



S.A(MD)No.401 of 2016

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED: 20.02.2023

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A(MD)No.401 of 2016

and

C.M.P(MD)No.4394 of 2016

James

... Appellant/Appellant/2nd Plaintiff

Vs.

1.Thangammal (Died)

2.Saroja

...1st & 2nd Respondents/Respondents
/Defendants

3.Jeeintha

4.Rani

5.Kani

6.Emelda

7.Melcy

8.Sona Park

9.Jegatha

10.Pitchai

... Respondents 3 to 10

*(Respondents 3 to 10 brought on record as LRs of deceased
1st Respondent vide Court order dated 15.03.2016 made in
M.P(MD)Nos.1 to 3 of 2012 in S.A(MD)SR.No.36966 of 2009
by RMDJ)*

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PRAYER :-

This Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 16.08.2004 made in A.S.No.80 of 2004 on the file of II Additional Sub Court, Tirunelveli, confirming the judgment and decree, dated 23.03.2004 made in O.S.No.636 of 1995 on the file of Principal District Munsif Court, Valliyoor.

For Appellant : Mr.S.Siva Thilakar
For R2 : Mr.R.T.Arivukumar
for Mr.R.Manimaran

JUDGMENT

The second plaintiff in the suit is the appellant. The appellant along with the deceased wife Lirvin Ammal filed a suit for declaration that the suit item No.2 is the part of first item and for recovery of possession of the suit property after removal constructions put up by the respondent. The suit was dismissed by the trial Court and the first appeal filed by the appellant was also dismissed. Challenging the concurrent findings, the second plaintiff is before this Court.



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2. According to the appellant, the suit property originally belonged to one Jesu Fernando. He sold the suit property to appellant's wife namely the first plaintiff in the suit for valuable consideration on 15.06.1972. The property of the first respondent herein lies on the eastern side of the suit property. Earlier, the respondents filed suits against the deceased first plaintiff in O.S.No.624 of 1972 and 944 of 1972 and those suits were dismissed and the findings of the trial Court was confirmed in the appeal by the High Court. It was further averred in the plaint that from 10.05.1995, the respondent herein tried to interfere with the possession of the appellants and hence, there was a Panchayat in the village on 12.05.1995, wherein, the respondents admitted the title of the appellants and the appellants agreed to leave 1 ½ feet in his property and the respondents agreed to leave half feet in his property. Contrary to the agreement reached between the parties in the Panchayat, the respondents started constructions by encroaching half feet in the 1 ½ feet left vacant by the appellant and hence, the appellant was constrained to file a suit for declaration and recovery of possession as prayed for.



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3. The respondents herein filed a written statement denying the title as well as the possession of the appellants over the suit property. It was also further averred that in the earlier litigation between the parties in O.S.No.624 of 1972 and 944 of 1972, the title of the appellants were negatived. It was also averred by the respondents that there was no Panchayat as claimed by the appellant on 12.09.1995. Even if, there was a Panchayat, the alleged document was not registered.

4. Before the trial Court the second plaintiff was examined as PW1 and fifteen documents were marked on the side of the appellants. On behalf of respondents, the second respondent was examined as DW1 and one Pitchaiya was examined as DW2. One document was marked on behalf of the respondent as Ex.B1. The Advocate Commissioner's Reports were marked as Ex.C1 and Ex.C2.

5. On appreciation of oral and documentary evidence available on record, the trial Court came to the conclusion that the appellant failed to prove his title over the entire suit property. The trial Court also found that the



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appellant without seeking declaration of his title based on a limited declaration sought for in the suit, cannot seek recovery of possession from the respondent and therefore, the suit filed by the appellant was dismissed by the trial Court. Aggrieved by the same, the appellant filed the first appeal in A.S.No.80 of 2004 on the file of the II Additional Sub Court, Tirunelveli. The First Appellate Court also concurrent with the findings rendered by the trial Court. Aggrieved by the same, the appellant is before this Court.

6. The learned counsel for the appellant submitted that the Courts below failed to take into consideration the Advocate Commissioner's Report and Plan, which would prove that the respondents encroached into the property of the appellant and put up offending constructions. The learned counsel further submitted that Ex.A15 - Mediation Agreement marked on the side of the appellant would estop the respondents from encroaching the suit property and put up any constructions therein.

7. In the present suit, the appellant sought for declaration that the second item of the suit property is the part of the first item. However, he had



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not sought for any declaration of his title over the suit property. Even as per the admitted case of the appellant in his plaint, there was earlier litigation between the parties, wherein, the title of the appellant was negatived. The judgment rendered in the earlier litigation between both the parties was marked as Ex.A2. The Courts below found that in O.S.Nos.624 of 1972 and 947 of 1972, suit filed by deceased first plaintiff, namely, the wife of the appellant against the first respondent, wherein, the title of the appellant's wife was negatived by the trial Court and the same was confirmed by the High Court. It is not clarified by the appellant that subsequent to dismissal of the suit filed by the appellant's wife, how the deceased first plaintiff in the present suit acquired title over the suit property. Though learned counsel for appellant tried to press into service judgement passed in other litigation in A.S.No.48 of 1981, the respondents in the present suit were not made as party in A.S.No.48 of 1981. The judgment rendered in the said appeal was marked as Ex.A3. When the respondents were not made as party to judgment under Ex.A3, both the Courts below found that the same would not bind the respondents. On the other hand, the judgment rendered under Ex.A2 would certainly bind the deceased first plaintiff, who laid those suits and the present appellant, who



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claims title under deceased first plaintiff. Therefore, both the Courts below came to the conclusion that the appellant failed to prove his right over the suit property.

8. With regard to Ex.A15, agreement reached in Panchayat, both the Courts below found that there is nothing in Ex.A15, to compel the respondent to leave the vacant space to the extent of half feet. It only reads that the appellant should construct his house two feet away from the wall of the respondents. Therefore, Ex.A15 would not advance the case of the appellant.

9. As far as the allegations that the respondent encroached the portion of the appellant's property is concerned, based on the Advocate Commissioner's Report, the Courts below found that the appellant was in possession of 30 feet and 8 inches more than 30 feet as identified under Ex.A15. Therefore, when he is in possession of more extent than what he is entitled to, the relief of recovery of possession after removal of constructions made by the defendant cannot be granted. Therefore, the contention made by the learned counsel for the appellant that the Courts below failed to take into



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consideration the report and plan of the Advocate Commissioner, is not acceptable to this Court. The Courts below after considering Ex.C1 and Ex.C2 came to the conclusion that the appellant is in possession of 30 feet and 8 inches more than what he is entitled to.

10. In these circumstances,

a) I do not find any substantial question of law and consequently the Second Appeal stands dismissed and the judgment and decree passed by the learned II Additional Sub Judge, Tirunelveli, dated 16.08.2004 made in A.S.No.80 of 2004 stands confirmed;

b) In the facts and circumstances of the case, there would be no order as to costs; and

c) consequently, connected Miscellaneous Petition is closed.

20.02.2023

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NCC : Yes/No
Index : Yes / No
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To

1. The II Additional Sub Court,
Tirunelveli.
2. The Principal District Munsif Court,
Valliyoor.
3. The Record Keeper,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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