

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :28- 09-2015

CORAM:

THE HON'BLE TMT. JUSTICE PUSHPA SATHYANARAYANA

S.A. No. 196 of 2009

1. Thaiyanayaki

2. Rajamanickam

.. Appellants/Plaintiff

Vs.

1. Panneerselvam

2. Sathiyaseelan

3. Selvarasu

.. Respondents/Defendants

Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 08.08.2008 passed by the learned Subordinate Judge, Chidambaram in A.S.No.32 of 2007, confirming the judgment and decree passed by the learned District Munsif cum Judicial Magistrate, Kattumannarkoil in O.S.No.108/2000 (DMC, Chidambaram O.S. No.76 of 1997), dated 07.03.2007.

For Appellants : Mr.K.V.Ananthakrishnan

For Respondents : Mr.C.A.Shanmugasundaram

JUDGMENT

The plaintiffs who had been unsuccessful before the Courts below, has preferred this Second Appeal.

2. The suit is filed for declaration of title and recovery of possession of 'A' schedule property from the defendants 1 and 2 and for declaration of title and recovery of possession of 'B' schedule property from the third defendant.

3. The suit properties are situate in R.S.No.90/11, which was previously in R.S.No.90/9. The total extent was 1.40 cents, out of which, the suit properties are an extent of 0.20 cents. The plaintiffs claimed to be in long possession and enjoyment of the same, based on which, patta was granted on 30.09.1970 to the second plaintiff. Thus, the plaintiffs had been in possession as owner of the property. On 30.05.1995, another patta was

granted to an extent of 0.16 cents in favour of the first plaintiff, who is the wife to the second plaintiff. As already, there was patta to an extent of 0.04 cents, the Government had granted patta for the entire extent of 0.20 cents in favour of the first plaintiff on 30.05.1995. The second plaintiff did not raise any objection for the same. Thus, the plaintiffs are in possession of the entire extent of 0.20 cents. On the Northern side of the suit properties, there are several trees and on the Southern side, there is one neem tree. To the North of the suit properties, the defendants 1 and 2, who are brothers are in possession of R.S.No.90/7. To the South of the suit properties, the third defendant is in possession. While so, the defendants had trespassed into an extent of 0.01 cents on the Northern side and an extent of 0.0½ cents on the Southern side of 'A' schedule properties. The Northern side portion referred to 'A' schedule properties and Southern side portion as 'B' schedule properties. The defendants have got no manner of right over the suit properties. The act of defendants is nothing but a trespass. Hence, the suit has been filed for declaration and recovery of possession.

4. The suit was resisted by the defendants, denying the facts, supporting the cause of action in the plaint. The defendants had denied the grant of patta to an extent of 0.20 cents in favour of the first plaintiff, as already patta was granted in favour of the first plaintiff to an extent of 0.04 cents. Without cancellation of the same, patta could not have been granted to another person for an extent of 0.20 cents. According to the defendants, the trees, namely, Illuppa, Poovarasu and Vembu are not situated in R.S.No.90/9 or 90/11 but they are situate only in R.S.No.90/7. Though the plaintiffs, claimed 0.20 cents of land as per patta, it was never measured and enjoyed. According to the defendants, it was they who planted the trees and fenced them. The defendants claimed right to an extent of 0.13 cents in Survey No.90/7. According to the defendants, the trees are situate on the Poramboke land, which had been enjoyed openly and uninterruptedly for more than 30 years by the defendants. Hence, the plaintiffs cannot claim any right or title over the same.

5. Before the trial Court, on the side of the plaintiffs, the second plaintiff examined himself as P.W.1 and one more witness was examined and Exs.A1 and A2 were marked. On the side of the defendants, the defendants 1 and 3 examined themselves as D.W1 and D.W2 and one more witness examined as D.W3 and marked Exs.B1 to B7 and Exs.C1 and 2 were marked as Court documents.

6. On the above facts, after considering the evidence and documents, the trial Court as well as the appellate Court have concurrently held that the plaintiffs did not establish their title over the suit properties and dismissed the suit. Aggrieved by the same, the above Second Appeal has been filed.

7. The only question that has to be decided in this Second Appeal is as to whether the suit may be decreed on the available evidence on the side of the plaintiffs?.

8. The survey No of the suit property is R.S.No.90/11 and previously, it was R.S.No.90/9, which is not disputed by the parties and the suit property of 0.20 cents is a portion in the entire extent of 1.40 acres. The alleged encroachment by the first and second defendants is on the Northern side of the suit property, an extent of 0.01 cents, measuring North-South 6', East-West 135'. Similarly, 'B' schedule property is an extent of 0.1 ½ cent, measuring, East-West 135' and North-South 2'. As stated earlier, on the Northern side of the suit property is the property of the first and second defendant and on the Southern side of the suit property is the property of the third defendant.

9. When the plaintiffs have specifically come up with the case of the trespass by the defendants, the burden is on the plaintiffs to establish the same. Ex.A1 is the patta dated 30.05.1995, in favour of the first plaintiff and Ex.A2 is another patta in favour of the second plaintiff dated 20.09.1970. Other than these two documents, the plaintiffs have not filed any other document to prove their ownership of the possession of the suit properties. The second plaintiff as P.W1 had deposed that on the 0.20 cents, that was allotted by the Government in their favour, the first and second defendants have trespassed into an extent of 0.01 cent and the third defendant trespassed into an extent of 0.0 ½ cents on the Southern side. However, the said allegation was denied by the defendants, contending that the Government had issued patta in his favour for 0.13 cents of the suit property.

10. From the evidence available and on a wider perception, it can be seen that the parties have been in possession of the suit properties as claimed by them, however, without knowing correct measurements. More so, P.W.1 had deposed that he is only ½ kilo metre away from the suit property and he has been living only there. He had never lived in the suit property. He has admitted that there is no documentary evidence to prove his

possession. Similarly, D.W.1 had also deposed that 0.13 cents in Survey No.90/7, belongs to the first and second defendant and Survey No.90/12, belongs to the third defendant. Though the parties have contended about the extent in their possession, there is no evidence to show that there was trespass by the defendants. In the plaint, it was averred that the first and second defendants have trespassed into the suit property during February 1997 and the suit was filed on 04.04.1997. However, it was numbered only in the year 2000. Ex.B1-Sale deed, in favour of the defendants was executed in the year 1976, which is standing in the name of the father of the defendants. The thorough scrutiny of Exs, A2 and B1-sale deeds and also Ex.B5-Patta, would go to show that the suit properties were classified as "Grama Natham" and the plaintiffs were assigned 0.20 cents in Survey No.90/11 and for, the first and second defendants, 0.13 cents were allotted in S.No.90/7 and 0.05 cents in Survey No.90/9, in favour of the third defendant. It is also admitted that the plaintiffs never lived in the suit properties, as it is a vacant site and they are living only in a house $\frac{1}{2}$ kilo metre away from the suit properties. Though the pattas were granted in favour of the plaintiffs, they had not taken care of the same and after a lapse of five years, they have filed the suit with an ulterior motive.

11. An Advocate Commissioner was also appointed, who had filed a report specifically stating that though there are trees on the suit properties and the plaintiffs have not explained/mentioned about the same in their plaint schedule properties. The Commissioner had also stated in his report that the trees would be approximately 15 years old. The Advocate Commissioner has also categorically explained in his report as well as sketch that on the Northern side of the suit property in Survey No.90/12 in a portion, marked as A, A1,D, there was live Bamboo fence and there are several other trees, which have a trunk of more than 3' in diameter. Similarly, on the Southern side of the suit property in Survey No.90/7 as marked in the Commissioner's report as B,G,C2,C1, there are several trees and they are also fenced with bamboo.

12. The learned counsel for the appellant contended that the alleged trespassers is mentioned in the plaint in February 1997 and the suit was filed in April 1997. However, the Commissioner was appointed in the suit only after six and half years. Therefore, even, if the trees that were planted by the defendants were fresh in the year 1997 and on the date of visit of Commissioner after six years, it would have grown in size. It was contended that the report of the Commissioner was misread by the Courts below. Though the said objections raised by the learned counsel for the appellant looks attractive in the first

blush, a careful consideration of the same shows, the cracks within. The Advocate Commissioner has been appointed at the instance of the plaintiffs and if they were aggrieved by the report, the same should have been clarified by examining the Commissioner or Surveyor. But the plaintiffs have not cared to do so.

13. The plaintiffs though seeks to recover possession of the suit properties had never been in possession of the same and even as admitted by them, they have been living ½ kilo metre away from the suit properties. Though the defendants have claimed their right by adverse possession, the burden is on the plaintiffs to prove their title. Once the plaintiffs establish their title, the onus would shift automatically on the defendants to prove that their possession was adverse to the interest of the plaintiffs. In this case, excepting Exs.A1 and A2, there are no other document to prove the title of the plaintiffs and their possession. When the plaintiffs have not established their title to the suit properties alleged to have been trespassed by the defendants, the burden does not shift on the defendants. The plaintiffs cannot succeed on a mere plea of title. When they come to court with an allegation of a definite act of trespass, they have to prove the same. The plaintiff having failed to establish the alleged trespass, based on which, the recovery of possession is sought for, the Courts below have rightly dismissed the suit. On the given factual matrix, there is no question of law that arises for consideration.

14. In the result, the Second Appeal is dismissed, confirming the judgments and decrees of the Courts below. No costs.

srn

-s/d-

Assistant Registrar (CS-IV)

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Sub-Assistant Registrar

To

1. The Subordinate Judge, Chidambaram
2. The District Munsif cum Judicial Magistrate, Kattumannarkoil
3. The Record Keeper, V.R. Section, High Court, Madras

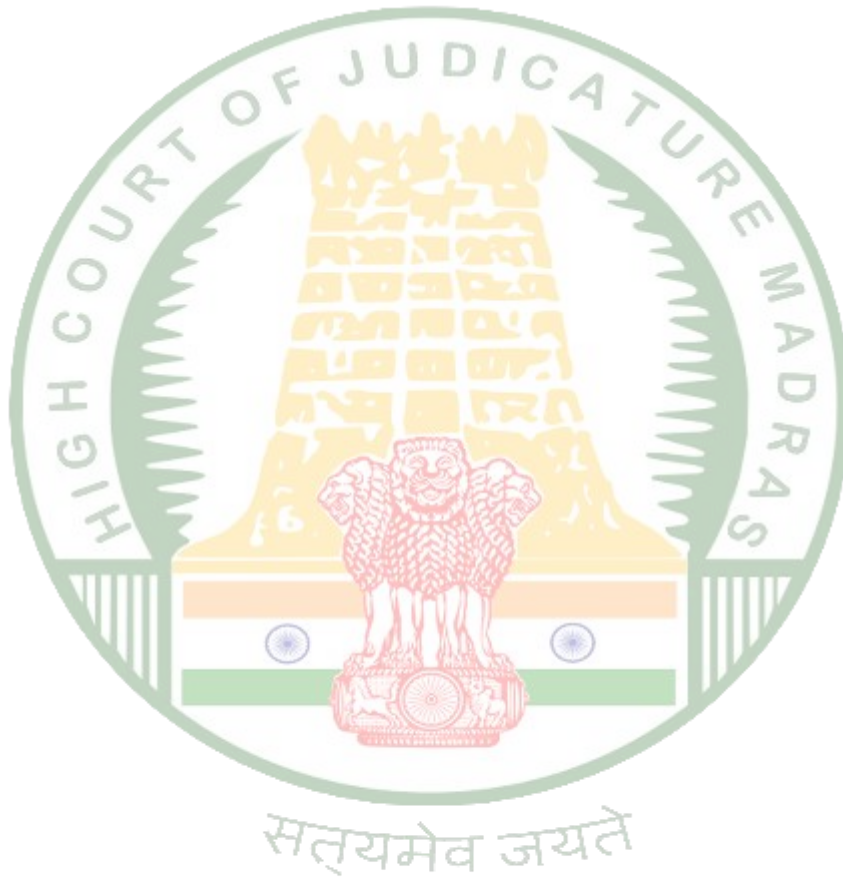
+ 1 cc to Mr.V.Thillaisamy, Advocate SR 58854

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