

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 13.06.2018

Pronounced on : 09.10.2018

CORAM:

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM

S.A.No.1645 of 1999

and

CMP.No.17606 of 1999

1. Amudharajan

2.Mahadevan

... Appellants/Plaintiff

Vs.

1. Thirumalai (deceased)

2. T. Ponniammal

3. T. Chockalingham

... Respondents/ Respondents

(Respondents 2 and 3 brought on record as LRs of the deceased sole respondent vide order of court dated 05.09.2003 made in CMP.Nos.21970 to 21972 of 2007)

Prayer:- Second Appeal filed under Section 100 of C.P.C., to set aside the Judgment and decree dated 04.12.1998 made in A.S.No.47 of 1998 on the file of the Principal Subordinate Judge, Maduranthakam setting aside the Judgment and decree dated 27.02.1998 made in O.S.No.393 of 1993 on the file of the Principal District Munsif, Maduranthakam.

For Appellants : Mr.M. Sriram

for Mr.A.Saravanan

For Respondents: Mr.K. Chandrasekaran

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J U D G M E N T

This second appeal has been filed by the defendants against the Judgment and decree passed by the Sub-Judge, Maduranthakam in A.S.No.47 of 1998 dated 04.12.1998 reversing the judgment and decree passed by the Principal District Munsif, Maduranthakam in O.S.No.393 of 1993 dated 27.12.1998. The first respondent herein has filed a suit in O.S.No.393 of 1993 on the file of the Principal District Munsif, Maduranthakam to declare his title

over the suit property and for consequential relief of permanent injunction restraining the defendants from interfering with his peaceful possession of the suit property. The learned Principal District Munsif by the Judgment dated 07.02.1998 has dismissed the said suit with costs. As against the same, the plaintiff has filed an appeal in A.S.No.47 of 1998 on the file of the Sub Judge, Maduranthakam. The learned Sub-Judge by the judgment dated 04.12.1998 has allowed the said appeal and set aside the judgment and decree passed by the trial court and decreed the suit as prayed for. However, he directed the parties to bear their respective costs. Feeling aggrieved, the defendants have filed the present second appeal. For the sake of convenience, the parties are referred to as described before the trial court.

2. The averments made in the plaint are, in brief, as follows:

The plaintiff is the absolute owner of the suit property and he is in possession and enjoyment of the same. He has put up a house in the suit property and residing there for the past forty years. The plaintiff has also raised a number of fruit bearing trees in the suit property and the patta for the suit property stands in the name of the plaintiff's father. The plaintiff's father died thirty years ago and from that date onwards, the plaintiff is in exclusive possession and enjoyment of the suit property in open and to the knowledge of the entire villagers and thereby, he has perfected title by prescription and also by ouster. The suit Survey Number bearing 169/5 is having total extent of 98 cents of which the plaintiff is the absolute owner of the northern half and the southern half is in possession of one Arumugam Vagayara. The defendants have no manner of right or title over the suit property and they are not in possession of the same. They are strangers to the suit property and they are trying to interfere with the plaintiff's peaceful possession and enjoyment and hence the plaintiff was constrained to file the above suit for declaration and permanent injunction.

3. The averments made in the written statement filed by the first defendant and adopted by the second defendant are, in brief, as follows:

The allegations made in the plaint that the plaintiff is the absolute owner of the suit property and he is in exclusive possession of the same are all false. The entire extent of 98 cents situated in S.No.169/5 was originally belonged to four brothers viz., Perumal, Arumugam, Iruson, Subramani. The aforesaid property was the ancestral property of the abovesaid four brothers and they are the sons of one Kundan. All the four brothers died. Perumal died intestate leaving behind his only son Rangasamy. Rangasamy also died intestate leaving behind his wife one Jayamani, his sons Purushothaman,

Dhamodaradoss and daughters Kanagadevi, Kasturi and Sangeetha. Arumugam died leaving behind his three sons Varadan, Natesan and Kali. Irusan died intestate leaving behind Thirumalai (plaintiff) and Subramani and he also died leaving behind his sons Govindasamy and Kannabiran. Govindasamy died intestate leaving behind his legal heirs Amudarajan (first defendant), Padmanaban, Ravi, Murali, his daughters Indirani, Anandi and his Muthulakshmi. Kannabiran died leaving behind his wife Ambika and minor sons Hari and Kothandam. The entire 98 cents in the suit survey No.169/5 were originally partitioned by Rangasamy, Varadan, Natesan, Kali, Thirumalai (plaintiff) Govindasamy, and Kannabiran some 20 years back. The entire fruit bearing trees and other trees were planted and raised only by the ancestors of the defendants and plaintiff. A rough plan filed along with the written statement will show the actual partition between the sharers. In S.No.169/5, 25 cents was given to the plaintiff which is shown as 'A' in the plan, 24 cents on the east of the plaintiff's share was given to Govindasamy and Kannabiran which is shown as 'B' in the plan. 25 cents was given to Rangasamy which is shown as 'C' in the plan and the remaining 25 cents was given to Varadan and his brothers. Therefore, the plaintiff is not an absolute owner of the entire 49 cents as alleged in the plaint. The plaintiff is in possession and enjoyment of only 25 cents on the western side in the suit property and the first defendant, his brother, mother and legal heirs of Kannabiran and others are in enjoyment of eastern 25 cents of the suit property. Therefore, the plaintiff cannot claim any right over the eastern 24 cents and the trees thereon. The first defendant alone is paying kist and other charges to the eastern 24 cents. The plaintiff made several attempts to grab the eastern 24 cents from the first defendant's family. During the year 1985, the first defendant also obtained the ownership certificate from Tahsildar, Maduranthakam, when the plaintiff made an unlawful attempt to grab the property. The first defendant never claimed any right over the western 24 cents of the suit property. The plaintiff has not come to the court with clean hands. The plaintiff has suppressed the material facts and he not even disclosed the relationship between the parties. On the contrary, he has stated that the defendants are strangers. The second defendant is a close relative of the first defendant and he was helping him in enjoying the eastern portion of the suit property. So, the plaintiff is not entitled for any relief as claimed in the plaint. Therefore, the defendants prayed to dismiss the above suit.

4. Based on the aforesaid pleadings, the learned District Munsif has framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff's son was examined as PW1 and one Elumalai was examined as PW2. Exs.A1 to A74 were marked as exhibits on the side of the plaintiff. On the

side of the defendants, the first defendant examined himself as DW1 and two more witnesses were examined as DW2 and DW3 and Exs.B1 to B5 were marked. The Advocate Commissioner was examined as CW1 and her report and plan were marked as Ex.C1 and Ex.C2 respectively.

5. The learned District Munsif, after considering the materials placed before her came to the conclusion that the plaintiff has failed to prove that he is having title over the suit property and he is in exclusive possession of the entire suit property. Accordingly, she dismissed the suit with costs. Aggrieved by the same, the plaintiff has filed an appeal before the Sub-Judge, Maduranthagam. The learned Sub-Judge has allowed the said appeal and set aside the judgment and decree passed by the trial court and decreed the suit as prayed for. However, he directed the parties to bear their respective costs. Feeling aggrieved, the defendants have filed the present second appeal.

6. This court at the time of admitting the second appeal, has formulated the following substantial questions of law:

(1) Whether the lower appellate court is right in holding that the respondent is entitled to the relief of declaration, only on the basis of the patta, when admittedly the same stands in the name of the joint family?

(2) Whether the lower appellate court had taken into account, the fact that the jurisdiction of the Civil Court is not barred even though the settlement proceedings had issued patta in respect of the properties in question and if so whether the lower appellate court is justified in decreeing the suit."

7. During pendency of the second appeal, the first respondent herein died and his legal representatives have been impleaded as respondents 2 and 3.

8. Heard Mr.M.Sriram for Mr.A.Saravanan, learned counsel for the appellants and Mr.K.Chandrasekaran, learned counsel for the respondents.

9. Q.Nos.1 and 2:

The learned counsel for the appellants/defendants has submitted that the first appellate court erred in reversing the well considered judgment of the trial court. He further submitted that admittedly the suit property is the ancestral property to both parties and the patta for the suit property stands in the name of family members, but without taking into consideration of the same, the first appellate court has set aside the judgment and decree passed by the trial court and

decreed the suit as prayed for. He further submitted that the first appellate court erred in holding that the proceedings of the Settlement Officer cannot be questioned before the Civil Court. He further submitted that the evidence adduced on the side of the defendant would clearly establish that the plaintiff is entitled for 25 cents only and he cannot claim right over 49 cents. He further submitted that Ex.B5 would clearly establish that the first defendant and his brother are entitled to 24 cents and that being so, the first appellate court ought not to have allowed the plaintiffs' appeal and decreed the suit as prayed for and therefore, he prayed to set aside the judgment and decree passed by the first appellate court and restore the judgment and decree passed by the trial court.

10. Per contra, learned counsel for the respondents has submitted that the documents produced by the plaintiff would clearly show that the property originally belonged to Zameen and the Zameen had granted assignment in favour of the plaintiff's father Irusan and his brother Arumugam. He further submitted that after abolition of Inam, ryotwary patta was also issued in favour of the plaintiff's father Irusan and his brother Arumugam. He further submitted that though the defendants have stated in their written statement that even twenty years ago, the suit property was divided between the plaintiff's father and his brothers orally but the defendants have not produced any material to substantiate the said plea. He further submitted that the trial court without appreciating the aforesaid facts in a proper perspective, has dismissed the suit, but the first appellate court after considering all the aforesaid facts, has rightly allowed the appeal and set aside the judgment and decree passed by the trial court and decreed the suit as prayed for. He further submitted that since the first appellate court has arrived the aforesaid conclusion based on the factual findings, this court cannot interfere in the said findings and therefore he prayed to dismiss the second appeal.

11. According to the plaintiff, out of 98 cents, in SR.No.169/5, on the northern side 49 cents belongs to him and the southern portion 49 cents belongs to one Arumugam and others. The plaintiff claimed right over the suit property based on Exs.A6 to A16 pattas. Exs.A6 to A15 pattas issued by the Zameen in favour of Arumugam and Irusan in respect of 97 cents situated in S.No.264. The said Irusan is the plaintiff's father. It is seen from Ex.A16 that on 15.06.1959, the Assistant Settlement Officer had issued a ryotwari patta in favour of plaintiff's father viz., Irusan for S.No.264 and for that, New Survey Number has been assigned as S.No.169/1. It is seen from Ex.A17 that the said Survey Number has been changed into S.No.169/5 and in which, the plaintiff's father viz., Irusan and Arumugam Father of Varadhan names have been mentioned as patta

holders. In Ex.A18 also, it is stated that patta stands for the S.No.269/5 in the name of Irusan (plaintiff's father) and another for the total extent of 98 cents. During cross examination of PW1, the defendants have not disputed the genuineness of Exs.A5 to A16 and A18.

12. The first defendant is claiming right through Ex.B5. Ex.B5 is the certificate issued by Tahsildar dated 19.12.1997, in which, it is stated that as per the Settlement Register of the year 1963, the patta No.379 for S.No.169/5 measuring about 98 cents stands in the name of one Irusan and Varadan S/o.Arumugam. It is further stated that Irusan is having one brother by name Subramani. It is further stated that out of the aforesaid 98 cents, the said Irusan is entitled to 49 cents and in the said 49 cents, Irusan's son viz., Thirumalai (Plaintiff) is entitled to 25 cents and Erusan's brother Subramani is entitled to 24 cents. It is further stated that after the death of Subramani, his son Govindasamy succeeded to the aforesaid 24 cents and since the said Govindasamy also died, his son Amudarajan (first defendant herein) is succeeded to the said 24 cents and the said Amudarajan is enjoying the said 24 cents by paying kists from the year 1985. Even from the aforesaid certificate, the patta for the entire 98 cents which is situated in S.No.169/5 stands in the name of the plaintiff's father Irusan and one Varadan S/o.Arumugam and out of the said 98 cents, the said Irusan is entitled to 49 cents. Though it is stated in Ex.B5 that the said Irusan got one brother Subramani and out of 49 cents, Irusan would get 25 cents and his brother would get 24 cents, the Tahsildar has not stated any reason as to how the said Irusan's brother namely Subramani would get 24 cents. If at all, the first defendant is entitled to get 24 cents, he ought to have filed a suit either for partition or for declaration. But he has not filed any suit to declare his right over the aforesaid 24 cents.

13. It is to be pointed out that in the written statement, the first defendant has stated that the entire 98 cents was orally partitioned by Rangasamy, Varadan, Natesan Kali, Thirumalai (plaintiff) Govindasamy and Kannabiran some twenty years back and in the said partition, 25 cents on the north-west corner was allotted to the plaintiff and 24 cents on the north-east corner was allotted to the first defendant. To prove the same, except the self drawn plan filed by the first defendant, no other documents have been produced. Even in Ex.B5, it is not stated that the properties were orally partitioned and the plaintiff is enjoying 25 cents on the north west corner and the first defendant is enjoying 24 cents on the north east corner. Further if the properties were divided twenty years before filing of the suit, either the first defendant or his father would have taken steps to get mutation of revenue records. But

his family members have not taken any steps to get mutation of the revenue records. The properties were not sub-divided in the revenue records. The Advocate Commissioner's report and the plan would show that the suit property measuring about 49 cents is not having any division. In the entire 49 cents, trees are planted and there are no ridges demarcating the properties and the said physical features also would show that the properties were not divided as claimed by the first defendant.

14. Learned counsel for the appellants/defendants relying on the decision of the Hon'ble Supreme Court in *Gurdwara Sahib Vs. Gram Panchayat Village Sirthala and Another* (2014) 1 SCC 669 has contended that the suit cannot be filed to declare a title based on the adverse possession and only if proceedings are filed against the plaintiff, he can use the adverse possession as shield/defence.

15. In this case, the plaintiff has claimed right over the suit property by virtue of patta granted in favour of his father. In addition to that, he pleaded that he perfected title by adverse possession also. But during trial, the plaintiff has not claimed right on the basis of adverse possession. The first appellate court also granted decree only on the basis of the patta granted in favour of the plaintiff's father and not on the basis of adverse possession. Therefore, the aforesaid decision will not apply to the facts of the case.

16. Learned counsel for the appellants relying on the decisions of the Hon'ble Supreme Court in (i) *Binapani Paul Vs Prathima Ghosh and Others* (2007) 6 SCC 100 and

(ii) in *N. Padmamma and Others Vs. S. Ramakrishna Reddy and Others* 2015 (1) SCC 417 has contended that since the plaintiff has taken a plea of adverse possession and also ouster, the burden is upon him to prove that he has perfected title over the suit property by ousting the co-sharers for over a statutory period.

17. As already pointed out that in the plaint, the plaintiff claimed right over the suit property through the patta which was granted in favour of his father. In addition to that, he also pleaded adverse possession and ouster, but during trial, the plea of adverse possession or ouster given up. The evidence was adduced only on the basis of the patta granted in favour of the plaintiff's father and therefore, the aforesaid decisions also will not apply to the facts of the present case.

18. The trial court failed to take into consideration of the fact that the plaintiff has proved his title over the suit property by producing patta which was granted in his father's name and the said fact was also mentioned in Ex.B5. Under the

said circumstances, the trial court ought to have granted decree in favour of the plaintiff but it refused to grant decree in favour of the plaintiff. The first appellate court has rightly interfered with the decision of the trial court and set aside the judgment and decree passed by the trial court and granted decree as prayed for. In the said factual findings, this court cannot interfere. Accordingly, the substantial questions of laws are answered against the appellants.

In the result, the second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (CS-VI)

//True copy//

Sub Assistant Registrar

gv

To

1. The Principal Subordinate Judge,
Maduranthakam.
2. The Principal District Munsif,
Maduranthakam.
3. The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.A.Saravanan, Advocate SR.No.69895

+1cc to Mr.K.Chandrasekaran, Advocate SR.No.70483

S.A.No.1645 of 1999

CNR (CO)
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