



S.A.No.869 of 2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.01.2024

PRONOUNCED ON : 31.01.2024

CORAM:

THE HON'BLE MR.JUSTICE G.ARUL MURUGAN

S.A.No.869 of 2007

Asaithambi

.... Appellant

VS.

1. Perumayee
2. Mohanasundaram
3. Paruvatham

... Respondents

PRAYER: Second Appeal is filed under Section 100 of Civil Procedure Code, 1908 against the judgment and decree dated 27.10.2006 passed by the learned Sub Judge, Dharmapuri, in A.S. No.4 of 2005 confirming the judgment and decree passed by the learned District Munsiff, Harur, in O.S.No.94 of 2000 dated 17.11.2004.

For Appellant : Mr.N.Siva Prakash

For Respondents : Mr.S.Kumara Devan

JUDGMENT

The plaintiff in the suit is the appellant. The respondents 1

to 3 herein are the defendants 1 to 3 in the suit.



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2. For the sake of convenience, the parties are referred to as per their ranking before the Trial Court.

3. According to the plaintiff, an extent of 1 acre of land, which is the suit property, was settled in his favour by his father through a registered settlement deed dated 22.02.1980 and he is in possession and enjoyment of the suit property along with other extents of land. The revenue documents like patta, chitta and adangal in respect of suit properties have been mutated in his favour. For the convenience of the plaintiff, he has put up a thatched shed on the eastern side and he is enjoying the same. Further, the properties to the northern side of the suit property were purchased by the plaintiff from the second defendant on 19.05.1990. The first defendant is the mother, the second defendant is the brother and the third defendant is the sister. There had been a registered partition among the family members by registered partition deed dated 15.07.1976 and each one is in possession and enjoyment of the respective shares independently.

4. It is the case of the plaintiff that the defendants, without the knowledge of the plaintiff, have created some false documents, with respect to the property. All of a sudden, they have been planning



to encroach on the north-east corner of the property. Therefore, the plaintiff has filed the suit for declaration, permanent injunction and also, in the event of the court coming to the conclusion that the defendants are in possession of the portion of the property earmarked in the plan, for recovery of possession.

5. The first defendant resisted the suit by filing the written statement contending that the suit schedule details are not correct and that the suit filed by the plaintiff, enclosing 16 cents of land belonging to the first defendant along with the house as part of the suit schedule property, is also not correct. The first defendant has denied that he attempted to make any encroachment on 25.03.2000 and has stated that when the first defendant is the owner of the property and she is in possession of the same, the question of trespass or encroachment does not arise.

6. According to the first defendant, there was an extent of 7 acres of land in survey no.3/1 of Pappireddipatti village belonging to the plaintiff and defendants' family members, which was later partitioned. In the partition, 2.31 acres of land was allotted to the first defendant and her husband, and an extent of 2.33 acres of land



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each was allotted to the share of the plaintiff and the second defendant. The balance extent of 3 cents, which is the well, was retained as a common share for all the sharers. Out of the land allotted to the first defendant and her husband, an extent of 1 acre was gifted to the plaintiff. The balance extent of 1.31 acres of land was sold by the first defendant's husband to the second defendant. The first defendant filed the suit in OS.No.155 of 1984 on the file of the District Munsif Court, Harur as against her husband and the second defendant. The suit was compromised, and in the compromise, the first defendant's husband and the second defendant have allotted an extent of 16 cents of lands along with a thatched house in favour of the first defendant.

7. It is the case of the first defendant that all along, the first defendant has been living in the thatched house. The present suit filed by the plaintiff, which includes 16 cents of the suit schedule property is not sustainable. It is the further case of the first defendant that from the 1.15 acres available with the second defendant, he has sold an extent of 0.74 acres in favour of the plaintiff. Therefore, the balance extent of 41 cents of land is available with the second defendant. The parties are in respective possession and enjoyment of



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the shares, and the plaintiff has malafidely filed the suit in respect of the 16 cents of lands allotted in favour of the first defendant by taking advantage of some errors in some documents. The second and third defendants have also filed separate written statements, which are in line with the written statement filed by the first defendant.

8. During Trial, on the side of the plaintiff PW.1 to PW.3 were examined and Exs.A1 to A14 have been marked. On the side of the defendants DW.1 to DW.3 were examined and Exs.B.1 to B.8 were marked. The Advocate commissioner report has been marked as Ex.C.1.

9. The Trial Court, after analysing the oral and documentary evidence, dismissed the suit. The trial court relied on the admission of PW.1, that the suit schedule property was allotted to his father during partition, and his father and mother resided in the house in that property. After his father's death, the last rites were performed in that house and the second defendant also resided in that house at that time. Aggrieved by the same, plaintiff filed appeal in AS.No.4 of 2005 on the file of Subordinate Judge, Dharmapuri. The Appellate Court after reappraising the evidence also dismissed the



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appeal confirming the judgment of the trial court. Aggrieved by the same, plaintiff is on appeal before this Court.

10. Mr.S.Natana Rajan, the learned counsel for the appellant submitted that when the court has found from the report of the advocate commissioner in Ex.C1 that the hut and vacant land are available in survey no.3/1B and survey no.3/1c, the courts below ought to have at least decreed the suit for the relief of declaration in favour of the appellant. Only as the appellant was not sure about whether the first respondent has encroached upon the suit schedule property or not, they have sought for the prayer that, if the court comes to the conclusion that the respondents have encroached upon the suit property, the recovery of possession in respect of suit schedule property should be granted. When the courts below have not held that the title deeds marked in Exs.A.1, A.3, A.4 and Ex.B.1, do not confirm any right on the appellant, the courts below ought to have decreed the title of the suit property in favour of the appellant.

11. The learned counsel further submitted that the court has got the power to remand the case as the lower appellate court has not taken into consideration the advocate commissioner's report and in



such circumstances, the witnesses may be permitted to adduce additional evidence by remanding the matter, which will provide a resolution to the entire issue.

12. In support of his submission, the learned counsel for the appellant relied on the following judgments of the Hon'ble Supreme Court,

- (i) **J.Balaji Singh Vs Diwakar Cole and Others** reported in
(2017) 14 SCC 207
- (ii) **Ajambbi (Dead) by Lrs. Vs. Roshanbi and others** reported in
(2010) 11 SCC 168
- (iii) **Bachahan Devi and Another Vs. Nagar Nigam, Gorakhpur and Another** reported in **(2008) 12 SCC 372**

for the proposition that the matter can be remanded for the purpose of recording additional evidence.

13. In reply, Mr.S.Kumara Devan, the learned counsel for the respondents submitted that the appellant herein, when he filed the suit claiming relief of declaration, injunction and recovery of possession, it is the bound and duty of the plaintiff to establish his title over the suit property and take all steps to identify the portion of



the property which, according to him, is encroached upon by the defendants. Only upon identification and proof of encroachment, will the plaintiff be entitled to succeed.

14. In the present case, the plaintiff has miserably failed to establish his title over the suit property, and the defendants have specifically denied their title. It is a specific case of the first defendant that his 16 cents of land, along with the house, was allotted by her husband and the second defendant in the compromise decree. The plaintiff has filed the suit in respect of 1 acre of the suit property by including the 16 cents of land in the suit schedule property which belongs to the first defendant. Further, the advocate commissioner inspected the premises and filed the report in Ex.C.1. The presence of the thatched house was very much available in the suit property. Moreover, this Court has appointed the advocate commissioner in the second appeal and after inspecting the property and conducting the survey with the help of the surveyor, the advocate commissioner has filed the report before this Court. On perusal of the report, it clearly reveals that one acre of land which was gifted in favour of the appellant has not been surveyed. Further, the thatched house has been removed, and the newly leveled damaged wall bricks were found,



which show the removal of the hut.

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15. Under such circumstances, the learned counsel for the respondent submitted that since both the courts below have arrived at the finding of the fact in respect of ownership and enjoyment of the first defendant in respect of 16 cents of land which is wrongly included in the suit schedule property, the findings are based on the material available on record and further no substantial question of law arises for the consideration of this Court in the Second Appeal and sought for dismissal of the appeal.

16. Heard the learned counsel on either side and perused the material available on record.

17. It is an admitted fact that a total extent of 7 acres of land was available in survey no.3/1 of Pappireddipatti village, which belongs to the plaintiff and defendants' family. Admittedly, there was a partition in the family through a registered partition deed dated 15.07.1976 in Ex.B.1, and the entire extent of 7 acres was partitioned among the family members. In the partition, the plaintiff's father was allotted an extent of 2.31 acres and the plaintiff and the second



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defendant, who are the sons, were allotted an extent of 2.33 acres each. The well situated on an extent of 0.3 acres was retained in common for all the sharers. The plaintiff and the defendants took possession and enjoyment of their respective shares.

18. Out of 2.31 acres of land allotted to the plaintiff's father, he has settled an extent of one acre of land to the plaintiff / appellant through settlement deed dated 22.02.1980 in Ex.A.1. It is pertinent to note that on perusal of Ex.B.1 and Ex.A.1, it reveals that, when the common properties of the family were partitioned, 2.31 acres of land along with the thatched house were allotted to the share of the plaintiff's father as 'A' schedule property in the partition deed. When the appellant's father settled one acre of land, out of the 2.31 acres that belonged to him in Ex.A.1, the thatched house did not form part of the suit schedule property. It can be seen that out of 2.31 acres of land and the house allotted to the appellant's father, he has retained 1.31 acres of land along with the house and has settled the balance extent of one acre of vacant land in favour of the plaintiff.

19. Further, the appellant's father had sold the remaining



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extent of one acre and 31 cents of land in favour of the second defendant through sale deed dated 04.06.1981 which is marked as Ex.A.4 and also Ex.B.2. As such, the balance extent of 1.31 acres of land along with the house available in the hands of the plaintiff's father was conveyed to the second defendant, who became the owner.

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20. As the entire land was sold in favour of the second defendant, along with the house where the first defendant and the plaintiff's mother was residing, the first defendant has filed a suit in OS.No.155/1984 on the file of District Munsif Court, Harur, as against her husband and the second defendant for the declaration of title over one acre and 31 cents, which was sold by her husband to her son, the second defendant and also for permanent injunction. In the suit, a compromise was arrived at and as per the compromise, the second defendant and his father have allotted an extent of 16 cents of land along with the thatched house where the first defendant was living, in favour of the first defendant. As per the deed of compromise, the second defendant has given an extent of 16 cents out of 1.31 acres of land purchased by him from his father in Ex.A.4 and Ex.B.2 in favour of his mother, the first defendant.

21. Thereafter, from the balance of available lands, the second defendant further sold an extent of 74 cents in favour of plaintiff through sale deed dated 09.05.1990 in Ex.A4 and Ex.B.4.

22. As such, the plaintiff apart from the 2.33 acres allotted to him in partition, he received one acre of land from his father



through settlement deed. He further obtained 0.74 acres of land through purchase from his brother, the second defendant. Therefore, the plaintiff owned a total extent of 4.07 acres. The first defendant became the owner of the 16 cents of land along with the house which was settled in her favour in the compromise decree. The remaining lands were in the possession of the second defendant.

23. When the father has retained the house in his share of 1.31 acres of land and has sold one acre of vacant land to the plaintiff in Ex.A.1, the plaintiff has failed to explain as to how he has filed the suit for declaration in respect of suit schedule property measuring one acre of land along with the thatched house. The plaintiff is bound to plead and prove his case and succeed on his own strength and not on the weakness of the defendant. When the plaintiff has sought for declaration of title, permanent injunction and recovery of possession, the plaintiff has to establish his title in respect of one acre of land, which was specifically identified as the portion of the property, which according to him his encroached by the defendants and prove the encroachment. Only then can the plaintiff seek recovery of possession.



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24. A perusal of the advocate commissioner's report in Ex.C.1 clearly shows that there was a thatched house on the suit property. The present report of the advocate commissioner filed before this Court reveals that the thatched house has been removed and newly levelled damaged wall bricks were found and further one acre of land gifted in favour of the plaintiff could not be surveyed separately.

25. In such circumstances, the plaintiff has not taken any steps to measure the entire land and show which portion of lands was settled in his favour, the portion of the lands that was allotted in favour of the first defendant in the compromise decree and the portion of lands that is available with the second defendant. If at all, the plaintiff had undertaken the exercise to measure and identify the property, the exact boundaries of the properties in respect of each part could have been easily identified. However, the plaintiff failed to measure and identify the one acre of land gifted to him in Ex.A.1. Without doing the same, filing the suit by the appellant by showing the one acre as suit schedule property by including the portion of 16 cents of land allotted in favour of the first defendant cannot be



sustained.

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26. The courts below have specifically relied on the evidence of PW.1 himself that during the partition, the portion of lands where the house is situated was allotted in favour of his father and his mother. The first defendant was living there in that house and after the death of his father, all the final rites took place only in the house allotted to his father, where the first defendant was residing. Further, upon perusal of documents, in Exs.A.1, A.4 and B.3, the court below found that the hut in the 16 cents of land was allotted to the share of appellant's father and the same was included in the compromise decree in favour of the first defendant. The plaintiff has failed to establish that the defendants have encroached into his portion of the property and that the entire extent of one acre of land shown in the suit schedule property belongs to him, as the same has been filed by including 16 cents allotted in favour of the first defendant. The decisions relied on by the appellant is not relevant for the present case, as there is no necessity for remanding the matter.

27. The concurrent finding of fact arrived at by the courts below are based on evidence and material available on record and do



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not suffer from any illegality or perversity for this Court to interfere in the second appeal. This Court does not find any substantial question of law that arises in the above second appeal. Under such circumstances, the second appeal is dismissed. However, there is no order as to costs.

31.01.2024

drl

Index : Yes / No

Speaking / Non-speaking

Neutral Citation : Yes / No

To

1. The Sub Court, Dharmapuri.
2. The District Munsif Court, Harur.



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G.ARUL MURUGAN.J.,

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