

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.11.2016

PRONOUNCED ON : 04.01.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.372 of 2011

&

M.P.No.1 of 2011

1.Davood Ali
2.Mohamed Ali
3.Sheik Ali
4.Chottimabi

...Plaintiffs/Appellants/Appellants

Vs.

1.John Basha
2.Lyakath
3.Abupakkar
4.Basheer
5.Asinabi
6.Hince
7.Shamshath Bi
8.Jerina Bi
9.Jaithoon Bi

...Defendants/Respondents/Respondents

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and decree dated 13.08.2010 made in A.S.No.1 of 2007 on the file of the Subordinate Judge, Gingee, confirming the Judgment and Decree dated 19.01.2006 made in O.S.No.117 of 1999 on the file of the Additional District Munsif Court, Gingee.

For Appellants : Mr.N.Suresh

For RR1 & 2 : Mr.S.D.S.Philip

RR 3 to 9 : No Appearance

JUDGMENT

The plaintiffs in this second appeal have impugned the judgment and decree dated 13.08.2010 made in A.S.No.1 of 2007 on the file of the Subordinate Judge, Gingee, confirming the Judgment and Decree dated 19.01.2006 made in O.S.No.117 of 1999 on the file of the Additional District Munsif Court, Gingee.

2.The Second Appeal was admitted and the following substantial questions of law are formulated for consideration in this Second Appeal:

(a)Whether the Courts below are right in giving a finding that the plaintiffs have not proved title over the property, when the suit is for injunction simpliciter as the issue of title will not be directly and substantially in issue?

(b)Whether the Courts below are right in recording finding regarding the title over the property as the finding on title cannot be recorded in a suit for injunction as per the judgment of the Hon'ble Supreme Court reported in Ananthula Sudhakar Vs. P. Buchi Reddy, 2008(4) SCC 594?.

3.The suit has been laid by the plaintiffs for permanent injunction.

4.The plaintiffs 1 to 3 are the sons and fourth plaintiff is the wife of one Abdul Majith Sahib. The defendants 2 and 3 are the sons of the first defendant Abdul Azeez. It is admitted that Abdul Majith Sahib and the first defendant Abdul Azeez are brothers. According to the plaintiffs, the suit properties were in the possession and enjoyment of Abdul Majith Sahib for the past 50 years and that he had put up a tiled house, thatched shed, hay rack in the suit properties and also using the same for storing rubbish and for other purposes and also obtained electricity service connection in respect of the usage of the suit properties and recognising his possession, patta has also been granted in his name and thus according to the plaintiffs, Abdul Majith Sahib and after his demise, the plaintiffs are in the possession and enjoyment of the suit properties and further according to the plaintiffs, the old survey number of the suit properties is S.No.83/9B and inasmuch as the defendants without any authority attempted to interfere with the possession and enjoyment of the plaintiffs in respect of the suit properties, the plaintiffs had been necessitated to lay the suit for permanent injunction.

5.Further, according to the plaintiffs, the defendants

against law and without notice seem to have obtained joint patta in respect of the suit properties in their names also and requisition has been given to delete the names of the defendants before the concerned authorities and the suit properties are not in the possession and enjoyment of the defendants.

6. According to the defendants, the suit properties are in the joint possession of the plaintiffs and the defendants and the plaintiffs are not in the possession and enjoyment of the entire suit properties as pleaded and further according to the defendants, in respect of the properties belonging to the joint family including the suit properties, the suit in O.S.No.1411/1979 had been laid for partition and in the said partition, the sharers were allotted the separate properties including the first defendant and therefore according to the defendants, the present suit laid by the plaintiffs is barred by resjudicata and estoppel and further, according to the defendants, inasmuch as the daughters of Abdul Majith Sahib have not been included in the suit, the suit is bad for non joinder of necessary parties and further according to the defendants, recognising the joint possession of the defendants in respect of the suit properties joint patta had been given in the name of the first defendant also in respect of the suit properties and it is alleged that originally patta had been given wrongly in the name of Abdul Majith Sahib alone and thus according to the defendants, the plaintiffs are not entitled to obtain the relief sought for.

7. The definite case of the defendants is that the plaintiffs are not in the possession and enjoyment of the entire suit properties as put forth in the plaint. The suit properties have been described to be situated in Gingee Taluk, Sorattur Village,

1. Re-survey No.158/3 199 square meter
2. Re-survey No.155/13 286 square meter
3. Re-survey No.158/14 238 square meter

inclusive of the tiled house, two thatched houses, trees and fence standing thereon. Therefore, as rightly argued by the learned counsel for the defendants, the description of the suit properties is hazy and indistinct.

8. As per Order VII, Rule 3 of the Code of Civil Procedure, where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers.

9. Therefore, as described under Order VII, Rule 3 of the

Code of Civil Procedure, it could be seen that the plaintiffs have not given the correct and identifiable description of the suit properties for deciding the issues involved between the parties. At the out set, it has been found that it is the specific case of the defendants that the plaintiffs are not in the possession and enjoyment of the entire suit properties as pleaded. In such view of the matter, at least after the filing of the written statement, the plaintiffs should have come out with a clear case by giving the correct description of the properties with boundaries etc so as to sort out the main issue whether the suit properties are in the possession and enjoyment of the plaintiffs as projected.

10.The plaintiffs base their case mainly upon the patta alleged to have been granted in favour of Abdul Majith Sahib in respect of the suit properties. Other than the patta, no other document has been filed to show that the plaintiffs have de jure possession in respect of the suit properties. According to the defendants, they are also in the joint possession and enjoyment of the suit properties and that the patta had been wrongly issued in the sole name of Abdul Majith Sahib and subsequently, the mistake has been rectified and joint patta has been given including the name of the first defendant, in respect of the suit properties. As found earlier, the plaintiffs have pleaded that the joint patta has been wrongly given including the name of the first defendant and that they have taken steps to rectify the same by requisitioning the concerned authorities.

11.Be that as it may, when it is found that the plaintiffs have laid their claim based upon the patta given by the revenue authorities and when clearly it is found that the same revenue authorities have also given joint patta including the name of the first defendant, it could be seen that as per the pleadings both the rival parties are claiming to be in the possession and enjoyment of the suit properties based upon their respective pattas, therefore, the Courts below have rightly found that the pattas not being the documents of title, the same would not be sufficient to confer de jure possession of either parties in respect of the suit properties. The Courts below inter alia have rejected the case of the plaintiffs mainly on the footing that the suit properties have not been properly described and inasmuch as the de jure possession of the plaintiffs has been challenged, the suit laid by the plaintiffs without seeking the relief of declaration is not maintainable and further the plaintiffs have failed to establish that they are in the possession and enjoyment of the entire suit properties as pleaded.

12.In this second appeal, it is argued by the learned

counsel for the plaintiffs that based upon the pleas made in the written statement, the court can easily come to the conclusion that the suit properties have been allotted to the share of Abdul Majith Sahib and so viewed, according to the plaintiffs, the plaintiffs have established their rightful possession of the suit properties based on title and in any event, according to the learned counsel for the plaintiffs, the court should not have proceeded to decide the question of title in the suit for permanent injunction and therefore the approach of the Courts below in rejecting the case of the plaintiffs solely upon their failure to establish the title is misdirected and erroneous in law and hence they are liable to be reversed. However, the above contention does not merit acceptance. The plaintiffs having come forward seeking the relief of permanent injunction based on a particular set of facts and when the same have been vehemently denied by the other side, the duty is cast upon the plaintiffs to establish their case by adducing acceptable and reliable evidence. When both the parties are projecting pattas for claiming to be in the possession and enjoyment of the suit properties, it could be seen that pattas cannot be the basis for granting the reliefs, particularly, when the defendants have also projected the patta documents for establishing their joint possession of the suit properties. It could be seen that the Courts below are right in rejecting the case of the plaintiffs on the footing that the plaintiffs have failed to establish that they are in the exclusive possession and enjoyment of the entire suit properties as described in the plaint.

13. It has not been explained by the plaintiffs as to why they have not come out in the plaint about the partition suit laid in O.S.No.1141 of 1979. Now, according to the plaintiffs, inasmuch as the defendants have made pleas in the written statement about the partition suit, according to the learned counsel for the plaintiffs, since in the said partition suit, the suit properties were allotted to the share of Abdul Majith Sahib, the court should uphold the plaintiffs case. However, even on that basis, the plaintiffs have failed to establish that the suit properties as described in the plaint were allotted to the share of Abdul Majith Sahib. One of the brothers namely Abdul Salih Sahib and others have laid the suit in O.S.No.1141 of 1979 seeking partition and it could be seen that Abdul Majith Sahib and the first defendant Abdul Azeez are also arrayed as the defendants in the said suit. Now the copy of the final decree passed in I.A.No.1676 of 1979 in O.S.No.1141 of 1979 has been marked as Ex.B3. Pointing to Ex.B3, it is argued by the learned counsel for the plaintiffs that as per the said decree, the first defendant has not been allotted any share belonging to the joint family and on the other hand, it is contended that Abdul Majith Sahib has been allotted a share and

according to the learned counsel for the plaintiffs, the share that had been allotted to Abdul Majith Sahib are only the suit properties. It is argued that as found in Ex.B3, Abdul Majith Sahib had been allotted the house and backyard portion viz., 'DELM' as shown in the Commissioner's plan No.7, marked as Ex.C8.

14.A perusal of Ex.B3, would go to show that 8 items of properties are described therein. Of them, the 8th item of property is stated to be situated in punjai S.No.83/9, 0.25 cents out of 3.18 acres within specific boundaries and with specific measurements inclusive of the tiled house and the vacant site. Now according to the learned counsel for the plaintiffs in respect of that item of the suit properties in O.S.No.1141/1979 Abdul Majith Sahib has been allotted a share as described in the Commissioner's plan No.7, marked as Ex.C8 and shown as 'DELM', which includes the house and backyard portion. According to the plaintiffs, the Old survey number of the suit property is 83/9B. The 8th item described in O.S.No.1141/1979 is stated to be only in S.No.83/9. In the description of the suit property, in the present suit, the total extent in cents have not been given. The description of the suit property is shown as if the suit properties are situated in three survey numbers and the extent in square meters are only given whereas the 8th item of O.S.No.1141/1979 is 0.25 cents out of 3.18 acres in punjai S.No.83/9 within the specific boundaries and with specific measurements. So it could be seen clearly that nothing is available on record to correlate the 8th item in O.S.No.1141 of 1979, with the suit properties of the present suit in any manner.

15.Further, the Commissioner's plan No.7 appended to Ex.B3 has described the said property to be situated in R.S.No.83/93, house 0.25 cents and in that only the 'DELM' portion is found to be allotted to Abdul Majith Sahib. What is the extent of the 'DELM' portion and what are its measurements, in what survey numbers are they now located or whether the entire 0.25 cents in R.S.No.83/93 including the house as such had been allotted to Abdul Majith Sahib, there is no indication or material in the Commissioner's plan No.7. The 'DELM' portion is stated to be only 'Garden'. In such view of the matter when there is nothing to indicate that only the present suit properties had been allotted to Abdul Majith Sahib in O.S.No.1141/1979 and in view of the above discussions 'DELM' portion found in Ex.B3 (Commissioner's plan No.7) is not shown to be pertaining to or having nexus to the present suit properties in any manner, it could be seen that the plaintiffs cannot be allowed to take advantage of the recitals found in the written statement and thereby attempt to succeed in their case without making

foundation for the same or placing reliable and acceptable evidence to uphold their case on such pleas. As found earlier, the plaintiffs have not laid their claim for claiming de jure possession of the suit properties based upon the decree rendered in O.S.No.1141/1979. On the other hand, they seek the relief in the present suit only based upon the patta issued in the name of Abdul Majith Sahib, marked as Ex.A1.

16.It has not been explained by the learned counsel for the plaintiffs as to why the plaintiffs have suppressed completely the proceedings of the partition suit in O.S.No.1141/1979. If really, as now projected and claimed by the learned counsel for the plaintiffs, the plaintiffs were in entirety allotted the present suit properties in O.S.No.1141/1979, nothing prevented the plaintiffs from stating about the same in the plaint and thereby seek the necessary reliefs. Now unable to withstand or resist joint patta issued in the name of the first defendant also and not able to explain as to how come the patta had been originally issued in the name of Abdul Majith Sahib alone, the plaintiffs are found to have taken recourse to the pleas of the defendants in the written statement pertaining to O.S.No.1149/1979.

17.However, as adverted to above when the so called allotted share of Abdul Majith Sahib in O.S.No.1141/1979 are not shown to be correlated in any manner to the present suit properties either by boundaries or by measurements or by the correct survey number etc, it could be seen that the plaintiffs cannot be allowed to take shelter under the decree passed in O.S.No.1141/1979 to claim that only the suit properties as described in the plaint had been allotted to the share of Abdul Majith Sahib in the final decree proceedings.

18.However, the learned counsel for the plaintiffs further contended that the first defendant has not been allotted any share in O.S.No.1141/1979 as found in Ex.B3 and further according to him DW3, in cross examination has admitted that the suit properties are in the possession of Abdul Majith Sahib and the plaintiffs and based upon his admission, the court should uphold the plaintiffs case. However, the above argument does not merit acceptance. Even accepting that the first defendant has not been allotted any share in O.S.No.1141/1979, that by itself would not lead to the conclusion that the plaintiffs had been allotted the present suit properties as described in the plaint to the share of Abdul Majith Sahib in O.S.No.1141/1979.

19.Further, as regards the admission of DW3, it is found that on a perusal of his evidence tendered during the course

of cross examination, it could be seen that questions were put to him about the partition suit in O.S.No.1141/1979 and in continuation of the same, when he was questioned about the suit properties he had testified that the suit properties are in the possession of Abdul Majith Sahib and the plaintiffs. However, a reading of his evidence wholly and together would only go to show that he had asserted that patta has been issued jointly in the name of the first defendant also in respect of the suit properties and he has denied the suggestion that only Abdul Majith Sahib and his legal heirs have title to the suit property. Therefore, in my considered opinion, the above piece of the evidence of DW.3 projected by the learned counsel for the plaintiffs as if he had in toto admitted the case of the plaintiffs as such cannot be readily accepted. The plaintiffs having come forward with the present suit seeking the requisite relief should establish their case by adducing convincing and reliable evidence. The plaintiffs cannot be allowed to pick holes in the defendants case and try to succeed in their case without establishing their pleas. In such view of the matter, the plaintiffs cannot be allowed to succeed in this case on the footing that inasmuch as Abdul Majith Sahib has been allotted a share in the properties in O.S.No.1141/1979, the court should hold that it is only the suit properties which had been allotted to Abdul Majith Sahib in the above said suit.

20.However, as discussed above, when there is nothing correlated or pointed out the suit properties as described in the plaint had been allotted to Abdul Majith Sahib, it could be seen that the final decree proceedings in O.S.No.1141/1979 or the alleged admission of DW3 would not be sufficient to uphold the plaintiffs case to hold that they are in de jure possession and enjoyment of the entire suit properties as described in the plaint.

21.The Courts below in view of the rival contentions projected by the contesting parties claiming to be in the possession and enjoyment of the suit properties have rightly found that the plaintiffs have to fail for want of proper description of the suit properties and also for not seeking the relief of declaration of title in respect of the suit properties when the plaintiffs claim de jure possession in respect of the suit properties and when their claim has been stoutly resisted by the defendants. In such view of the matter, the approach of the Courts below in rejecting the plaintiffs case for the reasons afore stated cannot be faulted with. Therefore, the contention of the learned counsel for the plaintiffs that the Courts below have failed to follow the principles of law adumbrated in the decision reported in 2008(4) SCC 594(Ananthula Sudhakar Vs. P. Buchi Reddy) as such cannot be

accepted. On the other hand, it could be seen that the Courts below have correctly found that the plaintiffs have failed to establish their de jure possession and enjoyment of the suit properties in its entirety as described in the plaint and when the plaintiffs have not sought the relief of declaration particularly when their de jure possession has been challenged by the defendants, the courts below rightly rejected the plaintiffs case and nothing could be assailed in the approach of the Courts below in rejecting the plaintiffs case. On the other hand, it could be seen that the Courts below have in letter and spirit followed the principles of law adumbrated in the above said decision and rightly rejected the plaintiffs case.

22. In view of the above discussions, the substantial questions of law formulated in this Second Appeal are answered against the appellants/plaintiffs and in favour of the respondents/defendants.

23. Resultantly, the Second Appeal fails and is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The Subordinate Judge,
Gingee

2. The Additional District Munsif Court,
Gingee

+1cc to Mr.S.D.S.Philip, Advocate, S.R.No.476

+1cc to Mr.N.Suresh, Advocate, S.R.No.1109

S. A.No. 372 of 2011

PVS (CO)
RS (06/05/2017)