

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 10.12.2018

PRONOUNCED ON: 22.01.2019

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A.No.1180 of 2007

and

MP.No. 1 of 2007

1.Mr. M.Kandasamy
2.Mr. M.Siva Subramanian
3.Mr. M.Arunachalam
4.Mrs.Dhanalakshmi

...Appellants/plaintiffs

Vs.

1.Mrs. Valliammal
2.M/s. Saraswathi
3.Mr. Kannan
4.Mr. Thirunanasambantham
5.Mrs.Vasantha
6.Mr.M.Selvaraj
7.Mrs. Dhanalakshmi

...Respondents/Defendants 1 to 5/
/Plaintiffs 6 & 7

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 22.02.2006 passed in A.S.No.177 of 2005 on the file of the learned III Additional Sub-ordinate Judge, Coimbatore confirming the judgment and decree dated 26.07.2005 passed in O.S.No.2532 of 1999 on the file of the learned III Additional District Munsiff, Coimbatore.

For Appellants : Mr.J.Raja Kalifulla,
Senior Counsel

For Respondents: Mr.S.Subbiah, Standing
Counsel for Mr.P.Raja
For RR1 to R5

For RR6 & 7 : No appearance

J U D G M E N T

The appellants/plaintiffs have preferred this Second Appeal against impugning the Judgment and decree dated 22.02.2006 passed in A.S.No.177 of 2005 on the file of the learned III Additional Subordinate Judge, Coimbatore confirming the judgment and decree dated 26.07.2005 passed in O.S.No.2532 of 1999 on the file of the learned III Additional District Munsiff, Coimbatore.

2. For the sake of convenience, the parties are referred to as, as described before the trial Court.

3. Suit for the relief of permanent injunction.

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

The first plaintiff Maruthakutty Gounder is the son of one Koundey Gounder. The said Koundey Gounder had two sons and two daughters namely, Patti Gounder, Maruthakutty Gounder (the first plaintiff), Subbammal and Nanjammal respectively. During his life time, the said Koundey Gounder had acquired some landed and house properties. He performed the marriage of his daughters namely Subbammal and Nanjammal in a decent manner with all 'Seervaraisai'. On 11.11.1964, he executed a registered Will vide Document No.205/1961, in favour of his sons and also in favour of his grandchildren. During the time of executing the above said Will, he left some uncovered landed property in S.F.No.78/2 of Kavundampalayam Village, Coimbatore Taluk and a house property in Sanganur Village, Coimbatore Taluk. Subsequently, after the death of the said Koundey Gounder, the Release Deeds were executed on 04.09.1982 among his heirs to clear their title in respect to the left out landed properties. After executing a Will by Koundey Gounder and the Release deeds among his heirs, no other document was executed with respect to the suit property till date. However, during the life time of the said Koundey Gounder, the total house property was divided orally into two shares between his two sons namely, the deceased first plaintiff and his elder brother Patti Gounder. Ever since, from the date of partition, both of them were put in possession and enjoyment of their respective shares. In the meanwhile, the elder brother of the first plaintiff namely Patti Gounder was died on 10.02.1965. After his death, the shares allotted in favour of him was enjoyed by his heirs. At the same time, the first plaintiff was in continuous possession and enjoyment of the schedule mentioned property till date. He let out the said property to one Nataraj for rent. The suit property is a East fencing tiled roof building and a vacant area is in front of it. On the

eastern boundary of the suit property there had been a compound wall constructed with mud mortarant stones several decades back. Now only the foundation of the wall under the ground level is there and the superstructure of the wall collapsed long back and there is not traced it above ground. The defendants are the owners of the property which is abutting at the eastern side of the suit property. They are trying to trespass and encroach into the vacant land of the suit property. On 10.12.1999, when the first plaintiff's son K.M.Selvaraj, was at the suit property, the defendants made an attempt to encroach into the vacant area of the suit property. Therefore, the plaintiffs have been necessitated to lay a suit seeking for the relief of permanent injunction restraining the defendants, their men, servants, agents and any other persons under their command from in any way interfering with the peaceful possession and enjoyment of the suit property. Pending suit, the first plaintiff Maruthakutty Gounder died. Inasmuch as, as per the order passed by the learned Principal District Munsiff, Coimbatore in IA.No.284 of 2002 dated 27.12.2004, his legal heirs are impleaded as the second to seventh plaintiffs in the suit.

5.The case of the defendants, in brief, is as follows:

The first defendant is the wife of one Late. Nanjappa Gounder and the defendants 2 to 5 are her sons and daughters. The said Nanjappa Gounder purchased his property by virtue of a Sale Deed dated 31.01.1972. After the death of Late.Nanjappa Gounder, all the defendants herein became the absolute owners of the property, which consists of house together with a vacant space situated on the west of the tiled house. The property which was situated on the west to the defendants' vacant space belongs to one Pachiammal and her sons. The said Pachiammal and her sons have no right or title or interest over the vacant space of the defendants, which was situated immediately on the west of the tiled building. The said Pachiammal and her sons were making attempts to annex the defendants' vacant space so as to have a better enjoyment of their house. During the year 1991, they made several unlawful attempts to commit encroachment upon the vacant space of the defendants. Therefore, the husband of the first defendant Late.Nanjappa Gounder put up a barbed wire fence in order to protect the vacant space. Since the said Pachiammal and her sons made unlawful attempts to remove the barbed wire fence, the Late Nanjappa Gounder filed a suit against them for permanent injunction. The said suit in O.S.No.902 of 1992 on the file of the learned District Munsif, Coimbatore was decreed in favour of Late.Nanjappa Gounder. The judgment and decree passed by the learned District Munsiff, Coimbatore was upheld before this Court. Only after the death of the said Late.Nanjappa Gounder, the plaintiffs herein have

filed a suit at the instigation of Pachiammal and her sons, who were the defendants in O.S.No.909 of 1992. The plaintiffs herein are trying to grab the vacant land of the defendants. In the meantime, in the execution proceedings filed vide EP.No.172 of 2000 in O.S.No.902 of 1992 by the defendants, the plaintiffs herein filed an obstruction petition and dragging on that case. The plaintiffs herein have filed the present suit only with an illegal intention and cause obstruction to the peaceful possession and enjoyment of the vacant space of the defendants. The plaintiffs have no cause of action to lay a suit and the suit laid by the plaintiffs was liable to be dismissed.

6. In support of the plaintiffs' case, the third plaintiff examined himself as PW1 and one Swaminathan, who is the neighbour to the suit property was examined as PW2. On the side of the plaintiffs, 19 documents were marked as Exs.A1 to A19. Further, before the learned District Munsif, Coimbatore, the second defendant Saraswathy examined herself as DW1 and four documents were marked as Exs.B1 to B4. Apart from that, the Report and Plan filed by the Advocate Commissioner was marked as Exs.C1 & C2.

7. On considering the oral and documentary evidence adduced by the respective parties and the submissions made, the learned I Additional District Munsif, Coimbatore, dismissed the suit absorbing that the plaintiffs have not proved their title and possession. Aggrieved over the judgment and decree passed by the learned I Additional District Munsif, Coimbatore dated 25.07.2005, the plaintiffs filed a Memorandum of Appeal before the Sub-Court, Coimbatore. On 22.02.2006, the learned III Additional Subordinate Judge, Coimbatore dismissed the appeal in A.S.No.177 of 2005 filed by the plaintiffs and confirmed the judgment of the I Additional District Munsif, Coimbatore passed in O.S.No.2532 of 1999. Feeling aggrieved with the findings arrived by the I Appellate Court, the plaintiffs have approached this Court by way of filing the present Second Appeal.

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

'a. Whether the Courts below are right in dismissing the suit when the defendants have not disputed the plaintiffs title to the suit property, ignoring the well settled principle possession follows title especially when the suit property is a vacant site?

b. Whether the suit between the defendants and the third parties and the filing rendered there

under will be barred by the principles of resjudicata in a subsequent suit between different parties?''

9. According to the plaintiffs, the suit schedule property initially was in the hands of Koundey Gounder. Recognising his title, possession and enjoyment of the suit property, the Corporation of Coimbatore issued a demand notice(Ex.A1) in Serial Nos. 16, 26 & 29 dated 25.02.1997. Since the said land comes under the category of ''natham'', no title deed was available with the plaintiffs and with their predecessor. According to the plaintiffs, the defendants without any authority attempted to interfere with their possession and enjoyment of the suit property and tried to encroach into the same unlawfully and therefore, the plaintiffs had been necessitated to lay the suit for the appropriate relief.

10. It is the case of the plaintiffs that their grandfather Koundey Gounder, was having two sons and two daughters. Even though on 11.11.1964, the said Koundey Gounder, executed a Will in favour of the plaintiffs and also in favour of the other legal heirs, he had not mentioned about the details of the suit schedule property in the above said Will. Accordingly, no title deed is available with the plaintiffs to show that they are inherited the above said property from their grandfather. It is not in dispute that to the east of the suit property, the defendants house and backyard is located. Since the suit property was stated to be a ''natham poramboke'' founded within the specific boundaries, as stated in the plaint, there is no title deed is available with the plaintiffs and with their predecessors.

11. The defendants have disputed the claim of the plaintiffs, particularly, about the vacant site situated in between both the houses. According to the defendants, the plaintiffs have no title, possession and enjoyment of the suit property and it is contended by the defendants that a house situated on the western side of their house was belonging to one Pachiammal and her sons. Further, it is contended that the plaintiffs have laid a false case claiming as if they are having the title to the suit property without any basis. It is also stated by the defendants that due to the attempts made by Pachiammal and her sons, the father of the defendants Late.Nanjappa Gounder filed a suit against them for permanent injunction. The suit in O.S.No.902 of 1992 on the file of the learned District Munsiff, Coimbatore was decreed in favour of Late.Nanjappa Gounder. The judgment and decree passed by the learned Principal District Munsiff, Coimbatore was marked as Ex.B1.

12. Aggrieved over by the above judgment, the said Pachiammal and others filed an appeal before the learned Subordinate Judge, Coimbatore and the same was dismissed on 04.02.1999. A copy of the judgment rendered by the learned Subordinate Judge, Coimbatore is marked as Ex.B2. It is also seen that against the judgment rendered by the learned Subordinate Judge, Coimbatore, an appeal was preferred before this Court, and the same was dismissed. To prove the same, a copy of the notice served to the third defendant in respect to the appeal before this Court is marked as Ex.B3. Further, the judgment dated 23.08.1999, rendered by this Court was marked as Ex.B4. Thus, the defendants have taken a defence that the plaintiffs are not entitled to obtain the relief sought for in respect to the suit property. Both the Courts below have held that the defendants had repudiated the plaintiffs claim for the suit property as not a true and genuine one and despite the same, the plaintiffs have not come forward to seek the relief of declaration of title in respect to the suit property.

13. In the written statement filed by the defendants, they had categorically denied the title of the plaintiffs in respect to the suit property. Once the defendants repudiated the claim of the plaintiffs for title in respect to the suit property, the plaintiffs ought to have amend the plaint for the relief of declaration. Considering the fact that the plaintiffs title to the suit property is in dispute or under cloud, the plaintiffs must have necessarily prove their title. In the present case, in order to prove their title and possession, the plaintiffs exhibited 11 documents as Exs.A2 to A11. Ex.A2 to A6 are the documents which shows that the grandfather of the plaintiffs paid the property tax to the authority concerned. Ex.B7 to B12 are the copies of the Release Deeds executed in between the family members of the plaintiffs and the sons of their uncle. In all those documents, it was stated that the property in question was initially belongs to one Maruthakutti Gounder, who was the father of the plaintiffs. Even after mentioning the name of their grandfather, for the reasons best known to the plaintiffs, they are not asking the relief of declaration of title in respect to the suit property in the manner known to law.

14. With reference to the above position of law, our Hon'ble Apex Court, in a judgment reported in AIR 2008 SC 2033 in Civil Appeal No.6191 of 2001 in the case of Anathula Sudhakar Vs. P. Buchi Reddy(dead) by L.Rs. & Others, held as follows:

'As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de

jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession''.

15. In the present case, through the evidence of DW1, the defendants claims that the vacant site situated in between two houses are belongs to them. In an evidence given by the second defendant as DW1, he has specifically stated that in a suit filed by Late. Nanjappa Gounder, a copy of the Sale Deed in respect to the vacant site is marked as exhibit.

16. In a decision reported in 2015(8) MLJ 799 dated 02.11.2015 in the case of S. Shanmugam and Others Vs. Chandrasekaran, it was clearly held by this Court that when there are rival claims for the title to the suit property as above noted in the present case, despite the same, the plaintiffs have failed to seek the relief of declaration by amending the plaint properly and prays this Court to render a decision on the same as per the law. It is found that on the above score alone, the plaintiffs suit has to fail.

17. In the present case, the third plaintiff/PW1, when at the time of giving evidence, he specifically stated that there was no title deed in respect to the suit schedule property since for the reason that the said property was a ''natham poramboke''. Even assuming that the said evidence is true and genuine, it is necessary for the plaintiffs to obtain patta to the suit property. It is a peculiar case that in the year 1992 itself, the father of the defendants instituted a suit against the one Pachiammal and Others for the vacant site in question.

18. Now, on going through Ex.B14, the Death Certificate of Koundey Gounder, which reveals that the said Koundey Gounder died on 22.10.2003. Inasmuch as if really, the said Koundey Gounder owned the suit schedule property in the year 2003, necessarily, the father of the defendants ought to have filed a suit only against the said Koundey Gounder. Non filing of a suit against the grandfather of the plaintiffs will prove that in the year 1999 itself, the said Koundey Gounder was not in possession of the suit schedule property. In other words, the deceased Koundey Gounder was not having title over the suit schedule property.

19. In respect to the principle of resjudicata, the plaintiffs herein are not the parties in an earlier suit filed by the father of the defendants in O.S.No.902 of 1992. Accordingly, for applying the above said principle, the main

inheritants i.e., the parties to the same were not in both the suits and hence, basically if the party to the proceedings are differ in both the suits, the principle of resjudicata is not applicable to the present case.

20. Accordingly, the substantial questions of law formulated in this second appeal are answered against the plaintiffs and in favour of the defendants.

21. The learned Standing counsel appearing for the respondents 1 to 5, fairly conceded that he is not having any grievance, in respect to the house property. Now, on considering the said submissions made on either side and also the facts of this case, it is observed that in the plaint, both the house property and the vacant site are mentioned as 'single property'. Hence, if the decree is granted in favour of the house property alone, the said decree cannot be executed.

22. In the light of the above discussions, it is seen that since the defendants have challenged their title to the suit property and also set up a rival title on themselves in respect to a portion of the suit property, the plaintiffs ought to have amended the plaint for the relief of declaration. Further, the plaintiffs had abruptly failed to establish their title to the suit property by placing an acceptable and reliable title deeds with reference to the same.

23. The Courts below have correctly look into the question and found that the plaintiffs have not established their prima facie case and hence, dismissed their suit. I am of the considered opinion that as already discussed, the failure on the part of the plaintiffs in seeking the relief of declaration and also non proving of their title by means of relevant documents, the suit fails.

24. In view of the above discussions, the Second Appeal fails and accordingly, the same is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

dn

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To

1. The III Additional Sub-ordinate Judge,
Coimbatore.
2. The III Additional District Munsif,
Coimbatore.

Copy to:-

The Section Officer,
V.R.Section,
High Court, Madras - 104.

+1cc to M/s.Elizabeth Ravi, Advocate, SR.No. 5268
+1cc to Mr.Jayendra Krishnan, Advocate, SR.No.4612

S.A.No.1180 of 2007

Kak(28/06/2019)



WEB COPY