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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 28.01.2019

Pronounced on: 06.02.2019

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

S.A.No.995 of 2000

1.Chidambaram(deceased)

2.Rajendran

... Appellants/Appellants/Plaintiffs

1st appellant died. Memo dated 18.01.2019 is recorded. 2nd appellant is recorded is recorded as LR of the deceased 1st appellant vide order of court dated 18.01.2019 made in S.A.No.995 of 2000(CVKJ)

Vs

1.Manicka Aasari(died)

2.Asupathi

3.M.Sundari

4.M.Prakash

5.M.Pradeep(minor)

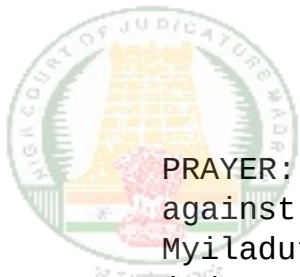
6.M.Priya

... Respondents/Respondents/Defendents

R5 Represented by guardian 3rd respondent (sundari) vide order of Court dated 26.09.2003 made in CMP.No.15655 of 2001.

RR3 to 6 are brought on record as LR of the deceased 1st respondent vide as per order of court dated 26.09.2003 made in CMP.Nos.15654 and 15655 of 2001(MTJ).

R3 discharged from her guardianship and R5 declared Major vide order of court dated 19.11.2012 and 05.12.2012 made in CMP.Nos.1618 & 1619 of 2008 respectively.



PRAYER: The Second Appeal filed under Section 100 of CPC, against the judgment and decree of the Principal Sub Court, Myiladuthurai, in A.S.No.1 of 1999 dated 25.01.2000 confirming judgment and decree of the District Munsif Court, Sirkazhi, in O.S.No.76 of 1996 dated 29.10.1998.

For Appellants : Mr.S.Sounthar

For R2,R4 & R6 : Mr.P.Veeraraghavan

For R3 & R5 : Given up

R1 : Died

JUDGMENT

The plaintiffs in O.S.No.76 of 1996 on the file of the District Munsif Court, Sirkazhi, are the appellants herein.

2. O.S.No.76 of 1996 had been filed by two plaintiffs Chidambaram and his son Rajendiran against two defendants Manicka Aasari and his mother Asupathi, seeking a judgment and decree of permanent injunction restraining the defendants from putting up any wall in the suit property and for mandatory injunction for demolition of the wall put up by encroaching into the suit property and also for costs. The suit property was described as Punja lands measuring 4½ cents in R.S.No.408/16 in South Street, Thirukadaiyur Village, Tharangampadi Taluk, Myladuthurai. By judgment and decree dated 29.10.1998, the suit was dismissed.

3.The plaintiffs then filed A.S.No.1 of 1999 before the Principal Sub Court, Myladuthurai. By judgment and decree dated 25.01.2000, the appeal was also dismissed.

4.Consequently, the plaintiffs then filed the present Second Appeal. The Second Appeal had been admitted on 22.09.2000, on the following substantial question of law:

"1.Whether the Courts below are right in rejecting the suit as prayed for, namely, seeking an injunction against the respondents for putting up any further



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construction, merely for want of title or on the basis of the alleged patta in favour of the first respondent?"

5. During the course of hearing by consent of both the parties, a memo was filed by the learned counsel for the appellant and the following two additional substantial questions of law were also framed for discussion and answer:

"1. Whether the judgment of the Lower Appellate Court is vitiated in negating prayer for limited injunction after giving a clear finding that appellants are title holders to the suit property?

2. Whether the judgment of the Lower Appellate Court is vitiated by misreading of evidence on record in its stating that the appellants have not taken back the possession of the suit property after discharging mortgage debt under Ex.A7?"

O.S.No.76 of 1996 (District Munsif Court, Sirkazhi):-

6. The plaintiffs claimed that the suit property was originally purchased by Saminatha Aasari the grandfather of the first plaintiff, on 18.10.1907. After his death, his two sons namely, Arumuga Pathar and Rajalingam, enjoyed the suit property. Thereafter, the first plaintiff enjoyed the property as absolute owner. The first plaintiff was also paying necessary kists for the property. It was stated that on the West of the property, the wall belonging to Kanthuruva is situated. On the North there is a fence, and in the East there is fence and also a wall. There is no fence on the South side. The defendants' property is on the East. It was stated that the first plaintiff had mortgaged the property in favour of the father of the first defendant in 1949. Since, the original mortgage deed was said to have been lost, the plaintiff had not sought return of it. When the property was purchased its survey number was 408/M. When re-survey was conducted in 1927 the survey number allotted was 408/16. The property was a vacant land. The first plaintiff had allotted the property to his son, the second plaintiff for construction of house. The first defendant had applied to the



Special Tashildar to grant patta in his name with respect to the suit property. The second plaintiff had issued a notice dated 26.05.1996. It was claimed that the defendants have no right over the suit property. It was stated that on receipt of the notice by the second defendant, the defendants encroached into the suit property and constructed the wall with intention to grab the property. It is under these circumstances, that the suit was filed seeking permanent injunction from putting up further construction of wall and for mandatory injunction to demolish the wall which had been put up.

7.The first defendant filed written statement which was adopted by the second defendant. The first defendant was represented by his power of attorney agent Krishnamoorthy. The title of the plaintiffs was specifically denied. The purchase by the forefathers of the plaintiffs was also specifically denied. It was also denied that the first plaintiff mortgaged the suit property in the year 1949. It was mentioned that the date of the mortgage was also not given in the plaint. It was specifically stated that the averment that the original mortgage deed was lost is false. It was also found from the documents of the title deeds of the plaintiffs, that the survey number of their property was 408/M. The allocation of re-survey number as 408/16 in the year 1927 was denied. It was specifically stated that the plaintiffs were attempting to grab the property belonging to the defendants. It was stated that the plaintiffs have not disclosed that a reply notice was issued on 06.06.1996. In the notice issued by the plaintiffs the survey number was given as 408/M. In the reply notice, dated 06.06.1996, the survey number was given as 408/16. It was specifically stated that the plaintiffs have moulded the plaint to suit the survey number and the classification of the land. In the notice dated 26.05.1996, there was no mention about mortgage. The genealogy was also different from what was given in the plaint. It was stated that the plaintiffs are not residing in the suit village. They are not arranging to construct the house. The physical features of the boundaries were also denied and disputed. It was stated that the defendants are enjoying the suit property. Patta was issued in the name of the first defendant as head of the family. It was claimed that the defendants were enjoying the property for well over the statutory period in their own right and without any interruption. The defendants put up foundation for construction of new building in the suit property as early as November 1995.



It was stated that construction over the ground level was in progress. The plaintiffs have not protested. It was specifically denied that the defendants trespassed into the suit property. It was stated that the suit should be dismissed.

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8. On the basis of the above pleading, the following issues were framed:

1. Whether the plaintiffs have been in possession and enjoyed the rights over the suit property as claimed by them at the time of institution of the suit?
2. Whether the plaintiffs were entitled to the relief of permanent injunction?
3. Whether the plaintiffs were entitled for the relief of mandatory injunction?
4. To what reliefs are the plaintiffs entitled to?

9. During trial, the first plaintiff Chidambaram was examined as PW1 and another witness Ramasamy wrongly named in the Trial Court judgment as Rajendiran was examined as PW2. On the side of the defendants, the first defendant Manickam was examined as DW1 and three other witnesses N.Kaliaperumal, Chokkalingam and S.Kaliaperumal were examined as DW2, DW3 and DW4. On the side of the plaintiffs Exs.A1-A7 were marked. Ex.A1 was the title deed in the name of Saminatha Pathar, dated 18.10.1907. Ex.A2 was the title deed in the name of Sundara Aachari dated 04.09.1901. Exs.A3 and A4 were the kist receipts for fasili 1402 and 1403. Ex.A5 was the notice dated 26.05.1996. Ex.A7 dated 10.06.1955 was the mortgage deed in favour of Krishnasamy Aachari. On the side of the defendants, Exs.B1-B10 were marked. Ex.B1 was the reply notice issued by the defendants dated 06.06.1996. Ex.B3 was the Chitta in favour of the first defendant dated 28.08.1996. Ex.B4 was the adangal for fasili 1404. Exs.B5-B10 were the kist receipts for fasili 1395, 1396, 1398, 1399, 1403, 1404 and 1406. An Advocate Commissioner was appointed and his report and sketch were marked as Exs.C1 and C2.

10. On the basis of the oral and documentary evidence, the learned District Munsif, Sirkazhi, by judgment dated 29.10.1998, observed that the burden was on the plaintiffs to prove that they were entitled to the suit property. It was also observed



that the suit was filed for permanent injunction alone. There was no relief sought for declaration of title. It was also observed that if the relief of permanent injunction is sought then possession must be established at the time of institution of the suit. It was also observed that the survey numbers for the suit property in Exs.A1, A2 and A7 and the classification of the land were different. In the notice issued by the plaintiffs in Ex.A5 a different survey number and different classification of land was mentioned. In Ex.A1, the survey number was 408/M and the land was classified as punjai manai. The particular page giving the survey number in Ex.A2 was torn. It was stated that even though the endorsement was made that the said page would be produced at the time of trial, it was not done. It was also found that the plaintiffs had not co-related that S.No.408/M and R.S.No.408/16 were for the same land. Even in the notice in Ex.A5 which was issued just five days prior to the institution of the suit, the survey number of land was given as 408/M and the lands as Natham Jarri. In the plaint, however, the survey number had been mentioned as 408/16.

11.It was also noted that the original mortgage deed had not been filed. In his evidence, PW1 stated that the mortgagee Krishnasamy was not well and died, consequently, it was not possible to get the original mortgage deed from him. However, in the plaint, it had been stated that the original mortgage deed was lost. It was also noted in the judgment that in the notice Ex.A5 there was no mention about the mortgage. It was stated that the survey numbers differed in the documents produced by the plaintiffs. It was also stated that the plaintiff should have sought the relief of declaration of title. It was finally held that the burden was on the plaintiffs to prove possession and entitlement. It was also found that Exs.A3 and A4, the kist receipts do not relate to the suit property. In Exs.B3 and B4, the patta number was 128 for S.No.408/16, whereas in Exs.A3 and A4, the patta number was given as 122. Holding all the above as findings on facts, the learned District Munsif, Sirkazhi, dismissed the suit.

A.S.No.1 of 1999 (Principal Sub Court, Myladuthurai):

12.The plaintiff then filed A.S.No.1/1999. This came up for consideration before the Principal Sub Court, Myladuthurai. By judgment dated 25.01.2000, the learned Sub Judge framed necessary points for determination and re-examined the evidence on record. The learned Sub Judge also found that in Ex.A1, the



survey number given was 408/M and in Ex.A7, the survey number given was 408/3. In the plaint, the survey number given was 408/16. It was also found that the boundaries given in the plaint and in Ex.A1 differed. It was also found that in Ex.A7, the mortgage was dated 10.06.1955, however, in the plaint, the year was given as 1949. The survey number given was also wrong. However, it was found that the boundaries tallied with Exs.A1 and A2. It was found that the defendants had filed Ex.B2 chitta, Ex.B4 adangal and Exs.B5-B10 tax receipts. It was also found that the plaintiffs had not established possession and the finding of the Trial Court that the defendants were in possession was confirmed. The judgment of the Trial Court was confirmed and the first appeal was dismissed.

S.A.No.995 of 2000:

13.Challenging that Judgment, the plaintiffs then filed the present Second Appeal. The Second Appeal had been admitted on 22.09.2000, on the following substantial question of law:

“Whether the Courts below are right in rejecting the suit as prayed for, namely, seeking an injunction against the respondents for putting up any further construction, merely for want of title or on the basis of the alleged patta in favour of the first respondent?”

14.As stated, the following two additional substantial questions of law had been framed by consent of both the parties and on memo filed by the learned counsel for the appellants.

“1.Whether the judgment of the Lower Appellate Court is vitiated in negating prayer for limited injunction after giving a clear finding that appellants are title holders to the suit property?

2.Whether the judgment of the Lower Appellate Court is vitiated by misreading of evidence on record in its stating that the appellants have not taken back the possession of the suit property after discharging mortgage debt under Ex.A7?”



Pending the Second Appeal, the first appellant died and a memo was recorded that the appellant is the son was already on record. The first defendant also died and his legal representatives were brought on record as respondents 3-6.

15. For the sake of convenience the parties would be referred as plaintiffs and defendants.

16. The plaintiffs claimed that the suit property namely, Punja lands measuring 4½ cents in R.S.No.408/16 in South Street, Thirukadaiyur Village, Tharangampadi Taluk, Myladuthurai, bounded on the West by Kanthuruva house and backyard, on the East by house of the defendants and backyard and of the South by South Street and on the North by ArthajamaKattalai backyard belonged to them. To establish title, the plaintiffs produced Exs.A1 and A2. Ex.A1 was the sale deed in the name of Saminatha Pathar executed by Sundara Aasari dated 18.10.1907. A perusal of the said document reveals that the survey number was 408/M and the land was classified as punjai manai. Ex.A2 was the previous title deed, namely, sale deed dated 04.09.1901, executed by Saminatha Pathar in favour of Sundara Aasari. In this the page relating to the survey number was torn. The learned District Munsif had therefore doubted whether Exs.A1 and A2 related to the same property. In the plaint, it was specifically mentioned that even though the original survey number was 408/M, during re-survey in 1927, the suit property was allotted R.S.No.408/16. However, the plaintiffs have not produced any document to co-relate the fact that S.No.408/M and S.No.408/16 relate to the same property. In the notice in Ex.A7 dated 10.06.1955, the suit property was described as 4½ cents Natham Jarri in S.No.408/M. However, in the plaint, it had been described as R.S.No.408/16, punjai land.

17. The First Appellate Court also had occasion to examine the identity of the property. It was found that the boundaries particularly in the Northern, Southern and Eastern boundaries in Exs.A1, A2 and A7 were the same. However, when a doubt was created over the identity of the property, it would only have been proper if the plaintiffs had instituted the suit for declaration of title. This was necessary because both the Courts have returned a finding on fact that the plaintiffs were not in possession on the date of institution of the suit. Further, the defendants have also claimed title over the property. They have also filed chitta and adangal with respect to the suit property as Exs.B3-B4. They have also filed kist receipts as Exs.B5-B10.



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When conflicting documents of title and possession are produced by both the sides, a cloud is created over the title of the plaintiffs. Necessarily the plaintiffs will have to file a suit seeking declaration of title. When admittedly, the possession with the defendants then the plaintiffs should also include the relief of recovery of possession. The suit for injunction for demolition of the wall already constructed and from putting up further wall would not be maintainable in the absence of establishing title to the property where the plaintiffs claim that the defendants are putting up the wall. The very fact that the defendants are putting up the wall would show that they are in possession. Both the Courts have therefore non-suited the plaintiffs on the ground that the suit has framed is not maintainable.

18. In this connection, in 2017 (4) L.W.377, Devendrametha & others Vs. R.Sakkaraiappan & another, it was specifically held by this Court that a suit filed for permanent injunction without the prayer for declaration particularly, when there was a dispute with regard to the title of the property is not maintainable and that the suit should have been filed for declaration of title.

19. This position of law had been established in an earlier judgment in 1944 (1) MLJ 87, Abdul Nabi Sahib Vs. Bajan Sahib and another, wherein also, it had been held, while examining Section 42 of Specific Relief Act 1877 which is equivalent to Section 34 of the Specific Relief Act 1961, that the person who is not in legal possession of property is not competent to maintain a suit for mere injunction against the party who is in possession.

20. The learned counsel for the appellants however, stated that the plaintiffs only claim the relief of permanent injunction from putting up further construction and for mandatory injunction to demolish the constructed wall. That would not alter the situation since admittedly if the evidence points that the defendants are in possession then a cloud over the title arises and the plaintiffs necessarily have to file a suit for declaration.

21. The first substantial question of law is whether the Courts below were right in rejecting the suit merely for want of title and on the basis of alleged patta in favour of the first defendant. Patta is prima facie a document of possession. The



plaintiffs have to establish title particularly when the defendants have patta in their name. Consequently, I hold that the Court below were right in rejecting the suit.

22.The second substantial question of law which had been framed and thereafter arguments were advanced on was whether the judgment of the Lower Appellate Court was vitiated after giving a clear finding that the appellants are the title holders to the suit property. The First Appellate Court only established identity of the property. It was also found by the First Appellate Court that a suit seeking declaration of title had not been filed. Consequently, the First Appellate Court was correct in negating the prayer for limited injunction.

23.The third substantial question of law which was also raised before arguments were advanced was with respect to discharge of mortgage under Ex.A7. The year of mortgage in the plaint was given as 1949, whereas in Ex.A7, it was given as 1955. In the plaint, it had been stated that the original mortgage deed has been lost. During evidence, PW1 stated that the mortgagee Krishnasamy fell sick and died. Consequently, the mortgage deed could not be retrieved. The possession was admittedly with the defendants as on date of institution of the suit. That is very crucial and on that one ground, the suit as framed is not maintainable.

24.For the reasons stated above, I am not able to convince myself that the Second Appeal deserves a positive result and consequently, the Second Appeal is dismissed, with costs. The judgment and decree of the District Munsif Court, Sirkazhi in O.S.No.79 of 1996 dated 29.10.1998 and the judgment and decree of the Principal Sub Court, Myladuthurai in A.S.No.1 of 1999 dated 25.01.2000 are both confirmed. The Second Appeal is dismissed with costs.

Sd/-

Assistant Registrar (CS-V)

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Sub Assistant Registrar

smv



To

1.The District Munsif Court, Sirkazhi.

2.The Principal Sub Court, Myladuthurai.

3.The Section officer

VR Section, Madras High Court

S.A.No.995 of 2000

RGH(CO)

B.VC (14/09/2021)