

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :30.01.2018
PRONOUNCED ON:12. 02.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A. No.1183 of 2003

Kothandapani ...Appellant/Respondent/Plaintiff

Vs

Subramaniam .. Respondent/Appellant/Defendant

Prayer:

Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree dated 21.04.2003 made in A.S.No.3 of 2003 on the file of Principal District Court, Nagapattinam reversing the Judgment and decree dated 28.10.2002 made in O.S.No.375 of 1999 on the file of District Munsif Court, Nagapattinam.

For Appellant : Mr.Srinath Sridevan

For Respondent : Ms.R.J.Shyamala

J U D G M E N T

This second appeal is directed against the judgment and decree dated 21.04.2003 passed in A.S.No.3 of 2003 on the file of the Principal District Court, Nagapattinam, reversing the judgment and decree dated 28.10.2002 passed in O.S.No.375 of 1999 on the file of the District Munsif Court, Nagapattinam.

2. The parties are referred to as per the rankings in the trial court.

3. Suit for permanent injunction.

4.The case of the plaintiff in brief is that the suit property was enjoyed by the plaintiff from the days of his ancestors on "paguthi" basis under V.S.Thiyagaraja Mudaliyar and subsequently, the suit property was purchased by Ramnath Koyanga from V.S.Thiyagaraja Mudaliyar on 29.03.1960 and the plaintiff had purchased the suit property from Ramnath Koyanga during the year 1962 and prior to his purchase, it is only the plaintiff and his predecessors in interest, who had been in possession and enjoyment of the suit property under "Paguthi" arrangement and there is a small pond in the suit property and the plaintiff had been utilizing the water from the pond to irrigate the vacant

portion of the suit property and the defendant had requested the plaintiff to permit him to irrigate his lands by using the water from the pond located in the suit property, which was not accepted to by the plaintiff and resultantly, developing enmity, the defendant attempted to interfere with the possession and enjoyment of the plaintiff with reference to the suit property and hence the suit for appropriate reliefs.

5.The case of the defendant in brief is that the suit is not maintainable either in law or on facts. It is true that the suit property and other extent of large properties were owned by V.S.Thiyagaraja Mudaliyar and accordingly, V.S.Thiyagaraja Mudaliyar had alienated the properties to various persons and accordingly the defendant's father Chidambaram acquired an extent of 3 acres and 53 cents from V.S.Thiyagaraja Mudaliyar on 31.01.1960 and in the said document, the extent of 50 cents in survey number 449 is shown as the second item and the defendant had purchased an extent of 50 cents situated in survey number 449 lying to the east of 50 cents of land purchased by his father from one Jaganathan on 20.01.1997 and accordingly, the defendant has been residing in the property acquired by him as above stated and the pond is situated in the property belonging to the defendant and the land of the plaintiff is situated to the south-west of the defendant's lands and the pond is not located in the plaintiff's land and the plaintiff had not utilized the water from the pond to irrigate his lands and taking advantage of the ex-parte injunction order, the plaintiff had put up fencing around the pond and the same could be evidenced by the inspection of the properties of the parties concerned by a Commission and the plaintiff's sale deed is subsequent to the purchase of the property by the defendant's father and the case of the plaintiff that the defendant had requested to utilize the water from the pond to irrigate his lands and that the same had been refused is false. The plaintiff has no title to the suit property and hence the suit is liable to be dismissed.

6.In support of the plaintiff's case, P.Ws.1 to 3 were examined. Exs.A1 to A11 were marked. On the side of the defendant, D.W.1 was examined. No document was marked. Exs.C1 to C4 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 decree the suit as prayed for. On appeal, the first appellate court, on an appreciation of the materials placed, set aside the judgment and decree of the trial court and by way of allowing the appeal preferred by the defendant, dismissed the suit laid 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.

(a) Whether the title of the plaintiff is to be proved in a suit for bare injunction under Section 27(c) of the Tamilnadu Court Fees & Suits valuation Act, 1955?

(b) Whether second advocate commissioner report can be looked into when the first advocate commissioner report was not scrapped?

(c) Whether a commissioner's report can be looked into an evidence of possession?

(d) Whether the judgment of the appellate court is not vitiated by failure to follow the principles adumbrated in 2000(1) CTC 505 (Supreme Court)?

9. The suit has been laid simpliciter by the plaintiff for the relief of permanent injunction. From the materials placed on record and the rival contentions put forth by the respective parties, it is found that the pond is the bone of contention between the respective parties. Now, according to the plaintiff, the pond is located in the property purchased by him, during the year 1962, which document has come to be marked as Ex.A1. The parties are not in dispute that the suit property and other extent of large properties in the area was originally owned by Thiyagaraja Mudaliyar. It is the case of the plaintiff that his vendor Ramnath Koyanga had purchased the suit property from Thiyagaraja Mudaliyar and he in turn, purchased the suit property and other properties from Ramnath Koyanga by way of Ex.A1. Though, it is specifically stated in the plaint that the pond in question is located in the suit property by the plaintiff, while describing the property in the plaint schedule, it is found that the plaintiff has only shown the same as comprising of an extent of 25 cents in the suit survey number 449 within the specific boundaries and as far as the pond in question is concerned, it is found that, though in the plaint, the plaintiff had originally included in the description of the property as including the pond, however, it is found that at the time of the presentation of the plaint, he had deleted or scored off the pond from the description and this would go to show that inasmuch as the pond is not located in the suit property as such, the plaintiff has chosen to delete the pond from the description of the suit property in the plaint and accordingly, claimed the relief of permanent injunction as regards the 25 cents of land in the suit survey number 449 as

described in the plaint schedule.

10. Now, according to the defendant, his father had purchased an extent of 3 acres 53 cents from Thiyagaraja Mudaliyar on 31.01.1960, and by way of the above said sale deed, an extent of 50 cents had been acquired by his father in survey number 449 and further according to the defendant, he had purchased an extent of 50 cents in the suit survey number 449 from Jaganathan, by way of a sale deed dated 20.01.1997, which document has been marked as Ex.A9 and further according to the defendant in the said sale deed, the suit survey number has been wrongly mentioned and thereafter he had obtained the rectification deed from the vendor's wife Kuppammal on 31.12.1999, which document had been marked as Ex.A10 and according to the defendant, the vendor Jaganathan was not alive at that point of time. Thus, according to the defendant, he owns an extent of one acre of land in the suit survey number 449 and the pond in question is located only within the property belonging to him and further according to the defendant, the plaintiff cannot lay any claim of title to the pond in question and hence the suit laid by the plaintiff is liable to be dismissed.

11. From the description of the suit property as narrated in the plaint, it is found that from the above factor and also the documents marked as Exs.A9 and A10, it is seen that the defendant owns lands in the suit survey number 449 and accordingly, it is found that from the pleadings set out by the respective parties in the matter, the defendant is not admitting the title of the plaintiff in respect of the suit property particularly, the pond in question. The case of the defendant is that on the footing that the pond in question is located only in the property belonging to the plaintiff and the plaintiff only on obtaining an ex-parte order of injunction, put up the fencing around the pond and therefore according to the defendant, the plaintiff would not be entitled to obtain the reliefs sought for in the plaint as on the date of the institution of the suit, the plaintiff is not in a possession and enjoyment of the suit property comprising of the pond in question.

12. In this matter, it is found that the Commissioner had inspected the properties of the parties concerned twice and at the first instance, the Commissioner had noting the fencing around the pond and from the report and plan of the Commissioner marked as Exs.C1 and C2, it is found that the fencing put up around the pond is of a new origin. It is therefore, found that the case of the defendant that the plaintiff taking advantage of the ex-parte order of injunction obtained, had put up the fencing illegally around the pond as if he has title to the same, cannot be easily brushed aside. Further, at the time of inspection of the properties concerned by the Commissioner during the second inspection, according to the Commissioner, the

pond in question is located in the property belonging to the defendant and the plaintiff's land is situated about 30 feet away from the pond. It is further found that as per the second report and plan of the Commissioner marked as Exs.C3 and C4, the pond in question is found to be located only in the property belonging to the defendant.

13.In this connection, the counsel for the plaintiff contended that the first appellate court erred in placing reliance upon the second report of the Commissioner ignoring the first report of the Commissioner and according to him, there is no warrant for the issuance of the Commission for the second time without scrapping the report of the first Commission and in such view of the matter, the first appellate court has erred in placing reliance upon the report of the second Commission. However, as rightly argued by the defendant's counsel, the Commissioner's report would not be the basis for determining as to which the party is in possession of the disputed property. In such view of the matter, it is found that neither Exs.C1 and C2 nor Exs.C3 and C4 could be relied upon for determining the possession of the particular party as regards the property in dispute.

14.As above seen, the property in dispute is the pond. The plaintiff claims that the pond is situated in his property where as the defendant claims that the pond is situated in his property. The parties of the lis, as above seen, are vying with each other with reference to the same. As adverted above, when the defendant is challenging the title of the plaintiff to the suit property, particularly, impugning that the pond in question is not located in the property belonging to the plaintiff and when it is found that the plaintiff has not included the pond in the description of the plaint schedule property, on the other hand, he has scored off the inclusion of the pond in the description of the property and when the materials placed by the plaintiff marked as Exs.A1 to A8 as such, do not indicate that the pond in question is located in the property said to be belonging to the plaintiff, it is seen that dehors the reports of the Commission sans any material in support of the plaintiff's case that he has title to the suit property inclusive of the pond or that he has title to the suit property as described in the plaint, it is seen that the plaintiff cannot be allowed to obtain the equitable relief of permanent injunction. When the plaint schedule description is, according to the plaintiff, given as per the position available on ground and when the same is not found to be in consonance with recitals found in Ex.A1 and further when the Kist receipts and the settlement register marked as Exs.A2 to A8 do not serve the plaintiff's case that the suit property as described in the plaint is in the possession and enjoyment of the plaintiff, no interference could be made to the judgment and decree of the

first appellate court in declining the relief of permanent injunction sought for by the plaintiff.

15. In this connection, it is contended by the plaintiff's counsel that the defendant has not placed any material to show that he is in possession and enjoyment of the property measuring an extent of one acre inclusive of the pond and therefore, the plaintiff's case should be accepted. Countering the same, it is argued by the defendant's counsel that the plaintiff having come forwarded with the suit seeking the equitable relief of permanent injunction should stand or fall on the strength of his own case and he cannot be allowed to obtain the reliefs prayed for based on the weakness of the defence version and therefore according to him the plaintiff's case, sans material should be rejected. The above argument of the defendant's counsel seems acceptable. When according to the plaintiff, the suit property is inclusive of the pond in question, however, the description of the plaint schedule property is found to be not inclusive of the pond and when the materials placed by the plaintiff do not point out that the plaintiff is in possession and enjoyment of the suit property and when the defendant is challenging the plaintiff's claim of title and possession of the suit property inclusive of the pond in question, it is found that for the reasons above stated, the plaintiff cannot be granted the relief of permanent injunction as prayed for.

16. It is admitted that the defendant also owns land in the suit survey number 449 and it is further found that the plaintiff as shown, the defendant's property as being located to the north of the suit property. The defendant is vehemently disputing the title, possession and enjoyment of the suit property inclusive of the pond as put forth in the plaint. According to the defendant, the pond in question is located in the property belonging to him. Thus, it found that when the defendant is throwing a challenge to the claim of the title to the suit property by the plaintiff, as rightly argued and determined by the first appellate court, the plaintiff should have amended the plaint to seek the relief of declaration in respect of the property in question. However, the plaintiff for the reasons best known to him, despite the stout defence put forth by the defendant as regards his claim of title, possession and enjoyment of the suit property, remained satisfied only in seeking the relief of permanent injunction. However, as determined by the first appellate court, the plaintiff's failure to seek the relief of declaration in respect of the suit property for the reasons above stated is fatal to the plaintiff's case and on that score alone, the plaintiff's suit should fail in the light of the decision of the apex court reported in AIR 2008 Supreme Court 2033 [Anathula Sudhakar Vs. P. Buchi Reddy (dead) by L.R's and others]

17.In the light of the above discussions, it is found that considering the above factors, when the title of the plaintiff is in dispute, the bare suit for permanent injunction laid by the plaintiff is found to be not maintainable. Further, it is seen that the Commissioner's reports filed in this matter cannot be taken into consideration as evidence of the possession of the property in dispute by the concerned parties and accordingly the same are not relied upon. For the reasons stated above, it is found that the first appellate court is right in non suiting the plaintiff and no valid and acceptable material has been placed by the plaintiff to hold that the judgment of the first appellate court is vitiated by failing to follow the principles of law adumbrated by the apex court. The substantial questions of law formulated in the second appeal are accordingly answered.

18.In conclusion, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

-s/d-

Assistant Registrar(CS-II)

True Copy

Sub-Assistant Registrar

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To

1. The Principal District Judge,
Nagapattinam.
- 2.The District Munsif,
Nagapattinam.
3. The Section officer
VR Section, High Court, Madras.

+1 CC to Mr. Srinath Sridevan, Advocate sr 10782.

+1 CC to Mr.R.T. Shymala, Advocate sr 10704.

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S.A. No.1183 of 2003

RR(CO)
SP(24/05/2018)