

IN THE HIGHCOURT OF JUDICATURE AT MADRAS

Reserved on : 11.10.2018
Pronounced on : 18.03.2019

CORAM:

THE HONOURABLE MR.JUSTICE P. RAJAMANICKAM

S.A.No.1928 of 2001

1.Patturaja

2.Roja

3.Sekar

..Appellants/Defendants

versus

Rasiyan
Respondent/Plaintiff

..

Prayer : Second Appeal is filed under Section 100 of C.P.C., against the judgment and decree of the Principal District Judge, Cuddalore, passed in A.S.No.138 of 2000; dated 28.06.2000 confirming the judgment and decree of the District Munsif, Cuddalore, passed in O.S.No.723 of 1996 dated 31.08.1998.

For Appellants :Mr.R. Gururaj

For Respondent :Ms.K.R.B.Dhaaranee

for Mr.T.R.Rajaraman

सत्यमेव जयते JUDGMENT

This second appeal has been filed by the defendants against the judgement and decree passed by the Principal District Judge in A.S.No.138 of 1998 dated 28.06.2000 confirming the judgment and decree passed by the Principal District Munsif, Cuddalore, in O.S.No.723 of 1996 dated 31.08.1998.

2. The respondent herein had filed a suit in O.S.No.723 of 1996 on the file of the Principal District Munsif, Cuddalore, to declare his title over the suit property and to grant permanent injunction restraining the defendants from interfering with his peaceful possession and enjoyment of the suit property.

The learned Principal District Munsif, by the judgment and decree dated 31.08.1998 had decreed the suit as prayed for. However, she directed the parties to bear their respective costs. Aggrieved by the same, the defendants had filed an appeal in A.S.No.138 of 1998 on the file of the Principal District Judge, Cuddalore. The learned Principal District Judge by the judgment dated 28.06.2000 had dismissed the said appeal with costs confirming the judgment and decree passed by the trial court. Feeling aggrieved, the defendants have filed the present second appeal. For the sake of convenience, the parties are referred to as described before the trial court.

3. The averments made in the plaint are, in brief, as follows:-

The suit property was originally a natham poramboke and the same has been occupied by the plaintiff about 40 years ago and put up a thatched house with a kitchen hut. He has been in possession and enjoyment of the suit property for more than 40 years openly and continuously and uninterruptedly and adverse to the interest of anyone else and hence the plaintiff had perfected title by adverse possession also. In the year 1986, the plaintiff had applied for patta. The Tahsildar, Cuddalore, after enquiry and verification, granted patta in the month of October, 1986 for the suit property. Since then the plaintiff has been in possession and enjoyment of the suit property. The patta stands in the name of the plaintiff and the patta number is 86. The old survey number for the suit property is 13/1 and the new S.No.82/15. The defendants are not having any right over the suit property and they attempted to trespass into the suit property and hence, the plaintiff was constrained to file a suit for declaration and permanent injunction.

4. The averments made in the written statement filed by the first defendant and adopted by the defendants 2 and 3 are, in brief, as follows:

The allegations that the suit property has been in possession and enjoyment of the plaintiff for about 40 years and he had perfected title by adverse possession also are all false. The allegations that the plaintiff had applied for grant of patta and after enquiry, the Tahsildar had granted patta in his favour, are all false. No notice was served on the defendants before issuing of patta. The suit property is situated on the northern side of the patta lands belonging to the plaintiff and the defendants. The total extent of the poramboke land which is situated in front of the houses of both the parties is 2½ cents, out of which, the plaintiff is entitled to ¾ cents only. The plaintiff had stealthily obtained patta without the

knowledge of the defendants. Hence, the plaintiff will not get any title over the suit property. The Government is a necessary and proper party to the suit. The plaintiff ought to have issued a notice under Section 80 CPC before filing of the suit; The suit is bad for non-joinder of necessary parties. The allegation that the defendant attempted to trespass into the suit property is false. The plaintiff had lodged a false complaint before the police and an enquiry was conducted in the police station and at that time, the VAO had stated that the plaintiff and the defendants got right over the suit property. Hence, the Sub-Inspector of Police had directed the parties to measure the property with the help of a surveyor. Accordingly, the first defendant had paid the survey fees on 23.07.1996. Before surveying the lands, the plaintiff had filed a suit with false allegations and therefore, the defendant prayed to dismiss the suit.

5. Based on the aforesaid pleadings, the learned Principal District Munsif, Cuddalore, had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1 and he also examined three more witnesses as P.Ws 2 to 4. The plaintiff had marked Exs.A1 to A14 as exhibits. On the side of the defendants, the first defendant examined himself as DW1. They also examined one more witness as DW2. They have not marked any exhibits on their side. The Advocate Commissioner's report, his plan and surveyor's plan were marked as exhibits Exs.C1 to C3 respectively.

6. The learned Principal District Munsif, Cuddalore, after considering the materials placed before her, found that since the plaintiff has not asked any relief against the Government, the suit is not bad for non-joinder of the Government as a party. She also found that only after inspection of the suit property, the Tahsildar has granted patta in the year 1986 vide Ex.A1 and in pursuance of the said patta, the plaintiff continues to be in possession and enjoyment of the same and the defendants have not produced any documentary evidence to show that they have any right over the suit property. Accordingly, she decreed the suit as prayed for. Aggrieved by the same, the defendants had filed an appeal in A.S.No.138 of 1998 on the file of the Principal District Judge, Cuddalore. The learned Principal District Judge, Cuddalore had dismissed the said appeal confirming the judgment and decree passed by the trial court. Feeling aggrieved, the defendants have filed the present second appeal.

7. This court at the time of admitting the second appeal has

formulated the following substantial questions of law:

"1. Whether the plea of enjoyment does not include enjoyment as ingress and egress?

2. Whether the judgments and decrees of the lower courts decrees are against the principles laid down by the Apex Court reported in AIR 1978 SC 1201 and hence not valid?

3. Whether the lower courts erred in granting a decree for property which is different from the basis of claim?"

8. Heard Mr.R.Gururaj, learned counsel for the appellants and Ms.K.R.B.Dhaaranee for Mr.T.R.Rajaraman, learned counsel for the respondent. The learned counsel for the respondent also filed written submissions.

9. Substantial questions of law 1 to 3:

The learned counsel for the appellants/defendants has submitted that the courts below failed to see that the plaintiff and the first defendant are brothers and also they are having one more brother. He further submitted that all the three brothers have not divided their patta lands and they have been using the suit property to reach the road. He further submitted that since the suit property is situated in front of the houses of all the three brothers, they are commonly using the suit property for reaching their houses from the road. He further submitted that Ex.A3 is only a Thoraya patta and no permanent patta has been granted in favour of the plaintiff. He further submitted that in the absence of permanent patta, the plaintiff cannot claim exclusive right over the suit property. He further submitted that the courts below erred in stating that there is no pleading regarding the user as a pathway failing to see that the manner of using the property, a manner of evidence and need not necessarily be a specific pleading. He further submitted that since the plaintiff had approached the court seeking relief of declaration and permanent injunction, the burden is upon him to prove his title over the suit property. He further submitted that in this case, the plaintiff failed to prove the exclusive title over the suit property and possession and hence he prayed to allow the second appeal and set aside the judgments and decrees passed by the courts below and dismiss the suit which was filed by the respondent/plaintiff.

10.The learned counsel for the appellants/defendants in support of his contention relied upon the following decisions:

1. Kasilingam Vs. Rajavannian and Others Manu/TN/2189/2012 (SA.169/2006 on the file of the High Court, Madras dated 10.10.2012)
2. P. Thangavelu Vs. R.Dhanalakshmi Ammal and Other 95 LW 708
3. Brahma Nand Puri Vs. Nelci Puri since deceased represented by Mathra Puri and another AIR 1965 SC 1506.

11. Per contra, Ms.K.R.B. Dhaaranee for Mr.T.R.Rajaraman, learned counsel for the respondent/plaintiff has submitted that though the defendants have stated in the written statement that the plaintiff is entitled to only $\frac{3}{4}$ cent in the suit property, they have not produced any documentary evidence to show that they are also having right over the suit property. She further submitted that though the patta was granted in favour of the plaintiff in the year 1986, so far, the defendants have not taken any steps to challenge the said patta. He further submitted that the defendants have not produced any documentary evidence to show that they have been in possession and enjoyment of the suit property. She further submitted that there is no pleading with regard to the fact that the defendants have been using the suit property as a pathway to reach their houses from the road. He further submitted that the oral and documentary evidence adduced by the plaintiff would clearly show that the plaintiff has been in possession and enjoyment of the suit property for more than 40 years and hence he has perfected title by adverse possession also. She further submitted that even assuming that only a thorarya patta was granted in favour of the plaintiff, the said fact would show that the plaintiff is exclusively in possession and enjoyment of the suit property, in which, the defendants cannot claim any right. She further submitted that the courts below taking into consideration of all the aforesaid facts have concurrently found that the plaintiff has proved his title over the suit property and the defendants are not entitled to interfere with the plaintiff's possession and enjoyment of the suit property and in the said concurrent factual findings, this court cannot interfere. She also filed written submission. In support of the aforesaid contentions, she relied upon the decision in Muthammal (died) & another Vs. State of Tamilnadu rep. By the Collector of Salem District, Salem and another 2006-3-L.W 361.

12. The suit property is situated in Guruvappanpettai village Gramanatham old S.No.13/1 and new S.No.82/13 admeasuring $2\frac{1}{2}$ cents. Admittedly, the said property is situated on the northern side- in front of the houses of the plaintiff and the defendants. It is also an admitted fact that the plaintiff and the first defendant are brothers and the defendants 2 and 3 are

the sons of the first defendant.

13. According to the plaintiff, he occupied the suit property 40 years ago and put up a thatched house with a kitchen hut and he applied for grant of patta in the year 1986 and considering his application and long possession, the Tahsildar, Cuddalore, after enquiry granted a patta in his favour in October, 1986. The case of the defendants is that since the suit property is situated in front of the houses of the plaintiff and the defendants, both the parties have been using the said property as pathway, for reaching their houses from the road and hence, the plaintiff is not entitled to the entire suit property. Their further case is that the plaintiff is entitled to only $\frac{3}{4}$ cents.

14. Ex.A1 is the proceeding of the Tahsildar, Cuddalore dated 03.10.1986 with regard to assignment of a house site in favour of the plaintiff measuring 0.00.5 hectare in Re-survey No.13/1 of Guruvappanpettai village. In the said document, boundaries also given for the property which was assigned to the plaintiff. As per the said document, the said property is situated on the north of street, east of vacant site; south of Selvaraju's house and west of Muthuvel's house. 0.00.5 hectares is equivalent to 1.235 cents, whereas the suit property is admeasuring $2\frac{1}{2}$ cents and boundaries given by the plaintiff in the plaint schedule are as follows:

"East of 'Pathai' in N.S.No.82/1; North of Patturasa's vacant site in N.S.No.82/14, South of School's 'Pathai' in N.S.No.82/16 and West of 'Pathai'.

15. So, it is clear that the property which is mentioned in Ex.A1 and the suit property, are totally different properties. Under Ex.A1, a specific property was assigned to the plaintiff even on 03.10.1986 itself and that being so, in respect of the same property, there was no necessity to issue notice under Ex.A2 directing the plaintiff to appear for enquiry on 21.07.1994. Further, there was no necessity to grant thoraya patta under Ex.A3 on 17.08.1994 and directed the plaintiff to appear for enquiry on 28.09.1994. Further in Exs.A2 and A3, the property mentioned is situated in new S.No.82/2015 (old S.No.13/1 part) admeasuring 00092 hectare. So, the aforesaid facts also would show that the property covered under Ex.A1 and the property covered under Exs.A2 and A3 are totally different properties. A combined reading of Exs.A1 to A3 and the oral evidence of PW1 and DW1 would show that Ex.A1 is relating to the property in which the plaintiff's house is situated whereas Ex.A2 and A3 are relating to the suit property. As per Ex.A3 a 'thoraya patta' was granted in favour of the plaintiff in respect of 00092 hectare. If 00092 hectare is converted into

cents, it would approximately come to only $\frac{3}{4}$ cents. This fact would support the case of the defendants.

16. For the aforesaid extent in Ex.A3 itself, a plan also attached. So, the plaintiff can seek relief only with regard to the aforesaid extent. Though in Ex.A3, it is stated that it is a 'Thoraya patta', it is also stated that objection if any for granting of the aforesaid Thoraya patta should be submitted on 28.09.1994 during enquiry which would be conducted on 28.09.1994 and thereafter, no objection will be received. It is not the case of the defendants that they have submitted any objection as mentioned in Ex.A3. Further, the evidence of PW2 (VAO) and PW3 (Village Assistant) would show that the enquiry has been conducted in the concerned village and with regard to the issue of patta in favour of the plaintiff, no one has submitted any objection. Therefore, though it is mentioned in Ex.A3 that it is only a thoraya patta, since no objection received from anyone, it can be presumed that the said patta has not been cancelled till today. Further, it is to be pointed out that the defendants in their written statement admitted that the plaintiff is entitled for $\frac{3}{4}$ cents. The measurement mentioned in Exs.A2 and A3 also would approximately come to $\frac{3}{4}$ cents only. Therefore, the plaintiff is entitled for the relief of declaration and permanent injunction only to the extent of the property mentioned in Exs.A2 and A3 i.e., approximately $\frac{3}{4}$ cents only.

17. In Kasilingam Vs. Rajavannian and Others (cited supra), the plaintiff claimed right based on the Ex.A4 (proposed patta notice) but the records would show that there is a house standing in the suit property and in the said house, the first defendant is in possession. Further, in that case it was not the case of the plaintiff that he raised the superstructure or his predecessor in title raised the superstructure. Under the said circumstances, this court remanded the matter to the trial court to enable the plaintiff to amend the plaint. But in this case, thoraya patta has been issued in favour of the plaintiff in respect of certain extent of the property and the defendant also admitted in their written statement that the plaintiff is entitled for $\frac{3}{4}$ cents. Therefore, the aforesaid decision will not apply to the facts and circumstances of this case.

18. In P. Thangavelu and R. Dhanalakshmi and others (cited supra), a Division Bench of this court has held that the plaintiff has to establish his case on the basis of the averments made in the plaint and he cannot pick holes in the title of the defendants and try to succeed.

19. In Brahma Nand Puri Vs. Nelci Puri since deceased represented by Mathra Puri and another (cited supra), also the

Hon'ble Supreme Court has held that the plaintiff must succeed or fail on title that he establishes.

20. There is no quarrel with regard to the aforesaid preposition of law. In this case, Exs.A2 and A3 would show that a thoraya patta was granted only in respect of 00092 hectare that would approximately come to $\frac{3}{4}$ cent. The defendants also admitted in their written statement that the plaintiff is entitled to $\frac{3}{4}$ cents only. Further, in pursuance of the said notice, no one submitted any objection and there is no evidence that Ex.A3 has been cancelled. Further, in Ex.A3 itself, a plan also has been attached to identify the property in respect of which the thoraya patta has been granted.

21. In the appeal memorandum, the appellants have raised a ground that the courts below erred in stating that there is no pleading regarding the user as a pathway failing to see that the manner of using a property is a manner of evidence a historical aspect and need not necessarily be specifically pleaded as is held in AIR 1978 SC 1201. In AIR 1978 SC 1201, it was contended that in the absence of a specific pleading that the properties had been blended, the two items of properties could not be held to be joint on the theory of blending. The Hon'ble Supreme Court held that "having appreciated the entire facts and circumstances of the case, we think that the pleading that the properties were the joint family properties was sufficient to enable the court to look into the evidence of blending which was merely a historical evidence of the question as to how the properties had become joint family properties". In this case, there is no pleading in the written statement that the defendants have used the suit property for ingress and egress. They have simply pleaded in their written statement that the suit property is situated on the northern side of the patta lands of the plaintiff and the defendants and the total extent of the property which is situated in front of their house is $2\frac{1}{2}$ cents, in which, the plaintiff is entitled to $\frac{3}{4}$ cent only. Nowhere in the written statement, the defendants have pleaded that they are also enjoying the suit property. Further, they have not stated that they are using the suit property for reaching their houses from the road. Therefore, the aforesaid decision will not help the defendants.

22. In Muthammal (died) & another Vs. State of Tamilnadu rep. By the Collector of Salem District, Salem and another, this court has held that no patta will be issued in respect of the Gramanatham and the first occupier is the owner of the particular portion of land. In this case, the plaintiff claimed that the Government had issued patta in his favour. Further, as per Ex.A3 thoraya patta was granted in favour of the plaintiff in respect of 00092 hectare and that would approximately come to

¾ cent. Since the plaintiff himself claimed that the Government had granted patta in his favour, he cannot take a stand that in respect of Gramanatham, no patta will be issued. Further, Ex.A3 would show that he is entitled to ¾ cents and only to that extent, he could seek relief. But the trial court without taking into consideration of all the aforesaid facts had granted a decree in respect of the 2½ cents. The first appellate court also mechanically confirmed the trial court's judgment. Hence, the trial court decree has to be modified to the extent that the plaintiff is entitled to the decree only to the extent of the property mentioned in Ex.A3. Accordingly, substantial questions of law are answered.

23. In the result, the second appeal is partly allowed and the judgments and decrees passed by the courts below are modified to the effect that the plaintiff is entitled to the decree for declaration of title and permanent injunction only to the extent of the property mentioned in Ex.A3 i.e., 00092 hectare. Ex.A3 shall form part of the decree. No costs.

s/d-

Assistant Registrar (CS VI)

True Copy

Sub-Assistant Registrar

gv

To

1. The Principal District Judge, Cuddalore.
2. The District Munsif, Cuddalore.

Copy to

The Section Officer,
V.R. Section,
High Court, Madras.

+1 CC to Mr.R.Gururaj, Advocate sr 25253.

WEB COPY

S.A.No.1928 of 2001

VGI (CO)
SP(14/10/2019)