

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.03.2018

CORAM:

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

S.A.No.340 of 2015
and M.P.No.1 of 2015

1. Venkatachalam
2. Rajamani

.. Appellants/Defendants

Vs.

Ramasamy

.. Respondent/Plaintiff

Prayer : Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgement and decree dated 24.02.2014 made in A.S.No.41 of 2013 on the file of the Principal Subordinate Court, Erode, reversing the judgement and decree dated 20.06.2013, made in Unnumbered Plaint in Court Fee Registered (CFR) No.7118 of 2013 on the file of the Principal District Munsif Court, Erode.

For Appellants : Mr.R.Dhanaram
for M/s.G.Ethirajulu

For Respondent : Mr.N.Manokaran

J U D G E M E N T

The defendants in an unnumbered suit has preferred the above appeal challenging the judgement and decree dated 24.02.2014 passed in A.S.No.41 of 2013 directing the suit to be numbered.

2. The plaintiff is one Ramasamy, who had filed the suit for permanent injunction restraining the defendants from in any manner trespassing into the suit properties and taking forcible possession of the suit properties, till possession of the suit properties are delivered to the defendants in accordance with law. The suit properties consist of two items, of which, the first item is situated in R.S.No.134/4 - an extent of 9.65 acres in Kumalamparappu Village, Erode, while the second item is also situated in R.S.No.134/4 - an extent of 4.91 ½ acres, out of 9.65 acres in the same Kumalamparappu Village, Erode. The said suit was rejected in CFR stage itself, as it is hit by Order 7, Rule 11(d) of the Code of Civil Procedure (in short, "CPC").

3. Aggrieved by the said order of the Trial Court, an appeal was preferred in A.S.No.41 of 2013 on the file of the Principal Subordinate Court, Erode, which allowed the appeal directing the suit be numbered. Aggrieved by the said order, the defendants 1 and 2 have preferred the above second appeal.

4. At the time of admission, the following questions of law were formulated by this Court for consideration :

"a. Whether the Lower appellate Court justified in holding that the suit for permanent injunction is maintainable since the boundaries of the suit property was interchanged irrespective of the findings to the effect that the plaintiff has admitted the title of the defendants in the suit property ?

b. Is it not the present suit for permanent injunction filed by the respondent amounts to re-litigating the same issue in respect of the same property which was delivered to the appellants in E.P.No.1 of 2008 ?"

5. The parties have been litigating for almost two decades. The concise facts leading to the above appeal are as follows :

(i) The plaintiff's father had purchased an extent of 70 cents in S.F.No.116A and 30 cents in S.F.No.117/B from one Chenniappan under Ex.A.1 on 11.07.1968. On 25.02.1968, the plaintiff himself purchased an extent of 70 cents in S.F.No.116A and 30 cents in S.F.No.117/B from one Arunachalam, who is the brother of Chenniappan, under Ex.A.2. The plaintiff also had purchased an extent of 2.06 ½ acres in S.F.No.116/B and 117/B from one Varanavasigounder, who is the father of Chenniappan and Arunachalam, under Ex.A.3 on 01.10.1973.

(ii) One Komarasami Gounder filed a suit in O.S.No.539 of 1974 on the file of the Subordinate Court, Erode, against the above referred V.Chenniappan for recovery of money. Pending the suit, in I.A.No.1609 of 1974, the property of Chenniappan in R.S.No.134/4 at Kumalamparappu Village, was attached before the Judgment on 07.11.1974. When the order of attachment was in force, the plaintiff herein purchased an extent of 38 cents from Chenniappan on 11.03.1976 under Ex.A.4. The order of attachment was also made absolute on 11.09.1978. The suit was decreed on 08.02.1980 in favour of Kumarasami.

(iii) E.P.No.519 of 1981 was filed and it was dismissed for default on 06.01.1983. Another E.P.No.139 of 1982 was filed, which was also dismissed for default on 07.11.1983. Once again, E.P.No.6 of 1986 was filed, in which, fresh order of attachment was passed on 19.06.1987. The property was purchased by one Somasundaram in E.P.No.6 of 1986, in the court auction on 23.11.1994. The sale was confirmed on 25.01.1995 and the sale

certificate was issued as per Ex.B.13. The symbolic possession of an extent of 4.82 ½ acres in R.S.No.134/4 was taken on 14.12.1995. The auction purchaser Somasundaram also entered into an agreement to sell with one Venkatachalam, who is the first appellant/defendant herein.

(iv) In the meanwhile, the plaintiff - Ramasamy had filed O.S.No.800 of 1996 before the District Munsif Court, Erode, for declaration of title and for permanent injunction in respect of the properties in R.S.No.134/4 based on the title deeds Exs.A.1 to A.4. The said suit was transferred to the I Additional Subordinate Court, Erode, and renumbered as O.S.No.124 of 2004.

(v) The first appellant/defendant filed a suit for specific performance in O.S.No.429 of 1996 against the auction purchaser - Somasundaram, based on the agreement dated 31.01.1996. Pending the suit in O.S.No.429 of 1996, the first appellant/defendant purchased a portion of the property from the auction purchaser under Ex.B.11. The second appellant/defendant also had purchased the remaining portion of the property from the auction purchaser Somasundaram under Ex.B.12.

(vi) The appellants herein/defendants also filed another suit in O.S.No.528 of 2001 on the file of the I Additional Subordinate Court, Erode, against the respondent/plaintiff, the auction purchaser - Somasundaram and others, for declaration of title of the property on the basis of the sale deed, for permanent injunction and for partition.

(vii) A joint trial was conducted clubbing O.S.No.124 of 2004 (originally O.S.No.800 of 1996) and O.S.No.528 of 2001 before the I Additional Subordinate Court, Erode. On 23.12.2004, O.S.No.124 of 2004 filed by the respondent/plaintiff was dismissed and a preliminary decree for partition was granted in O.S.No.528 of 2001. Aggrieved by the said judgment, the respondent herein, who is the plaintiff in O.S.No.124 of 2004, has preferred A.S.Nos.36 and 37 of 2005 on the file of the District Court, Erode, which were transferred to the Additional District Court (Fast Track Court No.I), Erode, and renumbered as A.S.Nos.7 and 8 of 2007. I.A.No.333 of 2005 was filed by the appellants/defendants for passing final decree based on the preliminary decree. The appeals filed by the respondent/plaintiff in A.S.Nos.7 and 8 of 2007 were dismissed by a common judgment on 31.07.2007. A final decree was passed in I.A.No.333 of 2005 in O.S.No.528 of 2001. Aggrieved by the dismissal of A.S.Nos.7 and 8 of 2007, S.A.Nos.561 and 562 of 2008 were filed before this Court. This Court dismissed the second appeals on 20.08.2008, against which, a challenge was laid before the Apex Court in SLP (Civil) Nos.3504 and 3505 of 2009, which were also dismissed on 30.03.2009.

(viii) In the meanwhile, challenging the final decree dated 31.07.2007, A.S.No.29 of 2008 was filed. The said A.S.No.29 of 2008 was also dismissed on 27.08.2010. Aggrieved by the same, the respondent herein/plaintiff filed S.A.No.1391 of 2010, which

was also dismissed on 14.09.2011 confirming the final decree passed.

(ix) The appellants herein/defendants filed E.P.R.No.1 of 2008 for taking possession of the property, which was resisted by the respondent/plaintiff praying not to record the delivery of possession, contending that the description of the property itself is incorrect. The Execution Court recorded possession after handing over the properties to the appellants/defendants.

(x) Aggrieved by the same, C.R.P.NPD.No.2417 of 2012 was filed, which resulted in a dismissal on 03.07.2012. Thereafter, Obstruction Petition which was filed by one Nachimuthu was dismissed and the CRP filed against the same in CRP NPD No.196 of 2013 was also dismissed on 18.01.2013.

(xi) While so, the plaintiff, who is the respondent herein, had filed a fresh suit in CFR No.7118 of 2013 on the file of the Vacation Civil Judge, Erode, against the appellants/defendants for permanent injunction restraining the appellants/defendants in any manner trespassing into the suit property. According to the respondent/ plaintiff, the property described in the execution petition is the second item of the suit property. The respondent/plaintiff had submitted that there is North-South Road running on the East side of the suit property, but the appellants/defendants have filed E.P.No.1 of 2008 for delivery of possession of the properties lying on the Eastern side of the North-South Road. According to the respondent/plaintiff, the suit properties are lying on the Western side of the North-South Road. Contending thus, the respondent/plaintiff filed a suit for injunction. It was stated further that the suit properties are not yet delivered to the appellants/defendants so far, as the respondent/plaintiff himself is in exclusive possession and enjoyment of the same. According to the respondent/plaintiff, the description of the property given in the execution petition is wrong. The alleged delivery of properties in accordance with the final decree is also wrong, as the description of the properties mentioned in the final decree proceedings in the execution petition are all incorrect. It is the specific case of the respondent/plaintiff that till the delivery is taken in terms of the final decree, the possession of the respondent/plaintiff should not be disturbed.

(xii) The Trial Court held that the suit is specifically barred by Section 47 of the CPC. Yet another reason for the rejection of the plaint was that the suit would be barred by Section 41(a) of the Specific Relief Act. On appeal, the same was reversed.

5. The learned counsel for the respondent/plaintiff submitted that the delivery taken by the appellants are with wrong description of the property and with the delivery warrant, the appellants/defendants are attempting to interfere with the respondent/plaintiff's possession of the suit property. It was

further contended that there was no cause of action for the suit.

6. Resisting the said argument, learned counsel for the appellants/defendants contended that the execution court cannot go beyond the decree even if the decree is wrong. If the respondent/ plaintiff has got any grievance, he should go only before the execution court and he cannot re-litigate.

7. The questions that arise for consideration are (i) whether the suit is maintainable, when the plaintiff had admitted the title of the defendants in the earlier proceedings ? ; and (ii) whether the present suit would amount to re-litigation ?

8. The respondent/plaintiff had admitted the title of the appellants/defendants. The suit properties vest with the appellants/ defendants and the same is also not disputed in the plaint. It is the contention of the respondent/plaintiff that the appellants/ defendants had interchanged East and Western boundaries and also interchanged North and Southern boundaries. Hence, the description given in E.P.No.1 of 2008 was wrong. Once the proceedings between the parties had reached the finality and the respondent/plaintiff had not disputed the title of the appellants/defendants, it is not open to him to challenge it by way of relitigation. It is the specific contention of the learned counsel for the respondent/plaintiff that what was settled from the trial Court up to the Supreme Court was only the title of the appellants/defendants. The question of possession was not gone into. Without the description of the properties being clarified, the appellants/defendants cannot take delivery of possession of the property, to which they are entitled to under the decree. In E.P.No.1 of 2008, the respondent/plaintiff had been a party and the description of the property was given in the execution petition with specific boundaries and the respondent/plaintiff, as respondent No.2 in the said proceedings, has filed his counter and he was very well aware of the description of the property. Having participated in the execution proceedings and in E.P.No.1 of 2008 filed for delivery of possession, the respondent/plaintiff is estopped from re-agitating the same, by filing a fresh suit.

9. Section 47 of the CPC provides for questions to be determined by the Court executing the decree. Accordingly, all the questions arising between the parties in the suit, in which the decree was passed and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by separate suit. It is not in dispute that both the appellants/defendants and the respondent/plaintiff were parties to the execution proceedings.

It was open to the respondent/plaintiff to challenge the questions relating to delivery of possession of the property even in the execution proceedings itself. Learned counsel for the appellants/defendants contended that Section 41(A) of the Specific Relief Act would also be a bar for filing a fresh suit.

9-a. In paragraphs 9 and 10 of the plaint that is impugned, it is stated as follows :

"9) The plaintiff further submits that taking advantage of the delivery receipt, on 15.05.2013, the defendants made arrangements to trespass into the suit properties in order to take forcible possession of the suit properties. The defendants have no right to take possession of the suit properties. Therefore, the plaintiff has prevented their unlawful attempt. But the defendants are continuing their attempt.

10) The plaintiff submits that the description of the properties described in the execution petition are wrong. The defendants have not taken delivery of the properties lying on the west of the north south road. They never taken possession of the suit properties at any point of time. The alleged delivery of the properties in accordance with the final decree is wrong. The defendants have not amended the execution petition. Further, the defendants did not take any action to correct the mistakes crept during the execution proceedings. The defendants ought to have taken steps to file an execution petition for the purpose of taking possession of the properties in terms of the final decree. Till then, they are not entitled to take possession of the properties forcibly. Therefore, the plaintiff is filing the present suit for permanent injunction restraining the defendants, their men, agents, etc., from in any way and in any manner either trespassing into the suit properties or taking forcible possession of the suit properties till possession of the suit properties delivered to the defendants in accordance with law. Unless the reliefs are granted, the plaintiff will be put to irreparable loss and hardships which cannot be compensated by any means."

10. A reading of Order 7, Rule 11 of the CPC makes it clear that the relevant facts, which need to be looked into for deciding an application are the plaint averments only. The trial court can exercise the power under Order 7, Rule 11 at any

stage of the suit before registering the plaint or after issuing summons to the defendant at any time before conclusion of the trial. For the said purpose only, the averment in the plaint are germane. It is relevant to refer to the decision of the Supreme Court in T.Arivandandam V. T.V.Satyapal, (1977) 4 SCC 467, wherein it has been held as follows :

".... 5. The learned Munsif must remember that if on a meaningful - nor formal - reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order 7 Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order 10 CPC. An activist Judge is the answer to irresponsible law suits. The trial courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage. The Penal Code is also resourceful enough to meet such men, (Chapter XI) and must be triggered against them."

11. The above view is reiterated by the Supreme Court in Church of Christ Charitable Trust and Educational Charitable Society V. Ponnamman Educational Trust, (2012) 8 SCC 706.

12. It is only the cause of action, which is a bundle of facts, which gives right to any plaintiff for a relief against the defendant. The cause of action for the present suit arose on 23.12.2004, when the preliminary decree was passed and on 17.01.2013 delivery was effected etc. The respondent/plaintiff was a party in all the proceedings and the orders were passed in his presence at every stage. It was always open to him to point out and get clarified whether what was delivered was on the east of north south road. The respondent/plaintiff had admitted and identified the property in all the earlier proceedings. Therefore, Section 47 of the CPC would be a bar to the suit. The suit is not filed for any recovery of possession of property, but only for bare injunction restraining the appellants/ defendants from in any manner trespassing into the suit properties and taking forcible possession of the suit properties, till possession of the suit properties are delivered to the appellants/defendants in accordance with law.

13. This Court has gone through all the averments in the plaint and satisfied that the documents filed along with the plaint are the copies of the orders passed in the earlier proceedings, which have already reached a finality and the

respondent/plaintiff cannot be allowed to relitigate over the same.

14. In the light of the above discussion, this Court is of the view that the judgment and decree of the appellate court that the possession of the respondent/plaintiff can be decided only in the suit after letting in evidence, when the litigation has already come to an end and the property delivered to the defendants/appellants, is wrong and the same is liable to be set aside.

15. Accordingly, the second appeal is allowed and the judgment and decree of the appellate court is set aside restoring the judgment of the trial court rejecting the plaint. No costs. Consequently, pending application is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

gg

To

1. The Principal Subordinate Court, Erode.
2. The Principal District Munsif Court, Erode.
3. The Section Officer,
VR Section, High Court, Madras

+2cc to M/s.G.Ethirajulu, Advocate Sr.No.23851
+1cc to M/s.N.Manoharan, Advocate Sr.No.23037

CNR(CO)
sm:10.4.2018

S.A.No.340 of 2015

WEB COPY