



S.A.No.987 of 2022

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.11.2024

CORAM

THE HONOURABLE MRS. JUSTICE R.HEMALATHA

S.A.No.987 of 2022

Dhanabagiyam

... Appellant

Vs.

1. Dhanabagiyam

2. N.Balachandar

... Respondents

Prayer : Second Appeal filed under Section 100 CPC, 1908 against the decree and judgment dated 29.11.2021 passed in A.S. No.39 of 2016, on the file of the I Additional Subordinate Court, Salem, upholding the decree and judgment dated 29.02.2016 passed in O.S.No.407 of 2014, on the file of the Principal District Munsif Court, Salem.

For Appellant : Mr.J.Prithivi

For Respondents : Mr.A.Arshad Khan

JUDGMENT

The unsuccessful plaintiff before both the Courts below has filed the present second appeal.



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2. The plaintiff filed the suit in O.S.No.407 of 2014, on the file of the Principal District Munsif Court, Salem, for a declaration of her title to the suit property which is morefully described in the plaint as 26 x 3 feet wide pathway in survey number 93/1 of Alagapuram Village, Salem. The plaintiff has also sought a permanent injunction restraining the defendants from interfering with her peaceful possession and enjoyment of the suit property.

3. For the sake of convenience, the parties are referred to as per their ranking in the trial court and at appropriate places, their rank in the present second appeal would also be indicated.

4.The case of the plaintiff in a nutshell is as follows :

The suit property and the other properties were inherited by one Raju, husband of the plaintiff. The suit property is a vacant land. On 20.04.1990, a settlement deed was executed in favour of the plaintiff by her husband and ever since the date of the settlement deed the plaintiff is



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in possession and enjoyment of the suit property. The defendants' property is on the southern side of the plaintiff's property. Since there was a dispute between the two families with regard to the suit property, the defendants filed a suit in O.S.No.509/2006 before the Principal District Munsif Court, Salem, for a permanent injunction restraining the plaintiff and her husband from interfering with their peaceful possession and enjoyment of the suit property. The suit was decreed in faovur of the defendants and it was upheld by the first appellate court. The second appeal in S.A.No.1070/2011 filed by the present plaintiff was also dismissed. The decree and judgment passed by this Court are based on the Advocate Commissioner's report.

5. The defendants remained absent before the trial court and were set *ex parte*.

6. In the trial Court, the plaintiff examined herself and marked Ex.A1 to Ex.A9.



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7. The learned trial court judge after analysing the oral and documentary evidence on record, dismissed the suit filed by the plaintiff vide his decree and judgment dated 29.02.2016.

8. Aggrieved over the same, the plaintiff filed an appeal in A.S.No.39/2016 before the I Additional Subordinate Court, Salem. The learned I Additional Subordinate Court Judge, Salem, after analysing the evidence on record, upheld the findings recorded by the trial court vide her decree and judgment dated 29.11.2021, as against which the present second appeal is filed.

9. At the time of admission the following substantial questions of law were framed :

"(1) Whether the subsequent suit for declaration of title and for permanent injunction can be dismissed on the ground of resjudicata when in the earlier suit, the focus of discussion was whether to grant injunction on the basis of possession?"



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2. Whether the corollary observations relating to title in the earlier suit can be considered to be an issue discussed and adjudicated as stated under Section 11 of the Code of Civil Procedure amounting to resjudicata between the parties?

3. Whether that observation relating to title though not directly in issue would be the starting point of limitation for instituting a separate suit for declaration of title and injunction?”

10. Heard Mr.J.Prithivi, learned counsel for the appellant and Mr.A.Arshad Khan, learned counsel for the respondents.

11. The plaintiff, in the instant suit, has prayed for a declaration of her title to the suit property through a settlement deed dated 20.04.1990 (Ex.A1) executed by her husband Raju in her favour. It is her further contention that her husband constructed a house and used the suit pathway for entering the said house. A perusal of the records shows that the defendants had filed a suit in O.S.No.509/2006 before the Principal District Munsif, Salem, for the relief of permanent injunction



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against the present plaintiff and her husband in respect of the very same suit property. The said suit was decreed as against which an appeal in A.S.No.199/2007 was preferred before the Sub Court, Salem. The decree and judgment passed by the trial court in O.S.No.509/2006 was upheld as against which S.A.No.1070/2011 was filed by the present plaintiff. The second appeal was also dismissed.

12. According to the plaintiff, she has been in continuous possession of the suit property since the year 1982 and that the defendants, on the basis of the decree obtained by them in O.S.No.509/2006, are trying to dispossess her.

13. An Advocate Commissioner was appointed in O.S.No.509/2006 and he filed his report and plan which were marked as Ex.C1 to Ex.C4. In the decree and judgment passed in O.S.No.509/2006 it was held that the defendants in the instant suit are in the possession and enjoyment of the suit property marked as 'ABCD' in the plaint plan. The issues involved in the present suit as well as in O.S.No.509/2006 are



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one and the same except the fact that in the present suit the plaintiff had prayed for declaration of her title to the suit property.

14. In the instant case, the plaintiff has not established either her title or her possession over the suit property. In the settlement deed dated 20.04.1990 (Ex.A1), the southern boundary of the plaintiff's property is described as the house of Arumugam Pillai and common pathway. The plaintiff claims title in respect of this pathway which is shown as 'ABCD' in the plaint plan. In the second appeal in S.A.No.1070/2011 a single judge of this Court has observed thus :

"6. A second appeal against an appellate decree of the Court Subordinate to the High Court shall lie only on a substantial question of law. The courts below on appreciation of evidence rendered a concurrent and factual finding that the vacant space lying on the south of the southern wall of the plaintiff's house belongs to the plaintiff and also held that such vacant space was of north-south measurement 2 feet and 6 inches as against 3 feet claimed by the respondent/plaintiff. The property was inspected by the Advocate Commissioner



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along with Government surveyor and the surveyor measured the property which resulted in the filing of Ex.C1 report and Ex.C2 Plan. Ex.C2 plan, according to the finding of the Courts below had been drawn as per the enjoyment of the parties. However, subsequently another report came to be filed as Ex.C3 along with a plan prepared by a private surveyor marked as Ex.C4. The said report states that measurements were taken based on a survey stone which has been jointly planted by both the parties. Upon considering the evidence in this regard, the Courts below have arrived at a concurrent finding that the said contention of the appellants/defendants was disputed and it was not proved that the said survey stone was planted jointly by the appellants/defendants and Respondent/plaintiff. It was also held that the said boundary stone was not the one planted by the survey authorities. That is the reason why the courts below have chosen to reject the report and plan marked as Exs.C3 and C4 and preferred to rely on the report and plan marked as Exs.C1 and C2. Even as per the report Ex.C3 and the plan Ex.C4, the entire vacant space lying on the south of the plaintiff's southern wall was not in the possession and enjoyment of the



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appellants/defendants and a portion alone was in the possession of appellants/defendants whereas the remaining portion was in the possession of the respondent/plaintiff. Only based on the same, the Courts below chose to rely on Exs.C1 and C2 to hold that not the entire extent claimed by the plaintiff, but a lesser extent was in the possession and enjoyment of the plaintiff and that the plaintiff was entitled to that lesser extent alone. The said finding led to the grant of the permanent injunction based on such enjoyment. The same is also supported by a plea made by the appellants/defendants that they are prepared to leave certain space on the south of the southern wall of the respondent/plaintiff for maintaining that wall."

It is seen from the records that even in the previous suit the plaintiff had claimed right over 26 x 3 feet in the pathway as per her settlement deed dated 20.04.1990 (Ex.A1). The said settlement deed was executed by her husband Raju in her favour. In Ex.A1 it is stated that Raju got the property by inheritance and the same is settled in favour of the plaintiff. According to the plaintiff, her husband left 26 x 3 feet in the property while constructing a building. However, the surveyor who measured the



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property of the plaintiff and the defendants in the previous suit had found that there was no pathway in the property of the plaintiff measuring 26 x 3 feet as claimed by the plaintiff on ground. The plaintiff had not adduced any documentary evidence to show as to how her husband inherited the suit property. No parent documents are filed. Thus the plaintiff has not proved either her title or her possession over the suit property and therefore, the substantial questions of law are answered against the appellant.

15. In the result,

- i. the Second Appeal is dismissed. No costs.
- ii. The decree and judgment dated 29.11.2021 passed in A.S. No.39 of 2016, on the file of the I Additional Subordinate Court, Salem and the decree and judgment dated 29.02.2016 passed in O.S.No.407 of 2014, on the file of the Principal District Munsif Court, Salem, are upheld.

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Internet: Yes/No

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Speaking/Non-Speaking order
mtl

To

1. The I Additional Subordinate Court, Salem.
2. The Principal District Munsif Court, Salem.
3. The Section Officer, VR Section, High Court, Madras.



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R. HEMALATHA, J.

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