

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.11.2019
CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN
C.M.A.No.2538 of 2009
and M.P.No.1 of 2009

Palanisamy

.. appellant

vs

1.Jothimani
2.Loganatha Gounder
3.The Tahsildar,
Pollachi, Coimbatore District.
4.The State of Tamil Nadu,
rep.by the District Collector,
Collectorate, Coimbatore.

.. Respondents

Prayer: Civil Miscellaneous Appeal filed under Order 43 Rule 1 (u) of C.P.C against the Judgment and decree dated 26.09.2008 made in A.S.No.30 of 2008 on the file of the Sub Court, Pollachi, to set aside the Judgment and Decree dated 08.04.2008 made in O.S.No.477/2005 on the file of the District Munsif, Court, Pollachi.

For appellant	:	Mr.T.P.Manoharan, SC for Mr.P.Jotheeswaran
For R1 & R2	:	M/s.M.N.Balakrishnan
For R3 & R4	:	Mr.N.Manikandan Government Advocate.

J U D G M E N T

Heard the learned counsel for the appellant and the learned counsel for R1 and R2 and learned counsel for R3 and R4.

2. The appellant had filed O.S.No.477 of 2005 before the District Munsif Court, Pollachi. The said suit was filed for declaration and for permanent injunction and mandatory injunction to direct the 3rd and 4th respondents herein to remove the name of the 2nd respondent, Loganathan Gounder from the

revenue records relating to the suit schedule property in S.F.No.158/3.

3. The case of the Appellant / Plaintiff was that the suit schedule property was originally owned by the appellant's grandfather Kaliappa Gounder to a total extent of 6.91 acres which came to be partitioned between his grandfather and his uncle Peria Rangasamy Gounder and his father Chinna Rangasamy Gounder vide registered deed dated 08.10.1976.

4. According to the appellant, the extent of 1.96 acres was allotted to the appellant's grandfather Kaliappa Gounder and another 1.96 acres in favour of Periya Rangasamy Gounder and the balance 2.99 acres of land in favour of the appellant's father Chinna Rangasamy Gounder.

5. The appellant further submits that by virtue of another registered partition deed dated 26.06.1991 entered between the appellant's father and his brothers, the aforesaid property was given to the appellant's father and that all along the property was in enjoyment of the appellant's father and thereafter by the appellant.

6. It is the case of the appellant that the 1st respondent Jothimani had purchased neighbouring land to an extent of 2.34 acres of land in S.F.No.160 /1 from one Silamani Gounder vide sale deed dated 12.04.1972. However, while granting joint patta, a portion of the property to an extent of 2.99 acres the property which was partitioned and allotted to the appellant under the partition deed dated 26.06.1991 had been included along with the lands of the 2nd respondent from 1986 even though the possession of the land was with the Appellant.

7. The appellant further submitted that the appellant's land and defendant's land are adjacent to each other and that the 2nd respondent curiously with a mischievous intention settled only a portion of 0.75 acres from out of the land in S.F.No.158/3 in the name of the appellant in favour of the 1st respondent taking advantage of the Joint Patta.

8. It is submitted that the said settlement deed dated 16.06.2005 was mischievous, in much as there was no necessity for the 2nd respondent to settle the said property alone in favour of the 1st respondent, as all the properties of the 2nd respondent would be inherited by him. It is further submitted that the land belonging to the appellant has been sought to be settled by the 2nd respondent in 2005 on 16.06.2005 in favour of the 1st respondent on the strength of the Joint Patta alone shows

that the 2nd respondent's attempt was not bonafide.

9. The trial Court has framed the following issues:

- i. Whether the plaintiff is entitled for the relief of declaration with respect to suit property as prayed for?
- ii. Whether the plaintiff is entitled for the relief of consequential permanent injunction with respect to suit properties as prayed for?
- iii. Whether the plaintiff is entitled for the relief of mandatory injunction as prayed for?
- iv. Whether the suit schedule property is an absolute property of the plaintiff is true?
- v. Whether the cause of action is true?
- vi. Whether the Court fee paid is correct?
- vii. To what relief?

10. On behalf of the appellants/plaintiff, 10 exhibits were marked as Exs.A1 to A10. The appellant/ plaintiff herein deposed evidence as PW1 and one Velusamy was examined as PW2.

11. On behalf of the 1st and 2nd respondents/defendants as DW1 and DW2 were examined respectively and 10 exhibits namely Exs.B1 to B10 were marked on behalf of 3rd and 4th respondents/defendants as DW3 was examined. The court also marked Exs.C1 and C2 as Court Exhibits.

12. The suit was decreed as prayed for by the Trial Court on 08.04.2008. Aggrieved by the Judgment and Decree dated 08.04.2008, the 1st and 2nd respondents filed A.S.No.30 of 2008 before the Sub Court, Pollachi.

13. The First Appellate Court by the impugned Judgment and Decree dated 26.09.2008 has allowed the appeal filed by the 1st and 2nd respondents and set aside the judgment and decree dated 08.04.2008 passed by the Trial Court and has remitted the case back to the Trial Court (District Munsif Court, Pollachi) for fresh disposal of the suit in accordance with law after inspection of the properties in S.F.No.158/3 and 160/1 by a qualified surveyor along with same Advocate Commissioner or some

other Advocate Commissioner after taking measurement of the properties with reference to the revenue records and filing the report and plans by the surveyor and the Advocate Commissioner.

14. The learned counsel appearing for the appellant / plaintiff submits that the First Appellate Court committed a grave error in setting aside the judgment and decree passed by the Trial Court on 08.04.2008. He further submits that even though the First Appellate Court has given a categorical finding in favour of the appellant, yet it has remitted the case back to the Trial Court for fresh denovo consideration. He also drew my attention to the paragraph No.22 of the impugned Judgment and decree dated 26.09.2008, wherein reference is made to the evidence of the 2nd respondent / 2nd defendant who was examined as DW2 to show that he has not acquired any right over the land in S.F.No.158 through any document and that there were no specific case in the written statement about the exact extent of the land in the possession in S.F.No.158/3, except of course, the averments made in para 8 that an extent of 0.75 cents on the western side of the property was settled in favour of the 1st respondent.

15. It is the contention of the appellant that there is no pleading to the effect that the 1st and 2nd respondents were claiming adverse possession and were trying to perfect their title. On the other hand, the 2nd respondent took a mutually destructive claim of the adverse possession over the suit property on the strength of sale deed dated 12.04.1972 in respect of the property in S.F.No.160 by claiming adverse possession.

16. The learned counsel for the appellant drew my attention to the decision of this Court and submitted that the revenue entries did not confer any title nor legal possession to the 1st and 2nd respondents on any portion of the suit property in S.F.No.158/3.

17. The learned counsel also submitted that to establish adverse possession, the respondents should prove hostile possession. He refers to the decision of the Court in Karnataka Board of Wakf vs. Government of India and Others (2004) 10 SCC 779, wherein it was held that " It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See S.M. Karimv.Bibi Sakina [AIR 1964 SC 1254] , Parsinniv.Sukhi[(1993) 4 SCC 375] and D.N. Venkatarayappa v.State of Karnataka[(1997) 7 SCC 567] .) Physical fact of

exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. [Mahesh Chand Sharma (Dr.) v. Raj Kumari Sharma [(1996) 8 SCC 128] .]

18. The learned Senior counsel for the appellant also relied on the decision of the Hon'ble Supreme Court in S.P.Chengalvaraya Naidu (Dead) By Lrs. v. Jagannath (Dead) and Others, (1994) 1 SCC wherein it was observed that one who comes to the court, must come with clean hands. The Court there observed that " we are constrained to say that more often than not, process of the court is being abused. Property -grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation. It is therefore submitted that the 1st and 2nd respondents are taking advantage of joint patta issued earlier.

19. The learned counsel for the appellant further submitted that Court has further observed that there was no evidence to show that the 1st and 2nd respondents were in possession and enjoyment of an extent of 0.75 acres in S.F.No.158/3. The Court has also given a categorical finding that none of the documents filed by 1st and 2nd respondents herein would prove that they were in possession and enjoyment of 0.75 acres of the land in S.F.No.158/3 from 1972. The court has also observed that the Advocate Commissioner who was appointed was merely directed to note the physical features of the properties in S.F.Nos.158/3 and 160/1 and it was not a Survey Commission.

20. Per contra, the learned counsel for the 1st and 2nd respondent submits that the order of the Appellate Court is well reasoned and requires no interference. He further submits that the 1st and 2nd respondents were in adverse possession of the

property from 1972 and patta was granted by the revenue authorities in favour of the 2nd respondent which has also established adverse possession. Therefore, the lower Appellate Court has rightly remanded the case back to the lower Court for fresh trial.

21. The learned counsel for the 3rd and 4th respondents submits that as per Rule 12 of the Tamil Nadu Patta Pass Book Rules, 1987 an application for cancellation of patta should have been made within a period of 90 days from the date of acquisition of right and since the appellants had not taken any steps for cancellation of patta under Section 10 of the Patta Pass Book Act 1983 r/w R.12 TNP Rules, 1983, the authorities cannot cancel the patta. If at all, it was still open to the appellant to challenge the patta issued to the respondents before the Writ Court for cancellation of patta or file appropriate application for modification of entries and since the appellant was not made 90 days of the acquisition of rights by way of the respondents 1 and 2 it cannot be annulled.

22. I have considered the arguments on behalf of the appellant and the respondents and perused the materials available on records.

23. The case of the appellant is that the property in question was derived under a partition deed dated 26.06.1991 which was proceeded by a registered partition deed 08.10.1976 between the members of the family of the appellant. These partition deeds conferred title over the property in S.F.No.158/3 to an extent of 2.99 acres to the appellant's father and thereafter to the appellant whereas, the 2nd respondent/2nd defendant claims to have purchased neighbour's property from one Silamani Gounder on 12.04.1972 to an extent of 2.34 1/2 acres of land in S.F.No.160/. However, a joint patta was issued by the 3rd respondent which has led to confusion. Based on this Joint patta, the 2nd respondent has settled an extent of 75 cents of the property in the name of his son i.e 1st respondent herein from and out of the 2.99 acres of land in S.F.No.158/3. Settling the property of the appellant's property traceable to his grand father on the strength of a mistake in joint patta raises serious question of bonafide of the 2nd respondent to settle the property particularly in the light of the fact that it was after the attempt to have the property measured by revenue authority failed. Having failed to obtain the measurement from the revenue authorities, the 2nd respondent proceeded to settle the property in respect of which, the appellant has valid title /right pursuant to partition deed

dated 26.06.1991 and 08.10.1976. Therefore, to claim ownership over the property based on the joint patta is not justified.

24. The respondents have also not filed any counter claim or suit to declare their rights over the property based on joint patta. As patta does not confer any rights over the property, the order of the Appellate court remanding the case back to the trial Court is liable to be set aside.

25. Further, after giving categorical finding that the Commissioner was not supposed to give findings with regard to the possession and the Commissioner can only note the physical features of the property and file his report, the court has concluded that the Commissioner's Report and the plan does not mention this survey of land which was in occupation of the 1st and 2nd respondent and the appellant herein. The Appellate court has concluded that in absence of any survey numbers, it cannot be decided definitely as to whether the 1st and 2nd respondents were in occupation in some portion of the S.F.No.158/3 and the appellant was in occupation of some other portion of S.F.No.160/1 and only the inspection by the surveyor will answer this question.

26. In paragraph No.24 of the order, the Appellate Court has however given a contrary finding that there were some invisible evidences to strongly infer that the 1st and 2nd respondents were in possession and enjoyment of some portion of land in S.F.No.158/3. The Appellate Court has merely found fault with the appellant that an existence of joint patta the name of 2nd respondent was not challenged earlier by the appellant and since no steps were taken to remove and mistake in the joint patta, strengthened the case of the respondent. Without any evidence of possession of the land, the court ought not to have set aside Judgment and decree of the Trial Court and remanded the case back to the said Court.

27. In my view, the respondents 1 and 2 are not entitled to raise the plea of adverse possession without any pleading and evidence before the trial Court in an appellate proceeding before the Lower Appellate Court.

28. In my view, the findings of the Trial court based on the issues framed are well reasoned. Therefore, I am of the view that the impugned Judgment and Decree of the Appellate Court setting aside the Judgment and Decree of the Trial court remanding the case back to the Trial Court is liable to be set aside.

29. The impugned Judgment of Sub Court, Pollachi dated 26.09.2008 is thus set aside and the Judgment and decree passed by the District Munsif Court, Pollachi, is upheld.

30. The civil Miscellaneous Appeal is allowed accordingly. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

kkd

To

1. The Sub Court, Pollachi.

2.The District Munsif Court,
Pollachi.

Copy to
The Section Officer
VR Section
High Court, Chennai-104

+1 cc to Ms.M.N.Balakrishnan advocate sr99488
+1 cc to Ms.K.P.Jotheeswaran Advocate sr99463
+1 cc to the Special Government Pleader sr99347

C.M.A.No.2538 of 2009
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