

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON : 17.11.2016
PRONOUNCED ON : 02.01.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN
S. A.No.271 of 2011

&

M.P.No.1 of 2011

1.Chandra
2.Deivayani
3.Kumaravel (since died)
4.Valli

....Appellants/Appellants/Plaintiffs

(Cause Title accepted vide order
of the Court dated 02.03.2011
made in M.P.No.1 of 2011 in
S.A.S.R.No.97128 of 2010)

Vs.

Vinayagam

....

Respondent/Respondent/
Defendant

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and decree dated 20.04.2010 made in A.S.No.4 of 2009 on the file of the Subordinate Judge, Madurantakam confirming the Judgment and Decree dated 05.02.2007 made in O.S.No.143 of 2004 on the file of the District Munsif Court, Madurantakam.

For Appellants : Mr.M.S.Subramanian

For Respondent : Mr.K.Govi Ganesan

सत्यमेव जयते

JUDGMENT

The plaintiffs have in this Second Appeal impugned the Judgment and decree dated 20.04.2010 made in A.S.No.4 of 2009 on the file of the Subordinate Judge, Madurantakam confirming the Judgment and Decree dated 05.02.2007 made in O.S.No.143 of 2004 on the file of the District Munsif Court, Madurantakam.

2.The suit has been laid by the plaintiffs for declaration and mandatory injunction and permanent injunction.

3.The Second Appeal has been admitted and the following substantial questions of law are formulated for consideration in

this Second Appeal.

(a) Whether the misreading of the documents (Villages are different) has led to the erroneous findings by both the Courts?

(b) Whether the specific pleadings in the written statement that the defendant is in no way connected with the suit property has been lost sight of by both the Courts?

(c) Whether both the Courts have failed to identify the property with reference to the documents?

4. The plaintiffs claim title to the suit property under two Sale Deeds dated 05.10.1981 and 15.10.1981, which are marked as Ex.A1 & A2 respectively. The plaintiffs are the legal heirs of Pachaimuthu Naicker. According to the plaintiffs, Pachaimuthu Naicker purchased the suit property under Ex.A1 and A2. It is stated that the suit property was originally owned by Athisivanaicker and the same was inherited by his sons namely, Sadasiva Naicker and Krishtappa Naicker and accordingly, Sadasiva Naicker and Krishtappa Naicker sold the suit property to Pachaimuthu Naicker under the Sale Deeds Ex.A1 and A2. It has not been stated in the plaint as to how Athisivanaicker derived title to the suit property, further it has also not been mentioned as to how the property of Athisivanaicker devolved on his sons either by way of partition, settlement or other wise.

5. A reading of the plaint gives as if the sons of Athisivanaicker inherited the property of their father Athisivanaicker, and it therefore appears that according to the plaintiffs, Sadasiva Naicker and Krishtappa Naicker derived 1/2th share each in the suit property. The suit property is stated to be situated in Cheyyur Taluk, Kodur Firka, Parmenkeni Village, Punja S.No.289/10C to an extent of 0.22 cents 0.09.0 hectares. It has not been described by giving boundaries. Therefore, it is found that according to the plaintiffs case, Sadasiva Naicker and Krishtappa Naicker each have 11 cents in the suit property.

6. The defendant disputed the title of the plaintiffs to the suit property. According to the defendant, the suit property belongs to his wife Jothirani. It is stated that his wife's father Perumal Naicker had two wives namely Rajambal @ Irusammal and Gunabushani Ammal and the suit property originally belonged to his first wife Rajambal @ Irusammal and Perumal Naicker got the suit property from his first wife and it is further stated that Rajambal @ Irusammal purchased the suit property under the registered Sale Deed dated 15.02.1945 from Etti @ Subbaraya Naicker and Subbaraya Naicker got the property from his ancestors, who got the same in a Shroddhirum patta.

Perumal Naicker had executed a registered Will dated 07.09.1972 bequeathing the suit property in favour of his second wife Gunabushani Ammal leaving a live estate to her and the vested remained to his daughter Jothirani. Therefore, according to the defendant, his wife Jothirani is the real owner of the suit property and that she is in possession and enjoyment of the same.

7.It is the case of the plaintiffs that the defendant is in possession and enjoyment of the suit property and that he has been putting up the construction on the suit property and also making attempts to put up the further construction. Therefore, according to the plaintiffs, they have been necessitated to seek the reliefs of mandatory injunction and permanent injunction against the defendant.

8.It is therefore evident as per the plaintiffs' case that the defendant is in possession and enjoyment of the suit property. It has not been made clear by the plaintiffs as to when from the defendant has been in possession and enjoyment of the suit property. Very vaguely, it has been stated that the defendant had started putting up the illegal construction in the suit property from 18.01.2003 onwards. Inasmuch as the defendant has disputed the title of the plaintiffs in respect of the suit property, it is clear that the plaintiffs have to establish their title to the suit property.

9.As adverted to earlier, according to the plaintiffs, the suit property originally belonged to Athisivanaicker. However, it has not been detailed either in the plaint and through the course of evidence as to how Athisivanaicker derived title to the suit property. In this connection, one of the vendors from whom the plaintiffs claimed to have purchased the suit property namely Krishtappa Naicker, son of Athisivanaicker has been examined on behalf of the plaintiffs as PW2.

10.According to PW2, his father Athisivanaicker has three sons namely Sadasiva Naicker, Kuppusamy Naicker and Krishtappa Naicker i.e., PW2. It is therefore, evident that if the property had originally belonged to Athisivanaicker, it could be seen that after his death, the property would have been devolved upon his three sons. What had happened to the share of Kuppusamy Naicker, has not been clearly spelt out. That apart as found earlier, it has also not been mentioned clearly as to how Sadasiva Naicker and Krishtappa Naicker had by themselves divided the suit property excluding the another son, Kuppusamy Naicker. As per the evidence of PW2, the suit property originally belonged to his grand father Venkatapathi. Therefore, PW2, has given a new version that the suit property originally belonged to Venkatapathi. Further, he has admitted that Venkatapathi had four sons and he has also admitted that he

does not know, how the sons of Venkatapathi had divided the properties. Further, he has also stated that Kuppusamy Naicker, his brother had not been allotted any share in the suit property and that he and Sadasiva Naicker had divided the suit property and there is a written document to evidence the same and he has also further admitted that if the document is seen it would disclose as to how the property came to his family and to whose share the property was allotted.

11. However, for the reasons best known to the plaintiffs, the written document evidencing the title of PW2 and his brother and their father or grandfather has not seen the light of the day. It has been suggested to him that the suit property does not belong to his family. No doubt PW2 has denied the same. It is therefore, very clear that both in the plaint and through the course of evidence, the plaintiff has not made out vividly as to how Athisivanaicker and his family had got title to the suit property other than Ex.A1 and A2. There is no reference as to how come Athisivanaicker and his family had derived title to the suit property. Further, in Ex.A1 and A2 also there is no narration as to how come the vendors namely Sadasiva Naicker and Krishtappa Naicker had derived title to the extent conveyed by them in the suit property under the above mentioned sale deeds.

12. According to PW2, he and his brother Sadasiva Naicker had divided the suit property under the written document. The said document has not been produced. From the evidence of the plaintiffs, it could be seen that the first plaintiff's husband and the father of the plaintiffs 2 to 4, Pachamuthu Naicker is the son-in-law of PW2 i.e., PW2 is the father of the first plaintiff. Even the relationship between them has not been clearly detailed in the plaint. It has not been explained as to why the plaintiffs have suppressed the relationship between them and the vendors namely Sadasiva Naicker and Krishtappa Naicker. PW2, Krishtappa Naicker has admitted that out of the 22 cents in the suit property, he is entitled to only 11 cents and the eastern side 11 cents was allotted to the share of his brother Sadasiva Naicker. However, when he was confronted that the sale deed executed by him in favour of Pachamuthu Naicker marked as Ex.A1, in which an extent of 14 cents is alleged to have been conveyed, he would state that he does not know how come he had alienated 14 cents under the said document.

13. Further, according to PW2, on the eastern side, Kasi Battai is the boundary, further it is also stated that on the northern side, the East Cost Road is running. However, the description of the properties given in Ex.A1 and A2 would go to show that the boundaries did not tally as admitted by the parties, there is no explanation whatsoever to the same. Even the boundary recitals as found in between Ex.A1 and A2 are found to be inconsistent and further no proper explanation is given to

the same. As regards how come PW2 had conveyed 14 cents under Ex.A1, there is no proper explanation. It is found that under Ex.A2, only an extent of 6 cents had been conveyed by Sadavisa Naicker. According to PW2, Sadasiva Naicker is entitled to 11 cents. What had happened to the two cents in the suit survey number there is no proper explanation. The plaintiffs have not filed any title deed in respect of the remaining two cents. All this would only go to indicate that inasmuch as PW2 and his brother or their father Athisivanaicker has no valid title to the suit property, it could be seen that the various discrepancies and inconsistencies seen above are found. Other than Ex.A1 and A2, no other document has been filed by the plaintiffs to show that they have title to the suit property. The trial Court has also observed that the plaintiffs have also not evinced interest to measure the suit property through an Advocate Commissioner with the help of qualified surveyor.

14.Be that as it may, barring Exs.A1 and A2, the other documents produced on behalf of the plaintiffs seems to be only patta documents. Patta documents as rightly argued, cannot be equated to documents of title. Therefore, on the basis of the pattas produced by the plaintiffs and marked as Ex.A3, A4, A8 to A10, we cannot hold that the plaintiffs have valid title to the suit property. It has not been explained by the plaintiffs as to how the patta has been issued in their favour by the revenue authorities.

15.It is vehemently argued by the learned counsel for the plaintiffs that the defendant has failed to establish his title to the suit property and therefore, the court should disbelieve the case of the defendant and uphold the case of the plaintiffs. It is only the plaintiffs who have come forward with the suit seeking for the reliefs of declaration and the other remedies. The defendant has disputed the title of the plaintiffs in respect of the suit property. In the said position, it could be seen that the plaintiffs have to fall or stand on the strength of their own case. The plaintiffs cannot be allowed pick holes in the defendant's case and thereby try or attempt to succeed in their case without establishing that they have a valid title in respect of the suit property.

16.As discussed above, the plaintiffs have miserably failed to establish that either they or their predecessor-in-interest have valid title to the suit property. Admittedly, the plaintiffs are not in possession and enjoyment of the suit property. On the other hand, it is found that the defendant is stated to be in possession and enjoyment of the suit property. The defendant had set up a title in respect of the suit property on his wife Jothirani under the Will. Despite the above stand of the defendant, the plaintiffs have not evinced interest to implead the defendant's wife as a party to the proceedings. No

acceptable reason has been projected by the plaintiffs for the same.

17.It is argued that inasmuch as the defendant's wife Jothirani has no title to the suit property, the plaintiffs have not impleaded her as a party to the proceedings. When a rival title has been set up on the defendant's wife through the document, in my opinion, it is incumbent upon the plaintiffs to implead her as a proper and necessary party. The plaintiffs have not taken appropriate steps in that regard. This has also been commented by the Courts below.

18.In the light of the above discussions, the argument put forth by the learned counsel for the plaintiffs that the property to which the defendant claim title is not situated in the suit village and they are situated in Perunthuravu Village and therefore, based upon the title deeds produced by the plaintiffs, the relief should be granted to the plaintiffs. However, the fact whether the property over which the defendant or his wife claim title is situated in the suit village or Perunthuravu Village would not of much significance and also does not require immediate consideration as at the first instance when it is found that the plaintiffs have failed to establish their title to the suit property by producing acceptable and reliable documents and when it is admitted that the defendant is in possession and enjoyment of the suit property and when the defendant has not been shown to be an encroacher into the suit property by the plaintiffs, it could be seen that the Courts below have correctly non suited the plaintiffs and dismissed their suit.

19.The Courts below have correctly analysed the evidence adduced by the respective parties in the right perspective and rightly held that the plaintiffs have miserably failed to establish that they have valid title to the suit property and thereby negated the reliefs sought for by the plaintiffs. Nothing is projected to interfere with the findings and conclusions arrived at by the Courts below for non suiting the plaintiffs.

20.In conclusion, the substantial questions of law formulated in this Second Appeal are answered against the appellants and in favour of the respondents. Resultantly, the Second Appeal fails and is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

-s/d-

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To

1.The Subordinate Judge,
Madurantakam

2. The District Munsif Court,
Madurantakam

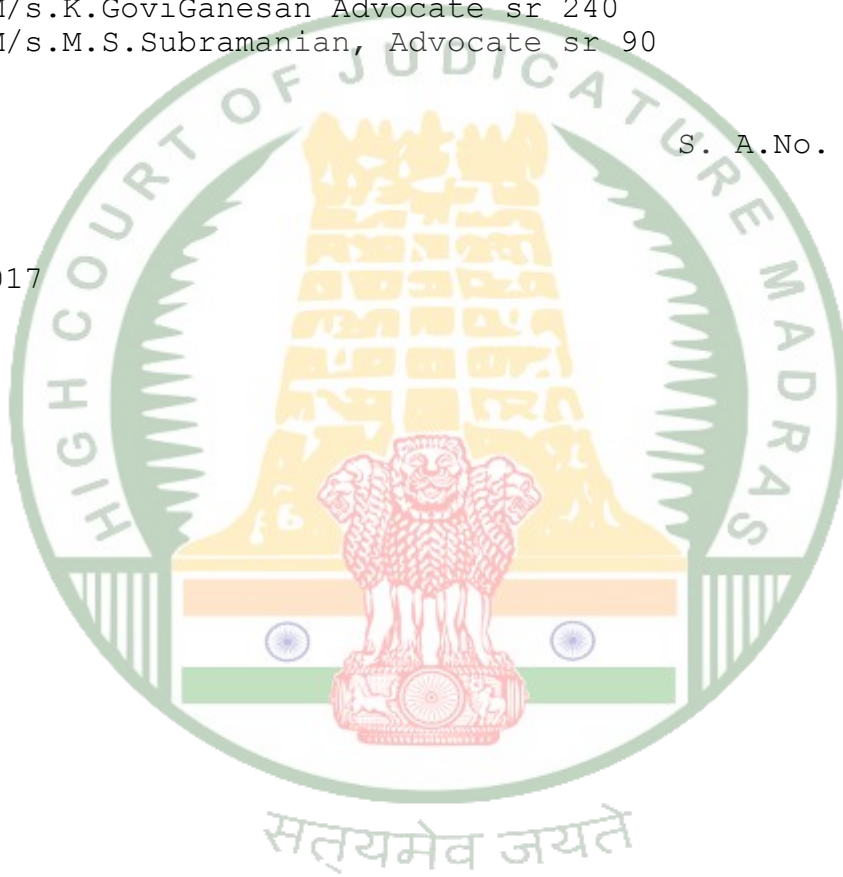
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