



S.A(MD)No.16 of 2019

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 05.09.2024

Pronounced on : 15.11.2024

CORAM

THE HONOURABLE MR.JUSTICE P.VADAMALAI

S.A(MD)No.16 of 2019

and

C.M.P(MD)No.913 of 2019

S.Gnanadhas

... Appellant/Appellant/Plaintiff

Vs.

Jainul Arabu

... Respondent/Respondent/Defendant

PRAYER :-

This Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 15.11.2017 made in A.S.No.31 of 2015 on the file of the Principal Subordinate Judge, Nagercoil, confirming the judgment and decree dated 08.04.2015 made in O.S.No.343 of 2011 on the file of the Principal District Munsif, Nagercoil.

For Appellant : Mr.P.Thiagarajan

For Respondent : Mr.V.Meenakshi Sundaram



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JUDGMENT

This Second Appeal is filed against the judgment and decree dated 15.11.2017 passed in A.S.No.31 of 2015 on the file of the learned Principal Subordinate Judge, Nagercoil, confirming the judgment and decree, dated 08.04.2015 passed in O.S.No.343 of 2011 on the file of the learned Principal District Munsif, Nagercoil.

2. The appellant is the plaintiff and the respondent is the defendant in O.S.No.343 of 2011 on the file of the Principal District Munsif Court, Nagercoil. The appellant/plaintiff filed the suit for permanent injunction and mandatory injunction in respect of the suit property against the respondent/defendant.

3. For the sake of convenience, the parties are referred as plaintiff and defendant as arrayed in O.S.No.343 of 2011 on the file of the Principal District Munsif Court, Nagercoil.



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4. Case of the plaintiff:

The plaintiff's mother purchased 42 ½ cents in R.S.No.612/12 comprised in old S.No.261, 264 of Kanyakumari village by virtue of registered Sale Deed, dated 03.12.1969. Out of 42.5 cents, 5 cents was allotted for usage of burial ground of their family members. The plaintiff's parent's cemetery is also in the suit property. The defendant purchased 1 cent 284 sq.ft. from the plaintiff's brother Thanabalan through a Sale Deed, dated 19.02.1994. The plaintiff's 5 cents is situated western side of the suit property. They jointly provided 3 cents of land for pathway on the northern side of the defendant's property. The defendant raised a compound wall encroaching 226 ¼ sq.ft. on the eastern side of the plaintiff's property. The defendant has no right over the plaintiff's property and his construction is illegal. Hence, the suit is filed seeking permanent injunction and mandatory injunction.

5. Case of the Defendant:

The defendant already filed a suit in O.S.No.516 of 2006 against the plaintiff and the same was decreed. Suppressing the earlier suit, the plaintiff filed the present suit to escape from the proceedings in E.P.No.113 of 2010 in



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O.S.No.516 of 2006. It is admitted that the plaintiff's mother purchased 42.5 cents in R.S.No.612/12 of Kanyakumari village and she left 5 cents for burial ground. The defendant purchased 1 cent 284 sq.ft. from the plaintiff's brother Thanabalan. The plaintiff is neither the owner nor in possession and enjoyment of the suit property. The defendant never encroached any portion of the plaintiff's property or burial ground as alleged by the plaintiff. On the west of the defendant's property, there is a family burial ground belonging to the plaintiff, the defendant's vendor and others. The plaintiff has no exclusive right in the burial ground, which is left as common. The compound wall is already existing in the property purchased by the defendant. The defendant's vendor Thanabalan is a necessary party. The suit is bad for non-joinder of the necessary party. Hence, the suit is liable to be dismissed.

6. The trial Court framed the following issues based on the pleadings of both sides:-

- 1) Whether the plaintiff is the absolute owner of the plaint schedule property?*
- 2) Whether this suit is barred by resjudicata by the O.S.No.516 of 2006 on the file of the 1st Additional District Munsif Court, Nagercoil?*



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3) Whether the suit is affected by non-joinder of necessary parties?

4) Whether the plaintiff is suppressed the previous suit in O.S.No.516 of 2006?

5) Whether the plaintiff is entitled to the relief of permanent injunction as prayed for?

6) Whether the defendant had made any constructions over the plaintiff's property?

7) Whether the plaintiff is entitled to the relief of mandatory injunction?

8) To what other reliefs to the parties?

7. During trial, on the plaintiff's side, the plaintiff was examined as P.W.1 and one Thangaswamy was examined as P.W.2 and marked 6 exhibits as Ex.A.1 to Ex.A.6. On the defendant's side, the defendant was examined as D.W.1 and six exhibits were marked as Ex.B.1 to Ex.B.6. Advocate/Commissioner's report and plan were marked as Ex.C.1 and Ex.C.2 through P.W.1.

8. After hearing both sides, the learned Principal District Munsif, Nagercoil, concluded that the plaintiff failed to establish his case and dismissed the suit by passing judgment, dated 08.04.2015.



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9. Aggrieved by the judgment and decree in O.S.No.343 of 2011, the plaintiff preferred the civil appeal in A.S.No.31 of 2015 before the Principal Subordinate Court, Nagercoil. Pendency of the appeal, the plaintiff filed the petition in I.A.No.74 of 2017 under Order 41 Rule 27 and Section 151 of the Civil Procedure Code, to accept the documents.

10. The first Appellate Court after hearing both sides and after perusing material records of the case dismissed the appeal in A.S.No.31 of 2015 and I.A.No.74 of 2017 by passing judgment, dated 15.11.2017 and confirmed the judgment and decree passed in O.S.No.343 of 2011.

11. Challenging the judgment and decree of the first Appellate Court, the plaintiff has preferred this Second Appeal and the same has been admitted on 06.02.2019 by framing the following substantial questions of law:-

"a. Whether the Lower Appellate court, being the final Court of facts finding, was right in not framing the necessary and proper points for determination to be decided in the appeal as required in Order 41 Rule 31 r/w Section 96 of the Civil Procedure Code?



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b. Whether the Courts below are right in non suiting the plaintiff as he is not the exclusive owner of the suit schedule property but only a co-owner, whereas the plaintiff being one of co-owner and being in possession and enjoyment of the suit property and taking care of the same and as such is he not entitled to protect the property belongs to the family members from 3rd party encroachment?

c. Whether the Courts below are right in dismissing the suit for “non joinder of necessary parties” as the other co-owners are not made as parties to the suit, when the plaintiff being one of co-owner and being in possession and enjoyment of the suit property and taking care of the same and as such entitled to protect the property belongs to the family member from 3rd party encroachment?

d. Whether the lower appellate Court right in dismissing the petition filed under Order 41 Rule 27 to receive the additional evidence without considering the requirements of those additional evidence to decide the real dispute between the parties with respect to their entitlement of extend of properties as per their respective title deeds?"



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12. The learned counsel for the appellant/plaintiff submitted that the plaintiff's mother purchased 42 ½ cents by virtue of Ex.A.1 - Sale Deed. Though she purchased 42 ½ cents, there was 34 cents only remained in the land. The plaintiff's mother left 5 cents for the family burial ground and left 3 cents for pathway. So, only 26 cents in the land was available, the plaintiff and his brother shared it equally, thereby, both are entitled to 13 cents each. The defendant claimed 1 cent 284 sq.ft., which was sold by the plaintiff's brother through Ex.A.2. The defendant encroached 226 ½ sq.ft. in the burial land, which is the western side of the defendant's land and constructed compound wall. As per Ex.C.1 - Advocate/Commissioner's report, the defendant's land was located as EFGH as 1.624 cents, whereas the defendant purchased 1 cent 284 sq.ft. so, the commissioner failed to note that the 340 sq.ft. is an encroached area. The Courts below have not considered these aspects. Moreover, the plaintiff filed the petition to receive five documents, in which, the plaintiff's brother sold one cent each as per sale deeds, dated 20.03.1989, 4 cents as per sale deed, dated 02.08.1991 and 6.474 cents as per sale deed, dated 30.08.1991. So, the plaintiff's brother sold 12.474 cents out of 13 cents. If so the plaintiff's brother cannot sell 1 cent 284 sq.ft. through



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Ex.A.2 - Sale Deed to the defendant. The first Appellate Court has not taken into those aspects but simply observed that the plaintiff has not explained the reason for non filing of those documents during the trial and that the plaintiff has not stated in what way those documents are relevant to this case. The first Appellate Court has not properly framed the point for consideration as required under law. The Courts below further observed that the defendant being the co-owner, the plaintiff cannot seek an injunction. The plaintiff has prevented the third party's encroachment in the burial ground, which was left only for his family members. Since the plaintiff's brother already sold his properties, it is not necessary to join him as a party to this proceedings. The plaintiff is entitled to the reliefs. Therefore, the Second Appeal may be allowed or may be remanded back to consider the additional documents filed by the plaintiff after receipt of the same. In support of his argument, the learned counsel relied on the decision of the principal seat of this Court reported in **2017 1 CTC 24 (S.Nirmala vs. Kanniammal & Ors.)**.

13. Per contra, the learned counsel for the defendant contended that the plaintiff has not specifically mentioned about the schedule of the property and not mentioned the survey number. The defendant purchased



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1 cent 284 sq.ft. through Ex.A2 - Sale Deed and obtained patta under sub division S.No.612/12A, but the plaintiff has not specifically mentioned the suit property's sub divided survey number. While the plaintiff stated 226.25 sq.ft. he could not explain the lie and location of the same during the commissioner's inspection. The plaintiff admitted that only 34 cents was available out of the land purchased by his mother and 8 cents was left towards burial ground and pathway and the rest 26 cents was shared by the plaintiff and his brother. The defendant purchased 720 sq.ft., and it was admitted by the plaintiff. The Advocate/Commissioner also found that the defendant is enjoying only 707 sq.ft. of property i.e., lesser than the 720 sq.ft. in location. Moreover, the commissioner mentioned the wall was already existed in the property and the plaintiff has also admitted the existence of wall in the defendant's property. Already there was a dispute regarding the property between the plaintiff and the defendant and the defendant filed a suit in O.S.No.516 of 2006 against the plaintiff and that suit was decreed. The plaintiff suppressed the same. All these facts were clearly appreciated by the Courts below and correctly gave concurrent finding. Therefore, the Second Appeal may be dismissed.



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14. Heard the arguments of both sides and perused the material records of the case. The suit property mentioned in the plaint is only 226 $\frac{1}{4}$ sq.ft. of land being eastern portion of 5 cents belonging to the plaintiff. Re.survey number is mentioned as 612/12. There is no dispute that the plaintiff's mother purchased 42 $\frac{1}{2}$ cents under Ex.A.1, but on location, the property was only 34 cents and out of 34 cents, 5 cents was left for burial ground and 3 cents was left for pathway. Admittedly, the remaining 26 cents was shared by the plaintiff and his brother. The plaintiff clearly admitted that his brother sold 1 cent 284 sq.ft. to the defendant by virtue of ExA.2 - Sale Deed, which is equal to 720 sq.ft. The defendant's property was subsequently sub divided as R.S.No.612/12A. This was also not disputed. On perusal of records, the plaintiff has not specifically mentioned the location of the encroached portion which is the suit property. The Advocate/Commissioner inspected the property and filed Ex.C.1 - Report and Ex.C.2 - Plan stating that the suit schedule property could not be identified by the plaintiff and that the defendant was enjoying 707 sq.ft. against the actual measurement of 720 sq.ft. as per the document produced by the defendant. Though the defendant filed an objection to the commissioner's report, he has not preferred any civil revision against that report. The learned counsel for the



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plaintiff stated that the defendant's property is 1.624 cents as stated in objection to the commissioner's report. The commissioner converted 720 sq.ft. into the said 1.624 cents, which is equal to 1 cent 284 sq.ft. It is an admitted fact that the defendant enjoying lesser property than his entitlement under Ex.A.2.

15. The Courts below correctly observed that it is for the plaintiff, who came to the Court, has to establish his case, but he failed to prove his case. Even the plaintiff suppressed the earlier litigation between the plaintiff and the defendant, though it was with regard to as a common pathway. The trial Court has framed 8 issues and has given findings. The plaintiff has not filed documents and FMB sketch in respect of his alleged burial ground and pathway on the ground as per revenue records, while he admits that though his mother purchased 42½ cents land, on location 34 cents was only available. Even the plaintiff could not identify the location of the suit schedule property as seen from Ex.C.1 - Advocate/Commissioner's report and the plaintiff has not agitated the same and has not adduced any contra evidence.



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16. Yet another contention of the plaintiff that his brother already sold 12.474 cents out of his 13 cents by way of four sale deeds, prior to the defendant's sale, but, the facts remain that the plaintiff admitted that the defendant purchased 1 cent 284 sq.ft. from his brother Dhanapalan eastern to the burial ground. There is no explanation as to why he has not challenged those sale deeds after the transaction by the brother of the plaintiff. Moreover, the 1st defendant obtained a patta and the property mentioned survey number was also subdivided as R.S.No.612/12A. The plaintiff has not stated any subdivision for the suit schedule property or he has also not stated as he has taken steps for subdivision in respect of the suit property. So, the first Appellate Court correctly observed that the plaintiff has not given a valid reason for not producing those documents and what prevented him from producing them during trial. On perusal of the records, the plaintiff was not specific in respect of measurement for the burial ground of 5 cents with sub divided survey number and even he could not identify the same at the time of advocate/commissioner's inspection. It is settled position one who seeks injunction in respect of the property he has to prove his case with acceptable evidence. The plaintiff failed to prove his case.



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17. The plaintiff approached the Court without disclosing the earlier litigation and without clean hands. In a suit for injunction, the description of property must be specific and this plaintiff is even unable to identify the property. The defendant's actual enjoyment is below than his entitled area as per Commissioner's report. The Courts below correctly appreciated the evidence and held the correct decision. It is a settled proposition of law that in the Second Appeal it is not open to the appellant to re agitate facts or to call upon this Court to reappreciate evidence and this Court cannot expand the scope of the appeal. This Court does not see any misappreciation of evidence by the Courts below. Concurrent findings cannot be interfered with in the absence of any perversity or illegality in the findings of facts by the Courts below. From the above facts and circumstances, the Courts below found concurrent findings based on the evidence adduced in the case. The said findings need not be interfered by this Court by way of the Second Appeal. Hence, the questions of law framed in this Second Appeal are answered against the appellant/plaintiff. Thus, this Second Appeal fails.



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18. In the result, this Second Appeal is dismissed. The judgment and decree, dated 15.11.2017 passed in A.S.No.31 of 2015 on the file of the Principal Subordinate Judge, Nagercoil, confirming the judgment and decree, dated 08.04.2015 passed in O.S.No.343 of 2011 on the file of the Principal District Munsif Court, Nagercoil, is confirmed. No costs. Consequently, the connected Miscellaneous Petition is closed.

15.11.2024

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

VSD

To

- 1.The Principal Subordinate Judge,
Nagercoil.
- 2.The Principal District Munsif Court,
Nagercoil.
- 3.The Record Keeper,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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P.VADAMALAI, J.

VSD

**Pre-Delivery Judgment made in
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