned judgment of the trial Court. The discussion made in Para Nos.26 to 28 of the trial Court judgment would ipso facto falsify the ipse dixit version of the first Appellate Court in Para No.14(v). The suit is for bare injunction, without a prayer for declaration, filed by the plaintiffs. Hence, the burden of proof is always upon the plaintiffs and they cannot take advantage in the loopholes, if any, in the case of the defendants. The trial Court, which had an occasion to see the demeanor of the witnesses, has thoroughly considered the oral and documentary evidences besides Exs.C1 to Ex.C4, for deciding the suit. But, the first appellate Court has simply relied upon Ex.A15 (FMB) and reversed the decree, by misquoting a portion of Ex.C1.

9. Learned counsel for the appellants, in support of his submissions, relied on the following decisions :



1) 2021 SCC online SC 694 (K.N.Nagarajappa and others Vs.H.Narasimha Reddy)

2) (2011) 12 SCC 220 (Rangammal Vs.Kuppuswami and another)

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10. Per contra, learned counsel for the respondents/plaintiffs would submit that the first Appellate Court, which is a fact finding Court, has gone through the entire plaint and the evidence recorded by the Trial Court and rightly allowed the appeal, which needs no interference by this Court. The learned counsel, thus, prayed for dismissing the Second Appeal.

11. This Court has considered the arguments put forth by the learned counsel on either side and also gone through the documents, namely, exhibits, including Exs.C1 to C4, the Commissioner's Report, and Plans, coupled with the judgments of both the Courts below.

12. The case of the respondents herein is that there is a 2 feet lane left by them on the south of their property, whereas the case of the appellants herein is that there is no such 2 feet lane, as alleged by the respondents, and the respondents had constructed building in their entire extent. It is also the case of appellants that the property south of respondents' property was the appellants property, which was demolished by the respondents before filing the suit, with a false claim.

13. There is no dispute about the fact that the property comprised in S.No.652/4 belongs to the respondents and the property comprised in S.No.652/7 belongs to the appellants herein.

14. Ex.C1 is the Advocate Commissioner's first Report. Subsequently, the suit property was re-inspected by the Advocate Commissioner with the assistance of a Taluk Surveyor and the reports and plans of the Advocate Commissioner and Surveyor were marked as Ex.C2 to C4.

15. The properties of both the appellants and the respondents were measured by the Taluk Surveyor, based on the revenue records. It is the specific and clear finding of the Taluk Surveyor that though the disputed lane is shown in blue colour as per the revenue records, there is no such lane in existence and there exists house property in the entire S.No.652/4, which categorically proved the case of the appellants that the respondents constructed their house to their entire extent, without leaving any space. This fact is also



clear from the reports and plan, marked as Exs.C-1 to C-4. The claim of the respondents for leaving the disputed lane has also been falsified by the fact that they have not provided any access to get into their house in R.S.No.652/4.

16. As rightly pointed out by the learned counsel for the appellants, the first Appellate Court has given undue credence to Ex.A15, FMB, dated 21.09.2011, which was the document of lis pendens, and erred in misquoting a part of Ex.C1, when the suit property was re-inspected by the same Advocate Commissioner with the help of Taluk Surveyor in order to give a clear picture about the entire physical features in correlation with the revenue records. In the considered opinion of this Court, the first Appellate Court has grossly erred in reversing the well reasoned judgment of the trial Court. Substantial questions of law are answered in favour of the appellants and against the respondents.

17. Second Appeal is, therefore, allowed, setting aside the judgement and decree, dated 31.01.2019, passed in A.S.No.36 of 2015 on the file of I Additional Sub Court, Erode, and confirming the judgement and decree, dated 27.04.2015, passed in O.S.No.62 of 2010 on the file of II Additional District Munsif Court, Erode. No costs. Consequently, the connected Civil Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

Mpa/dixit

To:

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

+1cc to Mr.N.Manokaran, Advocate SR.No.4508
+1cc to Mr.V.Raghavachari, Advocate SR.No.4218

S.A.No.681 of 2019

EV(CO)
GN(04/03/2022)