



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 25.03.2015
CORAM
THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN

Criminal Appeal (MD)No.8 of 2014

WEB COPY

Varadharajaboopathy

... Appellant/Complainant

Vs.

Swarnapandian

... Respondent/Accused

Prayer: Appeal filed under Section 372 of the Code of Criminal Procedure, to set aside the judgment and acquittal order passed by the learned Judicial Magistrate No.I, Nagercoil dated 08.10.2013 in C.C.No.287 of 2010 and convict the accused.

For Appellant	:	Mr.V.Kathirvelu Senior Counsel for Mr.J.John Jayakumar
For Respondent	:	Mr.M.Suri

J U D G M E N T

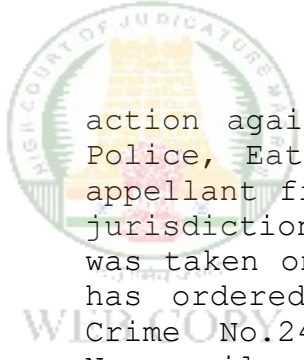
The appellant is a resident of Salem and native of Kanyakumari District.

2. The appellant herein filed O.S.No.69 of 1985 on the file of the Court of Subordinate Judge, Nagercoil, praying for partition and separate possession. The defendants in the said suit are his father(D1) and his brothers(D2 to D5). The respondent/accused herein was arrayed as the fourth defendant.

3. The first defendant/father of the appellant has filed a written statement and subsequently all the defendants were set ex-parte and an ex-parte preliminary decree came to be passed on 22.07.1992.

4. Thereafter, the defendants filed I.A.No. 254 of 1996 for setting aside the ex-parte preliminary decree and it was dismissed on 23.09.1998. The appellant herein filed I.A.No.98 of 1994 in O.S.NO.69 of 1985 on the file of the Principal Sub Court at Nagercoil, for passing final decree proceedings. Except the respondents 2 and 5 namely S.Jegadheesan and S.Soundarrajan, other respondents remained ex-parte and final decree was passed, declaring that in all the items of suit properties the appellant is entitled to 1/6 th share and no appeal has been preferred against the said final decree and it has become final.

5. It is the case of the appellant that subsequent to the final decree he entered into an agreement with one Stanlysam on 4.4.2009 and interdicted purchaser made verification and informed that in the joint patta dated 13.09.2012 in respect of the property in Survey No.223/5 Dharmapuram Village the name of the appellant is not found and the names of his father and brothers have been found. Then only the appellant became aware of the fraud and thereafter, submitted a representation dated 21.04.2009 on the file of Superintendent of Police to take criminal



action against the respondent and it was forwarded to the Inspector of Police, Eatamozhi Police Station and since he did not take action, the appellant filed a petition under Section 156(3) Cr.P.C. on the file of the jurisdictional Magistrate to take appropriate action. The said petition was taken on file in CrI.M.P.No.1393 of 2009 and the jurisdictional court has ordered investigation and file a report based on which a case in Crime No.24 of 2009 was registered by the District Crime Branch, Nagercoil. After conclusion of investigation, referred charge sheet has been filed stating that the matter is purely civil in nature.

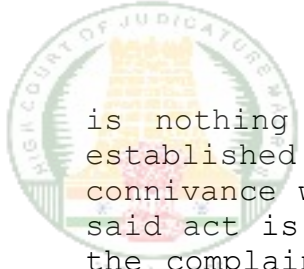
6. The appellant, became aware of the referred charge sheet closing his case as civil in nature, filed a protest petition and it was taken as private complaint in C.C.287 of 2010 and sworn statements of the witnesses were recorded. The court of Judicial Magistrate No.1, Nagercoil on the basis of the private complaint and sworn statements of the witnesses having found cognizance issued summons to the respondent/accused and on his appearance furnished with him the copies of documents under Section 207 Cr.P.C. The appellant/ complainant in order to sustain his case examined himself as P.W.1 and marked Exs. P1 to P6.

The respondent/accused was questioned under Section 313(1)(b) of the Code of Criminal Procedure, 1973, with regard to the incriminating circumstances made out against him in the evidence tendered by the prosecution and he denied it as false. The respondent/accused examined himself as D.W.1 and marked Ex.D1 to D.4. The trial court, on consideration of oral and documentary evidence and taken note of various civil litigations pending between the parties, has found that ingredients of offence under Section 468 IPC have not been made out against the respondent and therefore, acquitted him under Section 248(1) Cr.P.C. by the impugned order dated 8.10.2013. Challenging the legality of the said order of acquittal, the present appeal is filed.

7. Mr.Kathirvelu, learned Senior Counsel appearing for the appellant/private complainant, made the following submissions:

In the suit filed by the appellant for partition in O.S.No.69 of 1989 his father was arrayed as the first defendant and he contested the matter. The other defendants 2 to 5 are the brothers and since he did not participate in the trial all the defendants were set exparte and ex-parte preliminary decree was passed on 22.07.1992 and subsequently the defendants in the said suit filed I.A.No.254 of 1996 for setting aside the ex-parte preliminary decree and the same was set aside on 23.09.1998 and subsequently the appellant took out an application to pass final decree and final decree was passed on 03.09.2002 declaring 1/6th share in all the items of the properties including the property in Survey No.223/5. Though the respondent became aware about the said proceedings, in connivance with his brothers as well as the revenue authorities created patta in his name. The said act constituted the commission of offence under Section 415 IPC but the trial court erroneously took cognizance for the offence under Section 468 IPC and also placed reliance upon testimony of all the living witnesses and in the light of said infirmities the impugned order is liable to be set aside and it has to be once again remanded back to the trial court for fresh adjudication.

8. The learned Senior Counsel appearing for the appellant, on merits of the case, would contend that pendency of the civil proceedings



is nothing to do with the criminal prosecution as the appellant has established that the respondent in spite of having knowledge, in connivance with his brothers managed to get the joint patta and since the said act is per se illegal, trial court ought to have taken cognizance of the complaint with regard to the commission of offence under Section 415 IPC and convict him accordingly but failed to do so and hence prays for setting aside the impugned order.

9. Per contra, Mr.Suri, learned counsel for the respondent would contend that subsequent to the final decree, the appellant, on coming to know about transfer of patta, has filed O.S.No. 721 of 2008 on the file of the District Munsif, Nagercoil and got the patta in his name and the legality of the said decree was challenged by the respondent and his brother namely Mahendran by filing the suit in O.S.No.297 of 2010 on the file of the II Additional District Munsif Court, Nagercoil and the said suit was decreed on 15.07.2013 setting aside the decree passed in O.S.No.721 of 2008. The appellant challenging the legality of the decree dated 15.07.2013 in O.S.No.297 of 2010, filed A.S.No.79 of 2013 on the file of the Subordinate Court, Nagercoil and the same is pending adjudication and therefore, the grant of patta as claimed by the appellant is still at large and the said fact was taken into consideration by the trial court and it rightly arrived at the conclusion holding that the appellant has failed to establish the commission of offence punishable under Section 468 IPC on the part of the respondent and rightly dismissed the complaint and he prays for dismissal of this appeal.

10. This Court has carefully considered the rival submissions and perused the materials filed in the form of typed set of documents.

11. The fact remains that in terms of final decree dated 03.09.2002 in O.S.No.69 of 1985 the petitioner is entitled to 1/6th share in the suit scheduled properties including the property in Survey No.223/5. However the fact remains that the appellant did not levy to execution to get the actual possession of 1/6th portion of the property in question. Therefore, the property remained undivided. The respondent and his brothers claiming title based on the Will dated 02.07.1990 occasioned the joint patta No.2964 in respect of 7 items including the property in Survey No.223/5. The appellant herein has filed O.S.No.721 of 208 against the State and Jurisdictional Tahsildar for getting exclusive patta in his name and exparte decree came to be passed and challenging the said decree, the respondent and his brother namely S.Mahendran, had filed O.S.No.297 of 2010 on the file of the II Additional District Munsif, Nagercoil, against the appellant as the first defendant and 8 others. During the course of trial, the respondent who is the first plaintiff has examined himself as P.W.1 and marked Exs.A1 to A13. On behalf of the defendants, S.Velayutham was examined as D.W.1 and the appellant herein was examined as D.W.2 and Exs.D1 to D7 were marked.

12. A perusal of the said judgment would disclose that there are many litigations pending between the parties which included the appellant herein and the said court vide judgment dated 15.07.2013 has decreed the suit in O.S.No.297 of 2010 and thereby set aside the decree passed in O.S.NO.721 of 2008 filed by the appellant. The appellant aggrieved by the said judgment and decree, filed, an appeal in A.S.No.79 of 2013 on the file of the Subordinate Judge, Nagercoil and the same is pending adjudication. A careful analysis of the above said aspect would disclose that issue pertains to patta in respect of the above said property in question and it is interlinked with the civil proceedings pending between



the parties. As already pointed out A.S.No.79 of 2013 pertains to the same issue filed by the appellant herein is pending adjudication on the file of the Subordinate Judge, Nagercoil and the said aspect has rightly taken note of by the trial court. In so far as legal plea raised by the learned Senior Counsel appearing for the appellant is concerned, it is to be pointed out that it was not put forth before the trial court while adjudicating the private complaint in C.C.No.281 of 2010 and even otherwise, the said submission lacks merits for the reason that in the light of the provision under Section 465 Cr.P.C.

13. Section 465 of Cr.P.C is extracted hereunder:

465. Finding or sentence when reversible by reasons of error, omission or irregularity (1) Subject to the provisions herein before contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error; or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

14. As per the said provision, error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error; or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby. As per Sub Section 2, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

15. As pointed out, it was not even urged before the trial court and even otherwise, in terms of Section 465(1) IPC, it cannot be said the failure of justice has been occasioned.

16. This Court, on an independent application of mind to the materials placed before it, is of the considered view that there is no irregularity, infirmity or error apparent in the impugned judgment passed by the trial court and finds no merits in the appeal. Therefore, the appeal is dismissed. It is made clear that the findings/observations made are only for the disposal of the appeal and the parties herein have to sustain their stand in the pending legal proceedings based on the quality of evidence tendered by them.

Sd/-

Assistant Registrar (T&P)

/True copy/



1.The Judicial Magistrate No.I, Nagercoil

2.The Section Officer, Criminal Section,
Madurai Bench of Madras High Court, Madurai.

+1cc to Mr.M.Suri, Advocate in SR.No.14664

+1cc to Mr.J.John Jayakumar, Advocate in SR.No.15204

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JUDGMENT MADE IN
CRIMINAL APPEAL (MD) No.8 of 2014
25.03.2015