



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.01.2024

CORAM :

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

S.A.No.566 of 2013
& M.P. No.1 of 2013

P.Maniathal

... Appellant

Vs.

M.Maniathal

... Defendant

Prayer:- This Second Appeal has been filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 20.02.2013 in A.S.No.72 of 2012 on the file of the learned I Additional Subordinate Court,(Fast Track Court), Erode reversing the judgment and decree dated 03.04.2012 passed in O.S.No.385 of 2009 on the file of the Court of the Principal District Munsif at Erode.

For Appellant	: Mr.T.Murugamanickam, SC for Ms.P.T.Ramadevi
For Respondent	: Mr.A.Muthukumar for Mr.G.Ravishankar

JUDGMENT

This Second Appeal has been preferred against the Judgment and



decree dated 20.02.2013 in A.S.No.72 of 2012 on the file of the learned I Additional Subordinate Court,(Fast Track Court), Erode partly reversing the judgment and decree dated 03.04.2012 passed in O.S.No.385 of 2009 on the file of the Court of the Principal District Munsif at Erode.

2.The suit in O.S.No.385 of 2009 was filed by the respondent herein as against the appellant for the relief of permanent injunction, restraining the appellant from interfering with peaceful possession and enjoyment of the suit property. The relief also included an encroachment over the suit property and putting up construction. Pending the suit, an order of interim injunction was obtained, restraining the appellant from putting up any construction. Despite the order of injunction, the defendant proceeded with the construction, hence the plaintiff moved an amendment application, which was allowed by way of order dated 04.07.2011 in IA.No.3 of 2011 permitting addition of a prayer for mandatory injunction.

3.For the sake of convenience, the parties shall be hereinafter referred to as “plaintiff” and the defendant”.



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4.The plaintiff's father obtained natham patta on 09.01.1992 in respect of the property situated in S.Nos.355/5 and 355/6 of Avalpoondurai Village, Erode Taluk and District. The defendant claims right over the property situated in S.No.355/4 of the same village. It is the case of the plaintiff that since she was residing far away from the suit property, the defendant took advantage of the same and is making efforts to put up construction by encroaching upon her suit property. The plaintiff traced her title to the natham patta dated 09.01.1992 and the settlement deed executed by the beneficiary of natham patta, namely, her father vide document dated 02.06.1992. The suit was presented on 15.07.2009 and by order, dated 20.07.2009 in IA.No.656 of 2009, an Advocate Commissioner was appointed, who visited the suit property and submitted a report as follows:

“வாதியின் இடத்திற்கும் பிரதிவாதி கட்டிக்கொண்டிருக்கும் புதிய கட்டிடத்திற்கும் இடையில் 3 பப்பாளி மரம், ஒரு சிறிய வேப்ப மரம் மற்றும் செடிகள் கிழமேலாக வேலியாக அமைந்துள்ளது”

5.The property of the plaintiff is situated to the north of the



property of the defendant. In the suit property, three Papaya trees and one Neem tree and other trees were existing.

6.The Commissioner also noted that construction work had just commenced and construction materials had been laid in the area under survey. The report and plan submitted by the Advocate Commissioner have been marked as Exs.C1 & C2.

7. Pending the suit another application seems to have been taken out for reissue of warrant to the Advocate Commissioner, namely, Mr. V.P.Sankar Kumar in I.A.No.571 of 2010. The said Commissioner visited the suit property on two days, viz., on 31.01.2010 and 27.11.2010. On the basis of the second visit, a report was filed before the Court on 10.03.2011.

8. In the second report, the learned Advocate Commissioner noted that there was a live fence dividing the plaintiff's hut from the newly made construction of the defendant. During the second visit, he



conducted the survey with the help of the surveyor. The survey sketch has been filed as Ex.C5. The report filed after second visit by the Commissioner as well as the Inspector of Survey found that the plaintiff's property is situated in S.Nos.355/5 & 355/6 and the defendant's construction having encroached upon the said area.

9.The parties went to trial. The plaintiff examined herself as PW1 and marked Exs.A1 to A6. On the side of the defendant, she was examined as DW.1, but there was no documentary evidence marked on her side. The Advocate Commissioner's report dated 24.07.2009 (filed after first visit) and the report filed after second visit dated 10.03.2011 were received together along with the report of the Inspector of Survey and marked the same as Exs.C1 to C5.

10.On the basis of the evidence and documents filed before the Court, the learned trial Judge partly decreed the suit. He granted an order of permanent injunction restraining the defendant from interfering with the possession of the plaintiff in S.Nos.355/5 and 355/6 but denied the



relief of mandatory injunction on the ground that the plaintiff ought to have sought for declaration of her title to the property.

11. Being aggrieved by the denial of mandatory injunction, the plaintiff preferred an appeal in A.S.No.72 of 2011. The said appeal was allowed and decreed the suit in its entirety. This appeal arises against the said judgment.

12. The second appeal was admitted by this Court on 17.05.2013 and the following substantial questions of law were framed:

(i) Whether the First Appellate Court is right in allowing the appeal thereby decreeing the suit for bare injunction and also for mandatory injunction without a relief for declaring the title, in violation of Section 41 of specific Relief Act?

(ii) Whether the First appellate Court is right in placing the onus on appellant/defendant, to establish her title over the suit property where the plaintiff failed to prove her title and possession over the suit property?

(iii) Whether the First Appellate Court is right in holding that possession follows the title, without any evidence and where the plaintiff miserably failed to prove her title and



possession over the suit property?

(iv) Whether the First Appellate Court is right in disbelieving the Commissioner's report without giving any valid reason for the same?

13. For the sake of convenience, I heard all the questions of law together and are being answered accordingly.

14. Heard Mr. T. Murugamanickam, learned Senior Counsel appearing for Ms. P. T. Ramadevi, and Mr. A. Muthukumar learned counsel for Mr. G. Ravishankar, learned counsel appearing for the respondent.

15. Mr. T. Murugamanickam, would urge that the schedule of property, insofar as item no. 2 is concerned, has quoted the property situated in S.No. 355/5 along with S.No. 355/9 and therefore, this does not answer the requirement of description of the property. Therefore, he urges that the plaintiff is not entitled for the relief granted by the lower appellate Court. Expanding on this argument, he submits that since identification of the property is in dispute, the question of grant of an



order of injunction does not arise. He would further plead that since the plaintiff had not proved her possession on the date of presentation of the suit, she is not entitled for the relief of permanent injunction. He would further urge that the plaintiff ought to have sought for declaration of title and having failed to have sought for, the suit has to fail in its entirety.

16.Mr.A.Muthukumar, learned counsel for the plaintiff/respondent would rebut these arguments and would submit that the plaintiff is the owner of S.Nos.355/5 and 355/6 and on this aspect there was no dispute by the defendant either in the written statement or at the time of evidence. He would further plead that when the Advocate Commissioner had visited the first item, he did not note any "live fence". What was all that he saw was 4 trees situated between the plaintiff's property and the defendant's property and that cannot be construed as "live fence". He would point out that from the evidence of the plaintiff and the defendant, it appears that there is no dispute as regards the identity of the property and therefore, the submissions of the defendant/appellant before this Court do not deserve any merit for



consideration. Finally, he would state that the trial Court did find the encroachment but unfortunately denied the relief of mandatory injunction on the ground that no relief of declaration of title had been sought for, which is an erroneous conclusion and contrary to the judgment of this Court rendered by Srinivasan, J. (as he then was) in the case of ***“Palaniammal Vs.Pechimuthu and others”*** reported 1991(1) MLJ 31. In particular, he would draw my attention to paragraph no.3 of the said judgement.

17. I heard both sides and have carefully gone through the documents available on record.

18. Insofar as the crucial argument that the relief of declaration of title should have been sought for is concerned, I am entirely in agreement with Mr.A.Muthu Kumar. This is for the simple reason that the plaintiff has sought for her enforcement of right over S.Nos.355/5 and 355/6, the defendant does not dispute the right of the plaintiff over the said property situated in these survey numbers. She claims the right over title and



possession only with respect to the property situated at S.Nos.355/5 and 355/6 as the property which is situated to the northern side of S.No.355/5 and western side of S.No.355/6. For these properties, the defendant has not made any claim at all. In these circumstances, I do not find any cloud over the title in and over the plaintiff's claim. The relief of declaration is expensive one and it is not for the plaintiff to file a suit for declaration in all the cases, where the defendant encroached upon the property. This issue is no longer *res-integra* and has been settled by Supreme Court in the case of ***“Anathulla Sudhakar Vs. P. Buchi Reddy (dead) by Lrs and others”*** reported in (2008) 4 SCC 594. For ready reference, it would be appropriate to extract relevant portion found in para 14, as under:

“14. We may however clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to plaintiff's title raises a cloud on the title of plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or



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an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. Where the plaintiff, believing that defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised only the issue of possession and not any issue of title.”

19. I went through both the written statements filed by the defendant, one filed before the amendment and another one filed after the amendment. On a careful perusal of the same, it does not show any denial of title of the plaintiff. In such circumstances, the relief of declaration of title need not be sought for merely to satisfy the ego of the defendant. It is a legal remedy which ought to be sought for only when the title is denied and that has not been done in the present case.



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20. Apart from this, it is necessary to refer to the admission made by the defendant during the course of trial. I am extracting the said admission as follows:

“.....எனக்கு பாத்தியப்பட்ட இடத்திற்கு
வடபுறம் கிழபுறம் உள்ள இடம் ஆரம்பத்தில் வாதி
மணியாத்தாவின் தந்தை மாரியப்பனுக்கு
பாத்தியப்பட்டது என்றால் சரி தான்து...”

This shows that there is no dispute in title

21. I am in agreement with the view taken by the learned Appellate Judge that only in the case of encroachment made by the defendant over the plaintiff's property, the relief of declaration is necessary. Particularly, in this case, I do not find the said relief is necessary because the encroachment is said to have commenced on 09.07.2009, when the defendant started construction by digging holes in the property of the plaintiff. Taking note of the same, immediately, within a week, the plaintiff had presented the suit for mandatory injunction i.e. on 15.07.2009 and got the appointment of the Advocate Commissioner,



who visited the suit property forthwith on 20.07.2009 and hence, the plaintiff having approached the Court without any delay. Therefore, the aspect of delay would not defeat the relief of mandatory injunction sought for by the plaintiff.

22. Further more, the trial Court swayed with the second Advocate Commissioner's report that there was a "live fence" dividing the property of the plaintiff and the defendant. The trial Court had not taken into consideration the fact that in the first as well as the second reports of the Advocate Commissioner, which speak about three Papaya trees and one Neem tree existing in the property, such natural growth, as is possible, cannot be treated as "live fence". A "live fence" as is understood in this part of the Country is a series of plants, shrubs and trees planted in such a manner as demarcating the properties of neighbours. Three trees certainly cannot be understood as "live fence" and certainly it does not do so in the present case because the first report of the Advocate Commissioner specifically states that there was no "live fence" and it was only hinted upon in the second report.



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23. I enquired with Mr.T.Murugamanickam, as to whether any objections filed by his client to the Advocate Commissioner's report. To which, it is stated that there was no specific objection filed since the defendant has not encroached upon S.Nos.355/5 & 355/6 and that is the ground for non- filing objections to the Advocate Commissioner's report before the trial Court. The position of law with respect to non filing of objection to the Advocate Commissioner's report has been settled by the Division Bench of this Court in the case of ***Krishna Reddiar and Others Vs. Ramanuja Reddiyar & Others*** in AIR 1929 Madras 492.

24. The said judgment did arise out of a suit for partition but the principle of law was laid down by the Division Bench that where the party does not raise his objection to the Advocate Commissioner during inspection or does not object the Advocate Commissioner's report before the trial Court, he cannot raise the objection before the High Court that the report is defective.



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25. In the present case, the objection is regarding Ex.C5. I do not find any objection with respect to surveyor's plan or the Commissioner's report. That not having been done, it is not open to the defendant to plead in Second Appeal that Surveyor's report together with the Advocate Commissioner's report cannot be relied upon. I have carefully gone through Ex.C5 and noted that the Inspector of Survey (natham) has given a detailed plan which contains the measurement of the properties of the plaintiff as well as defendant's property.

26. One further argument of Mr.Murugamanickam, is that the plaintiff has not been in possession over the property in S.Nos.355/5 and 355/6 on the date of the presentation of the application. There is no dispute that the plaintiff is entitled to the property in S.Nos.355/5 and 355/6 by virtue of natham settlement dated 09.01.1992 followed by the Settlement Deed given to her by the beneficiary namely her father under Ex.A2. The defendant/appellant claims right only over S.No.355/4. If a party encroaches upon his neighbor property, then he is certainly answerable to the Court for such encroachment. When the defendant has



explained that the plaintiff's property is situated, on the northern side in S.No.355/6 and on the southern side in S.No.355/5, then the question of proving possession does not arise. It is an admitted case that the property was a vacant site. The title deeds have been filed before the Court, the Court necessarily have to arrive at the conclusion that the possession follows title. This is exactly the learned first Appellate Judge has opined.

27. In the light of the above discussion, I do not find any question of law much less substantial question of law arises for consideration in the present Appeal. Accordingly, the Second Appeal fails and it is dismissed. Consequently, connected miscellaneous petition is closed. The parties shall bear their own costs.

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12.01.2024

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- 1.The I Additional Subordinate Court,(Fast Track Court), Erode
- 2.The Principal District Munsif at Erode

V.LAKSHMINARAYANAN.J,

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