

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 04.09.2017	Delivered on: 07.09.2017
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CORAM:

THE HONOURABLE MR.JUSTICE S.BASKARAN

Second Appeal No.542 of 2013
and M.P.No.1 of 2013

- 1.The District Collector
Office of the District Collector
Nagapattinam having his
Office at Nagapattinam
Nagapattinam Taluk
and District Munsif
 - 2.The Tahsildar
Taluk Office
Nagapattinam
having his office at
Nagapattinam Taluk and District Munsif
 - 3.The Executive Officer
Thittacherry Town Panchayat
Having his office at Thittacherry Post
Nagapattinam Taluk
and District Munsif
- ... Appellants in Trial Court
Defendants 1 to 3
in O.S.220/05

Vs.

- 1.Abdul Jaffar
 - 2.Sabul Hameedu, S/o.Abdul Jaffar
 - 3.Hasantheen
 - 4.Ansari
- ... Respondents in Trial Court
Plaintiffs and defendants 4 to 6 in
O.S.220/05

Prayer : Second Appeal filed under Section 100 of C.P.C., against the Judgment and Decree dated 04.03.2011 made in A.S.No.24 of 2010 on the file of Court of the Subordinate Judge, Nagapattinam, confirming the judgment and decree dated 20.08.2009 made in O.S.No.220 of 2005, on the file of District Munsif Court, Nagapattinam.

For Appellants : Mr.T.Jayaram Raj
Government Advocate
For Respondents: Mr. G.Thiyagarajan for R1
R-2 to R-4 Private Notice served.

J U D G M E N T

The defendants 1 to 3 in the suit have come forward with this Second Appeal aggrieved over the Judgment and Decree dated 04.03.2011 made in A.S.No.24 of 2010 on the file of Court of the Subordinate Judge, Nagapattinam, confirming the judgment and decree dated 20.08.2009 made in O.S.No.220 of 2005, on the file of District Munsif Court, Nagapattinam.

2. The following substantial questions of law are raised by the appellants in this Second Appeal:-

"(i) Whether the court erred in holding that the suit is not barred under Section 23 of Tamil Nadu Kuduyiruppu (Conferment of Ownership) Act, 1971 ?

(ii) Whether the learned Judge justified to grant permanent injunction against the appellants when the court declined to grant the relief of declaration of the suit property ?

(iii) Whether the learned Judge did not consider that the suit itself is barred by Resjudicata and not maintainable when in suit of O.S.No.494 of 2000 is filed under representative capacity and the respondent did not prefer any appeal against the judgment and decree of O.S.No.494 of 2000.

(iv) Whether the learned Judge erred by allowing the inconsistent plea of claiming under Tamil Nadu Kuduyiruppu (Conferment of Ownership) Act, 1971 and perfected the title by adverse possession ?

(v) Whether the lower court erred in holding that the encroacher is entitled for permanent injunction when the plea of declaration is refused ?"

3. The suit has been laid by the plaintiff /1st respondent herein, seeking declaration that the decree pronounced in O.S.No.494 of 2000 on 23.06.2003 was obtained fraudulently and so it is nonest and for a permanent injunction restraining the defendants, their men and agents from causing any interference in plaintiff's enjoyment of the suit property till he is evicted from the suit property under due process of law.

4.1. The suit property is situated at Tachari Thoppu in Thittacherry Village and the plaintiff was stated to be residing and previously house tax assessment of suit property was assessed in the name of plaintiff's mother Kanagambal and before her in the name of plaintiff's father Rajagopal and the

plaintiff is the son of said Rajagopal and Kanagambal and previously he was named as Mathiazagan and thereafter plaintiff converted as a Muslim and his name is Abdul Jaffar.

4.2. As per the plaint averments, the suit property is under the enjoyment of plaintiff continuously for 30 to 40 years and plaintiff is an agricultural labour and so he is entitled for the benefits of Kudiyuruppu Act, 40/71 amended in the year 1990 and so the ground site of suit property as per the said Act belongs to the Plaintiff. Further plaintiff is also under the enjoyment of suit property for several years continuously without any interference and so plaintiff has perfected title to the suit property by way of adverse possession.

4.3. According to the plaintiff, the house in the suit property where plaintiff resides bears Door No.3 with E.B.Service Connection 1272 and for the said address, ration card and voters identity card are issued to the plaintiff and all those documents prove plaintiff's continuous enjoyment of the suit property for several years.

4.4. According to Plaintiff, on 28.06.2005 the fourth and fifth defendants claimed that they filed O.S.No.494 of 2000 before Nagapattinam District Munsif Court and obtained a decree over the suit property that it was gifted by a private person to the Panchayat. It is further stated that the as claimed by the defendants 4 and 5, the gift is said to have taken place five years back and at that time, the donor was not in possession of the property but the plaintiff was in possession of suit property and therefore, the Panchayat cannot have any right over the suit property.

4.5. The plaintiff further states that the Revenue Records also shows that the suit property is classified as Nanja Land and not as road and therefore, the decree obtained to remove the encroachment from the suit property in O.S.No.494 of 2000 has been fraudulently obtained and hence it is nonest. It is also submitted that in the said O.S.No.494 of 2000, the plaintiff who is in possession of the suit property was not a party and without showing his possession, the said decree was obtained and therefore, the decree without impleading him being a necessary party is not a valid one.

5.1. On the other hand, opposing the claim of the plaintiff, it is contended by the defendants that since the claim of the plaintiff that he is in possession of Kudiyuruppu, the type of suit is expressly barred by Section 23 of Tamil Nadu Occupants of Kudiyuruppu (Conferment of Ownership) Act, 1971 and as per the said provisions of the Act, plaintiff has to approach the authorized Officer and could not file suit before the civil court. The plaintiff has to prove that he has perfected title to the suit property by way of adverse possession. It is further stated that the plaintiff raised inconsistent pleas that he claims right over the suit property under Kudiyuruppu Act but also claims title to the suit property by way of adverse

possession and hence the suit is not maintainable. It is also stated that O.S.No.494 of 2000 on the file of District Munsif Court, Nagapattinam was contested by the third defendant/Executive Officer, Special Village Panchayat, Thittachery and so the defendants denied that that decree was obtained in that suit in collusion of other defendants. The defendants also preferred an appeal before Additional Sub Court, Nagapattinam, against the decree passed in the said O.S.No.494 of 2000 and it was also dismissed.

5.2. In the written statement, it is also averred that the suit property belonged to one Sheik Alaudheed and later he executed an Inam Sasanam in favour of this defendant Thittacherry Special Panchayat for laying Thar road for the welfare of public and so in view of the said Inam Sasanam, this defendant/Panchayat is the absolute owner of the suit property and got every right to lay the road and so the plaintiff is only a squatter in the suit property and so he is not entitled for the discretionary relief sought for in this suit and hence, prayed for dismissal of the suit before the court below.

6. The fifth defendant also filed Written Statement which is also adopted by fourth defendant, wherein, it is stated that the said defendant also instituted O.S.No.494 of 2000 in the representative capacity which also includes the plaintiff and obtained a decree on 23.06.2003 which was also confirmed by the Nagapattinam Additional Sub Court in A.S.No.13 of 2003 on 15.06.2004 and hence the suit is barred by principle of resjudicata since the judgment and decree in O.S.No.494 of 2000 is also binding upon the plaintiff. It is also stated that the judgment and decree in O.S.No.494 of 2000 has been confirmed in A.S.No.13 of 2003. The defendants also denied the plaintiff's enjoyment of suit property for more than 40 years and also denied that the plaintiff is the owner of the suit property by virtue of benefits of Kudiyuruppu Act.

7. According to defendants, there exists a village Kacha Road for more than 80 years connecting the Villages Thittacherry and Kattumangudi and people used to travel from Thittacherry to Piragramam via Katturmanargudi and the said Main Road had its existence in the private property belonging to one Sheik Alautheen who was then Panchayat President of Katturmangudi and out of benevolence he gifted 24 cents in favour of Thittacherry Town Panchayat by means of a Registered document for the purpose of laying a pucca road for the benefit of public and consequently there was action taken by the Town Panchayat for Revenue reason against the trespassers who caused hindrance and obstacles to the passers by and so O.S.No.494 of 2000 was filed as a representative suit against the Government for removal of encroachments and to extend the road to its full width and length and when the suit was in execution stage, the plaintiff

has come forward with the suit to squat upon the property illegally against the interest of villagers and public in general and so this suit is not maintainable.

8. The trial court after considering the oral and documentary evidence adduced by both sides has rejected the prayer for declaration but ordered for permanent injunction and aggrieved by the said judgment, the defendants 1 to 3 The District Collector, The Tahsildar, Nagapattinam Taluk, The Executive Officer, Thittacherry Town Panchayat, filed A.S.No.24 of 2010 and the defendants 4 and 5 viz., Sabul Hameedu and Hasantheen have filed A.S.No.55 of 2010. The First Appellate Court has taken both appeals and disposed of by a common order dated 4th March 2011.

9. The First Appellate Court after considering all the averments and grounds raised before it concluded that from the evidence of D.W.1 and D.W.2 and the documents such as house tax receipts, EB card and Election Identity Card clearly shows that the plaintiff is in continuous possession of the suit property and the Written Statement filed by the Thittacherry Panchayat in O.S.No.494 of 2000 revealed that the road which is the gifted property has already been formed to the necessary extent and there is no requirement for removing the encroachment. It is also held that since the plaintiff is in possession of suit property as on the date of plaint, he is entitled for the relief of permanent injunction as concluded by the trial court and declined the declamatory relief sought by the plaintiff. In respect of contention of the defendants that inconsistent plea has been taken by the plaintiff in the suit, the First Appellate Court held that the plaintiff has not sought for a declaration of his title to the suit property and hence the said contention is not acceptable. It is also pointed out by the First Appellate Court that the plaintiffs in O.S.No.494 of 2000 have failed to implead the plaintiff in the present suit as a party and therefore the judgment and decree passed by the District Munsif, Nagapattinam, in O.S.No.494 of 2000 is not binding on the plaintiff; further the judgment and decree passed in O.S.No.494 of 2000 which was filed by the plaintiffs therein in representative capacity is not binding on the plaintiff and the said judgment and decree do not operate as resjudicata for this suit. The First Appellate Court also held that Exs.A.2 to A.8 will prove that the suit property is in continuous possession and enjoyment of the plaintiff and therefore, the trial court was right in granting the relief of permanent injunction to the plaintiff. Thus the First Appellate Court confirmed the trial court finding and dismissed the appeals.

10. Aggrieved over the said conclusion of the First Appellate Court, the defendants 1 to 3 are before this court

contending that the property was gifted by Shiek Alautheen for the benefit of villagers to form the new road connecting the villages and therefore the encroachment made by the plaintiff/first respondent herein and the others are not entitled to maintain their possession against the interest of other villagers. It is also contended that suit for permanent injunction is not maintainable since the plaintiff is not the owner of the property. Further, the plaintiff who filed O.S.No.220 of 2005 has not issued 80 CPC notice to the authorities/appellants herein. It is further stated that the plaintiff simply filed 80(2) application and got relief from the court with regard to dispensation of 80 CPC notice. The plaintiff without any documentary proof claimed that he is the owner of the property and sought for declaration that the decree pronounced in O.S.No.494 of 2000 was obtained fraudulently and is nonest, which is unsustainable. The learned Government Advocate (CS) also invited the attention of this court to the schedule of suit property wherein it is stated as under:-

“எல்லை விபரம் வடக்கில் மதகு, தெற்கில் பக்கிரியம்மாள் வீடு கொல்லை, கிழக்கில் கண்ணி, மேற்கில் ரோடு / இதற்குள் பட்டது.”

The learned Government Advocate submitted that the one of the boundaries adjoining the suit property is the water body and therefore, removal of encroachment is necessary in the interest of villagers. The learned Government Advocate (CS) relied upon the Ruling of the Supreme Court reported in AIR 1997 Supreme Court 2181 [State of Himachal Pradesh Vs. Keshav Ram and others], wherein it is held as under:-

“In the absence of the very order of the Assistant Settlement Officer directing necessary correction to be made in favour of the plaintiffs, it is not possible to visualize on what basis the aforesaid direction had been made. But at any rate such an entry in the Revenues papers by no stretch of imagination can form the basis for declaration of title in favour the plaintiffs. To our query as to whether there is any other document on the basis of which the plaintiffs can claim title over The disputed land, the learned counsel for the plaintiffs- respondents could not point out any other document apart from the alleged correction made in the register pursuant to the order of the Assistant Settlement Officer. In our considered opinion, the courts below committed serious error of law in declaring plaintiffs' title on the basis of the aforesaid order of correction and the consequential entry in the Revenue papers. In the circumstances the appeal is allowed and the judgment and decree passed in all the there forums are set aside. The plaintiffs' suit stand dismissed. There will be no order as to costs. ”

The learned Govt. Advocate also relied on the ruling reported in CDJ 2011 SC 093 [Jagpal Singh & others Vs. State of Punjab and others] , wherein, it is held as under:-

"The appellants herein were trespassers who illegally encroached on to the Gram Panchayat land by using muscle power/money power and in collusion with the officials and even with the Gram Panchayat. We are of the opinion that such kind of blatant illegalities must not be condoned. Even if the appellants have built houses on the land in question they must be ordered to remove their constructions, and possession of the land in question must be handed back to the Gram Panchayat. Regularizing such illegalities must not be permitted because it is Gram Sabha land which must be kept for the common use of villagers of the village.

16. The present is a case of land recorded as a village pond. This Court in Hinch Lal Tiwari vs. Kamala Devi, AIR 2001 SC 3215 (followed by the Madras High Court in L. Krishnan vs. State of Tamil Nadu, 2005 (4) CTC 1 Madras) held that land recorded as a pond must not be allowed to be allotted to anybody for construction of a house or any allied purpose. The Court ordered the respondents to vacate the land they had illegally occupied, after taking away the material of the house. We pass a similar order in this case.

17. In this connection we wish to say that our ancestors were not fools. They knew that in certain years there may be droughts or water shortages for some other reason, and water was also required for cattle to drink and bathe in etc. Hence they built a pond attached to every village, a tank attached to every temple, etc. These were their traditional rain water harvesting methods, which served them for thousands of years."

Hence, the appellants seek to set aside the finding of the First Appellate Court in respect of Injunction and to dismiss the suit in total.

11. In spite of notice being served, there is no appearance for respondents 2 to 4. Further, as pointed out, in spite of the First Appellate court coming to the conclusion that the plaintiff is not entitled for declaration, the same is not challenged and no appeal is preferred by the plaintiff/respondent against the said conclusion. Admittedly the suit property is in possession of the plaintiff and the evidence of D.W.1 and D.W.2 also corroborates the same. The finding of the First Appellate Court in that regard is not seriously challenged and no serious valid issue is raised by the appellants in that regard in the grounds of the Second Appeal

except stating that the plaintiff is a trespasser and as such he is not entitled for the relief of permanent injunction.

12. Thus, admittedly the plaintiff is in possession of the suit property and the same is not disputed by the defendants 1 to 3/appellants herein/Government officials. However, as the plaintiff is found not entitled for declaration as sought for by him and both the courts below negatived the said prayer, in such circumstances, the appellants herein/Government/owner of the property is at liberty to take steps for eviction by following the due process of law, if they are entitled to. Relief of permanent injunction granted in favour of the plaintiff is subject to the appellants/Government authorities/owners taking steps for eviction of Plaintiff by following the due process of law. The point is answered accordingly.

13. The finding of the First Appellate Court is modified to the extent indicated above. The Second Appeal is disposed of accordingly. No costs. Consequently, connected MP is closed.

Sd/--

Assistant Registrar(co)

//True Copy//

Sub Assistant Registrar

To

- 1.The Subordinate Judge, Nagapattinam,
- 2.The District Munsif Court, Nagapattinam.

Copy to:The Section Officer, V.R.Section,
High Court, Madras.(2 copies)

+lcc to Mr.G.Thyagarajan, Advocate Sr.No.64715

+lcc to Special Government Pleader SR.No.63926

Second Appeal No.542 of 2013

PVS (CO)

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