

IN THE HIGH COURT OF JUDICATURE OF MADRAS

Judgment Reserved on : 08.09.2017

Judgment Pronounced on : 16.03.2018

CORAM:

THE HONOURABLE MR. JUSTICE S.BASKARAN

S.A.No.1566 of 2011
and M.P.Nos.1 and 2 of 2011

1.The Commissioner,
Corporation of Chennai,
Rippon Buildings,
Chennai-600 003.

2.The Assistant Engineer,
Zone X, Division 153,
Corporation of Chennai,
Velacherry Main Road,
Velacherry, Chennai-600 042. ... Appellants/Defendants

Vs.

1.M.Pratheepa
2.A.Charumathi ... Respondents/Plaintiffs

Prayer:-Second Appeal filed under Section 100 of CPC, against the judgment and decree dated 13.11.2008 passed by the learned V Additional Judge, City Civil Court, Chennai, in A.S.No.110 of 2008, allowing the appeal setting aside the Decree and Judgment dated 21.09.2007 passed by the learned IV Assistant Judge, City Civil Court, Chennai, in O.S.No.3327 of 2004.

For Appellants : Ms.A.Karthikaa Ashok

For Respondents : Mr.S.Udayakumar for R-1
M/s.Kumar
for Ms.K.Kumudha for R-2

JUDGMENT

The above Second Appeal arises out of the Judgment and Decree dated 13.11.2008 passed by the learned V Additional Judge, City Civil Court, Chennai, in A.S.No.110 of 2008, allowing the appeal setting aside the Decree and Judgment dated 21.09.2007 passed by the learned IV Assistant Judge, City Civil Court, Chennai, in O.S.No.3327 of 2004.

In this Judgment, for the sake of convenience, both Parties will be referred to as they were arrayed before the Trial Court. The Defendants in the Suit are the Appellants.

2. Brief facts of the Plaintiffs' case is as follows:-

Originally, the suit property was possessed and owned by one Nadana Sabapathi in the name of his Firm M/s. Murugan Syndicate Nagar. Due to his financial commitments, he was declared as insolvent and the Official Assignee took possession of the estate of the Nadana Sabapathy. The said Official Assignee had sold plot by plot to third parties and on receipt of such sale price, the creditors of the said Nadana Sabapathy had been paid and thus the entire claim of third parties had been discharged and after such discharge, the remaining extent of the land had been reverted back to the said Nadana Sabapathy and similarly the insolvency proceedings had been annulled against him. The extent of the land comprised in Survey No.298 from the Official Assignee had in turn been sold to third parties and accordingly a piece of land measuring 2440 sq.ft. bearing Plot No.64-B, had been sold to one Dr.S.Kalaiyarasi Prakash on 16.03.1989. The said Dr.S.Kalaiyarasi Prakash in turn sold the said Plot in favour of one Nalini on 22.11.1993. In turn, the said Nalini had executed two sale deeds in favour of the plaintiffs 1 and 2 on 22.08.1996. The plaintiffs have purchased the land to an extent of 2440 sq.ft. by means of two sale deeds which comprised in Survey No.298/18. The Plaintiffs have purchased half share each in the said land comprised in Plot No.64-B. Thereafter, they have also obtained patta in their name. The defendants corporation has claimed the suit property shown as meant for play ground and the first defendant tried to erect the name board for the purpose of laying play ground. Hence, the Plaintiffs came forward with Writ Petition No.19306 of 2004 before this Court and this Court ordered the Writ Petition with direction to the plaintiffs to approach the competent civil Court. Hence, the Plaintiffs have come forward with the suit for the relief of permanent injunction, restraining the Defendants from interfering with peaceful possession and enjoyment of the suit property by the Plaintiffs.

3. The defendants denied the rights of the Plaintiffs on the ground that there is no Plot No.64-B earmarked in the Layout No.63/67. The Layout comprises of Plot No.64 only and the adjoining land on the Northern side of Plot No.64 is earmarked as children play space. The same is pointed out on verification of records including document relating to Plot No.64. Thus, the appellants/defendants sought for dismissal of the suit.

4. Before the Trial court, on the side of the Plaintiffs, one Ashok was examined as P.W.1 and document Ex.A1 to Ex.A15 was produced to substantiate their claim. On the side of the

defendants D.W.1 was examined and documents Ex.B1 and Ex.B2 was marked to prove their claim. Further Court documents Ex.C1 and Ex.C2 were also marked. After contest, the Trial Court dismissed the suit. Aggrieved over the same, the plaintiffs preferred the appeal before the First Appellate Court and the appeal was allowed setting aside the decree and judgment of the trial Court and the suit for permanent injunction was decreed as Prayed for. Aggrieved over the said judgment and decree, the defendants/Municipal Corporation has preferred this Second Appeal.

5. At the time of admission, the following substantial questions of law were framed by this Court for consideration.

(1)When the suit was laid by the plaintiffs/respondents herein for seeking a decree for permanent injunction on the plea taken by the defendants/appellants denying the title of the land in question, whether it is open to the Appellate Court to decree the suit particularly when the trial Court has accepted the case of the defendants/respondents?

(2)When the suit for bare injunction has been filed by the plaintiffs/respondents, whether the Appellate Court, with the impugned judgment can decree the prayer putting the burden on the defendants/appellants holding that they have failed to disprove the case of the plaintiffs/respondents?

6. The learned counsel for the Appellants/Defendants contended that when the title of the Property is disputed by them, the court below is not justified in granting Permanent Injunction in favour of the Plaintiffs. It is further contended that the Suit land being earmarked for Public Purpose, the same cannot be sold to any person. The First Appellate Court failed to appreciate the evidence properly. The First Appellate Court also failed to appreciate the fact that even though no settlement or gift deed was executed in favour of the defendants, based on the Approved Lay-out Plan, the defendant is in possession of the suit property which is to be used as Playground. The lower court also failed to appreciate the fact that the suit property which was under the jurisdiction of the Municipality was shifted to the defendants Corporation only during 1987 and thereafter the possession was with the defendants who fenced the same. The Lower Court also failed to take into account the detailed report filed by the Advocate Commissioner with the sketch. The Lower Court also did not appreciate properly the fact that in the title deed in respect of the Plot No.64, Children Play area is mentioned as its

Northern boundary. Thus, it is contended by the defendants/Appellants herein that the reasoning and the conclusion of the First Appellate Court is erroneous and the same is liable to be set aside.

7. Per contra, the learned counsel for the respondents/Plaintiffs would submit that the findings of the First Appellate Court is based upon proper appreciation of oral and documentary evidences and as there is no question of law involved in this appeal, there is no scope for interference with the finding of the court below. Therefore, the appeal is sought to be dismissed by the Respondents/Plaintiffs.

8. Heard both sides in detail and perused the available evidence on record.

9. As such, the points for consideration is that when the title of Plaintiffs is disputed, without seeking declaratory relief, whether granting of permanent injunction relief alone can be entertained and whether the same is permissible under law.

10. On perusal, the suit property originally belonged to one Nadana Sabapathi. Since the said Nadana Sabapathy was declared as insolvent, the Official Assignee took possession of the property of Nadana Sabapathy and sold some estate of the Nadana Sabapathy and after discharge of the creditors, remaining lands were handed over to the said Nadana Sabapathy. In turn, he sold the remaining plots. The suit property was sold by said Nadana Sabapathy to one Dr.Kalaiarasi Prakash. Thereafter, the said Dr.Kalaiyarasi Prakash sold the said land to one Nalini. From the said Nalini, the plaintiffs have purchased. These are undisputed facts.

11. The only contention raised by the appellants is that the properties earmarked for the purpose of children park cannot be sold. For the said property, the owner himself made layout and got approval by showing open space as children park for the public use and now converted the same as house site and sold to the Predeceator in Interest to the Plaintiffs. The plaintiffs have purchased the same without verifying the physical features. The original owner Nadana Sabapathy while selling Plot No.64 to one Nalini, has shown the northern boundary as children play space, in the said document dated 13.01.1983. The Advocate Commissioner has also inspected the suit property and filed his report Ex.C.1 along with his Sketch marked as Ex.C.2 stating that there is a name board in the Suit Property showing that Place as Corporation children Play ground. In the Report and Sketch, he has also shown the fence. Hence, the trial Court arrived at the conclusion that while getting approval, open

space was provided for public purpose, but subsequently the same was sold away to the Plaintiffs. Accepting the fact that Suit Property was earmarked as Play Ground and the Defendants is the custodian of the Property and Vendor of Plaintiffs has no title to pass on, the Trial court negated the claim of the Plaintiffs. Further, without establishing the title to the suit property, the plaintiffs are not entitled for the relief of permanent injunction. Hence the trial Court dismissed the suit.

12. However, on appeal preferred by the Plaintiffs, the First Appellate Court reversed the finding on the ground that the Plaintiffs filed the suit for permanent injunction relating to their possession on the basis of their title deeds. It is the duty of the Defendants to disprove the Plaintiffs' claim by way of substantive oral and documentary evidence. The Lower Appellate Court held that even though the Plaintiffs have established their possession through relevant documents, the Trial court dismissed the suit and on such finding, reversed the finding of the Trial court. Now, in this Appeal, it is to be analysed whether the above said reasoning is acceptable or not?

13. The principles of development of land and principles of providing some open space for the benefit of the Public, the importance and legal consequences of such Provision are dealt with in the Ruling reported in [2006 (4) MLJ 719] MAHARANI AVENUE KUDIYERUPORE NALA SANGAM Vs. THE COMMISSIONER, TOWN AND COUNTRY PLANNING, wherein it is held as follows:-

"As per Rules while promoting the lands into plots certain area has to be set apart for public purpose, namely, Park, Children play ground etc., The basic principles of allotting certain area for public purpose is to provide for the use of the residence of that area."

14. However, the First Appellate Court while decreeing the suit as prayed for, has found that only for the purpose of selling the plots and to attract the purchasers, the Promoters have mentioned some approval numbers given by DTP but there was no actual entrustment and division of the Plot for Public Purpose viz., Children Play Area and therefore, mere mentioning of the DTP Approval Number is not sufficient to come to the conclusion that the Suit Property was divided and provision of Open Space for public usage was provided. The First Appellate Court also found that the Promoters can say something to attract the purchasers so as to sell the Plots. The reason adduced by the First appellate Court is certainly against the Provision and Intent of Town and Country Planning Act. The learned counsel for the Defendants/Appellants contended that in order to create decent and hygienic living atmosphere only, such provision of

Open Space is made and not for the purpose of attracting the purchasers alone, it is done. Further, the approval number and plot number is provided by the promoters themselves in the sale deeds itself, which clearly prove the allotment of Open Land for Public Purpose. The said contention is to be accepted. On the side of the Plaintiffs, it is contended that as the defendant-Corporation which claims to be having approved Layout plan, failed to produce the same and therefore adverse inference has to be drawn. The First Appellate court has also accepted the same and held in favour of the Plaintiffs. Pointing it out, learned counsel for the Defendants/Appellants contended that no such adverse inference can be drawn, as vendors of Plaintiffs themselves have given DTP approval Number in the Sale Deed against them. In this regard, the learned counsel appearing for the Appellants/defendants has relied upon the Apex Court verdict in Civil Appeal No.1374 of 2008 UNION OF INDIA Vs. IBRAHIM UDDIN AND ANOTHER. In the said Ruling, it is held as follows:-

"The Court below had wrongly drawn adverse inference against the appellant/defendant No.1 for not producing the documents as there was no direction of the Court to produce the same. Neither the first plaintiff/first respondent made any application in this respect nor he filed any application under Order 11 C.P.C. submitting any interrogation or for inspection or production of documents."

Admittedly, in the case on hand, no such step was taken by the Plaintiffs. Therefore, as rightly contended, no adverse inference can be drawn against the defendants. Thus, the conclusion of the First Appellate Court to the contrary is unsustainable.

15. As per the above verdict of the Apex Court, for drawing adverse inference, the Plaintiffs ought to have made an application under Order 11 C.P.C., to direct the first defendant to produce the approval plan. If even after such direction, the first defendant failed to produce the same, the Court can draw adverse inference, but, in the case on hand, no such claim was made by the plaintiffs to the first defendant. In such circumstances, as per Apex Court verdict, the plea of adverse inference does not arise. Thus, the conclusion of the First Appellate Court to the contrary is unsustainable.

16. The Plaintiffs have already approached this Court by way of writ petition and this Court has also directed the plaintiffs to seek remedy by proving their title before the competent civil Court. However, the plaintiffs have not sought for any declaratory relief. Thus without seeking the relief of declaration and simply claiming the relief of bare injunction is not sustainable under law. Since the title of the plaintiffs is questioned by the defendants and original vendor the said Nadana

Sabapathy himself admitted that on the northern side of the plot No.64, space for children play ground is provided, the plaintiffs ought to have examined the original vendor, who is the promoter of the Syndicate Nagar as he is the competent person to speak about the actual division and obtaining of approval and Related issues. The Plaintiffs have not examined the original owner or subsequent purchasers and except the interested testimony of the plaintiffs, no other relevant witnesses were examined to substantiate their claim. When the vendor himself provided land for open space for children play ground and got approval on the basis of the provision of play ground and pathway, subsequently selling the said area by suppressing the above facts, is against the Provisions of the Town and Country Planning Act. The original vendor Nadana Sabapathy is only a trustee and he cannot sell away the property as stated above.

17.1. In this aspect, this Court has already given finding which is reported in 2012 (2) CTC 324 [S.RAJASEKARAN Vs. DISTRICT COLLECTOR, KANCHEEPURAM]. Accordingly, under Section 47 of the Tamil Nadu Town and Country Planning Act, after coming to force of any development plan in any area, no person other than any State Government or Central Government or any local authority shall use or cause to be used any land or carry out any development in that area otherwise than in conformity with such development plan under this Act. The authority concerned prepares development plan in which the provisions are made for reserving certain area as open space for the purpose of park, laying streets etc. So, as per Section 47 of the Town and Country Planning Act, except the State or Central Government authority no person can make any development against the approved layout. In this case, the original owner Nadana Sabapathy as a promoter, specifically applied for real estate projects by name Syndicate Nagar and got approval and then after he was declared Insolvent; the Official Assignee sold the same on the basis of approved plan. The remaining land was handed back to said Nadana Sabapathi after his debts was cleared. As such, he is entitled to sell the same only on the basis of approved plan and not as per his own wish and pleasure, following above said verdict of this Court.

17.2. It is further contended by the learned counsel for the Appellants/defendants that in the case on hand, the property which was earmarked as open space and Play ground was sold away by the original owner, only after the suit property was described as Play ground, in the Approved Lay-out. As such, the appellants/defendants who is the custodian of the property cannot be restrained by way of injunction by the Plaintiffs from making use of the property and the sale effected in favour of the Plaintiffs is unsustainable. In support of the same, the

learned counsel relied upon the Ruling reported in CDJ 2007 MHC 2455 [Karpaga Nagar Nala Urimai Sangam Versus Municipal Administration and Water Supply Department, Rep. By its Secretary, Chennai-2 and Others], wherein, it is held as follows:-

" 20. In the present case, however, it appears that alienation of the property has taken place only after the area became part of the Madurai Corporation. There is no dispute that, in such Plan No.1 of 1975, which was filed and approved by the appropriate authorities after the area in question became part of Madurai Corporation, the land in question had been shown as meant for school and public purpose or common use. Section 250(2) of the Madurai City Municipal Corporation Act envisages that area upto 10% of the layout is required to be reserved for common purpose in addition to the area provided for laying out streets. If the owner contravenes any of the conditions stated in Section 250, he shall be liable for prosecution. Once such lay-out is filed and approved it must be taken that such area is required to be used for common purpose and the owner cannot subsequently wriggle out of such a situation. "

It is further contended by the learned counsel for the appellants/defendants that the Municipal Corporation is empowered to take possession of the property ear marked to be used as play ground, as custodian of the property and they cannot be restrained from putting to use the property as play ground. He also pointed out that in the Plaint itself, it is only stated that the defendants tried to erect the name board for the purpose of laying playground. Thus, the learned counsel for the appellants/defendants relying upon the Ruling reported in CDJ 2012 MHC 4120 [G.Pandi Versus The Commissioner, Hosur Municipality and Others] contended that there cannot be any injunction order issued against the defendants restraining them from using the land for the purpose which was intended to be used. In the said Ruling, it is held as follows:-

"24. This takes us to the next question as to whether in the absence of any declaration under Section 37 and the consequential release of the land under Section 38, the Municipal Corporation could claim ownership of the land on the basis of the resolution. The resolution questioned by the Appellants does not speak of the right of the Municipal Corporation for ownership, but it only speaks for taking over possession of the land. That resolution, in our opinion, could only be read for taking over possession of the open space by the

Municipal Corporation in order to maintain as park, etc., as per the layout plan and not for conferring title on the Municipal Corporation. Hence, the validity of the resolution is of no consequence on the facts of this case. In Pt. Chet Ram Vashist v. Municipal Corporation of Delhi , 1995 (1) SCC 47, the Apex Court has directed that the Corporation shall have the right to manage the land which was earmarked for school, park etc., and the Corporation shall not have any right to change the user of land which shall be for beneficial enjoyment of the residents of the colony and it is left open to the Corporation to get the land transferred in its favour after paying the market price as prevalent on the date when the sanction to the layout plan was accorded. Placing reliance on the above judgment, the learned Judge has found that the Municipal Corporation would be only the custodian of the land and cannot claim to be the owner. The custodian of the land is only for the purpose of maintaining the open space and to put to use the purpose for which it was earmarked and for the benefit of the inhabitants. Hence, the learned Judge rightly did not interfere with the resolution and found that the Municipal Corporation is only the custodian of the open space. In our view, the said finding requires no interference. Accordingly, point Nos.(iii) & (iv) are answered. "

It is clear from the above said Ruling and the facts on record that the suit property which was assigned as play ground in the approved lay out is to be utilised for the said purpose by the defendants, and the plaintiffs as such are not entitled to seek any injunction order against the defendants without seeking relief of declaration of title in their favour. As rightly pointed out by the defendants counsel, unless and until the plaintiffs prove the fact of the the suit property being their own property and not the one assigned for use as play ground, they are not entitled to seek the relief sought for by him in the suit. The said contention is appropriate and the same is to be accepted.

18. The learned counsel for the Plaintiffs contended that there was no assignment of land in favour of the defendants as no gift deed or settlement deed was created and therefore the defendants are not entitled to oppose the claim of the Plaintiffs. In such circumstances, the Plaintiffs contends that the Defendants having got no title, the Plaintiffs are entitled to maintain the suit and seek the relief of injunction in respect of the suit property. In support of the same, he relied upon the Ruling reported in 2015 3 LW 84 [P.Ravichandran and another Vs. The President, C.Kothangudi Panchayat, C.Kothangudi

Village, Chidambaram Tk, Cuddalore District and another] and also the Ruling reported in 2015 3 MLJ 436 [Commissioner, Corporation of Chennai, Ripon Building, Chennai-600 003 Versus Meera SV Kumar]. In the First Ruling, the Plaintiffs were granted a limited injunction restraining the Panchayat Authorities from using the suit property in the said suit for the public purpose viz., to erect the borewell and to construct an overhead tank, instead of using the same as Park as originally approved. In the second Ruling relied upon by the Plaintiffs, the relief sought for is declaration of title and also injunction. In the present case on hand, the relief sought for is only bare injunction. In the case on hand, the defendants/appellants herein only states that they are the custodian of the Property and they are seeking to use the open space as Play area and not for any other purpose. It is evident from Ex.C.1-Commissioner Report that a Board has been put up to that effect in the suit property. It is therefore clear that the suit property is being used only for the purpose it was intended to be and further as the Plaintiffs themselves have stated that DTP Approval Plan number and other particulars was furnished in the sale deed, it is for them to prove their title and to succeed in the suit. As such, the Rulings relied upon by the Plaintiffs/respondents herein is of no use to advance their case.

19. From the above discussion, the reasoning adduced by the First Appellate Court to reverse the finding of the trial Court is not acceptable and the same is not based on proper appreciation of materials on record and further more it is against the provision of Section 47 of the Tamil Nadu Town and Country Planning Act. Hence, the finding of the First Appellate Court is not sustainable and the same is liable to be set aside. The Point is answered accordingly.

20. In the result, the Second Appeal is allowed. The Judgment and Decree dated 13.11.2008 made in A.S.No.110 of 2008 passed by the learned V Additional Judge, City Civil Court, Chennai, is hereby set aside and the Judgment and decree dated 21.09.2007 passed by the learned IV Assistant Judge, City Civil Court, Chennai, in O.S.No.3327 of 2004 is hereby restored. Considering the facts and circumstances of the case, there shall be no order as to costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

To

1.The V Additional Judge,
City Civil Court,
Chennai.

2.The IV Assistant Judge,
City Civil Court, Chennai.

+1cc to Mrs.Karthikaa Ashok, Advocate Sr.19892
+1cc to Ms.K.Kumudha, Advocate Sr.19828
+1cc to Mr.S.Udayakumar, Advocate Sr.19829

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