



S.A.(MD)Nos.646 and 712 of 2008

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 12.06.2024

CORAM:

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

S.A.(MD)Nos.646 and 712 of 2008

and

M.P(MD)Nos.1 and 1 of 2008

S.A.(MD)No.646 of 2008:-

Ramasamy

...Appellant

-Vs-

1.Ellammal

2.Saroja

3.Balamani

4.Minor Sagunthala

represented by her mother and next friend

Ellammal

5.Rajamani

... Respondents

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree of the Subordinate Court, Karur in A.S.No.30 of 2007, dated 26.04.2007 upheld the judgment and decree passed by the learned Additional District Munsif Court, Karur, in O.S.No.226 of 2004, dated 24.04.2006.



WEB COPY

S.A.(MD)Nos.646 and 712 of 2008

For Appellant : Mr.N.Tamil Mani
For R1 and R4 :Mr.V.Balaji
R2, R3 and R5 :No Appearance

S.A.(MD)No.712 of 2008:-

Ramasamy

...Appellant

-Vs-

Ellammal

... Respondent

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree of the Subordinate Court, Karur in A.S.No.29 of 2007, dated 26.04.2007 upheld the judgment and decree passed by the learned Additional District Munsif Court, Karur, in O.S.No.582 of 2002, dated 24.04.2006.

For Appellant : Mr.N.Tamil Mani
For Respondent :Mr.V.Balaji

COMMON JUDGMENT

S.A.(MD)No.646 of 2008 is arising out of a suit for declaration, recovery of possession and mandatory injunction in respect of suit 'B' schedule property filed by the respondent. The suit was decreed by the trial Court and the findings



S.A.(MD)Nos.646 and 712 of 2008

of the trial Court were affirmed by the first appellate Court. Aggrieved by the concurrent findings, the defendant has filed the aforesaid Second Appeal.

2.S.A.(MD)No.712 of 2008 is arising out of a suit for bare injunction filed by the appellant. The suit was dismissed by the trial Court and the findings of the trial Court were affirmed by the first appellate Court. Aggrieved by the concurrent findings, the un-successful plaintiff has filed the said second appeal

3.According to the appellant, the plaintiff in O.S.No.582 of 2002, the suit property is situated in S.No.244/2, with an extent of 2 acres and 38 cents was allotted to him in a family partition deed, dated 15.07.1992. The plaintiff claims to be in possession and enjoyment of the said property from the date of partition. The respondent/defendant in O.S.No.582 of 2002, is the eastern neighbour of appellant and she attempted to destroy the kiluva fence in between the property of the plaintiff and the defendant and encroach the portion of the suit property and hence, the appellant was constrained to file a suit for bare injunction.

4.The suit for bare injunction filed by the appellant was resisted by the



S.A.(MD)Nos.646 and 712 of 2008

WEB COPY

respondent/defendant on the ground that she was the owner of 5 acres and 8 cents of lands in S.No.244/3, which is situated on the eastern side of the plaintiff's property in S.No.244/2 and the appellant by moving the dividing fence gradually encroached 14 cents of respondent's property in S.No.244/3. When the respondent made preparation for filing appropriate suit against the appellant, the suit had been filed by the appellant with an ulterior motive.

5.The suit in O.S.No.226 of 2004 was laid by the respondent for declaration of title, recovery of possession and for mandatory injunction to remove the encroachment made in suit 'B' schedule property. The respondent sought for mandatory injunction to remove the stone kept by the appellant in the encroached portion of the suit property.

6.The said suit was resisted by the appellant by asserting his title over 2 acres and 38 cents of property in S.No.244/2 allotted to him under a partition deed, dated 15.07.1992. It was also claimed by the appellant that the fence in between the properties of the parties had been in existence for more than 100 years and it has not been moved into the property of the respondent by the



S.A.(MD)Nos.646 and 712 of 2008

appellant. Therefore, claiming possession of the property on the west of fence for more than the statutory period, the appellant sought dismissal of the suit.

7.Both the suits were tried together and evidence was recorded in the suit filed by the appellant in O.S.No.582 of 2002. The appellant, Ramasamy Nayakkar, was examined as PW-1 and one of the sharer of the parties was examined as PW-2 and on behalf of the appellants, 6 documents were marked as Ex-P1 to Ex-P6. On behalf of the defendant, the second respondent was examined as DW-1 and yet another witness was examined as DW-2 and three documents were marked as Ex-B1 to Ex-B3. The Advocate Commissioner's reports and plan were marked as Ex-C1 to Ex-C3 and the Surveyor's plan was marked as Ex-C4.

8.The trial Court on appreciation of oral and documentary evidence came to the conclusion that the appellant had encroached 14 cents of the land in S.No. 244/3 belonged to the respondent and hence, decreed the suit of the respondent as prayed for and dismissed the suit filed by the appellant. Aggrieved by the same, the appellant preferred two appeals in A.S.Nos.29 and 30 of 2007 on the file of



S.A.(MD)Nos.646 and 712 of 2008

WEB COPY

the Subordinate Court, Karur. The first appellate Court affirmed the findings of the trial Court. Aggrieved by the concurrent findings, the appellant is before this Court.

9.The learned Counsel for the appellant submitted that the fence in between of the properties of the plaintiff and the defendant has been in existence for more than 100 years and both the appellant and the respondent have been in possession of their respective properties for more than statutory period and hence, the Courts below were not justified in granting a decree for recovery of possession in favour of the respondent, when the appellant proved his adverse title over the suit property by long uninterrupted possession for more than statutory period. The learned Counsel further submitted that when there is no dispute with regard to the title and possession of the appellant in respect of his property in S.No.244/2, the Courts below erred in dismissing his suit for bare injunction.

10.A perusal of the pleadings of the parties would suggest that the appellant claims right over 2 acres and 38 cents in S.No.244/2 under a partition deed, dated 15.07.1992, marked as Ex-A1. The respondent herein claims right over an extent



S.A.(MD)Nos.646 and 712 of 2008

of 5 acres and 8 cents in S.No.244/3 under a partition deed, dated 01.09.1989 marked as Ex-B2. The property of the respondent lies on the eastern side of the property of the appellant. It is the specific case of the respondent that the appellant gradually moved the dividing fence and encroached 14 cents of her land in S.No.244/3. The said allegation was refuted by the appellant by claiming that the dividing fence in between the properties of the parties had been in existence for more than 100 years and hence, the appellant prescribed his title over the total extent of the property in his possession on the western side of the fence.

11.In order to resolve the controversy, an Advocate Commissioner was appointed to measure the suit property with the help of the Surveyor and they filed their reports and plan. The Advocate Commissioner's reports and plan were marked as Ex-C1 to Ex-C3 and the Surveyor's plan was marked as Ex-C4. A perusal of the Surveyor's plan would suggest that the appellant encroached 14 cents of lands in S.No.244/3 belongs to the respondent. The encroached portion was shown as green washed area in the Surveyor's plan marked as Ex-C4. Based on the report of the Advocate Commissioner and Surveyor's plan, both the Courts



S.A.(MD)Nos.646 and 712 of 2008

below came to a factual conclusion that the appellant had encroached 14 cents of land in the property belong to the respondent in S.No.244/3. The said encroached portion is described as 'B' schedule property in the suit filed by the respondent in O.S.No.226 of 2004. The respondent seeks declaration of title and recovery of possession and mandatory injunction in respect of the said encroached portion.

12.In view of the admitted position of the parties in their pleadings, the appellant has no right over the property in S.No.244/3. However, the Surveyor's plan established that the appellant found to be in possession of 14 cents in S.No. 244/3. Further, under Ex-A1, the partition deed relied on by the appellant, he was allotted only 2 acres 38 cents, which is equivalent to 96.5 ares in S.No.244/2. A reading of Advocate Commissioner's report, Ex-C3 would suggest that even as per the revenue record, 'A' register, the total extent of S.No.244/2 belongs to the appellant was only 96.5 ares. However, on ground, as per the measurement made by the Surveyor, the appellant was found to be in possession of 1 hectare and 2 cents. The excess 14 cents under the possession of the appellant lies in S.No. 244/3 belongs to the defendant. Therefore, the conclusion reached by the Courts below that the appellant encroached 14 cents in the property of the respondent is



S.A.(MD)Nos.646 and 712 of 2008

based on proper appreciation of evidence available on record, which requires no interference by this Court.

13.The learned Counsel for the appellant vehemently contended that the dividing fence between the properties of the parties had been in existence for more than statutory period and hence, the Courts below ought to have held that the appellant prescribed his title over the excess land in his possession. The said submission made by the learned Counsel for the appellant is not appealable to this Court because of the following reasons:

13.1.The appellant was allotted with 2 acres 38 cents under Ex-A1, partition deed, which had taken place on 15.07.1992. Therefore, on 15.07.1992, the appellant was given only 2 acres 38 cents in S.No.244/2. However, when the Surveyor visited the property, the appellant was found to be in possession of more extent. Therefore, the alleged encroachment, if any, should have been made only after 15.07.1992. The suit has been filed in February 2004, well within 12 years from the date of partition. In such circumstances, the submission made by the learned Counsel for the appellant, as if, the appellant prescribed title over the



S.A.(MD)Nos.646 and 712 of 2008

excess property in his possession, is not acceptable to this Court. Both the Courts below on proper appreciation of oral and documentary evidence, negated the plea of prescriptive title set out by the appellant and same is not vitiated by any perversity.

14.The learned Counsel for the appellant also submitted that when the respondent herself admitted the title of the appellant over the property in S.No. 244/2, the Courts below ought to have granted a decree for injunction in his favour. As mentioned earlier, the appellant is found to be in possession of portion of respondent's property. Any attempt by the respondent to retrieve her own property encroached by the appellant cannot be treated as an attempt to interfere with his possession over the property in S.No.244/2. There is no evidence available on record to suggest that the respondent attempted to interfere with the possession of the appellant in respect of his property in S.No.244/2. The right of appellant over S.No.244/2 is not at all disputed by the respondent. Therefore, there is a failure of cause of action for the suit for injunction filed by the appellant. Accordingly, the Courts below are justified in dismissing the suit for bare injunction filed by the appellant.



S.A.(MD)Nos.646 and 712 of 2008

WEB COPY

15.In view of the discussion made earlier, I do not find any substantial question of law to interfere with the factual conclusion reached by the Courts below. Accordingly, the Second Appeals are dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

12.06.2024

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

cmr

To

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



WEB COPY



S.A.(MD)Nos.646 and 712 of 2008

S.SOUNTHAR, J.

cmr

S.A.(MD)Nos.646 and 712 of 2008

12.06.2024