

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.04.2018

PRONOUNCED ON : 18.04.2018

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.986 of 2004

1. Kulaiya Gounder
2. Chinnappan

...
Vs.

Appellants

1. Kandasamy
2. Shiva Mani
3. Pachaiyammal

...

Respondents

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 17.10.2003 passed in A.S.No.6 of 2003 on the file of the Subordinate Court, Udumalpet, confirming the Judgment and Decree dated 30.12.2002 passed in O.S.No.477 of 1997 on the file of the District Munsif Court, Udumalpet.

For Appellants : Mr.J.Hariharan
for M/s.V.Nicholus

For Respondents : No appearance
set exparte
(vide Order dt.11.04.2018)

JUDGMENT

This second appeal is directed against the Judgement and Decree dated 17.10.2003 passed in A.S.No.6 of 2003 on the file of the Subordinate Court, Udumalpet, confirming the Judgment and Decree dated 30.12.2002 passed in O.S.No.477 of 1997 on the file of the District Munsif Court, Udumalpet.

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

3. Suit for permanent injunction

4. In brief, according to the case of the plaintiffs, the suit property originally belonged to one Palani gounder, he having purchased the same by way of a sale deed dated 21.01.1977 and enjoying the same and adjacent to the suit property, Palani gounder was owning an ancestral house on the eastern and southern side and for having access to the suit house from the road, the suit property has come to be purchased by him and he had put up a hut on the southern side and been dumping the waste on the northern side of the suit property and also, as abovesaid, using the same as pathway to reach his house from the main road and the plaintiffs are the legal representatives of Palani Gounder, who died about 10 years ago and succeeded to the suit property and are in possession and enjoyment of the same and the defendants, who are the owners of the house adjacent to the west of the suit property, attempted to trespass into the suit property and thereby, interfered with the plaintiffs' possession and enjoyment and hence, the suit for appropriate reliefs.

5. The case of the defendants, in brief, is that the suit laid by the plaintiffs is not maintainable either in law or on facts. The property purchased by Palani Gounder by way of a sale deed dated 21.01.1977 is not related to the property in the possession and enjoyment of the defendants. The deceased Palani Gounder purchased the property near the house of the plaintiffs on the western side and the property purchased by the deceased Palani Gounder by way of the sale deed dated 21.01.1977 earlier belonged to Parupathan chettiar, who had purchased the same by way of a sale deed dated 11.08.1924 and there is a southern pathway to reach east-west road and the plaintiffs, with a view to grab the defendants' property, have also included the defendants' property in the suit and the property in the possession and enjoyment of the defendants is a Natham property and given to them by the Government under the Natham Nilavari Scheme and also the defendants had been granted patta in respect of the suit property and accordingly, they had put up a hut and by way of dumping waste, been enjoying the property and also paying necessary tax for the same and the plaintiffs have no right to the suit property as such and therefore, the suit laid by the plaintiffs without seeking the relief of declaration is not maintainable and hence, the suit is liable to be dismissed.

6. In support of the plaintiffs' case, PW1 was examined and Exs.A1

& A2 were marked. On the side of the defendants, DWs1 & 2 were

examined and Exs.B1 to 5 were marked. Exs.C1 to C3 were also marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Courts below were pleased to accept the plaintiffs' case and granted the reliefs sought for. Impugning the same, the present second appeal has been laid.

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

" (i) When the defendants specifically dispute the right, title interest and possession of the plaintiffs over the suit property and as such the suit filed by them for bare injunction is not maintainable in law, whether the Courts below are correct in granting a decree for permanent injunction?

(ii) When the burden is on the plaintiffs to establish their right, title, interest and possession of the suit property, whether the Courts below are correct in placing the burden of proof on the plaintiffs?

(iii) The case of the plaintiffs would

stand or fall on their over pleadings and evidence and they could not be allowed to take advantage of the weakness if any in the separate case, whether the Courts below are correct in granting the decree in favour of the plaintiffs on the basis of the weakness if any in the case of the defendants?"

9. The plaintiffs have laid the suit simplicitor for the relief of permanent injunction. The defendants have disputed the plaintiffs' claim of title, possession and enjoyment of the suit property and in the light of the abovesaid defence projected by the defendants, particularly, challenging the plaintiffs' title to the suit property as such, as rightly put forth, the plaintiffs should have endeavoured to amend the suit and include the relief of declaration of title also as one of the reliefs in the suit. However, the plaintiffs have not chosen to include the relief of declaration and proceeded with the suit barely for the relief of permanent injunction.

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10. The materials placed on record on the side of the plaintiffs would go to show that the plaintiffs' claim title to the suit property by way of a sale deed dated 21.01.1977, which has come to be marked as Ex.A1. Now, according to the defendants, Ex.A1 does not relate to the property acquired by the plaintiffs' vendor by way of a sale deed dated

11.08.1924, which document has come to be marked as Ex.A2. Now, according to the second plaintiff examined as PW1, his father had acquired title to the suit property by way of Ex.A1 sale transaction and further, according to him, the parent title deed for the suit property is the sale deed dated 11.08.1924, which is Ex.A2. When, according to the plaintiffs, the parent title deed of the suit property is Ex.A2, as rightly put forth, the plaintiffs' vendor, at the best, would be entitled to convey the property acquired by way of Ex.A2 only in favour of the deceased Palani Gounder by way of Ex.A1 sale deed. As rightly argued by the defendants' counsel, on a perusal of Exs.A2 and A1, it is found that the two properties are not one and the same and differ. Particularly, in Ex.A2 sale deed, there is no reference about any survey number as such. Further, as per the boundary recitals contained in the two documents abovestated, the boundaries on the northern, southern and eastern side differ in both the documents and according to Ex.A2 sale deed, the property comprised therein is situated to the south of Navitha Thirumanavithan house and vacant site and to the north of houses of Kandasamy Gounder and Nachimuthu and to the west of south-north pathway. Whereas, in Ex.A1, the property comprised therein is stated to be located to the south of Kalinavithan's house, to the north of Ayyasamy, Avanaiti Gounder houses and to the west of the house share allotted to Arumuga Chettiar. Accordingly, it is found that as rightly put forth, the three boundary recitals of the documents marked as Exs.A2 & 1, as abovestated, do not

tally with each other and only the western side boundary is found to be same in both the documents. That apart, it is also to be noted that even the extent mentioned in the two documents are found not to be same as such and with reference to the same, there is no proper explanation forthcoming on the part of the plaintiffs. When, according to the plaintiffs, only through Exs.A2 & A1, they had acquired title, possession and enjoyment of the suit property and on the face of it, when Exs.A2 & A1 do not tally with each other and found to be comprising of different properties as above discussed and there is no nexus even with reference to the extent of the property conveyed under the above said two documents and that apart, when there is no reference at all about any survey number in Ex.A2, it is found that merely on the basis of Exs.A2 & A1, we cannot safely conclude that the plaintiffs had acquired a valid title to the suit property by way of the abovesaid documents and on the abovesaid footing alone, it is found that the plaintiffs' suit should fail.

11. As above stated, the plaintiffs have laid the suit simplicitor for bare injunction. For sustaining the relief of bare injunction, at least, the plaintiffs should have putforth acceptable and reliable documents to establish that it is only they, who are in possession and enjoyment of the suit property by way of Exs.A2 & A1. When, it is found that Exs.A2 & A1 by themselves, do not tally as above discussed and in particular, when the defendants are challenging the alleged possession and enjoyment of

the suit property by the plaintiffs, to evidence that the suit property is in their possession and enjoyment, the plaintiffs should have established the same by placing acceptable and reliable documents. Though the plaintiffs have laid the suit for permanent injunction on the footing that the suit property is in their possession and enjoyment, to establish their claim of possession and enjoyment, not a single document has been placed by the plaintiffs to evidence the same. With reference to the same, there is no explanation forthcoming on the part of the plaintiffs. Thus, it is found that the plaintiffs have miserably failed to establish that the suit property is in their possession and enjoyment as claimed by them.

12. As above adversed to, the defendants have impugned the claim of title to the suit property by the plaintiffs tooth and nail. Despite the above resistance putforth by the defendants, the plaintiffs have not chosen to include the relief of declaration of title in their plaint and no valid reason has been offered for the same by the plaintiffs. The defendants have also raised the abovesaid plea in the memorandum of grounds filed before the first appellate Court. Despite the above stand of the defendants, even the first appellate Court has not seriously endeavoured to adjudicate the said issue and it is found that the first appellate Court, on the reasonings that the defendants have admitted the purchase of the properties referred under Exs.A1 & A2, on that basis, proceeded to hold that the defendants have admitted the title of the

plaintiffs to the suit property and hence, there is no need on the part of the plaintiffs to seek the relief of declaration. However, when the evidence adduced by the defendants is seen cumulatively, they had only raised the pleas that the plaintiffs by way of Exs.A2 & A1 are trying to grab the property in the possession and enjoyment of the defendants and the plaintiffs have no valid title to the property and the same is in the possession and enjoyment of the defendants. Even though, the defendants as such have admitted Exs.A2 & A1, but, when according to them, in specific Exs.A2 & A1 are not pertaining to the same property and also not relating to the property in their occupation, as such and further, when according to them, the plaintiffs, in the guise of the present suit, have also included their property in the possession and enjoyment of the defendants, accordingly, disputed the claim of title, possession and enjoyment of the suit property as put forth by the plaintiffs. In such view of the matter and the defence raised by the defendants, the first appellate Court is found to have erred in reasoning that the defendants having admitted Exs.A2 and A1, thereby, there is no need for the plaintiffs to seek the relief of declaration. In my considered opinion, the above view is erroneous and unacceptable. The defence raised by the defendants, on being assessed wholly, it is found that the defendants have, in all aspects, disputed the claim of the plaintiffs in respect of the suit property as such and in such view of the matter, as rightly put forth by the defendants' counsel as well as in the light of the principles of law

enunciated by the apex Court and our High Court in the decisions reported in ***AIR 2008 Supreme Court 2033 (Anathula Sudhakar V. P.Buchi Reddy (Dead) by L.Rs and Ors.)***, ***2014 (2) CTC 421 (Ratna Kounder Vs. Annamalai and others)*** and ***the judgement dated 27.03.2018 passed in S.A.No.1682 & 1683 of 2003 (Bujingan @ Gandhi and two others Vs. Padma @ Padrammal)***, it is found that the plaintiffs having failed to include the relief of declaration in their plaint, despite the defendants throwing a challenge to their title to the suit property, on that ground alone, it is found that the suit laid by the plaintiffs simplicitor for bare injunction is not maintainable and liable to be dismissed.

13. The defendants' claim that the suit property is a Natham land and accordingly, they had been granted patta, which has come to be marked as Ex.B1 and according to them, the suit property is in their possession and enjoyment. Now, according to the Courts below, the defendants are not entitled to lay a claim of title to the suit property on the basis of revenue record and further, they have also taken the view that the defendants having failed to establish their alleged claim of title to the suit property, the plaintiffs' suit should succeed. However, as rightly putforth by the defendants' counsel, the weakness of the defendants' case is not the decisive factor for upholding the plaintiffs' case. The plaintiffs having come forward with the suit seeking the relief on a

particular set of facts and when the same had been vehemently disputed by the defendants, it is for the plaintiffs to establish their entitlement to the relief sought for by placing acceptable and reliable evidence. The plaintiffs cannot be allowed to pick holes in the defence version and thereby, endeavour to succeed in their case sans any material worth acceptance pointing to the same. In such view of the matter, even assuming for the sake of arguments that the defendants have failed to establish their claim of title to the property and their possession and enjoyment as such and insofar as this case is concerned, when the documents of title projected by the plaintiffs are found to be not similar and when the plaintiffs have failed to establish their possession and enjoyment of the suit property by placing any acceptable and reliable evidence and further when the plaintiffs have miserably failed to seek the relief of declaration, despite the challenge thrown to their title by the defendants, in view of the abovesaid inherent weakness in the plaintiffs' case, they cannot be allowed to succeed in their attempt by pointing to the weakness of the defendants' case. It is thus found that the Courts below had proceeded to uphold the plaintiffs' case by picking holes in the defence version, which cannot be legally sustained for the reasons aforestated. The substantial questions of law formulated in this second appeal are accordingly answered in favour of the defendants and against the plaintiffs.

Resultantly, the Judgement and Decree of the courts below are set aside and the suit laid by the plaintiffs is dismissed with costs. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

18.04.2018

Index : Yes / No

Internet : Yes / No

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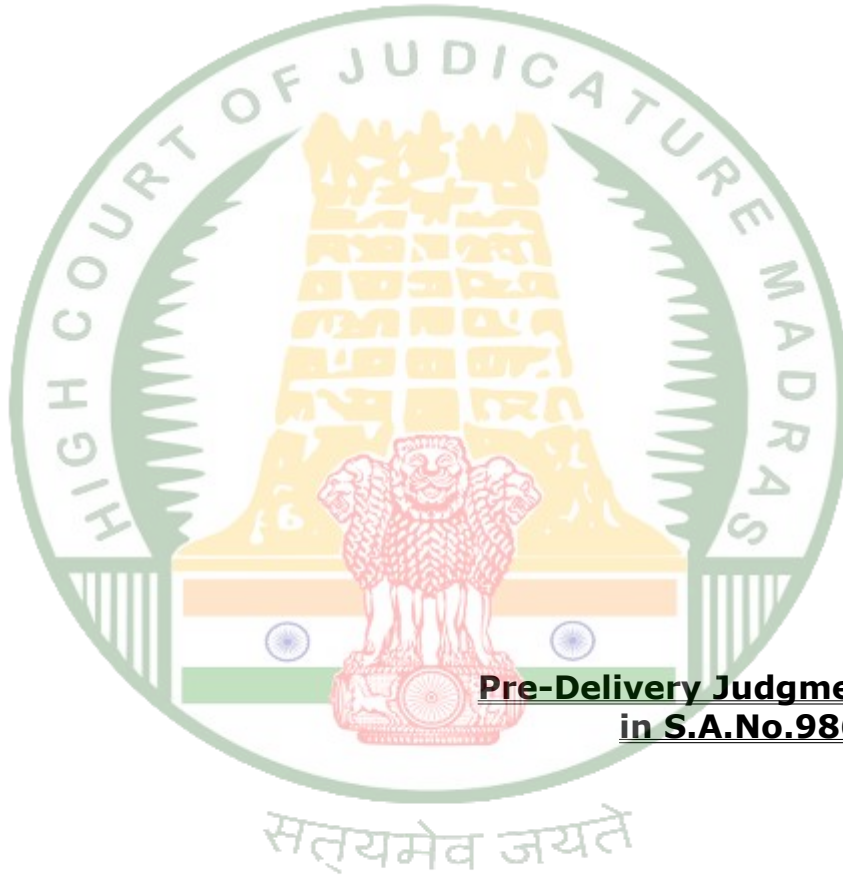
1. The Subordinate Court, Udumalpet.
2. The District Munsif Court, Udumalpet.
3. The Section Officer, V.R. Section, High Court, Madras.

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T.RAVINDRAN, J.

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**Pre-Delivery Judgment made
in S.A.No.986 of 2004**

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