

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reserving the Judgment : 20.07.2017	Delivered on : 28.07.2017
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CORAM :

THE HONOURABLE MR.JUSTICE S.BASKARAN

Second Appeal No.601 of 2013
and
M.P.No.1 of 2013

- 1.Gunasekaran
- 2.Kannan
- 3.Madusudhanan
- 4.Bashyarangan
- 5.Sathiyabama
- 6.Vimala
- 7.Priya

... Appellants/Plaintiffs 3 to 9

Vs.

1. The District Collector
Villupuram District
2. The Assistant Divisional Engineer
Highways and Rural Works Department
Gingee
3. The Junior Engineer
Highways and Rural Works Department
Gingee

... Respondents/Defendants
1 to 3

Prayer : Second Appeal filed under Section 100 of C.P.C., against the Judgment and Decree dated 27.01.2011 in A.S.No.31 of 2009 on the file of Sub Judge, Gingee, reversing the decree and judgment dated 31.08.2009 in O.S.No.67 of 2000 on the file of Additional District Munsiff, Gingee.

For Appellants : Mr.G.Rajan

For Respondents : Mr.T.JayaramaRaj

J U D G M E N T

Challenge in the second appeal is made by the plaintiffs 3 to 9 against the judgment and decree dated 27.01.2011 passed by the Subordinate Judge, Gingee, in A.S.No.31 of 2009 reversing

the judgment and decree passed in O.S.No.67 of 2000 by the Additional District Munsif, Gingee, who decreed the suit as prayed for by the plaintiffs granting declaration and injunction. The following are the questions of law raised by the appellants/plaintiffs in this Second Appeal:-

"(A) Is not the First Appellate Court wrong in reversing the decree and judgment of the trial court when the plaintiff has proved his title and possession on the basis of Ex.A.1 and in the absence of any contra evidence adduced by the defendants to disprove the same ?

(B) Is not the First Appellate Court wrong in reversing the decree and judgment of the trial court which is based upon the appreciation of the documentary evidence and the credibility of witnesses, merely on the basis of surmises and conjectures ?

(C) Whether the First Appellate Court is correct in allowing the appeal by ignoring the voluminous documentary and oral evidence submitted by the plaintiffs to prove that the sale of genuine under Ex.A.1 and the plaintiffs are in long and continuous possession of the suit property without any interruption?

(D) Is not the First Appellate Court wrong in decreeing the suit when the defendants, who are the Government authorities failed to produce any revenue records to show that the property is classified as "Government land"? "

2. The suit has been laid by the plaintiffs 3 to 9/appellants herein i.e., the Legal Heirs of the deceased 1st and 2nd plaintiff, who died pending suit and the LRs are brought on record as plaintiffs 3 to 9. The suit in O.S.No.67 of 2000 was filed seeking declaration that the suit B Schedule property belongs to them and to restrain the defendants/Highway Authorities from demolishing the building constructed in the said suit B schedule property.

3. According to the plaintiffs, the suit A schedule property excluding superstructure was originally owned by Saithan Sahibu and he was in the enjoyment of the property. One Singarammal @ Savithriammal purchased the ground excluding the superstructure from Saithan Sahibu on 21.2.1968 as per Ex.A.1 sale deed and she has been in continuous possession and enjoyment of the property. Subsequently on 04.02.1985, the land in A schedule property excluding the superstructure was purchased by the deceased/1st plaintiff from Singarammal @ Savithriammal under Ex.A.23 sale deed and ever since, the said property is in possession of the plaintiffs. After purchasing the property, the 1st plaintiff

applied for necessary permission to put up superstructure and accordingly permission was granted by the concerned Panchayat on 13.07.1986 and he put up the construction. The 1st plaintiff availed loan of Rs.40,000/- from the Housing Society in Gingee, under loan No.242 and the same is yet to be settled. The 1st plaintiff produced Pass Book relating to the said house loan as Ex.A.2. The plaintiffs also state that after completing the construction of the house in 1987, the 1st plaintiff obtained electricity connection in his name under E.B.Connection No.84 and 85 and thereafter regularly paid house tax as well as Electricity charges. The plaintiffs produced house tax receipts as Ex.A.3 to Ex.A.5, water tax receipts in the name of 1st plaintiff as Ex.A.6 to Ex.A.9 and the E.B.Card receipts as Ex.A.10 to Ex.A.17. The plaintiffs state that to the east of the A schedule property, a tar road is running from north to south and the same is with the Highways Department. The plaintiffs state that the same was originally a Poramboke patai and the same was subsequently transferred to Highways and the plaintiffs have no knowledge of the same since they were not served with any notice. While so, the 2nd and 3rd defendants, without giving any notice, informed the plaintiffs on 18.05.1997 that the suit B schedule property which is part of the suit A schedule property belongs to Highways Department and directed the plaintiffs to remove the superstructure put up by them in the said B schedule property. Thereafter, the 1st plaintiff approached this court by filing W.P.No.7428 of 1997 contending that no notice was issued before ordering removal of superstructure and the copy of the order passed in the said writ petition is produced as Ex.A.18. According to the plaintiffs, in the said W.P., the authority concerned was directed to take steps for eviction after giving notice to the plaintiffs. Even thereafter, without issuing any notice and conducting enquiry, the 2nd and 3rd defendants again issued another order dated 11.08.1999 to the plaintiffs asking them to remove the superstructure in the suit B schedule property and aggrieved over the same, the 1st plaintiff again approached this court by way of W.P.14541 of 1999 wherein, the defendants were directed to issue notice and conduct enquiry properly before passing any orders of eviction and the said order dated 27.08.1999 is produced as Ex.A.24. Only thereafter, the 2nd defendant issued notice dated 13.12.1999 to the 1st plaintiff requesting him to appear for enquiry on 17.12.1999, on which date at the request of the 1st plaintiff, the enquiry was adjourned to 29.12.1999, on which date, again the 1st plaintiff appeared for enquiry and made written request to furnish him necessary documents from the defendants to show that the B schedule property belongs to highways department. On receipt of the same, the 2nd defendant informed the 1st plaintiff that the date for further enquiry will be communicated, but without doing so, on 12.01.2000, the 2nd defendant again issued orders to remove the superstructure to

the plaintiffs; With no other go, the 1st plaintiff again approached this court by way of W.P.No.1297 of 2000 seeking declaration that the B Schedule property belongs to him and the said writ petition was disposed of by this court on 31.01.2000 directing the 1st plaintiff to approach the appropriate civil court for necessary relief. The copy of the said order passed in the said Writ Petition is produced as Ex.A.25. While so, the 2nd defendant issued order dated 24.02.2000 produced as Ex.A.20 informing that the superstructure in the B schedule property will be removed on 04.03.2000. Hence, the plaintiffs have filed the suit contending that the suit B schedule property belongs to them and the same forms part of A schedule property, which was purchased by them as per Ex.A.23 sale deed. The plaintiffs also stated that the 2nd defendant never claimed any right over the property and the 3rd defendant issued certificate for purchase of cement by 1st plaintiff on 14.12.1986, for construction of the building in the B schedule property accepting the fact that the said property belonged to the 1st plaintiff. According to the plaintiffs, the Highways road is to the east of the suit B schedule property and as such, the defendants have no right, title or interest over the property and they have no right to direct the plaintiffs to remove the superstructure. Hence, the plaintiffs seek declaration and permanent injunction as mentioned in the suit, against the defendants.

4. On the other hand, the contention of the defendants / Highways Authority is that the claim of the plaintiffs that the suit property belongs to them is not correct and the suit itself is not maintainable as the plaintiffs have failed to give statutory notice under Section 80 C.P.C., to the authorities. It is further contended by the defendants that the plaintiffs encroached to an extent of 5.02 meters to 6.60 meters in the Highways property and the same was measured and shown to the plaintiffs and the relief sought for by the plaintiffs is unsustainable. In spite of being given enough opportunity and notice received by them, the plaintiffs have not established their claim that B schedule property belongs to them. The defendants state that they issued notice on 01.12.1999, 13.12.1999 and 12.01.2000 to the plaintiffs to prove their claim over the suit property, but they failed to do so. The defendants further contended that as per the order dated 31.01.2000 passed by this court in W.P.No.1297 of 2000, the claim of the plaintiffs was not accepted and the removal of encroachment was ordered and the same is only being sought to be implemented by them. Hence, the defendants contend that the plea of the plaintiffs is unsustainable and the suit is liable to be dismissed.

5. Before the trial court, the plaintiffs examined P.W.1 to P.W.3 and produced Ex.A.1 to Ex.A.25 and the defendants examined

three witnesses D.W.1 to 3 to substantiate their claim, but no documentary evidence was produced by the defendants.

6. On the basis of oral and documentary evidence produced before it, the trial court found the plea of the plaintiffs is just and valid and decreed the suit as prayed for. Aggrieved over the same, the defendants preferred A.S.No.31 of 2009 before the First Appellate Court and the same was allowed reversing the judgment of the trial court. Aggrieved over such reversal by the First Appellate Court, the plaintiffs have come up before this court with this Second Appeal.

7. The contention of the plaintiffs is that the deceased/1st plaintiff purchased suit A schedule property as a vacant land on 04.02.1985 under Ex.A.23 sale deed and subsequently, superstructure was put up in the same. According to them, suit B schedule property forms part of the said A schedule property. The plaintiffs produced the parent documents for the said land viz., their vendors sale deed as Ex.A.1. It is also evident from Ex.A.2 house loan pass book issued by the concerned housing society that the plaintiffs have availed housing loan to put up construction in the suit property and documents Ex.A.3 to Ex.A.17 to substantiate their claim that they are in possession and enjoyment of the property by paying house tax, water tax and electricity charges. The said fact that plaintiffs are having possession and enjoyment of the suit property is admitted by the defendants and they only contend that the plaintiffs have encroached upon the Highways property and the property shown as B schedule in the plaint is the encroached property, they seek to demolish the superstructure and take possession of the property. According to the plaintiffs, to the east of the property, road is situated and they never encroached upon the said Highways Property and they put up construction only in the property purchased by them. The plaintiffs also contend that the suit A schedule property which includes B schedule property belonged to them as per the sale deed Ex.A.23 and there is nothing on record to show that it was poramboke or highways property as claimed by the defendants. Thus, it is to be found out whether the suit B schedule property forms part of A schedule property and the same was purchased by the plaintiffs or it is an encroachment on the Highways land as claimed by the defendants. In the trial court, the plaintiffs sought for appointment of Advocate Commissioner and accordingly, the Commissioner was appointed and after measuring the property, he submitted his report and rough sketch which is marked as Ex.C.1 and Ex.C.2. As per the said report, the suit A schedule property is mentioned in the sketch as 'A' 'B' 'C' 'D' and the B schedule property as 'E' 'F' 'D' 'C' with measurements. It is also pointed out that the measurement of the property given in the said Ex.C.1 Commissioner's report is the same as to

the area mentioned in Ex.A.23 sale deed. Thus the property in dispute, is the same as mentioned in Ex.A.23 sale deed whereby the plaintiffs purchased it.

8. As stated earlier, even though the defendants examined 3 witnesses, the evidence of D.W.1 and D.W.2 was eschewed. No documentary evidence is produced by the defendants. It is only the oral evidence of D.W.3 is available. The trial court has extracted the evidence of D.W.3 in its Judgment, wherein, he has admitted the purchase of suit property by 1st plaintiff. D.W.3 also stated that no action was initiated by them against the plaintiffs or the Predecessors to recover the suit property. D.W.3 also admitted that they have no objection to plaintiffs enjoying the property mentioned in Ex.A.23 sale deed. It is the further admission of D.W.3 that the Advocate Commissioner appointed by the trial court submitted report and rough sketch and the same was verified by him and they have no objection for it. Thus the defendant/Highways Authority has not disputed the contents of Ex.C.1 and Ex.C.2 and there was no objection filed by them for the same. It is therefore clear that the plaintiffs are in possession and enjoyment of the property purchased by them under Ex.A.23 which is the suit 'A' schedule property including the suit 'B' schedule property. The defendants have not placed any material before the court to prove that the superstructure put up by the plaintiffs is an encroachment upon the Highways land. Further there is no material produced by the defendants/authorities to show that the property mentioned in Ex.A.23 sale deed includes any area of Government land or the property mentioned in the said sale deed, originally belonged to the Highways Authority or the State. Admittedly as per the Commissioner's Report, Ex.C.1, who inspected and measured the suit A schedule property which includes B schedule property, the extent in possession of the plaintiffs is exactly in measurement with the property mentioned in Ex.A.23 sale deed, is only which the property was purchased by the plaintiffs. It is also pointed out that the measurement given in Ex.A.23 sale deed is in accordance with the parent documents which is also produced before the court. The defendants have not pleaded nor proved that the property covered under Ex.A.23 sale deed is acquired for any Government Purpose or any notification been issued seeking to acquire the property. In the absence of any record placed before the court by the defendant to show that the suit property mentioned in B schedule belonged to Highways Authority or the Government or any other department of Government, the contention of the plaintiffs that the property belongs to them and they have not encroached upon the Highways land has to be accepted. The same is categorically established by Ex.C.1 and Ex.C.2 and in this regard, Rough sketch is also produced before this court. In such circumstances, the conclusion arrived at by the trial court that the plaintiffs are in possession and

enjoyment of the suit property as per Ex.A.23 sale deed and the superstructure is put up in their property only is just and proper. The finding of the First Appellate Court that the suit property is a public property and it is a road is not sustainable and the First Appellate Court has not stated any reasons for arriving at such a conclusion. Likewise, the conclusion of the First Appellate Court that no declaration can be given as sought for by the plaintiffs, since the property is not a patta land and the same belongs to Government also is not sustainable for above said reasons.

9. The learned counsel for the defendants contended that there is no proper notice given by the plaintiffs under Section 80 CPC and on that ground the suit is not maintainable. In support of his contention, the learned counsel for the respondents/defendants relied upon the Ruling of Supreme Court in the case of Raghunath Das Vs. Union of India and another reported in AIR 1969 Supreme Court 674(1) and stated that the object of the notice contemplated by Section 80 CPC is to give to the concerned public officers opportunity to consider the legal position and to make amends or settle the claim, if advised without litigation.

10. On the other hand, the learned counsel for the appellants/plaintiffs contended that the intent and purpose of giving notice under Section 80 CPC is to put the officials of the Government on notice and not to take them by surprise and in the case on hand, in the plaint itself, notice under Section 80 CPC is sought to be dispensed with and further there are number of Writ Petitions filed by the plaintiffs in respect of the same property against the defendant and only as per the direction given in W.P.No.1297 of 2000, the suit has been filed and in such circumstances, the plea of the defendants that for want of 80 CPC notice, the suit is not maintainable cannot be accepted. In support of the above said contention, the learned counsel for the appellants relied upon the Ruling of this court in the case of Parameswara Kurup (died) and others Vs. State of Tamil Nadu and others, reported in AIR 1986 Madras 126, wherein, it is held as follows:-

"7. One other point raised by the learned Government Advocate appearing for the State is that in O.S. 9 of 1977, the plaintiff has not given notice under S. 80, C.P.C. and therefore the suit should fail. But my attention is invited by the learned counsel appearing for the appellant in S.A. 1847 of 1979 to the fact that the plaintiffs in O.S. 9 of 1977 filed a writ petition W. P. 938 of 1975 (N.Paramesara Kurup v. State of Tamil Nadu, rep. by the Secretary to Govt. Education Dept., Madras), against the State of Tamil Nadu challenging the Tamil

Nadu Recognised Private Schools (Regulations) Act 29 of 1974, and a Bench of this Court dismissed the said writ petition granting three months time to the petitioner to seek the remedy by way of suit. Accordingly the plaintiffs filed the suit, O.S. 9 of 1977, within three months from the date of judgment in W. P. 938 of 1975. Therefore, I must hold that the suit is not bad for want of notice under S. 80, C.P.C."

The learned counsel for the appellants/plaintiffs also relied upon the Ruling of Supreme Court in the case of Bishandayal and Sons Vs. State of Orissa and others reported in AIR 2001 Supreme Court 544 to contend that Notice under Section 80 CPC can be waived at and the plaintiffs have sought for abstaining with such notice and the same is not disputed by the defendants.

11. Further as stated earlier, the 1st plaintiff has earlier filed W.P.No.7428 of 1997 challenging the notice dated 18.05.1997 issued by the 1st defendant seeking removal of superstructure without any enquiry, in the A schedule property and in the said writ petition, direction was issued to the authorities to take appropriate action after issuing notice to the plaintiffs. Even thereafter, as 2nd and 3rd defendants issued order dated 11.08.1999 seeking the 1st plaintiff to remove the superstructure in A Schedule property, without conducting any enquiry. The 1st plaintiff again filed Writ Petition No.1454 of 1999 and as per the orders passed in the same, the 2nd defendant issued notice dated 13.12.1999 to the 1st plaintiff to appear for enquiry on 17.12.1999 and the plaintiff sought for adjournment to 29.12.1999 and on that date, sought for permission to verify the records of the Highways Department to ascertain whether the suit property belongs to the Government. However, without giving any chance to the 1st plaintiff to put forward his contention, and without any enquiry, the 2nd defendant again issued orders dated 12.01.2000 to remove the superstructure of the plaintiffs in the suit property and aggrieved over the same, the 1st plaintiff again approached this court by filing W.P.No.1297 of 2000 seeking to declare that the suit B schedule property belonged to them. He was directed to approach the civil court to establish his claim in the said Writ Petition and accordingly he has filed this suit.

12. The said fact that Writ Petitions filed by the 1st plaintiff is not denied by the defendants herein. In such circumstances, it is apparent that the defendants/respondents herein who were parties in the above said proceedings which were filed relating to the property involved in the suit were aware of the proceedings and the present suit itself was filed pursuant to the directions issued by this court in W.P.No.1297

of 2000. In such circumstances, following the above said ruling [AIR 1986 Madras 126] (cited supra), it is clear that the contention of the defendants that the suit is not maintainable for want of notice under Section 80 CPC cannot be accepted and the same has to fail.

13. During arguments, it is admitted by the plaintiffs/appellants herein that beyond the suit property there is some construction and he is willing to remove the same. The defendants are entitled to remove the said construction which is outside the suit schedule property as the same is necessary encroachment on the highways land.

14. In view of the above said discussion, the conclusion arrived at by the First Appellate Court is liable to be set aside and the finding of the trial court granting the relief of declaration and injunction is just and proper and the same is to be restored. For the above said reasons, the substantial question of law raised in the second appeal is answered in favour of the appellants/plaintiffs.

15. In the result, the Second Appeal is allowed. The judgment and decree of the First Appellate Court passed in A.S.No.31 of 2009 dated 27.01.2011 is set aside. The judgment and decree passed in O.S.No.67 of 2000 by the trial court dated 31.08.2009 is confirmed. No costs. Connected MP is closed. The defendants are at liberty to remove the superstructure admittedly put up by the plaintiffs beyond the suit schedule property.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

nvsri

To

1.The Subordinate Judge,
Gingee.

2.The Additional District Munsiff,
Gingee.

+lcc to Mr.G.Rajan, Advocate, S.R.No.54200

Second Appeal No.601 of 2013

VD(CO)
CA(30/08/2017)