



S.A.(MD)No.573 of 2008

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 22.04.2024

CORAM

THE HONOURABLE MR.JUSTICE **S.SOUNTHAR**

S.A.(MD)No.573 of 2008

Maragatham Ammal

...Appellant

-Vs-

1.Habib Rehman
2.Ummul Bajanollah

... Respondents

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree, dated 13.11.2006 made in A.S.No.53 of 2005 on the file of the learned Subordinate Judge, Ramanathapuram confirming the decree and judgment, dated 12.08.2005 made in O.S.No.32 of 1993 on the file of the learned District Munsif, Ramanathapuram.

For Appellant : Mr.S.Parthasarathy

For Respondents : Mr.D.Senthil



S.A.(MD)No.573 of 2008

WEB COPY

JUDGMENT

The plaintiff is the appellant. The suit is for bare injunction restraining the defendants from opening a doorway towards the courtyard of plaintiff's property. The plaintiff also sought for a declaration and consequential recovery of possession in respect of Item No.II of the suit property. He also sought for a mandatory injunction directing the defendants to remove the construction put up in the Item No.II of the suit property. The suit was initially decreed and on appeal, the matter was remanded back. After remand, the suit was dismissed. Aggrieved by the same, the plaintiff filed an appeal and the appellate Court confirmed the findings of the trial Court. Aggrieved by the concurrent findings, the plaintiff is before this Court.

2.According to the plaintiff/appellant, she purchased the entire suit property from one Vasanthaveni Natchiar on 03.07.1971 and she has been enjoying the north-eastern portion of the property purchased by her by putting up a house. The land situate on immediate west of the house was enjoyed as courtyard. The property on the southern side of the house was enjoyed as backyard. It was



S.A.(MD)No.573 of 2008

WEB COPY

claimed by the plaintiff that the suit Item No.II, which lies on the south of courtyard, has been enjoyed by the plaintiff, as an access to reach her backyard portion for several years. Thus, she prescribed her right over the said portion of the suit property by open continuous possession. The defendants purchased a property, which lies on the south of plaintiff's courtyard and west of backward portion. While putting up a construction in the property purchased by the defendants, the defendants put up a wall obstructing the passage enjoyed by the plaintiff, as an access to her backyard from courtyard through Point-C. Therefore, the plaintiff was constrained to file a suit for aforesaid relief.

3.The defendants filed their written statement denying the averments of the plaintiff, as if she has been using the suit Item No.II, as an access. The plea of adverse possession and prescriptive title made by the plaintiff was specifically denied in the written statement. It was also claimed by the defendants that the second defendant had put up a construction only in the property purchased from one Surendran vide sale deed, dated 20.04.1985. Therefore, the defendants sought for dismissal of this suit.



S.A.(MD)No.573 of 2008

WEB COPY

4. Before the trial Court, the plaintiff Maragatham Ammal was examined as PW-1 and yet another witness was examined as PW-2. On her side, 12 documents were marked as Ex-A1 to Ex-A12. The first defendant was examined as DW-1 and nine documents were marked on behalf defendants, as Ex-B1 to Ex-B9. The Advocate Commissioner's report and plans were marked as Ex-C1 to Ex-C6.

5. The trial Court based on the learned Advocate Commissioner's report and plan marked as Ex-C5 and Ex-C6 came to the conclusion that the property purchased by the second defendant from one Surendran under Ex-B1 includes a narrow strip of land, over which, the plaintiff claimed title and hence, dismissed the suit. Aggrieved by the same, the plaintiff preferred an appeal in A.S.No.53 of 2005. The first appellate Court also based on the Advocate Commissioner's report and plan in Ex-C5 and Ex-C6 came to the conclusion that the Item No.II of the suit schedule property, over which the plaintiff claimed prescriptive title, comes within the property purchased by the defendants and consequently, dismissed the appeal. Aggrieved by the same, the plaintiff is before this Court.

6. The learned Counsel appearing for the appellant/plaintiff submitted that



S.A.(MD)No.573 of 2008

in Ex-C5 and Ex-C6, the learned Advocate Commissioner observed that the suit property was measured, as per the measurement found in the plaintiff's document, Ex-A1 and the disputed construction by the defendants was located within the measurement found in Ex-A1. Later on, he also observed that if the property measured, as per the defendants' document in Ex-B4, the disputed construction comes within the measurement found in Ex-B4. Therefore, the observation made by the learned Advocate Commissioner is not categorical with regard to the actual location of the disputed construction put up by the defendants. In such circumstances, both the Courts below committed a serious error in relying on the said Advocate Commissioner's report and plan.

7.A perusal of the plaint averment would suggest that the plaintiff claimed right over a narrow strip of land, which was described as Item No.II. It was the specific case of the plaintiff that she acquired prescriptive title over the said land by virtue of long enjoyment. Therefore, it is not the case of the plaintiff that she purchased Item No.II of the suit property. She only claimed adverse title by virtue of long hostile enjoyment. In such circumstances, it is not open to the appellant to argue in the Second Appeal that the said narrow strip of land comes



S.A.(MD)No.573 of 2008

WEB COPY

within the property purchased by the plaintiff. In order to establish the long and hostile possession of the plaintiff over the suit Item No.II, the plaintiff has not produced any acceptable evidence, except her oral testimony and that of PW-2. It is also not clear from the pleadings whether she admits the title of the defendants over the disputed the portion or not. A person claiming adverse title must admit the title of other person and plead hostile possession with the knowledge of the original owner. In the absence of clear pleading and acceptable evidence to establish the hostile possession for more than statutory period, the plaintiff is not entitled to declaration of adverse title and other consequential relief.

8.Though the learned learned Counsel for the appellant pointed out discrepancy in the conclusion reached by the learned Advocate Commissioner with regard to the actual location of the construction or projection put up by the defendants, as a plaintiff, the appellant has not taken any steps for re-issue of warrant to the Advocate Commissioner to clarify the said contradictions in the report. The plaintiff could have filed an appropriate application for scraping of the report or to re-issue of warrant to the same Advocate Commissioner or to some other Advocate Commissioner to re-measure the property and find out the



S.A.(MD)No.573 of 2008

WEB COPY

exact location of the construction put up by the defendants. The plaintiff, for the reason best known to her, failed to take any steps for scrapping of the report or to re-issue warrant to the Advocate Commissioner before the Courts below. In these circumstances, she is not entitled to take advantage of the discrepancy in the report of the learned Advocate Commissioner and try to establish her hostile possession over the suit. Therefore, the submission made by the learned Counsel for the appellant based on the discrepancy in the report of the learned Advocate Commissioner is not acceptable to this Court. The plaintiff having failed to establish the prescriptive title pleaded by her, is not entitled to succeed in this second appeal, as I do not find any substantial questions of law to interfere with the conclusion reached by the Courts below. Therefore, the Second Appeal stands dismissed. No costs.

22.04.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes / No
cmr



S.A.(MD)No.573 of 2008

WEB COPY

To

- 1.The Subordinate Judge, Ramanathapuram.
- 2.The District Munsif, Ramanathapuram.
- 3.The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



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S.A.(MD)No.573 of 2008

S.SOUNTHAR, J.

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S.A.(MD)No.573 of 2008

22.04.2024