

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.09.2019

PRONOUNCED ON : 15.10.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.1893 of 2000

1. Rajagopal
2. Ponnai
3. Subramaniam
4. Devan

... Appellants/Defendants/Defendants

Vs.

1. K.Arumugam (deceased)
2. Jayabalan
3. K.Raju
4. A.Prabhu
5. A.Vancheeswaran

(RR4 and 5 brought on record
as LRs of the deceased R1
vide Order of Court dated
20.04.2016 made in
CMP.Nos.415 and 416 of 2015
in SA.No.1893 of 2000)

... Respondents /Respondents/ Plaintiffs

PRAYER : Second Appeal filed under Section 100 of C.P.C.,
against the judgment passed in A.S.No.45 of 1998 dated
31.08.1999 on the file of the learned Subordinate Judge,
Maduranthagam confirming judgment and decree passed in
O.S.No.299 of 1991 dated 29.10.1997 on the file of the learned
District Munsif, Madhuranthagam and praying to set aside the
same.

For Appellants : Mr.G.Perumal

For Respondents : Mr.N.Nagu Sah

JUDGMENT

This second appeal has been filed by the defendants
against the judgment and decree passed by the Sub-Judge,
Madhuranthagam in A.S.No.45 of 1998 dated 31.08.1999
confirming the judgment and decree passed by the District
Munsif, Madhuranthagam in O.S.No.299 of 1991 dated
29.10.1997.

2. One Kanniapillai had filed a suit in O.S.No.299 of 1991 on the file of the District Munsif, Madhuranthagam, to declare his title over the suit property and for permanent injunction to restrain the defendants, their men, agents, etc., from interfering with his peaceful possession and enjoyment of the suit property. During pendency of the said suit, the said Kanniapillai died and hence his legal representatives had been impleaded as plaintiffs 2 to 5. The learned District Munsif by the judgment dated 29.10.1997 had decreed the suit as prayed for with costs. Aggrieved by the same, the defendants had filed an appeal in A.S.No.36 of 1998 on the file of the Principal Sub-Judge, Chengalpattu. Subsequently, the said appeal was transferred to the Court of Sub-Judge, Madhuranthagam and re-numbered as A.S.No.45 of 1998. The learned Sub-Judge, Madhuranthagam by the judgment dated 31.08.1999 had dismissed the said appeal confirming the judgment and decree passed by the trial court. However, he directed the parties to bear their respective costs. Feeling aggrieved, the defendants have filed the present second appeal.

3. For the sake of convenience, the parties are referred to as described before the Trial Court.

4. The averments made in the plaint are in brief as follows:

The first plaintiff namely Kanniapillai is the absolute owner of the suit property. He got the same under a registered sale deed dated 22.07.1943 from Narayana Reddiar and others and under an exchange deed dated 17.09.1959 and the remaining extent is the ancestral property. After purchase, the patta for the entire suit property was transferred to the name of the first plaintiff. He has been enjoying the suit property by paying kist. In any event, the first plaintiff prescribed title by adverse possession also. The first plaintiff's brother is one Varadha Pillai who is also joint pattadhar. Under oral family partition, the suit property was allotted to the first plaintiff and there is no dispute between the first plaintiff and his brother. The defendants with a view to grab the suit property attempted to trespass in to the suit property by denying the first plaintiff's title. Hence, the first plaintiff was constrained to file the suit for declaration and permanent injunction. During pendency of the suit, the first plaintiff died intestate and hence his legal representatives had been impleaded as plaintiffs 2 to 5.

5. The averments made in the written statement filed by the defendants 1 to 4 are in brief as follows:

The allegations that the first plaintiff is the absolute owner of the suit property and he got the same under a registered sale deed dated 22.07.1943; under an exchange deed dated 17.09.1959 and the remaining extent is the ancestral property are all false. It is also false to state that the patta has been changed in to his name and he has been

in continuous possession and enjoyment of the suit property and he also perfected title by adverse possession. It is also false to state that in the oral partition which took place between the first plaintiff and his brother, the suit property was allotted to his share. It is also false to state that the defendants with a view to grab the suit property attempted to trespass into the suit property and casting clouds over the title of the first plaintiff. The first plaintiff's family is not having any ancestral property as alleged in the plaint. The sale deed dated 22.07.1943 and the exchange deed dated 17.09.1959 are not related to the suit property. One Venkitasamy sold 33 cents in S.No.159/3 to one Vedachalam through a sale deed dated 06.05.1976. The said Vedachalam took possession of the same as per the sale deed and after the said sale, he took possession of 41 cents in S.No.159/2 in or about 1977 and from then onwards, the said Vedachalam enjoyed the said 41 cents till his death and after his death, his sons enjoyed the said property and sold the same to the first defendant by way of a registered sale deed dated 31.07.1990 and from then onwards, the first defendant is in possession and enjoyment of 41 cents of the suit property till today. The said 41 cents situated on the eastern side of survey number 159/3. The patta also changed as per enjoyment. The first defendant and his predecessors-in-title have been in possession and enjoyment of the aforesaid 41 cents continuously for more than statutory period and thereby, the first defendant had perfected title by adverse possession. The first plaintiff never questioned the possession and enjoyment of the aforesaid 41 cents by the first defendant and his predecessors-in-title. The first plaintiff is making all efforts to grab the properties from the first defendant. The first plaintiff is not in possession and enjoyment of 41 cents which is situated in S.No.159/2 and hence, the defendants prayed to dismiss the suit.

6. Based on the aforesaid pleadings, the learned District Munsif, Madhuranthagam had framed necessary issues and tried the suit. During trial, on the side of the plaintiffs, the third plaintiff was examined as PW1 and they also examined two more witnesses as PWs 2 and 3. They had marked Exs.A1 to A9 as exhibits. On the side of the defendants, the first defendant examined himself as DW.1 and also examined two more witnesses as D.Ws. 2 and 3. They had marked Exs.B1 to B10 as exhibits. The Advocate Commissioner was examined as CW1 and his report and plan were marked as Exs.C.1 and C.2 respectively.

7. The learned District Munsif, Madhuranthagam, after considering the materials placed before her, found that the plaintiffs are the absolute owners of the suit property and they are in possession and enjoyment of the same. Accordingly, she decreed the suit as prayed for with costs. Feeling aggrieved, the defendants had filed an appeal in A.S.No.36 of 1998 on the file of Principal Sub-Judge, Chengalpattu and

subsequently, the said appeal was transferred to the file of Sub-Judge, Madhuranthagam and re-numbered as A.S.No.45 of 1998. The learned Sub-Judge, Madhuranthagam, had dismissed the said appeal confirming the judgment and decree passed by the trial court. However, he directed the parties to bear their respective costs. Feeling aggrieved, the defendants have filed the present second appeal.

8. This Court at the time of admitting the second appeal has formulated the following substantial questions of law.

" (1) Have not the courts below erred in having failed to consider the sale deed dated 22.11.1990 and other connected documentary evidence produced by the first appellant?

(2) Have not the courts below erred in having rejected the commissioner's Report without assigning any reasons?

(3) The Commissioner Report since refers to two survey numbers with respect to the land in possession of the appellant and that it proves that the claim of the respondent for the land in S.No.159/2 would not be correct. In such circumstances have not the court below erred in having granted relief with respect to S.No.159/2 without excluding the lands in S.No.159/3 in possession of the appellants".

9. Heard Mr.G.Perumal, the learned counsel for the appellants and Mr.N.Nagusah, the learned counsel for the respondents.

10. Substantial Questions of Law 1 to 2:

The learned counsel for the appellants has submitted that the Courts below erred in granting decree declaring title to the suit property in favour of the plaintiffs. He further submitted that the courts below ought to have found that the first appellant/first defendant is the owner of the property to an extent of 41 cents in S.No.159/2 and 33 cents in S.No.159/3 and that he is in possession and enjoyment of the same. He further submitted that the Courts below failed to consider that the respondents/plaintiffs have not claimed any relief in respect of the land in S.No.159/3 and that the land in S.No.159/3 to an extent of 33 cents has been wrongly included in the plaint schedule. He further submitted that the Courts below failed to consider that the Advocate Commissioner's report which would prove that the claim of the plaintiffs for the land in S.No.159/2 would not be correct. He further submitted that the courts below erred in rejecting the commissioner's report without assigning any reason and therefore, he prayed to allow the second appeal and set aside the judgments and decrees passed by the courts below and

dismiss the suit.

11. Per contra, the learned counsel for the respondents/plaintiffs has submitted that the first defendant claimed that he purchased 41 cents in S.No.159/2 under Ex.B.2, but he has not produced any evidence to show that how his vendor is entitled to the said property. He further submitted that though the defendants had stated in their written statement that Vedhachalam took possession of the said 41 cents in S.No.159/2 in the year 1977, they have not produced any evidence to show how the said Vedhachalam took possession of the said 41 cents. He further submitted that Exs.B5 and B6 are not related to the suit property and Exs.B9 and B10 were obtained during pendency of the suit and as such no reliance can be placed upon the said documents. He further submitted that though the first defendant claimed that he purchased property of 33 cents in S.No.159/3, to substantiate the same, he has not produced any sale deed. He further submitted that Exs.A1 and A2 would clearly establish that the suit properties are the ancestral properties of the plaintiffs and Ex.A8 would show that Bimass number mentioned in Exs.A1 and A2 would correlate with the suit survey number. He further submitted that the Advocate Commissioner cannot say who is in possession of the property and hence the courts below rightly did not rely upon the Advocate Commissioner's report and plan. He further submitted that the Trial Court taking into consideration of the oral and documentary evidence held that the plaintiffs are entitled to the relief of declaration and permanent injunction in respect of the suit properties and the same has been confirmed by the First Appellate Court and in the said concurrent factual findings, this court cannot interfere and therefore, he prayed to dismiss the second appeal.

12. The suit property is measuring 4 acres of agricultural land situated in S.No.159/2 of Melma village, Maduranthagam Taluk. According to the plaintiffs, the first plaintiff A.Kannia Pillai got the suit property under a registered sale deed dated 27.09.1943; under an exchange deed dated 17.09.1959 and the remaining extent is the ancestral property. In support of the aforesaid claim, the plaintiffs had filed the sale deed dated 21.07.1943 and marked as Ex.A.1. They also filed exchange deed dated 17.09.1959 and marked as Ex.A.2. A perusal of Ex.A.1 shows that the first plaintiff's father Ayyadurai Pillai had purchased 3.66 acres in various Bimass numbers. Under Ex.A.2, the first plaintiff and one Ranga Reddiar had exchanged certain properties and the first plaintiff got 3.06 acres under the said exchange deed. The boundaries mentioned in Ex.A2 would show that apart from the properties mentioned in Ex.A2 (schedule-A), the first plaintiff got some other properties also. Ex.A.9 (Adangal Extract) would show that the first plaintiff Kanniapillai got 4 acres in S.No.159/2 and the corresponding patta number is 402. Ex.A.3 Patta also shows that the first plaintiff got 4

acres in S.No.159/2.

13. The first defendant in his written statement has stated that his vendor Vedhachalam had purchased 33 cents in S.No.159/3 from one Venkatesa Naidu under a registered sale deed dated 06.05.1976, and thereafter in or about 1977 that the said Vedhachalam took possession of 41 cents in S.No.159/2, but he has not stated as to how the said Vedhachalam took possession of 41 cents of S.No.159/2. A registration copy of the sale deed dated 06.05.1976 said to have been executed by Venkatesa Naidu in favour of the said Vedhachalam has been marked as Ex.B.1. In the said document, it is stated that the said Vedhachalam in S.No.159/3, had purchased 33 cents in one place and 87 cents in another place and totally he purchased 1.20 acre in S.No.159/3, but it is not stated that he purchased any property in S.No.159/2. In the sale deed dated 20.11.1990 said to have been executed by the sons of said Vedhachalam (Ex.B2), it is stated that the land measuring 41 cents situated in S.No.159/2 had been sold to the first defendant. As already pointed out that under Ex.B.1, the said Vedhachalam has not at all purchased any property in S.No.159/2. On the contrary, he purchased 1.20 acre in S.No.159/3. In such a case, the sons of said Vedhachalam could not have any right to execute Ex.B.2 sale deed in respect of the properties situated in S.No.159/2.

14. In the Advocate Commissioner's report and plan (Exs.C1 and C2), the Advocate Commissioner has stated that a portion of the property measuring 41 links on the northern side, 5 links on the southern side and 511 links on the western side is mingled with the lands situated in S.No.159/3 and the said portion has been marked in Commissioner's plan (Ex.C2) as 'ABCD'. As already pointed out that as per Ex.B1, Vedhachalam had purchased totally 1.20 acre in S.No.159/3 (33 cents in one place and 87 cents in another place), but it appears that the first defendant proceeded on the premise that the said Vedhachalam had purchased under Ex.B1 only 33 cents in S.No.159/3. Further it appears that the said Vedhachalam's sons (vendors of the first defendant) also under the wrong impression that the said Vedhachalam had purchased only 33 cents under Ex.B1 in S.No.159/3, but at the time of taking possession of the said 33 cents, he also took possession of 41 cents in S.No.159/2 and that must be the reason in Ex.B2, S.No.159/2 has been mentioned. But the said defect has not been set right by getting a rectification deed. PW1's evidence shows that the first defendant is in possession of the property which is lying adjacent to the suit property (S.No.159/2). The said fact also shows that the first defendant had purchased the property only in S.No.159/3, but in Ex.B2, it has been wrongly mentioned as S.No.159/2. As per the Commissioner's Report and plan, a portion of the property of S.No.159/2 which is shown as 'ABCD' mingled with the lands situated in S.No.159/3 and there is no demarcation between the said properties.

15. At this juncture, it would be relevant to refer in Chellathurai and 5 Others Vs. Perumal Nadar, 1998 3 LW 119, wherein, this Court in Paragraph No.9 has observed as follows:

" 9. According to me, Ex.C.1 report and Ex.C.2 plan will have a great bearing in deciding the issue in this case. Unfortunately, the lower appellate court has not taken into consideration that material evidence, except for a mere statement that a Commissioner's report has been filed. There is no discussion about Exs.C-1 and C-2 report and plan. Why I am referring to Ex.C-1 report is because, nobody has got any objection to the lie of the property as identified by the Commissioner. It is an impartial report even according to both parties, and the same has been prepared by an independent person. All the other piece of evidence are interested. I am not saying for a moment that the Commissioner's report has to be relied on for the purpose of proving possession. I am relying on the Report and Plan only for the purpose of proving the physical features of the property, from which certain inference can be drawn."

16. From the aforesaid decision, it is clear that the Advocate Commissioner's report and plan cannot be relied on for proving the possession. They can be relied on only for the purpose of proving physical features of the property, from which, certain inference can be drawn. In this case, as already pointed out that the commissioner's report and plan would clearly show that a portion of the property in S.No.159/2 is mingled with in S.No.159/3 and there is no ridge demarcating the said properties. The aforesaid physical features would show that the defendants are in possession and enjoyment of the 'ABCD' portion as shown in Ex.C2 Plan along with the property situated in S.No.159/3. When the aforesaid portion is in possession of the defendants, the Courts below should not have granted decree for the relief of permanent injunction including the aforesaid portion. Therefore, this Court is of the view that though the plaintiffs are entitled for the relief of declaration of title in respect of the entire 4 acres of property situated in S.No.159/2, they are not entitled for the relief of permanent injunction in respect of the property marked as 'ABCD' in Ex.C.2 Plan. In respect of the remaining portions alone, the plaintiffs are entitled for the relief of permanent injunction. Accordingly, these substantial questions of law are answered.

17. In the result, the second appeal is partly allowed. The Judgments and decrees passed by the Courts below are modified as follows:

owners of the suit property;

(ii) that the plaintiffs are entitled for the relief of permanent injunction in respect of the suit property excluding the portion which is shown as 'ABCD' in Ex.C.2 Plan;

(iii) that the suit is dismissed in respect of permanent injunction with regard to 'ABCD' portion as shown in Ex.C.2 Plan;

(iv) that it is open to the plaintiffs to file a suit for recovery of possession, in respect of ABCD portion as shown in Ex.C2 plan if they are advised to do so; and

(v) that considering the facts and circumstances of the case, the parties are directed to bear their respective costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

Vv

To

1. The Subordinate Judge,
Maduranthagam
2. The District Munsif,
Madhuranthagam.
3. The Section Officer,
VR Section,
High Court, Madras.

+2cc to Mr.G.Perumal, Advocate, S.R.No. 86022
+1cc to Mr.N.Nagusah, Advocate, S.R.No. 86374

S.A.No.1893 of 2000

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