

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.07.2017

PRONOUNCED ON : 07 .08.2017

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.738 of 1999

1.The State of Tamil Nadu,
by the District Collector,
Salem.

2.The Chief Educational Officer,
Salem.

3.The District Educational Officer,
Salem.

4.Head Master,
Government Higher Secondary School,
Kondalampatti,
Salem.

...Appellants

सत्यमेव जयते Vs

1.T.Krishnasamy Chettiar (deceased)

2.R.Kullapadayachi

3.G.Siddhuraj

4.S.Mani

5.K.Suseela

6.V.Rajamani

7.A.Jayalakshmi

8.T.Ravikrishnan

(RR2 to 4 impleaded vide order dated
25.04.2014 made in CMP No.188/2014)

(RR5 to 8 brought as Lrs of the
deceased 1st respondent vide

order of the Court dated 15.10.2014

in CMP No.189 to 191 of 2014)

... Respondents

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree dated 25.09.1998 made in A.S.No.82/1994 on the file of the District Judge, Salem reversing the judgment and decree dated 11.10.1993, made in O.S.No.1647/1987 on the file of the learned Principal District Munsif, Salem.

For Appellants : Mr.T.Jayaramaraj,
Government Advocate (CS)

For R.1 : Died

For RR.2 to 4 : Mr.K.Selvaraj

For RR.5 to 8 : Mr.J.Sudhakaran

JUDGMENT

The defendants are the appellants in this second appeal. The suit filed for injunction was dismissed by the Trial Court. On appeal, the First Appellate Court reversed the judgment and decree of the Trial Court and decreed the suit. Hence, this Second Appeal.

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2. According to the plaintiff, the suit property measuring 11 cents bearing S.No. 158/2 at kondalampatti Village, Salem District was purchased by his mother Venkattamma on 10.03.1935. After the demise of his mother, her other legal heirs released their right over the property in favour of the plaintiff on 27.05.1963. The mutation of revenue records had

been carried out and the property stands in the name of the plaintiff. The Government High School is located encircling the suit land. When the School authorities and some local people wanted the plaintiff to donate the suit property for the school, the plaintiff refused to donate. Therefore, at the instigation of some local people, the fourth defendant who is the Head Master of the High School is trying to encroach upon the suit property and interfere the peaceful possession of the plaintiff by putting up construction over it.

3. Notice under Section 80 of the Code of Civil Procedure was issued to the defendants 2 and 4 on 27.06.1986. Since, the defendants have brought down building materials to put up construction in the suit property, permanent injunction restraining the defendants from interfering the peaceful possession of the plaintiff was sought for.

4. The defendants resisted the suit on the ground that, on 14.05.1970, Thiru. Govindarajulu Chettiar and five others donated vast land inclusive of the suit property for establishing School at their Village. Since then, the suit property is in possession and enjoyment of the fourth defendant school. They never compelled the plaintiff to donate the suit property. The alleged notice issued under Section 80 of the Code of Civil Procedure is defective and the suit as such is bad for non-joinder of necessary parties.

5.The Trial Court rejecting the Patta (Ex.A-3), Chitta (Ex.A-4), Kist receipts (Exs.A-5 to A-7), Title documents (Exs.A-1 and A-2) relied by the plaintiff, dismissed the suit, holding that the plaintiff has failed to prove his possession and peaceful enjoyment over the suit property and also the presuit notice under Section 80 of the Code of Civil Procedure.

6.In the first appeal preferred by the plaintiff, the First Appellate Court, reversed the finding of the trial court and decreed the suit. Therefore, the defendants are before this Court with this Second Appeal.

7.At the time of admission, this Court has formulated the following substantial questions of law:-

“1.Whether the lower Appellate Court exercised the jurisdictional power and right in holding that the respondent/plaintiff is in lawful possession of the suit property?

2.Whether the lower Appellate Court is right in rejecting the exhibits D1, D2, D4 and D5 without assigning any proper and valid reason thereof ?

3.Whether the lower Appellate Court is right in rejecting the exhibit C1 and C2 based on the spot inspection conducted by the Commissioner ?

4. Whether the lower Appellate Court is right in determining the relief granted to the respondent/plaintiff as prayed for holding that the plaintiff is in possession in the absence of any documentary evidence to that effect while rejecting the exhibits relied on by the appellants herein. "

8. The learned Government Advocate (CS) challenges the First Appellate Court judgement on three fronts. First, the Advocate Commissioner has clearly pointed out that the suit property falls within the compound wall of the school premises. While the property being in possession and enjoyment of the 4th defendant school as playground and class room, bare injunction without seeking declaration of title and possession, is not sustainable. Second, the statutory notice issued under Section 80 of the Code of Civil Procedure was served only on the defendants 2 and 4, that too long before the institution of the plaint. Since, the other defendants were not served with notice under Section 80 of the Code of Civil Procedure, the suit is not maintainable. Lastly, the description of the property was not properly defined. No linear measurement given in the plaint. Though, it is pleaded that Survey Number 158/2 was subdivided into 158/2 A and 158/2B, the schedule of the property is mentioned as 158/2 measuring 11 cents, which is factually incorrect.

9. The First Appellate Court, on reappriciation of the evidence such as the testimony of DW-1, Ex.B-1 - gift deed executed by Thiru.Govindrajulu

Chettiar and others in respect of S.Nos.158/2,158/4 and 158/5, Exs.A-1 to A-3 – which are the title documents and patta issued to the plaintiff, Ex B-5 - approved plan for the school building and Exs C-1 and C-2 the Advocate Commissioner's report and sketch, had given a finding, on fact that, as far as 11 cents land in S.No.158/2B, stood in the name of Thiru.Krishnasamy Chettiar - the plaintiff, it is not part of the property gifted to the school by Thiru.Govindarajulu Chettiar and others, neither Thiru.Krishnasamy Chettiar the title holder a party to the gift deed - Ex B-1. Further, D.W-1 candidly admits the title of the plaintiff in respect of the 11 cents, which is the subject matter of the suit, the First Appellate Court allowed the suit.

10.The defence taken by the defendant is that, all along the suit property was in possession and enjoyment of the fourth defendant school not accepted by the First Appellate Court because, as per the school building approved plan - Ex B-5, neither the suit property of 11 cents in S.No. 158/2B is included nor construction of compound wall encircling it was permitted. The Commissioner who inspected the suit property in the year 1992, two years after instituting the suit has found that a compound wall was built annexing the suit property. Therefore, the First Appellate Court has arrived at the conclusion that the portion of the property which is subject matter of the suit has been encroached subsequent to the suit. Following the principle that in case of vacant land the possession goes with title, the First Appellate Court has allowed the suit.

11.It is not the case of the defendants that on the date of issuing the statutory notice or on the date of filing the suit, the compound wall was in existence and the compound wall encompass the suit property. Except stating that the suit property is being used as play ground, there is no specific plea that, ever since 1970, the school is in possession and enjoyment of the suit property open, continuous and exclusively. The fourth defendant school was gifted 6 acres of land by Thiru.Govindarajulu Chettiar and others. The plaintiff predecessor in title is not a party to the gift deed. His title to the 11 cents of land is traceable through Ex.A-1 which is a sale deed of the year 1935. Admittedly, the disputed 11 cents is over and above the 6 acres of land gifted to the school.

12.The Advocate Commissioner's report marked as Ex. C-1 is dated 12.01.1993. In his report, it is stated that notice to parties were served on 03.01.1990 and 27.11.1992. But finally, he visited the suit property on 7.12.1992 and 12.12.1992 . This clearly indicates that, in the suit instituted as early as on 08.10.1987, the Commissioner has inspected the suit property nearly 5 years after the suit. That is the reason why the First Appellate Court has rightly not given much credence to the Commissioner's report. It is obviously seen that the defendants have prevented the Commissioner from inspecting the property for nearly two years and after putting up structures which does not form part of the approved plan, allowed him to inspect the property. Therefore, the day on which the suit was laid,

the subject land is presumed to be vacant and under such circumstances, being the title holder, the suit for bare injunction filed by the plaintiff is sustainable. Omission to seek declaration or delivery of possession does not affect the plaintiff case.

13.It is also incorrect to say the First Appellate Court has overlooked to appreciate Exs.B1,B2,B4 and B5. In fact, the First Appellate Court has compared the gift deed in favour of the defendants and the title deed of the plaintiff and has held that the 11 cents in S.No. 158/2 B is not part and parcel of the gift deed.

14.Lastly, no doubt in the suit schedule, the linear measurement and sub-division of the survey number is not given. But, the parties were aware of the exact identity of the property in dispute and had contested the same. The commissioner in his report has also clearly stated about the identity of the property and recorded its measurement. It is also found in the Commissioner's report that part of the property in S.No.158/2 B, class room exist and the same is marked as 'EFGH'. The remaining vacant portion is used as playground. Therefore, from the perusal of the records, this Court finds no legal infirmity in the finding of First Appellate Court to interfere its judgment. On factual aspect, the finding of the First Appellate Court is probable. Hence, under section 100 of the Code of Civil Procedure, in the

absence of any perversity, no scope to interfere.

15. In **Union of India vs. Ibrahim Uddin** (2012 (8) SCC 148), the Hon'ble Apex Court has held as follows:-

"Section 58 of the Indian Evidence Act provides that a fact may not need to be proved in any proceeding which the parties thereto agreed to admit at the hearing or which, before the hearing, they agree to admit by any writing under their hands or which they admitted by their pleading, even in that case court may, in its discretion, even if such a admission has been made by the party, require the fact admitted to be proved otherwise than by such admission. In fact, admission by a party may be oral or in writing. 'Admissions' are governed under Sections 17 to 31 of the Evidence Act and such admission can be tendered and accepted as substantive evidence. While admission for purposes of trial may dispense with proof of a particular fact. Section 58 deals with admissions during trial i.e. at or before the hearing, which are known as judicial admissions or stipulations dispense it with proof. Admissions are not conclusive proof but may operate as estoppel against its maker. Documents are necessarily either proved by witness or marked on admission."

16.D.W.1 in his deposition, admits that the title in favour of the plaintiff. Therefore, as pointed out above by the Hon'ble Supreme Court, such admission operate as estoppel against its maker. While so, when there is no dispute with respect to title of the plaintiff, suit for bare injunction is maintainable.

17.As far as the defects pointed out by the learned Government Advocate (CS) regarding Section 80 of the Code of Civil Procedure, the First Appellate Court has observed that attempt to encroach upon the land of the plaintiff is not an act purporting to be done by the public officer in his official capacity and therefore, noticed issued under Section 80 Code of Civil Procedure, itself is not required in the facts and circumstances of the case. This Court concurs the said view without any reservation.

18.On perusal of the evidence, the finding of the First Appellate Court is found to be justifiable therefore, on this ground also, the appellants fail.

19.In the course of arguments, the learned counsel for the respondents 5 to 8 submitted that pending Second Appeal, the general public of the Kondalampatti Village and the Parents Teachers Association has requested them to gift away the portion of land where the school has put up construction and the vacant land may be retained by the title holder namely, the respondents 5 to 8 herein and pursuant to the said compromise, they

have written to the authorities, the appellants herein on 20.03.2015 indicating the terms of contract and if the appellants are agreeable for that, they are ready to settle 2104 sq.ft of land which includes the building portion marked as 'EFGH' in the Commissioner's report and the land appurtenant to the building.

20.The learned Government Advocate (CS) appearing for the appellant has no instruction about the proposal. His submission in this regard is that the vacant portion which the respondents want to retain shall also be magnanimously donated for the school purpose. Such a proposal cannot be forced upon the respondents by the Court. It is for them to decide whether to donate the entire 11 cents of land which is about 5040 sq.ft or to donate a portion of the land where the appellants have already put up construction. This aspect is left open for the respective parties to decide.

21.In the said circumstances, this Court takes judicial notice of the fact that, the respondents 5 to 8 herein have filed an affidavit expressing their willingness to gift the suit property measuring 2104 sq.ft in favour of the fourth respondent school. Rough Sketch is also annexed along with the said affidavit. The sketch indicates that the land on which Class room and nutrition meal shed located and land opportuntent to that measuring about 2104 sq.ft is agreed to be gifted in favour of the school.

22.To give quietus to the dispute in an amicable manner, without affecting the interest of the school and general public, the appellants are advised to accept the proposal offered by the respondents 5 to 8. Accordingly, the Second Appeal is disposed of. No costs.

jbm

Index: Yes/No

Speaking order/non speaking order

Note:Issue order copy on 08.08.2017

To

1.The Subordinate Judge,
Namakkal District.

2.The Principal District Munsif,
Namakkal.

7.08.2017



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Dr.G.JAYACHANDRAN.J.,

jbm



**Pre Delivery Judgment made in
Second Appeal No.738 of 1999**

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