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S.A.No.107 of 2009

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.03.2023

CORAM

THE HONOURABLE JUSTICE Mr.V.LAKSHMINARAYANAN

S.A.No.107 of 2009

- 1.Raju Bellie (Deceased)
- 2.B.Subban
- 3.B.Chandrasekaran
- 4.Tharasu
- 5.Veena
- 6.Sona
- 7.Ramesh

.....Appellants.

(Appellants 5 to 7 brought on record as Lrs of the deceased 1st Appellant vide order dated 26.04.2016 made in M.P.No.2 & 3 of 2015 in S.A.No.107/2009).

Vs.

- 1.H.L.Bellie (Deceased)
- 2.B.Balasubramani
- 3.Mahalakshmi

...Respondents.

(R2 & R3 brought on record as Lrs of the Deceased R1 vide order of Court dated 26.04.2016 made in CMP Nos.5951 & 5952 of 2016 in S.A.No.107 of 2019)

PRAYER: Second Appeal filed under Section 100 of the Code of Civil



Procedure against the judgment and decree dated 20.06.2008 made in A.S.No.5 of 2008 on the file of Sub Court, Udhagamandalam in confirming the Judgement and Decree dated 16.11.2007 made in O.S.No.6 of 2002 on the file of the District Munsif, Coonoor.

For Appellants : Dr.R.Gowri
For Respondents : Mr.T.Murugamanickam
for Mr.L.Mouli – R2 to R3.
: R1 – Died.

JUDGMENT

The defendant in O.S.No.06 of 2002 on the file of the District Munsiff Court Coonor, who was the appellant in A.S.No.5 of 2008 on the file of the Sub Court Udhagamandalam is the appellant before me.

2. The suit has been presented for bare injunction or permanent injunction, restraining the defendants from interfering with the peaceful possession and enjoyment of the plaintiff's property.

3. The case of the plaintiff is that the suit schedule property originally belong to one H.L.Bellie, his father. His father and his two brothers had jointly purchased 2 ½ acres of land in and by way of a registered sale deed under Ex.A2. After the purchase of property under Ex.A2, the three brothers



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partitioned the property and 1 acre fell to the share of H.L.Bellie. This, 1 Acre of land, fell in Survey No.494/1D. Apart from this 1 Acre of Land, the plaintiff's father had also purchased another extent of 3 Acres from one Bellie Gowder under Ex.A1 in the year 1962. Out of the 1 acre of land in Survey No.494/1D, corresponding to new survey No.545/1, the plaintiff's father had sold, 1 acre to one Bellie Gowder. In fine, adding to the 1 acre that he sustained by way of partition with the brother, and 2 Acres which he had obtained by way of sale, the plaintiff's father and after him the plaintiff was in enjoyment of 3 Acres of land. The plaintiff further pleaded that on 10.12.2001 and 11.12.2001, the defendants sought to interfere with their possession and therefore, they have constrained to file a suit for permanent injunction.

4. Rebutting this case, the defendant filed a detailed written statement. In that statement he, admitted that the plaintiff's father and his brothers had purchased the property to the extent mentioned in the plaint. However, he took a plea that out of the total extent of 2 ½ acres if the property had been equally divided, H.L.Bellie would have only got 83 cents and not 1 acre as pleaded. Keeping this as the basis, he would further admit



to the purchase of 3 acres by H.L.Bellie and the sale of 1 acre by the said Bellie in favor of the Bellie Gowder and the remaining extent in the family being 2 Acres, he would argue that what was in effect was available with the family was about 2.83 Acres. He would further allege that the schedule of the property given in the plaint is wrong. It was further alleged that, it was the evil intention of the plaintiff to grab the property that the present suit had been brought forth.

5. On behalf of the plaintiff, apart from himself as P.W.1, one B.Holan was examined as P.W.2, P.W.2 is the cousin of P.W.1. Ex.A1 to A11 were marked. The 1st defendant examined himself as D.W.1 and the 3rd Defendant examined himself as D.W.2. Through the 1st defendant, two crucial documents namely Ex.A12 and Ex.A13 have been marked. Similarly, through DW2 Ex.A14 has been produced in evidence. On the defendants side, Ex.B1 to B6 were marked.

6. The Trial Court after analyzing the evidence of the plaintiff and the defendant, decreed the suit. It relied upon the admissions made by the defendant while in the witness box, which had tended to give up their case



in the written statement. This was carried in appeal before the Subordinate Judge Udhagamandalam, who confirmed the same. Against these concurrent findings, the defendant is before me.

7. Heard, Dr. Gowri, learned Counsel for the Appellant. At the time of admission, the following substantial questions of law were framed:-

“The second appeal is admitted on the following substantial questions of law:-

a. Whether the Courts below are right in decreeing the suit filed for permanent injunction ignoring the settled dictum of law that injunction cannot be granted against the co-owners of the joint patta suit property.

b. Whether the Courts below are right in shifting the burden completely upon the defendants to disprove the suit ignoring the dictum of law that the burden heavily rests upon the plaintiff to discharge his burden of proof to establish his case as per due process of law.

c. Whether the Courts below are right in not dismissing the suit at the threshold on the sole ground that the plaintiff has not been examined and has not chosen to depose evidence and that his non examination is fatal to the case and would clearly reveal to establish the falsity and fictitious suit filed by the plaintiff.”

8. Dr. Gowri, would try to emphasize the following points:-



(I) The description of the property, as given in the
plaint was wrong.

(ii) Secondly, she would argue that under Ex.B1
Revenue Document of the year 1882, the ancestors of the
plaintiff and the defendant have been shown as co-owners
and therefore one co-owner cannot present the plaint against
the another.

(iii) In, any event she would submit that the plaintiff's
have not proved their possession and therefore, both the
Courts below had grievously erred in decreeing the suit.

(iv) That in order to localize the property, the Court
below ought to have appointed an advocate commissioner or
at least the plaintiff should have taken steps to appoint an
advocate commissioner in order to localize the property and
only thereafter the suit ought to have been decreed, if at all.

9. Expanding on these points she would further contend that she
having been denied the title of the plaintiff and had set up title in himself,
therefore, the plaintiff ought to have presented the suit for declaration of his



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title for 17 cents and failure to do so is fatal. She

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would rely upon the classic judgment of the Supreme Court in *Anathula Sudhakar Vs. P.Buchi Reddy reported in (2008) 4 SCC 594* .

10. Mr.T.Murugamanickam, Learned Senior Counsel for the respondents would very strenuously argue and submit none of these points arise for consideration in this present appeal.

11. Heard both sides.

12. I have carefully gone through the pleadings, evidence, documents and perused the judgments, of the lower Courts. It is true that in paragraph No.06 of the written statement, the defendant has disputed the schedule as given in the plaint. However, at the time of examination this case was literally given up by the defendant following evidence would go to show the same:-

“1.தாவா சொத்தை ஒட்டி கட்டபெட்டு / பெட்டப்டி
ரோடு போகிறது என்பது சரியல்ல. கட்டபெட்டு / ஒசட்டி



ரோடுதான் போகிறது. அதே ரோடு ஓசட்டியிலிருந்து /
பெட்டட்டி வரை போகிறது.

2.எவ்வளவு விஸ்தீரணம் என்று சொல்லவில்லை. பல
துண்டுகளாக தாவா சர்வே எண்ணில் எங்களுக்கு காலிபூமி
உள்ளது. இந்த தாவா சொத்துக்கு அருகிலும்,
எங்களுக்கு காலி பூமி உள்ளது என்பதை காட்ட ஆவணம்
எதுவும் நான் தாக்கல் செய்யவில்லை.”

13. A perusal of the schedule as given in the cross-examination corresponds to the schedule given in the plaint. It does not tally with the schedule as given in the written statement. Though, the parties have had variance in the pleadings, at the time of giving evidence, D.W.1 has been honest enough to admit to the schedule as given by the plaintiff. Therefore, I reject the argument that the description of property is not proper. As per Order VII Rule 3, if a suit relates to an immovable property, it must be described by way of a schedule, containing revenue survey numbers and other particulars by which the property can be properly identified. In this case, this identification is accepted too by the defendant. Therefore, nothing further need to have been done.

14. Insofar as second argument is concerned, Ex.B1 is the document of the year 1882. It is true as pointed out by Dr. Gowri that with respect to survey number 463 A and corresponding entry in 494, the registered name of the owners were Perattu Bellie Nanja, Jogi Ajjan and Padam. The entry in Ex.B1 would show that the names of the persons found in survey numbers



463 should be read with survey numbers 494. On the strength of Ex.A1 that is the survey and settlement register, Dr. Gowri would argue that since name of the ancestors in the plaintiff and defendant find place as joint pattadars, they have to be treated as joint owners of the property.

15. The genealogy given by Dr. Gowri would show that Peratu Bellie had four sons and the defendants are the grand sons through Nanjan Gangade, and Mathan. It is here that Ex.A12 to Ex.14 loom large as against the case of the defendants. Ex.A12 to Ex.14 were all the documents marked in the cross-examination of D.W.1 & D.W.2. In the said documents, it is clear that the ancestor Nanjan had given the property in mortgage to one Aristotle Chakona on 22.01.1895. A perusal to the schedule of this property shows that with respect to Survey No.494, the former occupant was one Peratu Bellai and the present occupant is one Kullan. Kullan, as seen above, is the father of the 3rd Defendant and son of Mathan.

16. From Ex.A13 it becomes clear that as Nanjan did not redeem the property, the same was brought to sale and it was sold by Aristotle Chockana. As pointed out previously, Exs.A12 and Ex.A13 were documents marked on the admissions made by DW1. The same situation holds for the notarized copy of the sale deed which was marked under the cross-



examination who is the 3rd defendant. Therefore, apart from the survey and land registered under Ex.B1, properties have been alienated by the family and to what extent the family continue to be in enjoyment has not been made clear by the defendants. If the plaintiff and defendants were co-owners, the documents would have certainly spoken about a share of Nanjan being alienated and not as if Nanjan was in exclusive possession and enjoyment of the property. The absence of those averments persuades me to hold that the case co-ownership as projected by the defendant is not believable.

17. I move on to the next point on whether the plaintiff should have filed suit for declaration of their title with respect to the 17 cents of the property. Here the evidence of PW2 becomes relevant. As pointed out by Dr.Gowri, PW1 is an interested evidence and he has stated that the family of Bellie and his father H.L.Bellie had partitioned the property and his father had been given 1 Acre. This has been stoutly denied by the defendant in his statement. However, the plaintiff has examined PW2, his cousin, in order to substantiate the same. When the defendant admits to the partition and pleads that it was only an equal partition of 83 cents each, the burden shifts to the defendant to show what had in fact been allotted to H.L.Bellie was only 83



cents and not 1 Acre.

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18. It is not the case where the partition has been denied in entirety but the partition has been admitted and the extent of property allotted in the partition alone has been disputed.

19. Dr.Gowri would further argue that 17 cents of their land were land locked between the properties of HL Bellie and Bettathy-hossatty panchayat road. That was projected before the Trial Court as well as the Lower Appellate Court. It is too well settled that title cannot prove the admission. However, in a suit for injunction I can make at best make incidental-ingress into matters related to title. The fact-um of purchase between Ex.A1 and A2 has not been denied nor it can be denied by the defendants. That the family had purchased 2 ½ acres is a matter on record. Therefore the title of Bellie and his brother is not in dispute. The defendant has not denied the title in the entirety but had merely stated that in the land that had been allotted to Bellie, the father of the plaintiff, he had not secured 1 acre but had secured 83 cents. This shows, Dr.Gowri is only questioning the extent of allotment and not the right of allotment. How the family wants



to put its properties to uses is the business is the exclusive right of that family and the defendant, being a stranger to the family cannot question the same. PW2's evidence is believable and especially the lack of cross-examination of the plaintiff on this aspect throws much light.

20. In fact, there is a positive examination of the plaintiff of DW1 on the extent of the property obtained under partition.

21. The answer to the question as to what was the extent in the partition has been positively asserted as 1 Acre. The defendant could have done well by not putting up that question. Having put that question and secured an answer against his interest, the subsequent suggestion does not take away the vitality of the answers already recorded. Further it is not necessary that a suit for title must be filed in all circumstances. Here is a case where I do not read the written statement as a denial of a title, but as a denial of extent of land allotted in the partition. Apart from that in ***Anathula Sudhakar Vs. P.Buchi Reddy reported in (2008) 4 SCC 594*** paragraph 13.1 has categorically held as follows:-

“Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.”



This extract makes it very clear that it is not necessary in all cases that a suit for declaration of title is essential.

22. Dr.Gowri would further argue that issues are not been cast in a proper way and vitiates the judgment of the Trial Court. Unfortunately, I am not with her on this point. The issues that have been framed by the Trial Court is, whether the plaintiff is entitled to permanent injunction. It is in general terms. If the defendant wanted the court to recast the issues. He could have filed a memo or petition before the Trial Court and the issues could have been recast anytime before the pronouncement of judgment. That bus having departed in Connor in the year 2003 cannot be boarded in Chennai in the year 2023.

23. Lastly, she would plead that as the plaintiff had not taken an application for appointment of an Advocate Commissioner together with the surveyor is fatal to the suit. Here I am not willing to travel the distance she wants me to.

24. Where there is a dispute in the identity of the property or the extent, even in a suit for permanent injunction, an advocate commissioner together with the surveyor can be appointed in order to bring to notice of the court the “lie” of the property. As already extracted supra , the plaintiff's



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case on the schedule of the property had been specifically admitted by the defendant in the cross-examination. When there is no dispute in the identity in the mind of the parties, the necessity for appointment of an advocate commissioner does not arise, I would hold, that in a suit for permanent injunction, an appointment of an Advocate Commissioner is not a total bar but where parties have understood their respective cases and have deposited an evidence and the identity of the property is not in dispute, appointment of an Advocate Commissioner would have been a futile exercise.

25. Before, concluding I have to state that this is a suit for bare injunction and I have not gone into issues of title. Their defendant has statistically conceded a case to an extent of 2.83 Acres. The dispute boils down to 17 cents. The findings given in the judgment will not affect the right of either parties to file a suit for declaration of title to the aforesaid extent.

26. In fine, none of the questions of law suggested by Dr.Gowri arise for consideration in this appeal. The Second Appeal is dismissed. The judgment and decree of the court of the subordinate judge at Udhagamandalam dated 20.06.2008 in A.S.No.5 of 2008 in confirming the



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judgment and decree in O.S.No.06 of 2002 dated 16.11.2007 on the file of the District Munsif Court, Coonnor stands confirmed. In other words the suit shall stands decreed. Considering the fact that the parties are neighbors, I am not imposing any costs. MP is closed.

28.03.2023

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Index : Yes/No
Speaking : Yes/No
Neutral Citation Case : Yes/No



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To:

- 1.The Sub Court,
Udhagamandalam.
- 2.District Munsif Court,
Connor.

V.LAKSHMINARAYANAN. J.

nst



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