

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 11.03.2015

CORAM:

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

Second Appeal No.1209 of 2014
and
M.P.No. 1 of 2014

1.Syed Sahib Basha
2.S.A.Chan Basha
3.R.Karemulla

.. Appellants/Plaintiff

-Vs-

1.Nazir
2.Maqbool
3.Ahamed Peeran
4.Jalaludeen
5.Nainudeen
6.Kutbuddeen

7.The Municipal Commissioner,
Representing the Gudiyattam Municipality,
Having Office at Gudiyattam Municipal Office,
Gudiyattam Town,
N.A.District.

8.Nazimabi
9.Mohamed Farooq

.. Respondents/Defendants

SECOND APPEAL filed under Section 100 of Code of Civil Procedure against the judgment and decree passed in A.S.No.76 of 2011 dated 23.06.2014 on the file of the learned Subordinate Judge, Gudiyattam confirming the judgement and decree dated 04.08.2011 made in O.S.No.42 of 2011 on the file of the learned District Munsif cum Judicial Magistrate - 1, Walajahpet.

For Appellants : Mr.R.Abdul Mubeen
For Respondents : Mr.Nainudeen, R.5
Appeared party-in-person

J U D G M E N T

Originally, the plaintiffs filed the suit in O.S.No.38 of 1987 on the file of the learned District Munsif, Gudiyattam. On transfer, it was re-numbered as O.S.No.42 of 2011 on the file of the learned District Munsif cum Judicial Magistrate No.1, Walajapet. The plaintiffs are the appellants herein. The respondents are the defendants in the suit. The plaintiffs filed the said suit for permanent injunction to restrain the defendants 1 to 8 from interfering with the alleged peaceful possession and enjoyment of the suit property and also for mandatory injunction to direct the defendants 1 to 8 to remove any construction made by them on the suit property and for other reliefs. By decree and judgement dated 04.08.2011, the trial Court dismissed the suit. As against the same, the appellants filed an appeal in A.S.No.76 of 2011 on the file of the learned Subordinate Judge, Gudiyattam. By decree and judgement dated 23.06.2014, the First Appellate Court dismissed the appeal thereby confirming the decree and judgement of the trial Court. That is how the appellants are before this court with this second appeal.

2.This second appeal has come up today for admission. I have heard the learned counsel for the appellants and I have also perused the records carefully. Mr.Nainudeen, the seventh defendant in the suit and the fifth respondent herein is present before this Court. I have heard him also.

3.The case of the plaintiff is as follows:-

The suit property was originally an inam land. By initiating proceedings under Section 3 of the Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act 1963 (Tamil Nadu Act 30 of 1963), the Government got this property vested in it with effect from 15.02.1965 as per the proceedings in T.D.No.715, thereafter, suo moto proceeding was initiated for grant of patta for the said property. One Mosque by name 'Thalayanatham Durgah' claim patta for the said property. One Mr.Sri Hafiz Syed Niyamathulla Hassani Sahib, who was the then Muthaavalli of the said Durgah made a claim and gave evidence in this regard. The Settlement Tahsildar No.2, Branch Settlement Office, Chengalpet, by his proceedings in G.R.S.R.No.3/71 GDM/TNMI/Act 30/63 dated 15.05.1971, declared that the Masjid Macan and Durgah are entitled for Ryotwari patta under Section 8(2)(ii) of the Act 30 of 1963. The Settlement Tahsildar has also declared that the suit lands were under the lawful possession of the Durgah and the Trustees were paying the taxes due on them. The Tahsildar therefore, granted ground rent patta under Section 13(1) of the Act 30 of 1963

in respect of the said lands to the said Durgah. Thus, according to the plaintiffs, their ancestors were in possession and enjoyment of the suit property and after them, the plaintiffs are in possession and enjoyment of the suit property for rendering services in the Durgah. The suit property, according to the plaintiffs measures, 3.44 acres, out of the total extent of 10.83 acres in T.S.No.792/5 at Thalayanatham in Gudiyatam. The further case of the plaintiffs is that the defendants 1 to 8 have got no right whatsoever over the suit property, but, they are disturbing their possession. It is also stated that the defendants have made some constructions on the suit property.

4.The defendants 1 to 8 have filed written statement disputing the above facts. The total extent of the property is 17.3 acres of the land. According to them, the plaintiffs are rendering services to the Durgah and for which, they have been in possession and enjoyment of only 2.55 acres of land and 5.51 acres of land were acquired by the Harijan Colony and the balance 9.77 acres of land were allotted to a private wakf and the same were in possession of the defendants 5 to 8.

5.It is further sated that in two earlier suits in O.S.No.369 of 2006 and in O.S.No.443 of 1967, it has been already declared that the plaintiffs are entitled only for 2.55 acres for rendering services to the Durgah. It is also contended that the plaintiffs are not in possession of more than 2.55 acres of land. For these reasons, according to the defendants, the suit is liable to be dismissed.

6.Based on the above pleadings, the trial Court framed appropriate issues. On the side of the plaintiffs, two witnesses were examined and 9 documents were exhibited. On the side of the defendants, the seventh defendant was examined as D.W.1 and 3 documents were exhibited.

7.Having considered all the above, the trial Court dismissed the suit which was confirmed by the First Appellate Court. That is how the appellants are before this Court with this second appeal.

8.The learned counsel for the appellants would submit that the defendants have admitted in their written statement that the plaintiffs have been given 2.55 acres of land in the suit survey number for the services rendered in the Durgah. The Courts below ought to have atleast granted decree in favour of the plaintiffs in respect of 2.55 of land. The learned counsel would further submit that the plaintiffs have however proved that they are in possession and enjoyment of 3.44 acres of land in the suit survey number which

is evidenced from patta proceedings. The learned counsel would further submit that the Courts below have held that under Order VII Rule 3 C.P.C., the property should be duly described, so that, it could be identified. But, the Courts below have held that the property has not been identified properly as required under the said provision. It is the further contention of the learned counsel that however, it is crystal clear that, there is enormous evidence to prove that the property has been duly identified and virtually knowing the identification of the property only the parties have contested the case.

9.I have considered the above submissions.

10.A plain reading of the written statement would go to show that the defendants themselves have admitted that the plaintiffs were given 2.55 acres in the suit survey number for the services rendered in the Durgha. The Courts below have referred to the decrees passed in O.S.No.369 of 2006 and in O.S.No.443 of 1967 wherein, the Courts have held that the plaintiffs are entitled only for 2.55 acres. The Courts below have also held that the suit property has been described as 3.44 acres. Out of this 3.44 acres, where the 2.55 acres of land lies, has not been identified properly. Further, there was no Advocate Commissioner appointed to correlate the patta proceedings with this suit property and also to correlate the decrees in O.S.No.369 of 2006 and in O.S.No.443 of 1967 with the property concerned. The burden is upon the plaintiffs to prove that they are in possession of the suit property more particularly, the extent of the land in which they are in possession.

11.The Courts below have appreciated these evidences available on record and have come to the conclusion that the plaintiffs have failed to prove their possession in respect of 3.44 acres. Though, the plaintiffs in the plaint, claim that they are in possession of 3.44 acres of land in the suit survey number, the second relief sought for in the plaint is for mandatory injunction to direct the defendants 1 to 8 to remove the constructions made if any, on the suit property. This shows that the plaintiffs are not sure of their own case. If any construction has been made by the defendants on the suit property, that should be specifically pleaded in the plaint with reference to the time on which it was constructed and under what circumstances it was constructed and under what arrangement, the same was constructed. Nothing has been stated in the plaint. The very prayer in the suit for a direction to the defendants to remove the construction if any, made by the defendants would go to show that the defendants were also in possession of a portion of the suit property. This was also rightly considered by the Courts below. Therefore, it

is for the plaintiffs to file appropriate suit to get the possessory right to be declared in respect of the area for which, they are really entitled, provided, there is no bar of res judicata by the judgements rendered in the earlier proceedings and it is for the plaintiffs to seek for appropriate consequential relief. So far as the present suit is concerned, I find that the Courts below were right in dismissing the suit.

12.Above all, absolutely, I find there is no question of law much less a substantial question of law involved warranting admission of this second appeal. The second appeal deserves only to be dismissed.

13.In the result, the second appeal fails and accordingly, the same is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

jbm

To

1. The Subordinate Judge,
Gudiyattam
2. The District Munsif cum Judicial Magistrate - 1,
Walajahpet

+1cc to Mr.Syed Nainudeen, S.R.No.13825

+1cc to M/s.R.Abdul Mubeen, Advocate, S.R.No.13624

सत्यमेव जयते

S.A.No.1209 of 2014

SAI (CO)
CA(22/05/2015)

WEB COPY