

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.06.2016

CORAM

THE HONOURABLE MR. JUSTICE P.KALAIYARASAN

S.A. No.1492 of 1998

Sivanandam

..Appellant/Plaintiff

vs.

1. State of Tamil Nadu
Rep. by Collector
Dharmapuri.
2. The Natham
Special Tahsildar
Uthangarai, Pochampalli,
Dharmapuri District.
3. Basha

..Respondents/Defendants

Second Appeal is preferred under Section 100 of the Code of Civil Procedure against the Judgment and Decree, dated 10.07.1998 made in A.S.No.7 of 1997 on the file of the Principal District Judge, Krishnagiri, reversing the Judgment and Decree, dated 23.08.1996 made in O.S.No.42 of 1995 on the file of the District Munsif-cum-Judicial Magistrate, Uthangarai.

For Appellant : Mr.S.Subramanian

For Respondents: No appearance for R1

Mr.S.B.Fazluddin for R3

R2 - Dismissed vide order

of this Court, dated 15.02.2006

J U D G M E N T

This Second Appeal is filed against the Judgment and Decree, dated 10.07.1998 made in A.S.No.7 of 1997 on the file of the Principal District Judge, Krishnagiri, reversing the Judgment and Decree, dated 23.08.1996 made in O.S.No.42 of 1995 on the file of the District Munsif-cum-Judicial Magistrate, Uthangarai.

2. The plaintiff in O.S.No.42 of 1995 on the file of the District Munsif-cum-Judicial Magistrate, Uthangarai is the appellant herein. The plaintiff filed the suit to declare the assignment patta issued by first and second defendants in favour of third defendant as null and void and also for permanent

injunction against the defendants from interfering with the peaceful enjoyment of the suit property by the plaintiff.

3. The parties herein will be referred to according to their rank in the suit.

4. The plaintiff acquired the property shown as ABCD in the plaint plan on 02.02.1990, constructed the building and has been in possession and enjoyment of the same. From the house, on the eastern side, there is 10 feet width pathway leading to Dharmapuri to Tirupattur main road. The above said pathway runs to the east, then to the north, then to the east. The above pathway is in the poramboke land. PQRS in the plaint plan is also part of the above said public pathway. There is no other access, except the above said pathway to the plaintiff's house. The plaintiff and his predecessor have been in enjoyment of the suit property for more than 35 years. D1 and D2 assigned the property in S.No.201/A1, including the suit property (PQRS in plaint plan) to D3. Therefore, the suit has been filed.

5. In the written statement filed by the second defendant and adopted by the first defendant, they contend that the suit property is not the pathway. It is true that the property assigned to D3, is a poramboke land. The said property has been in possession of the third defendant for several years and based on the possession, the suit property was assigned to D3. The plaintiff purchased the property shown as ABCD in the plaint plan only on 02.02.1990 and therefore, he has got no right over the suit property.

6. The third defendant in his written statement, contends that the property now assigned including the suit property was purchased by his grand father, Madhar Sahib on 11.05.1914 and since then he had been in possession of the property. When the third defendant was away from the village for his livelihood, one Abdul Kadar trespassed into the property. The third defendant came to the village in 1987, he got back possession through panchayatdars. The property was assigned to him on the basis of his possession. There is no pathway in the suit property as shown in the plaint plan. The plaintiff has got pathway on the southern side of his property and he has been using only the southern pathway. Therefore, the suit has to be dismissed.

7. The trial Court, after raising issues, took oral and documentary evidence. On the side of the plaintiff, three witnesses were examined and Ex.A.1 to Ex.A.28 were marked. On the side of the defendants, D.W.1 and D.W.2 were examined and Ex.B.1 to Ex.B.8 were marked. The Commissioner's Report and plan were also marked as Ex.C.1 and Ex.C.2.

8. During the pendency of the suit, the plaintiff has not

pressed the relief of declaration, as the assignment of the suit property to the third defendant was revoked and prosecuted only the other relief of permanent injunction.

9. The trial Court, after discussing the entire evidence, oral and documentary, came to the conclusion that the plaintiff has been in enjoyment of the suit property, i.e., PQRS in the plaint plan, as pathway and granted permanent injunction.

10. The third defendant preferred A.S.No.7 of 1997 on the file of the District Court, Dharmapuri @ Krishnagiri. The First appellate Court, re-appreciated the entire evidence, allowed the appeal, by dismissing the suit, on the ground that when declaratory relief is not pressed, permanent injunction cannot be granted and also rejected the documentary evidence, Ex..A.1 and Ex.A.3 and the Advocate-Commissioner's Report, saying that the Advocate-Commissioner was not examined.

11. The Judgment of the Lower Appellate Court is challenged in this Second Appeal by the plaintiff.

12. While admitting the second appeal, the following Substantial Question of Law was framed :

"In a suit for declaratory relief and injunction, the contesting defendants accepting the prayer of declaration concede and act accordingly, will the consequential injunction become unforceable ?"

13. The plaintiff filed the suit, to declare the assignment issued by D1 and D2 in favour of D3, with respect to the suit property as null and void and also for permanent injunction restraining the defendants from interfering with the plaintiff's enjoyment of the suit property. The plaintiff does not claim the suit property as his own. He claims right of pathway in the suit property, which is a poramboke land. D1 and D2 in their written statement admit that the suit property is a poramboke land. D3 claims possession of the suit property from his forefathers and the same has been rejected by the trial Court with reasons, on the basis of the documentary evidence.

14. The trial Court, in its Judgment observed that the plaintiff filed a memo, not pressing the relief of declaration, as the assignment in favour of D3 with respect to suit property was revoked and proceeded the trial only with respect to the relief of permanent injunction.

15. The Lower Appellate Court, in paragraph 10 of its Judgment, observed that both the appellant as well as the respondents conceded about the cancellation of assignment patta. It is further observed that from Ex.A.28, dated 04.02.1994 of District Revenue Officer's Proceedings that assignment patta

already granted to D3 was cancelled. Since the assignment patta was cancelled during the pendency of trial, plaintiff filed a memo, not pressing the relief of declaration. D3 is not only claiming possession and enjoyment of the suit property, on the basis of assignment patta alone but also claims right through the purchase by his grand father. Therefore, the relief of permanent injunction is independent to that of the relief of declaration, particularly as against D3. However, the relief of permanent injunction sought for as against D1 and D2, being officials issued assignment becomes unnecessary.

16. It is well settled that the Court can mould the relief and the plaintiff is always entitled to get a lesser relief than what he actually sought for.

17. Learned counsel for the appellant cited our High Court ruling in Natarajan v. R.Muthukrishnan, reported in 2001 (4) CTC 513 at P.No.517, for the proposition that the Court has got power to grant smaller relief that may be found to be entitled in law. In the above ruling, it is held as follows, by citing the Supreme Court Judgment :

"5. It is true that the writ petition contained a prayer for the quashing of the gradation list in so far as it related to the inter-se ranking of the petitioner vis-a-vis respondents Nos. 3 to 8 and the petitioner (appellant) had also sought the issuance of a writ of mandamus directing respondents Nos. 1 and 2 to forbear from implementing or acting upon the said gradation list. But subsequent to the institution of the writ petition, the Central Government has refixed the ranks of respondents Nos. 3, 4, 5, 7 and 8 (Telengana officers) and placed them below the appellant thereby redressing the grievance of the appellant in so far as it pertained to the ranking of the aforesaid respondents. It therefore became unnecessary for the appellant to pursue his claim for relief with respect to the ranks assigned to those five respondents. It was under those circumstances that the appellant submitted before the learned single judge of the High Court, at the time of final hearing of the writ petition, that he was pressing the writ petition only in so far as it related to his claim for seniority over the 6th respondent. We fail to see how the fact that the appellant had sought in the writ petition the issuance of a writ of mandamus directing respondents 1 and 2 to forbear from implementing or acting upon the provisional

gradation list will operate to preclude him from seeking a lesser relief, namely, the quashing of the list only so far as it pertains to the fixation of the inter-se seniority between himself and the 6th respondent. The material facts and circumstances had undergone a substantial change subsequent to the filing of the original petition and it was in consequence thereof that it had become unnecessary for the petitioner to pursue his original prayer for the grant of a larger relief. Besides ignoring this crucial aspect, the Division Bench of the High Court has also lost sight of the well established principle that in an action where a party has prayed for a larger relief it is always open to the court to grant him any smaller relief that he may be found to be entitled in law and thereby render substantial justice. The Court can undoubtedly take note of changed circumstances and suitably mould the relief to be granted to the party concerned in order to meet out justice in the case. As far as possible the anxiety and endeavour of the Court should be to remedy an injustice when it is brought to its notice rather than deny relief to an aggrieved party on purely technical and narrow procedural grounds. We do not, therefore, find it possible to uphold the view expressed by the Division Bench of the High Court that since the writ petition was not pressed in so far as it related to the officers belonging to the Telengana region the question of inter-se seniority between the writ petitioner and the 6th respondent should not have been considered by the single judge and the writ petition should have been dismissed.

6. Accordingly, we set aside the judgment of the Division Bench and remand the writ appeal to the High Court for fresh disposal in accordance with law. The parties will bear their respective costs in this appeal."

18. Following the above decision and also for the aforesaid reasons, this Court is of the considered view that the lower appellate Court is not correct in dismissing the suit, holding that permanent injunction is not maintainable, when the relief for declaration was not pressed.

19. The Lower Appellate Court, has rejected the

Commissioner's Report in toto, saying that the Advocate-Commissioner was not examined as a witness. The Lower Appellate Court, acted contrary to the legal principle. The report of the Advocate-Commissioner, appointed to inspect the spot and to make investigation together with the evidence enclosed therewith is substantive evidence in the suit. This is clear from the language of rule 10 (2) under Order 26 of CPC.

20. It is not the case of the respondents that the objection was filed for the Advocate-Commissioner's Report and the Advocate-Commissioner was not examined in spite of their request.

21. Further, the Lower Appellate Court, rejected the documentary evidence of Ex.A.1. The reason assigned for rejection is that the document is of the year 1990. The suit is of the year 1991. The pre-suit document, depicting the pathway was rejected, in spite of the fact that there is no whisper or suggestion to the witness through whom the document was marked as to the foul play, if any.

22. The rejection of the Commissioner's Report as well as the above documentary evidence is contrary to the established legal principles and the lower appellate Court ignored material evidence.

23. Where lower Appellate Court committed error in appreciating the evidence and its finding is incompatible with the evidence and materials on record, exercising jurisdiction under Section 100 CPC, High Court can certainly interfere with the findings of lower Appellate Court. The Judgment of the lower Appellate Court is set aside and Judgement of the trial Court is modified and permanent injunction is granted as prayed for by the plaintiff against the third defendant alone.

In the result, the Judgment and Decree of the lower Appellate Court in A.S.No.7 of 1997 is set aside and the Second Appeal is allowed. No order as to costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

tsvn

To

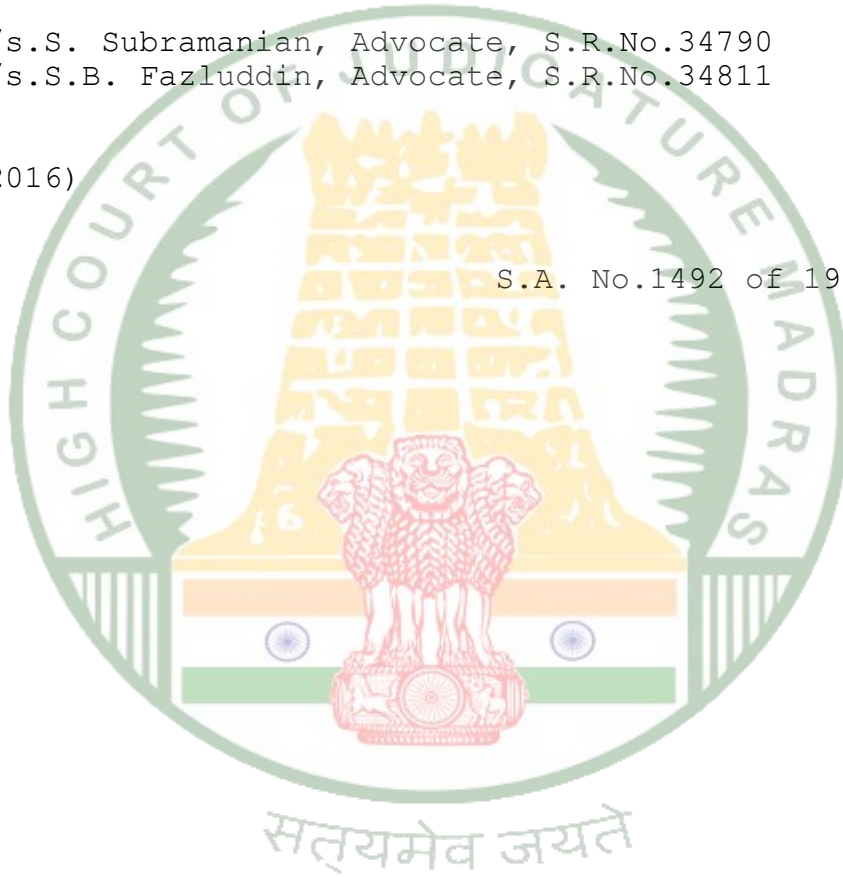
1. The Principal District Judge,
Krishnagiri.
2. The District Munsif-cum
-Judicial Magistrate, Uthangarai.

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VR Section, High Court, Madras-104.

+1cc to M/s.S. Subramanian, Advocate, S.R.No.34790
+1cc to M/s.S.B. Fazluddin, Advocate, S.R.No.34811

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EU(21/11/2016)

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