

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.12.2018

CORAM :
THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN
S.A.No. 813 of 1998

1. K.Marimuthu
2. Ramathal .. Appellants/ Plaintiffs

Vs.

1. Karuppuswamy
2. Marappan alias Palaniswamy

..Respondents/ Defendants

PRAYER: This Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and Decree of the learned Subordinate Judge of Tirupur dated 13.1.1997 in A.S.No. 19 of 1994 confirming the Judgment and Decree of the learned District Munsif of Tirupur dated 15.03.1994 in O.S.No. 345 of 1991.

For Appellants : Mr. J.Hariharan
for Mr.V.Nicholas

For Respondents : Mr. R.Krishna Prasad
for M/s. Sarvabhauman Associates

JUDGMENT

The plaintiffs in O.S.No. 345 of 1991 on the file of the District Munsif Court, Tirupur are the appellants herein.

2. O.S.No. 345 of 1991 had been filed by K.Marimuthu and his wife Ramathal against Karuppuswamy and his brother Marappan alias Palaniswamy, seeking a Judgment and Decree directing the defendants and anybody acting under them to vacate and handover possession and enjoyment of the suit property and also for costs of the suit.

3. The suit property had been described as land and house bearing Door No. 47-A in Natham S.No. 442, Thottipalayam Village, Bommanaickenpalayam, Tirupur. The land measures 1400 sq.ft. This suit came up for consideration before the District Munsif, Tirupur, who by Judgment dated 15.03.1994 dismissed the suit. Thereafter, the plaintiffs filed A.S.No. 19 of 1994 on the file of the Sub Court, Tirupur. The First Appeal came up for consideration on 13.01.1997 and the learned Sub Judge,

Tirupur dismissed the Appeal, confirming the Judgment and Decree of the trial Court. The plaintiffs have then filed the present Second Appeal.

4. The Second Appeal had been admitted on the following two substantial questions of law:-

"(i) when the evidence placed by the plaintiffs clearly established that they alone are the owners of the suit property, whether the Courts below are correct in coming to a conclusion contrary to the evidence and negating the claim of the plaintiffs?

(ii) When the documents relied on by the defendants do not relate to the suit property, whether the Courts below are correct in upholding the claim of the defendants contrary to the materials on record?"

5. Heard arguments advanced by Mr. J.Hariharan for Mr.V.Nicholas, learned counsel for the appellants and Mr.R.Krishna Prasad, for M/s. Sarvabhauman Associates learned counsel for the respondents.

6. It had been the case of the plaintiffs that they are the absolute owners of the suit property having purchased the same by sale deed dated 04.02.1982 from Ramasamy, Muniappan, and Muthusamy, son of late Rangasamy. The original sale deed has also been filed in Court. They also filed the parent title deeds of the property which were sale deeds dated 12.05.1958 and 11.04.1959. It was stated that the house in the property was in a very dilapidated condition. They reconstructed it and put tiled roof. It was further stated that the plaintiffs had gone out of station for a marriage on 13.11.1991. When they returned on 13.11.1991, they found that the defendants had unlawfully trespassed into the property and had commenced to reside there. The plaintiffs demanded the defendants to vacate the premises. They refused. Consequently, the suit was filed. The suit was originally filed for injunction and later the reliefs seeking recovery of possession was included.

7. The defendants filed a written statement in which they claimed that they have been in possession of the suit property after obtaining delivery through Court. They stated that their father purchased the property on 12.06.1962. After his death the defendants have been in possession of the suit property. Since the plaintiffs interfered with possession, the defendants

filed O.S.No. 499 of 1987 for permanent injunction. That suit was decreed ex parte on 30.10.1987. Thereafter the defendants were not in station, the plaintiffs had taken possession of the property. A police complaint was also given. The defendants then filed O.S.No. 186 of 1990 for delivery of possession. That suit was decreed ex parte on 31.08.1990. The defendants then filed E.P.No. 12 of 1991 to take delivery of possession through Court. Delivery was granted on 13.05.1991. The defendants claimed that they were in continuous possession of the suit property. The defendants also filed an additional written statement denying that they encroached the suit property on 13.11.1991. This additional written statement was necessary since the plaint which was originally filed for injunction had been amended to one for mandatory injunction seeking recovery of possession. The defendants claimed that the suit should be dismissed.

8. On basis of the above pleadings, the learned District Munsif, Tirupur, framed the following issues:

(i) Whether the plaintiffs are in possession of the suit property;

(ii) Whether the plaintiffs are entitled for the relief of permanent injunction?; and

(iii) To what other reliefs are the plaintiffs entitled to?

9. The following further additional issues were also framed:-

(i) Whether the plaintiffs are entitled for possession?;

(ii) Whether proper Court fees has been paid?; and

(iii) To what reliefs the plaintiffs are entitled?

10. During trial, the plaintiffs examined three witnesses. The defendant examined one witness. The plaintiffs marked Exs. A-1 to A-3. The defendants marked Exs. B-1 to B-7. Ex.A-1 was the sale deed dated 04.02.1982 and Exs. A-2 and A-3 were the parent title deeds of the property dated 17.05.1958 and 11.04.1959. Ex. B-1 was the sale deed in favour of the father of the defendants dated 12.06.1962. Exs. B-6 and B-7 are the orders in Execution Petition in E.P.No. 12 of 1991 granting delivery of possession to the defendants.

11. On the basis of the oral and documentary evidence, the learned District Munsif, by Judgment dated 15.03.1994 found that the defendants had taken possession of the property through Court and consequently, the dismissed the suit. The plaintiffs then filed A.S.No. 19 of 1994 which came up for consideration

before the Sub Court, Tirupur. By Judgment dated 13.01.1997, the learned Sub Judge reappraised the evidence and framed points for consideration. The learned Sub Judge observed that the suit was originally filed for permanent injunction and thereafter amended seeking the relief of delivery of possession. The learned Sub Judge also found in favour of the defendants, who were the respondents in the Appeal. It was found that they had taken possession through Court. Consequently, the Appeal was dismissed. Challenging that, the plaintiffs have filed the present Second Appeal.

12. As stated above, the Second Appeal had been admitted on the following two substantial questions of law:-

"(i) when the evidence placed by the plaintiffs clearly established that they alone are the owners of the suit property, whether the Courts below are correct in coming to a conclusion contrary to the evidence and negating the claim of the plaintiffs?

(ii) When the documents relied on by the defendants do not relate to the suit property, whether the Courts below are correct in upholding the claim of the defendants contrary to the materials on record?"

13. During the course of arguments, Mr. J.Hariharan, learned counsel for the appellants pointed out that this Court had, by order dated 10.08.2011 thought it fit to appoint Mr.R.Ramasamy, Advocate, Tirupur, as Advocate Commissioner. He was directed to measure the suit property with the help of surveyor, identify the suit property, correlate the same with reference to the documents exhibited on either side and submit a report along with surveyor sketch. This exercise was necessary since, the plaintiffs had claimed that they have sought recovery of possession of S.No. 442 whereas in Ex.B-1 the sale deed through which the defendants claimed title, the survey number of the property was given as 436.

14. The Advocate Commissioner discharged his warrant and filed a report along with sketch. In the report, the Advocate Commissioner found that the property described in the plaint was in S.No. 442 which corresponded to the present S.No. 845. He identified the property. He also compared the identity of the property with the description of the property as found in Ex.A-1 sale deed. In the report, he stated that the property shown in the plaint and the property described in Ex.A-1 are one and the same. The Advocate Commissioner then identified the property

given in Ex.B-1 sale deed which was S.No. 436. He compared that property with the property which was granted delivery in E.P.No. 12 of 1991. He found that the said property had S.No. 436. Admittedly, the suit property was in S.No. 442, presently S.No. 835. The Advocate Commissioner also found that both the properties are situated more than 1 km away. It was categorically found that the defendants were in possession of S.No. 442, present S.No. 835 which is the property claimed by the plaintiff. Since this is a finding on fact which had not been objected to by the respondents by filing objections, I hold that the Court has to accept findings. It was initially debated whether evidence should be recorded to test the findings of the Advocate Commissioner. But since the respondents herein did not file their objections, the report is taken as part of the Court records.

15. The first substantial questions of law relates to the title of the plaintiffs which is derived from Ex.A-1. The second substantial questions of law relates to the documents relied on by the defendants, which do not relate to the property for which the relief is sought by the plaintiffs.

16. I hold that both the Courts below had erred in coming to a conclusion particularly when admittedly the plaintiffs sought recovery of possession only with respect to S.No. 442, present S.No. 835 whereas under Exs. B-6 and B-7, the respondents were given possession of S.No. 436 which is nearly 1 km away from S.No. 442, present S.No. 835.

17. In view of all these facts, I have no hesitation in interfering with the Judgment and Decree of both the Trial Court and the First Appellate Court. It is made clear that the plaintiffs are entitled for recovery of possession only with respect to S.No. 442, present S.No. 835 as described in the plaint in Thottipalayam Village, Bommanaickenpalayam, Tirupur. The boundaries are also given in the schedule to the plaint.

18. The Second Appeal is allowed, however, in the circumstances without costs. The Judgment and Decree of both the trial Court and the First Appellate court is set aside.

Sd/-
Assistant Registrar(CS-VIII)

//True Copy//

Sub Assistant Registrar

vsg

To

1.The sub Judge, Tiruppur.

2.The District Munsif, Tiruppur.

+1cc to Mr.V.Nicholas, Advocate, S.R.No. 86630

+1cc to Mr.Sarvabhauman Associates, Advocate, S.R.No. 87156

S.A.No. 813 of 1998

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GN(25/01/2019)