

(2005) 04 MAD CK 0186
In the Madras High Court
Case No : Second Appeal No. 1272 of 1994

R. Veerasamy

APPELLANT

Vs

Govindasamy Udayar and Akilandammal

RESPONDENT

Date of Decision : 09-04-2005

Acts Referred:

Citation : (2005) 04 MAD CK 0186

Hon'ble Judges : AR. Ramalingam, J

Bench : Single Bench

Advocate : T.R. Rajaraman, for the Appellant; V. Raghavachari, for R1, for the Respondent

Final Decision : Allowed

Judgement

AR. Ramalingam, J.—Aggrieved against the concurrent judgments of both the courts below in O.S. No. 3003 of 1979 and A.S. No. 35 of 1992, the plaintiff viz., Veerasamy has filed this second appeal on the grounds that the first appellate court viz., the Sub Judge should not have dismissed the suit in its entirety inasmuch as title of the plaintiff upon the suit property under Ex.A1 sale deed and that the first appellate court should not have ignored the commissioner's report and plan wherein the encroachment made by the defendants in respect of 7 cents upon the plaintiff's land has been mentioned and thereby the suit should have been decreed in favour of the plaintiff as prayed for.

2. The case of the plaintiff before the Trial Court viz., the District Munsif, Thiruvannamalai can be narrated in brief as follows. The plaint schedule property viz., (1) 42 cents in wet Survey No. 42/9D and (2) 7 cents within the said 42 cents under the very same survey number as specifically described therein in the plaint schedule was owned by one Ponnusamy Udayar and then it was purchased by the plaintiff's father viz., Rama Udayar through a registered sale deed dated 31.3.1942. From the date of purchase, the plaintiff's father was in possession and enjoyment of the suit property and thereafter the plaintiff being eldest son in the family, is in possession and enjoyment of the suit property along with his

family members. That is why the plaintiff filed the suit in the capacity of Manager of the joint family. The defendants have no manner of right, title or interest upon the suit property. However they forcibly trespassed and took possession of the 7 cents of land in or about October 1978. The plaintiff issued advocate notice on 23.12.1978 demanding to deliver the encroached portion of 7 cents. But, the defendants replied with false allegations. Therefore, the plaintiff happened to file the suit for the relief of declaration of title upon the plaint schedule first item of the suit property and for recovery of possession of the plaint schedule second item (encroached 7 cents) as marked in red colour in the plaint plan.

3. The said suit was resisted by the defendants through written statement filed by the first defendant with the following brief allegations. It is true that the plaintiff purchased 42 cents as alleged in para 3 of the plaint from Ponnusamy Udayar. It is also true that the plaintiff took possession of the property purchased under the sale deed. But, it is not correct to state that the defendants trespassed upon the suit property of an extent of 7 cents as described in the plaint second schedule. No doubt, the plaintiff issued advocate notice and it was replied with suitable allegations. The defendants never trespassed upon any portion of the plaintiff's property as falsely alleged in the plaint. In fact, the plaintiff alone is in excessive enjoyment of 17 cents of land upon the suit survey number and when the defendants questioned such excessive enjoyment, the plaintiff has come forward with the suit and therefore, there is no cause of action for the suit and the same is liable to be dismissed.

4. On trial, the District Munsif, Thiruvannamalai, after examining the plaintiff Veerasamy as PW1 and one witness Gopal as PW2 and Govindasamy Udayar as DW1 and marking of seven documents as Exs.A1 to A7 for the plaintiff besides commissioner's report and plan as Exs.C1 and C2, has found and come to the conclusion that there is no question of encroachment as alleged by the plaintiff and the suit has been filed with ulterior motive and consequently dismissed the suit with exemplary cost of Rs.1000/=.

5. On appeal, the Sub Judge, Thiruvannamalai in A.S. No. 35 of 1992, has also found and come to the conclusion that there is no question of encroachment as alleged in the plaint and consequently dismissed the appeal by confirming the judgment and decree of the Trial Court.

6. I have gone through the entire oral and documentary evidence available in this case in the light of the judgements of both the courts below and arguments of the counsels appearing for either side in detail. From this, the following important and material aspects have to be taken into consideration as revealed from the evidence available. The commissioner's report and plan marked as Exs.C1 and C2 goes to indicate that the commissioner has chosen to inspect S. No. 42/9D and 42/9E and measured the lands with the help of the surveyor and thereby on measurement he found 5-1/2 cents marked in blue colour in his plan as well as 1-1/2 cents marked in green colour therein had been encroached by the defendants in S. No. 49/D and further, the encroachment has been made on

the southern portion and northern portion of 49/9D respectively upon the extent of 5-1/2 cents and 1-1/2 cents. This commissioner's report and plan are very much relied on by the appellant/plaintiff. At the same time, PW1 viz., the plaintiff has admitted in his evidence that 7 cents on the southern portion of 49/D had been encroached by the defendants in slow progress probably one year before filing of the suit and when it was questioned before one year by the plaintiff, the defendants did not respond properly and the surveyor was engaged to measure the lands and yet, the defendants have thrown away the survey stone laid by the surveyor. But, there is no evidence about any survey made and survey stone laid at the instance of the plaintiff one year before filing of the suit. Further, he has admitted that the surveyor along with commissioner measured the suit land in the presence of advocates for either side and it was found that there was encroachment of 1-1/2 cents on the north and 5-1/2 cents on the south. In the cross examination, he pleads ignorance of total extent of S. No. 42 and he is not aware as to when the said survey No. 42 was sub-divided and he has not specifically mentioned about the direction upon which encroachment had been made and he came to know only after the inspection made by the surveyor about the encroachment of the northern portion and that the commissioner and surveyor did not measure S. No. 42/9E and at the time of commissioner's inspection, sugarcane crop was standing upon the defendants' land. Further, he has admitted that the commissioner did not measure the land of one Govindasammal lying on the north and the land of Akilandammal as well as the defendants' land and particularly, at that time, the survey stone was found outside the sugarcane crops and that stone was there even before the purchase made by the defendants and the portion within that survey stone only, the defendants and their predecessor in title are enjoying. Further, he has admitted that only when measurement was taken, he came to know about his own boundary of the land purchased by him and he did not make any purchase before the said measurement taken about the alleged encroachment. Therefore, all the admissions of the plaintiff cumulatively go to indicate that the plaintiff has chosen to file the suit as if the defendants have made encroachment upon his property and to his knowledge only at the time of measuring the lands.

7. Further, whether there is actual encroachment upon the plaintiff's property or not is a question of appreciation of evidence available on either side including the commissioner's report and plan and courts below have come to the conclusion that there is no question of encroachment upon the plaintiff's land as alleged by the plaintiff and that is why they have concurrently dismissed the suit.

8. However, as rightly pointed out by the counsel for the appellant that both the courts below have committed mistake in dismissing the suit in entirety including the plaint schedule first item and instead both the courts below should have dismissed the suit in respect of the plaint schedule second item viz., the alleged encroachment of 7 cents alone. The reason is that according to Ex.A1 sale deed, it is an admitted fact that the plaintiff's father purchased 42 cents from Ponnusamy Udayar in the year 1942. Consequently, it becomes necessary that

the relief of declaration has to be granted so far it relates to purchase of 42 cents on the strength of Ex.A1 and the relief of recovery of possession in respect of the alleged encroachment of 7 cents described in the second item of the plaint schedule has to be negated.

9. Therefore, the second appeal is allowed in part so far it relates to the relief of declaration of title and the judgment and decree of both the courts below are modified to that extent and in other respects, the relief of recovery of possession in respect of 7 cents as described in second item in the plaint schedule is dismissed. No order as to costs.