

IN THE HIGH COURT OF JUDICATURE AT MADRAS**RESERVED ON : 02.02.2018****PRONOUNCED ON : 21.02.2018****CORAM****THE HONOURABLE MR.JUSTICE T.RAVINDRAN****S.A.No. 1076 of 2003**

Sivanandam

...

Appellant

Vs.

Swaminathan

...

Respondent

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 26.02.2003 made in A.S.No.76 of 2002 on the file of the Additional Subordinate Court, Mayiladuthurai, reversing the Judgment and Decree dated 22.08.2002 made in O.S.No.560 of 1999 on the file of the Additional District Munsif Court, Mayiladuthurai.

For Appellant : Mr.A.Muthukumar

For Respondent : Mr.S.Sounthar

JUDGMENT

Challenge in this second appeal is made to the Judgement and Decree dated 26.02.2003 passed in A.S.No.76 of 2002 on the file of the Additional Subordinate Court, Mayiladuthurai, reversing the Judgment and Decree dated 22.08.2002 passed in O.S.No.560 of 1999 on the file of the Additional District Munsif Court, Mayiladuthurai.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for permanent injunction or in the alternative for recovery of possession.

4. The case of the plaintiff, in brief, is that the suit property belonged to Varadharajaperumal Kovil and the plaintiff took the suit property from the above said temple on Paghuthi basis, on 16.07.1980, by way of executing a Paghuthi deed and since then, the suit property has been in possession and enjoyment of the plaintiff. The suit property has been described as ABCD in the plaint plan and in the A1D1 line, the compound Wall of the temple is located and in the BC line, trees are located and the plaintiff has been in possession and enjoyment of the suit property. While so, the defendant purchased the property situated to the north of BC line as shown in the plaint plan and taking advantage of the absence of the fence on the BC line, the defendant, with the help of his men, attempted to encroach into the portion of the suit property and put up bamboo fencing, which action was thwarted by the plaintiff and in this connection, police complaint has also been lodged by the plaintiff and further, on 02.12.1999, the defendant illegally put up a temporary Padal on EF line and accordingly, is making attempts to encroach into the portion of the suit property shown as BCEF and accordingly, the plaintiff

has been necessitated to lay the suit against the defendant for appropriate reliefs.

5. The case of the defendant, in brief, is that the suit is not maintainable either in law or on facts and it is not admitted that the plaintiff became a tenant of the suit property under the temple on 16.07.1980, by way of a Paghuthi arrangement and the same has to be established by the plaintiff and the plaintiff has created the document with reference to the same, with the connivance of the temple authorities and the plaint plan does not reflect the true position. The portion shown as BCEF in the plaint is not at all in the possession of the plaintiff at any point of time and the measurement given in the plaint plan is not correct and the defendant alone is in possession and enjoyment of the BCEF portion shown in the plaint plan and the trees standing at point BC belongs to the defendant and the ground site and the standing trees thereon originally belonged to Krishnamurthy Iyer, who conveyed the ground site as well as the trees in favour of the defendant by way of a sale deed dated 29.04.1999 and at that point of time, Krishnamurthy promised to give the trees thereon to Mariamman Kovil, Maraiyur and accordingly, the temple authorities have to cut and carry away the said trees and Krishnamoorthy instead of paying cash, offered the above said standing trees to the temple and accordingly, the defendant is residing with his family members by putting up a pacca building to the north of BC

line and there is no dividing boundary line at point BC between the property of the defendant and the suit property and the same is contiguous and at the point EF, there is a fence and that is the southern boundary of the defendant's property and hence, the case of the plaintiff that the defendant attempted to encroach into the BC portion of the plaint schedule property by putting up bamboo stick and Padal etc., are all false and made for the purpose of the case and further, the case of the plaintiff that he had lodged a police complaint with reference to the same is also false and hence, the question of alleged encroachment of the defendant in the BCEF portion does not arise and the same has been all along in the possession of the defendant as above stated and hence, the plaintiff has no cause of action to lay the suit against the defendant and the suit is liable to be dismissed.

6. In support of the plaintiff's case, PW1 has been examined and Exs.A1 to 7 were marked. On the side of the defendant, DW1 has been examined and Ex.B1 was marked. Exs.C1 & C2 were also marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to dismiss the suit laid by the plaintiff. On appeal, the first appellate Court, on an appreciation of the materials placed on

record, was pleased to set aside the judgment and decree of the trial Court and by way of allowing the appeal preferred by the plaintiff, decreed the suit as regards the alternative relief sought for by the plaintiff. Impugning the same, the present second appeal has been preferred.

8. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

" (i) Whether the lower appellate court not erred in law in granting the relief of possession without examining the title of the plaintiff's lessor which is germane in a suit for possession?

(ii) Whether the lower appellate Court not erred in law in simply relying on the alleged unregistered pakuthi chit Ex.A-1, when the genuineness of the same was questioned and particularly in the absence of any evidence to support the title of the plaintiff's lessor?

(iii) In the absence of any proof for the execution of Ex.A-1 and the title of the plaintiff's lessor whether the lower appellate Court not erred in law in granting the relief of possession, when

the suit was filed on the basis of title and not under Section 6 of the Specific relief Act?

(iv) Whether the lower appellate Court misconstrued and mis-appreciated the evidence on record particularly Exs.B-1, C-1 and C-2?"

9. The plaintiff has filed the suit seeking the relief of permanent injunction or in the alternative for the recovery of possession of the property alleged to have been encroached by the defendant. The plaintiff has filed a plan along with the plaint, which plan has been impugned by the defendant tooth and nail. Now, according to the plaintiff, the property shown as ABCD in the plaint plan belongs to the temple and he had taken the same on Paghuthi arrangement under the temple and been enjoying the same and further, according to the plaintiff, the defendant had purchased the property situated to the north of BC line shown in the plaint plan and taking advantage of the absence of fencing on the BC line, according to the plaintiff, the defendant had encroached into the portion of the suit property shown as BCEF illegally by putting up bamboo sticks, Padal etc., and hence, according to the plaintiff, he has been necessitated to lay the suit for appropriate relief.

10. Per contra, it is the case of the defendant that the plaint plan does not reflect the true position and the ground site and the trees standing on the portion shown as BCEF originally belonged to Krishnamurthy Iyer, from whom, the defendant had purchased the property by way of a sale deed dated 29.04.1999 and accordingly, the said portion as well as the other portions of the property comprised in the above said sale deed had been in the possession and enjoyment of the defendant and hence, there is no question of trespass as projected by the plaintiff and according to the defendant, the plaintiff, at no point of time, had been in possession and enjoyment of BCEF portion by having a pucca title as claimed in the plaint and hence, it is the case of the defendant that the plaintiff is not entitled to obtain the reliefs sought for.

11. Considering the pleadings projected by the respective parties, as rightly put forth by the defendant's counsel, when the defendant has impugned the right and title of the plaintiff in respect of BCEF portion shown in the plaint plan as projected in the plaint tooth and nail and in such view of the matter, in the light of the above said defence version, the plaintiff should have instituted the suit or at least amended the suit subsequently for seeking the relief of declaration as far as the disputed BCEF portion is concerned. However, the plaintiff has only laid the suit as simplicitor for permanent injunction or in the alternative sought for the recovery of possession of the BCEF portion from the defendant alleging

that the same had been encroached into by the defendant illegally.

12. Accordingly, it is found that the defendant has not admitted the title of Varadharajaperumal Kovil in respect of the disputed BCEF portion and therefore, it is found that the first appellate Court has erroneously proceeded in this matter on the premise that there is no dispute between the parties as regards the title of Varadharajaperumal Kovil with reference to the disputed portion i.e. BCEF. When according to the defendant, without the plaintiff establishing his alleged right and title in respect of the BCEF portion, no relief could be granted to him, it is found that it is for the plaintiff to establish his right and title to the said portion as claimed in the plaint. Accordingly, it is found that as above seen, the plaintiff should have sought for the relief of declaration with reference to the above said disputed portion.

13. In such view of the matter, it is for the plaintiff to establish that inclusive of disputed BCEF portion, the plaintiff has been given the property by Varadharajaperumal Kovil by way of Paghuthi arrangement as claimed in the plaint. Now, according to the plaintiff, he has been a tenant of the suit property shown as ABCD in the plaint from the said temple from 16.07.1980 and the Paghuthi deed with reference to the above case of the plaintiff has been marked as Ex.A1. As rightly contended by the defendant, merely from Ex.A1, it could not be inferred

that Varadharajaperumal Kovil has title to the property comprised therein nor the said document could be held to be a conclusive proof that the portion comprised therein had been validly leased out to the plaintiff by the said temple. It is thus found that as regards the disputed portion i.e. BCEF, the defendant is questioning the alleged Paghuthi arrangement/deed marked as Ex.A1. On a perusal of Ex.A1, it is found that as per the same, the portion measuring east-west 152', north-south 42' has been given to the plaintiff by the said temple within the specific boundaries and the further description of the property comprised therein would go to show that as per the said document, the plaintiff has claimed that he would use an extent of 4' as pathway from the compound Wall of the temple on the north side by putting up a fence and a mere perusal of Ex.A1 would go to show that the north-south measurement shown as 42' seems to be altered or corrected and with reference to the same, there is no proper explanation on the part of the plaintiff. It is therefore, highly doubtful whether as per Ex.A1, the plaintiff has been let out the portion measuring north-south 42'. In this connection, the plaintiff has not chosen to examine the temple authority to establish that he has been let out the portion as depicted in Ex.A1 document.

14. In this matter, the Commissioner had been appointed to inspect the properties of the parties concerned and accordingly, the commissioner had inspected the properties and filed his report and plan

and the same had come to be marked as Exs.C1 & C2. On a conjoint reading of Exs.C1 & C2, it is found that even as per the same, the plaintiff is found to be in possession of the portion measuring east-west 152' and north-south 41' from the compound wall of the temple on the AD line given in Ex.C2. It is thus found that excluding the AD compound wall, the plaintiff is shown to be in possession and enjoyment of 41' north-south and therefore, as rightly determined by the trial Court, inclusive of the compound wall measurement taken as 1', accordingly, it is found by the trial Court that the plaintiff is in possession and enjoyment of the suit property as leased out to him by the temple by way of Ex.A1. That apart, on a perusal of Ex.A1, it is found that the property belonging to Krishnamurthy Iyer is shown to be on the northern side and therefore, accordingly, the said boundary recitals read in conjunction with the report and plan of the advocate commissioner marked as Exs.C1 & C2, would go to show immediately to the north of BC line, the property belonging to Krishnamurthy Iyer commences and accordingly, the further case of the plaintiff that he has been leased out or let on Paghuthi basis, the portion BCEF also, as shown in the plaint plan cannot be readily accepted. As above seen, the plaintiff has claimed by way of Ex.A1 that he would make use of 4' pathway from the compound wall of the temple on the A1 D1 line by putting up a fencing. However, as per the report of the advocate commissioner marked as Ex.C1, there is no pathway adjacent to the compound wall of the temple as claimed by the plaintiff and accordingly,

it is seen that the plaintiff's claim that he had been using an extent of 4' as pathway from the compound wall of the temple is not buttressed by the report of the advocate commissioner Ex.C1 and therefore, it is seen that the plaintiff is in possession and enjoyment of the property let out to him by the temple inclusive of the compound wall as depicted in Ex.A1, accordingly, it is seen that while describing the property in Ex.A1, the property of Krishnamurthy is shown to be situated immediately to the north of the same and in such view of the matter, when the plaintiff has failed to establish that the disputed BCEF portion either belonged to Varadharajaperumal Kovil or have been let out to him on Paghuthi basis by the said temple and on the other hand, when the said portion is shown to be belonging to Krishnamurthy Iyer as per the boundary recitals found in Ex.A1, it is seen that the plaintiff cannot lay any claim or right in respect of BCEF portion.

15. As above seen, when the defendant is disputing the right and title of the plaintiff or for that matter, disputing the right and title of the temple as regards the said BCEF portion, it is for the plaintiff to establish his claim to the same either by examining his lessor or by summoning the document available with the lessor to prove that the lessor has the title to the disputed portion and competent to let out the same to the plaintiff on Paghuthi arrangement. Further, when seen from Exs.C1 & 2, the plaintiff is in possession of east-west 152' and north-south 41' and when the

extent of the compound wall is taken into account as held by the trial Court and particularly, when there is alteration /correction found in the north-south measurement in Ex.A1 and with reference to the same, there is no explanation offered on the part of the plaintiff and further, when as per the report of the advocate commissioner, the plaintiff has not been using any portion as pathway adjacent to the compound wall of the temple on the A1 D1 line, it is found that the first appellate Court has erroneously determined that the defendant has encroached into the BCEF portion and removed the trees standing thereon and hence, the plaintiff is entitled to the relief of recovery of possession. As regards the same, as rightly argued, the suit has not been laid as per Section 6 of the Specific Relief Act and on the other hand, the suit is based upon the title. When the defendant is disputing vehemently the claim of title and right of the plaintiff to the disputed BCEF portion, it is for the plaintiff to establish the same by placing acceptable and reliable materials. However, the only document placed by the plaintiff with reference to the same Ex.A1 and further when Exs.C1 & C2 do not advance his case and on the other hand, when it is found that the plaintiff is in possession and enjoyment of the portion let out to him by the temple as noted by the advocate commissioner and when the plaintiff has failed to establish that the temple has the right and title to the disputed BCEF portion, as rightly argued, the first appellate Court seems to have based its decision on the weakness of the defendant's case and thereby granted the relief sought

for by the plaintiff without any material.

16. However, the plaintiff's counsel contended that as per the Commissioner's report and plan marked as Exs.C1 & 2, the fencing put up on the BC line is found to be new origin and further, the trees standing on the disputed portion at the time of the first inspection of the commissioner being found to be cut away during the second inspection of the commissioner, therefore, it is contended by the plaintiff's counsel that it is only the defendant, who had illegally trespassed into the said portion. However, when the plaintiff has miserably failed to establish that the above said disputed portion belonged to the temple and let out to him on Paghuthi basis by the temple, on the other hand, the said portion is shown to be belonging to Krishnamurthy Iyer even in Ex.A1 Paghuthi deed and when it is the specific case of the defendant that he has purchased the property of Krishnamurthy by way of Ex.B1, merely on the footing that the fencing on BC line is of new origin and that, the trees had been cut away, by itself would not automatically lead to the conclusion that the disputed portion is in the possession and enjoyment of the plaintiff on Paghuthi basis as claimed.

17. The mere fact that the portion in the occupation of the plaintiff is found to be at a higher level and equally, the disputed portion being of a slightly higher level than the portion of the defendant by itself would

not automatically lead to the conclusion that the disputed portion i.e. BCEF portion belonged to Varadharajaperumal Kovil or that, the said portion had been let out to the plaintiff by way of Ex.A1 arrangement. The plaintiff having come forward with the suit seeking specific reliefs and when the entitlement or right of the plaintiff to the disputed portion is being impugned by the defendant and despite the same, the plaintiff having not evinced interest to seek the relief of declaration and also failing to establish his lessor's title to the disputed BCEF portion and failing to establish the disputed BCEF portion had been let out to him on Paghuthi Basis and on the other hand, Ex.A1 arrangement depicts that the portion immediately situated to the north of the paghuthi portion belonged to Krishnamurth Iyer, from whom the defendant had derived title, merely on the footing that the disputed portion is slightly at a higher level than the defendant's other portion by itself would not be a conclusive proof to uphold the plaintiff's right or entitlement to the disputed portion. On a conjoint reading of the commissioner's report and plan, it is made clear that the plaintiff is not in possession and enjoyment of the disputed portion by way of Ex.A1 and it is further found that the portion BCEF has not been established to be let out to the plaintiff by way of Ex.A1 arrangement and when Ex.A1 depicts that the property of Krishnamurthy Iyer is lying on the north side, as rightly argued, the disputed portion is in the possession and enjoyment of only the defendant and his predecessor in title as claimed by the defendant and in such view

of the matter, the plea of trespass into the disputed portion by the defendant as claimed by the plaintiff cannot be countenanced.

18. In the light of the above discussions, the first appellate Court erred in granting the relief of possession in favour of the plaintiff, merely on surmises and conjunctures, without the plaintiff establishing the right and title of his lessor as regards the disputed portion and the first appellate Court has also erred in placing reliance upon the Paghuthi arrangement Ex.A1 *ipso facto*, despite the challenge thrown to the same by the defendant with reference to its authenticity and particularly, when the plaintiff has based his suit only on his entitlement to the disputed portion and not laid the suit under Section 6 of the Specific Reliefs Act, sans material placed by the plaintiff to hold that his lessor had a valid title to the disputed portion or his lessor had validly let out the disputed portion to the plaintiff by way of Ex.A1, it is found that the first appellate Court had misconstrued and misappreciated the evidence on record, particularly, Exs.B1, C1 & C2 in the wrong perspective and committed a serious miscarriage of justice in granting the relief of possession in favour of the plaintiff. The Substantial questions of law formulated in this second appeal are, accordingly, answered against the plaintiff and in favour of the defendant.

At the end, the Judgement and Decree dated 26.02.2003 passed in A.S.No.76 of 2002 on the file of the Additional Subordinate Court, Mayiladuthurai, are set aside and the Judgment and Decree dated 22.08.2002 passed in O.S.No.560 of 1999 on the file of the Additional District Munsif Court, Mayiladuthurai, are confirmed. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Index : Yes / No
Internet : Yes / No
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21.02.2018

To

1. The Additional Subordinate Court, Mayiladuthurai.
2. The Additional District Munsif Court, Mayiladuthurai.
3. The Section Officer, V.R.Section, High Court, Madras.

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T.RAVINDRAN, J.

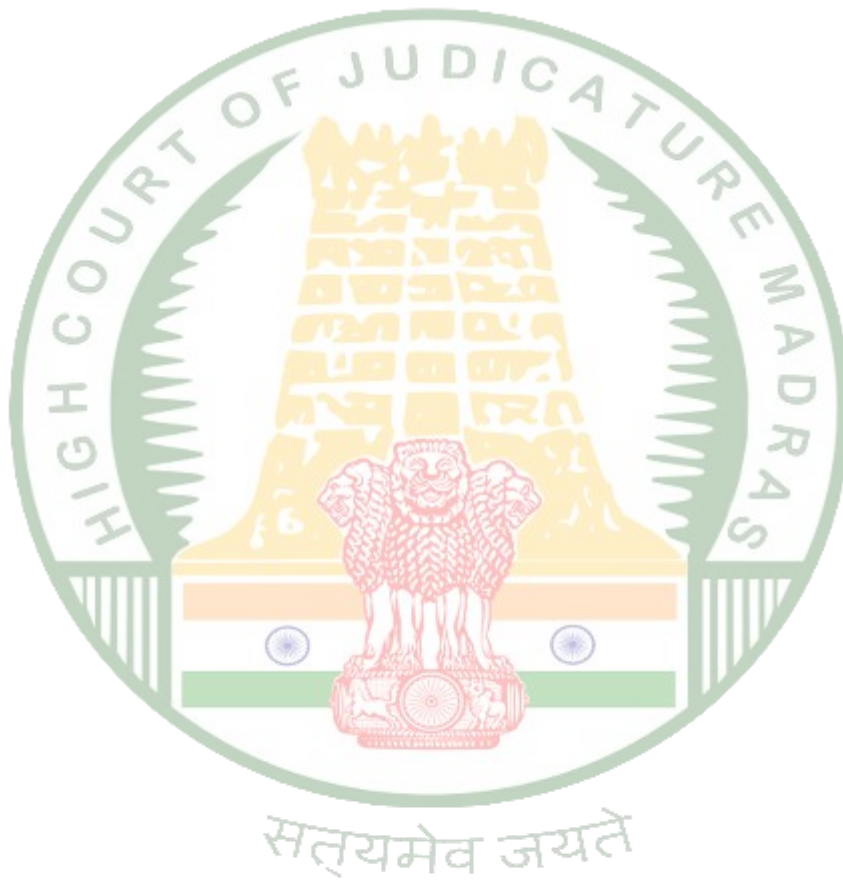
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**Pre-Delivery Judgment made
in S.A.No. 1076 of 2003**

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