

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.04.2019
PRONOUNCED ON : 26.04.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No.400 of 2007

1.Munusamy Naicker
2.Rani
3.Illanjiammal

...Appellants/Defendants

Vs.

Kishtappa Naicker

...Respondent/Plaintiff

Prayer:

Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 21.12.2004 made in A.S.No.51 of 2004 on the file of the Principal Subordinate Judge, Chengalpattu, reversing the judgment and decree dated 28.04.2004 made in O.S.No.345 of 1995 on the file of the District Munsif Court, Chengalpattu.

For Appellants : Mr.B.Mahendran Naidu

For Respondents : No appearance. Set exparte vide order dated 09.04.2019.

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 21.12.2004 passed in A.S.No.51 of 2004 on the file of the Principal Subordinate Court, Chengalpattu, reversing the judgment and decree dated 28.04.2004 passed in O.S.No.345 of 1995 on the file of the District Munsif Court, Chengalpattu.

2. The second appeal has been admitted on the following substantial questions of law.

"1. Whether the lower appellate court is correct in saying that the burden of proof lies only the appellate to prove their possession over the suit property?

2. Whether the lower appellate court is right in coming to the conclusion that the

possession is with the respondent on the basis of the tax receipts?

3. Whether any oral evidence can be taken against the registered sale deed Ex.P-1, which is hit by the principle of Section 92 of the Evidence Act?

4. Whether the lower appellate court is correct to say that the appointment of commissioner is not necessary to find out the possession of the suit property by the respondent?

3. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4. For the sake of convenience, the parties are referred to as per their rankings in the trial court.

5. Suffice to state that the plaintiff has laid the suit against the defendants for permanent injunction.

6. The suit property is described as lying in the suit village in grama natham in survey No.124/25B measuring east-west 115 feet, south-north 47 feet bounded within the specific boundaries with a hut, cattle shed, etc., and according to the plaintiff, the abovesaid property belonged to his father Perumal Naicker. It is his father and thereafter the plaintiff who had lived in the suit property and put up a house therein and enjoying the vacant portion and cattle shed, etc., by paying the tax, etc., and the defendants, without authority, attempted to interfere with his possession and hence it is stated that he has been necessitated to lay the suit for appropriate reliefs.

7. The defendants resisted the plaintiff's suit contending that neither the plaintiff's father nor the plaintiff has title, possession and enjoyment of the suit property at any point of time and according to them, the suit property originally belonged to Kanniappa Naicker and further stated that the first defendant had purchased the suit property by way of the sale deed dated 02.01.1986 from the sons of Kanniappa Naicker, namely, Perumal Naicker and Dilli Naicker and enjoying the same and therefore, contended that the plaintiff is not entitled to the suit property and also further contended that the description of the suit property is not correct and the plaintiff taking advantage of the similarity of the name of the first defendant's vendor and his father i.e., both being Perumal Naicker, is attempting to grab the suit property one way or the

other without any entitlement and further contended that the documents projected by the plaintiff are not related to the suit property in any manner and accordingly prayed for the dismissal of the plaintiff's suit.

8. Based on the materials available on record, both oral and documentary, the trial court, on a perusal and assessment of the same, was pleased to dismiss the plaintiff's suit. However, the first appellate court reversed the judgment and decree of the trial court in the appeal preferred by the plaintiff and granted the reliefs in favour of the plaintiff as prayed for. Challenging the same, the present second appeal has been preferred.

9. The defendants, in toto, have disputed the claim of title, possession and enjoyment of the suit property as put forth by the plaintiff in the plaint. In fact, the defendants have challenged the claim of title to the suit property on the part of the plaintiff. The plaintiff has not come forward in the plaint as to how he traces the title to the suit property other than vaguely stating that the suit property belonged to his father Perumal Naicker. As to how his father Perumal Naicker had acquired the title to the suit property, absolutely, there is no plea projected by the plaintiff in the plaint. As to when from the plaintiff's father had been in the enjoyment of the suit property also, there is no clear plea other than vaguely stating that the plaintiff's father had got the possession of the suit property during the year 1925. As abovenoted, the defendants have projected the rival claim of title to the suit property. In such view of the matter, when the defendants have thrown a stout challenge to the claim of title to the suit property on the part of the plaintiff and in particular, when the plaintiff has not come forward with the clear case as to how his father and he had acquired title to the suit property, in such view of the matter, atleast, after the denial of his title to the suit property by the defendants as projected in the written statement, the plaintiff should have endeavoured to amend the plaint and sought for the relief of declaration of tile in the plaint as regards the suit property. On the other hand, the plaintiff has not amended the suit for including the relief of declaration of title. On the above score alone, it is found that the plaintiff's suit should fail.

10. According to the defendants, the suit property has not been properly described. The plaintiff claims to be in the possession and enjoyment of the suit property. In the description of the suit property in the plaint, the suit property is stated to be measuring east-west 115 feet, north-south 47 feet within the specific boundaries including a hut and the cattle shed. To sustain the claim of possession and enjoyment of the abovesaid suit propoerty, the plaintiff has marked nine house tax receipts marked as Exs.A1 to A9.

Conveniently, the plaintiff has not whispered the door number of the house stated to be lying in the suit property. In such view of the matter, when the house tax receipts projected by the plaintiff would not be useful to sustain the case of the plaintiff that he is in the possession and enjoyment of the suit property as described in the plaint, it is found that the house tax receipts marked as Exs.A1 to A9 would serve no purpose to uphold the plaintiff's case. Equally is the case with reference to the electricity bills projected by the plaintiff marked as Exs.A11 and A12. The plaintiff has not whispered the service connection number available in the suit property and in such view of the matter, the electricity bills, abovestated, cannot be inferred that they relate to the suit property as such. It is thus seen that no valid document has been projected by the plaintiff to establish that the suit property, as described in the plaint, is in his possession and enjoyment.

11. As abovenoted, the defendants have also challenged the case of the plaintiff that the suit property has not been properly described. According to the defendants, they had acquired the property of an extent of east-west 96 feet and north-south 19 feet by way of the sale deed dated 2.01.1986. In particular, the plaintiff has not established that he is in the possession and enjoyment of the suit property within the boundaries specified in the plaint. No doubt, D.W.1., during the course of cross examination has admitted that the plaintiff is in the possession of an extent of 2½ cents to the south of Adimoolam's property. Even he has admitted the eastern and the western boundaries of the abovesaid 2 ½ cents in the possession of the plaintiff, however, disputed the southern boundary of the said extent. Despite the abovesaid position, the plaintiff has not come forward with any other material to show that he is in the possession and enjoyment of the suit property as described in the plaint. As above pointed out, the house tax receipts and the electricity bills projected by the plaintiff would not be useful to sustain the plaintiff's case.

12. The first appellate court seems to have accepted the plaintiff's case on the footing that the plea had been projected in the first appellate court that the suit property is the poromboke land and accordingly no patta document could be projected with reference to the suit property. When the plaintiff has come forward with the case that the suit property is grama natham site and has miserably failed to establish his title, possession and enjoyment of the same, the plea put forth by the plaintiff before the first appellate court that the suit property is the poromboke land belonging to the government cannot be readily accepted. Even assuming for the sake of arguments that the suit property is to be taken as the poromboke land belonging to the Government, still, for sustaining his claim of possession and enjoyment of the same, the plaintiff

should have produced the B-memo receipts with reference to the same to evidence the claim of the possession and enjoyment of the same. Absolutely, no B memo receipt has been projected by the plaintiff to hold that the Government had recognised his possession and enjoyment of the suit property as described in the plaint. On the other hand, the first appellate court seems to have shifted the burden on the defendants and found fault that the defendants have failed to establish their claim of possession and enjoyment of the property as projected by them in the written statement. When the defendants have challenged the claim of title, possession and enjoyment of the plaintiff in respect of the suit property as described in the plaint and on the other hand, during the course of arguments, D.W.1 has admitted that the plaintiff is in enjoyment of only 2½ cents and that too, not within the boundaries as described in the plaint and when even with reference to the enjoyment of 2½ cents, there is no material on the part of the plaintiff other than the house tax receipts and electricity bills, it is thus seen that the first appellate court, without any basis, on the pleas of the abovesaid admission on the part of the D.W.1, proceeded to hold that it should be construed that it is only the plaintiff who is in the possession and enjoyment of the suit property as described in the plaint. When the suit property is found to be measuring of a particular extent and within the particular boundaries and when the claim of the plaintiff to the same is, in toto, challenged and when the plaintiff has miserably failed to establish his claim of title, possession and enjoyment of the suit property and when no B memo receipt has been projected by the plaintiff with reference to the same, in such view of the matter, the approach of the first appellate court in finding fault with the defendants that they had failed to establish their claim of possession and enjoyment of the suit property and thereby endeavouring to accept the plaintiff's case when there being no material to sustain the plaintiff's case, in my considered opinion, the reasonings and the conclusions of the first appellate court in upholding the plaintiff's case, sans any material pointing to the same, is totally suffering from complete perversity and also found to be totally illogical and irrational in all aspects. The first appellate court, instead of directing the plaintiff to establish his case is found to have shifted the burden of proof on the part of the defendants and thereby proceeded to uphold the case without there being any material on the part of the plaintiff to hold that the suit property is in his possession and enjoyment. The first appellate court has also noted that the defendants have failed to take out the commission to establish their plea of possession and enjoyment of the property. When the possession of the property by the parties concerned cannot be determined based on the commission's report, the abovesaid approach of the first appellate court in finding fault with the defendants, as such,

cannot be countenanced. In all, it is seen that the first appellate court has completely erred in accepting the plaintiff's case, particularly, in the absence of any proof pointing to the possession and enjoyment of the suit property by the plaintiff in any manner and in such view of the matter, the judgment and decree of the first appellate court is liable to be set aside.

13. in the light of the abovesaid discussions, the substantial questions of law formulated in this second appeal are accordingly answered against the plaintiff and in favour of the defendants.

14. For the reasons aforesaid, the judgment and decree dated 21.12.2004 passed in A.S.No.51 of 2004 on the file of the Principal Subordinate Court, Chengalpattu, are set aside and the judgment and decree dated 28.04.2004 passed in O.S.No.345 of 1995 on the file of the District Munsif Court, Chengalpattu are confirmed. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

s/d-

Assistant Registrar (CS VIII)

True Copy

Sub-Assistant Registrar

bga

Copy to

1. Principal Subordinate Court, Chengalpattu,
2. District Munsif Court, Chengalpattu
3. The Section Officer, V.R.Section, High Court, Madras

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