



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 02.01.2019	Pronounced on: 09.01.2019
-------------------------	---------------------------

Coram:

The Honourable Dr.Justice G.Jayachandran

Second Appeal No.1329 of 2004

1. Mara Naicker,
S/o.Kuppanaicker,

2. Malla Naicker,
S/o.Kuppa Naicker,
Both are residing at
Chinnathambipalayam,
Anthiyur Village,
Bhavani Taluk.

... Appellants/Respondents/Defendants

/versus/

Naga Naicker,
S/o.Naganaicker,
Door No.49 A1,
Palaya Mettur,
Anthiyur Village,
Bhavani Taluk

... Respondent/Appellant/Plaintiff

PRAYER: This Second Appeal has been filed under Section 100 of Civil Procedure Code, praying against the judgment and decree dated 04.04.2003 made in A.S.No.27 of 2003 on the file of the Additional District Court/Fast Track Court No.IV, Erode at Bhavani reversing the judgment and decree dated 29.06.2001 made in O.S.No.578 of 1998 on the file of the Second Additional District Munsif Court, Bhavani.

For Appellants : Mr.N.Manokaran

For Respondent : Mrs.Zeenath Begam

J U D G M E N T

This Second Appeal is preferred by the defendants in O.S.No.578 of 1998. The suit has been laid against them for permanent injunction from interfering with the peaceful possession and enjoyment of the plaintiff in respect of the suit property as a dominant owner.

2. According to the plaintiff, the vacant site measuring 14 yards north-south and 12 yards east-west was purchased by his father Naganaicker on 24.10.1945 from one Kalanaicker. Since then, the said property was in possession and enjoyment of his father. After the demise of his father, the plaintiff has got the possession and enjoyment of the suit property. He has constructed a thatched house in the vacant site, two years before filing of the suit. On 14.08.1998, the defendants who are brothers living next to the plaintiff attempted to encroach upon the suit land and engulf the suit property.

3. The said suit was resisted by the appellants herein by filing written statement denying the alleged encroachment and plaintiff claiming title over the suit property through the sale deed dated 24.10.1945. The defendants specifically contented that the plaint schedule does not specify the actual extent and description. The land being classified as 'natham', the Government has granted patta to all the inhabitants of the village including the plaintiff and the defendants. Suppressing the said facts, based on her documents alleged to have been executed in the year 1945, which does not specify the extent of the property, the suit has been filed.

4. In the written statement, the defendants have specifically submitted that they are in possession and enjoyment of specific extent of the property, for which they have been granted patta by the Government in old SF No.132/2 which corresponds to new SF No.1872/17. The plaintiff attempted to encroach the vacant site belongs to the defendants situated on the eastern side marked as "E", in the Advocate Commissioners' report and also the vacant site situated on the southern side of the property. The villagers objected to the attempt of encroachment. The plaintiff agreed before the panchayathar that he will not interfere or encroach any vacant site which does not belongs to him. However, he has filed the present suit with fallacious averments, as if the defendant attempts to encroach upon the vacant site.

5. To note down the physical features of the suit property, the defendant has taken out an application to appoint an Advocate Commissioner and pursuant to the order of Court, the Advocate Commissioner has inspected the suit property and has filed report and sketch.

6. The defendant has specifically pleaded that the plaintiff can claim possession and enjoyment only in respect of the house property and the vacant site available on the northern

and western side, as per the patta. He cannot claim any title, right or possession for the suit property based on the sale deed executed in the name of his father long ago without proper description or identity of the property.

7. The trial Court has framed the following issued based on the pleadings.

- (i). Whether the plaintiff is entitled for permanent injunction as prayed ?
- (ii) What the relief sought for?

8. To prove the case, the plaintiff has examined himself as PW.1 and one Boomanaicker as PW.2. Ex.A.1 and Ex.A.2 were marked, they are copy of the sale deed executed by Kalanaicken in favour of Naganaicker the father of the plaintiff and the house tax receipts issued by Chinnathambipalayam Panchayat for the assessment year 1989-1999 for Door No.49A-1, in the name of the Naganaicker/plaintiff. The defendants examined as D.W.1 and two exhibits were marked. Ex.A.1, the patta issued to him in respect of new survey No.1872/17 along with Form 1 and 3 and Ex.B.2, house tax receipts for Door No.35-B for the assessment year 1995-1996, 1996-1997, 1997-1998 and 1998-1999. Besides these documents filed by the respective parties, the Advocate Commissioner's report and plan are marked as Ex.C.1 and Ex.C.2.

9. The trial Court has dismissed the suit on the ground that the plaint does not carry the complete description of the property for which the plaintiff seeks injunction. Further, the suppression of the facts that the patta was issued to the plaintiff as well as the defendants in the year 1988 in respect of the portion in their respective possession, dis-entitled the plaintiff, the relief sought for.

10. Taking note of the Advocate Commissioners' report and the sketch, the trial Court has observed that the plaintiff admits that in the vacant site purchased by his father, he has constructed the building which is 26 feet length and 10 feet breath. The land and building were measured during natham survey and patta was issued. However, the plaintiff has not shown present boundaries in the suit schedule property and issuance of patta with specific measurement. In the absence of documents to show that the plaintiff is in possession of the suit property, injunction cannot be granted.

11. Aggrieved by dismissal of his suit, the plaintiff has preferred the appeal before the Additional District Court/Fast Track Court No.IV, Erode at Bhavani in A.S.No.27 of 2003.

12. The lower Appellate Court has allowed the appeal. Consequently allowed the suit for injunction holding that the property has been adequately described in the plaint and the house tax receipt Ex.A.2 carries Door No.49-A1. While, the first defendant has admitted that he is the next home neighbour of the plaintiff and the 2nd defendant his brother, there is no point in raising objection with regard to non-mentioning of the survey number in the schedule of property.

13. The learned First Appellate Judge has observed that while 90% of the subject matter has been admitted by the respondent in favour of the appellant, there is no point in objecting with regard to non-mentioning of survey number. Therefore, in view of the admission by the respondent and in the absence of any claim of adverse possession of the suit by the appellant, Court has to hold that the averments in the plaint are well found and proved.

14. With the above observations, the Lower Appellate Court has allowed the appeal and set-aside the dismissal judgment of the trial Court and decreed the suit as prayed.

15. Against the reversal finding, the defendant has preferred this Second Appeal. At the time of admission, this Court has framed the following Substantial Question of law:

"Is there any legal admission on the part of the defendant which would satisfy the requirements of Section 17 and 21 of the Indian Evidence Act, on which any Court can act upon."

16. The learned counsel for the appellant would submit that the finding and the observation of the lower Appellate Court on the face of it erroneous and without any application of mind. Nowhere, the defendant has admitted the possession or enjoyment of the plaintiff in respect of the suit property. While so, the lower Appellate Court has without any basis has allowed the appeal and granted permanent injunction in respect of the property, which is bereft of description and details for identification.

17. The learned counsel for the appellants would submit that the trial Court has properly appreciated the evidentiary value of sale deed (Ex.A.1) and the patta (Ex.B.1) issued in favour of the first defendant. In the light of the Advocate Commissioners report and sketch the trial Court has rightly

dismissed the suit for injunction holding that the plaintiff has failed to prove his possession and enjoyment in respect of the suit property and the suit schedule property is defective in description. Contrarily, the Lower Appellate Court without considering the evidentiary value of the documents and the admission of the plaintiff himself regarding suppression of issuance of patta, has erroneously concluded that the defendant has admitted the possession and enjoyment of the plaintiff.

18. The learned counsel for the appellants would further submit that when the title regarding the specific portion of suit schedule land is disputed, the suit for bare injunction is not maintainable as per the guidelines postulated in Anathula Sudhakar Vs.P.Buchi Reddy(Dead) by LRs and others reported in (2009) 1 MLJ 1001 (SC). Hence, the judgment of the lower appellate Court requires interference.

19. Per contra, the learned counsel appearing for the respondent would submit that the plaintiff has derived title over the suit property as per sale deed (Ex.A.1) which is more than 30 years old document. The suit property is described as found in sale deed Ex.A.1. There is no dispute regarding identity of the property even though the survey number is not furnished. Therefore, the lower Appellate Court has rightly held that the plaintiff having title over the property and the defendant is not making any claim of adverse possession over the property, the plaintiff is entitled for injunction as a dominant owner. Being a vacant land, the possession goes with title. The defendants who are the neighbouring land owner cannot interfere the peaceful possession of the plaintiff. Having admitted on oath that he is not intend to interfere with the peaceful possession of the property held by the plaintiff, there is no error in the finding of the Lower Appellate Court.

20. The case of the appellant is that as a dominant owner, he is entitled for the relief of injunction restraining the defendants from interfering with the peaceful possession. Admittedly, the suit schedule property is a vacant site. According to the plaintiff, he has title over the property as per sale deed (Ex.A.1). However, the description and boundaries of the suit property is same as it is found in sale deed (Ex.A.1) of the year 1945. The four boundaries as described in Ex.A.1 and in the plaint is not the present four boundaries. The suit schedule property assigned with survey number and separate pattas was also issued for the plaintiff as well as the defendants in the year 1998. The plaintiff for the reasons best known has not filed the patta issued to him. Conveniently

suppressing the facts about the issuance of patta and the present four boundaries of the plaint schedule property with survey number, he has laid the suit with insufficient description of the property.

21. The proven facts before the Courts below is that the disputed area is abutting the patta lands of plaintiff and the defendants. The plaintiff in the deposition has admitted that in the vacant site purchased by his father under sale deed Ex.A.1 he has constructed the house. The Advocate Commissioner who has inspected the disputed site at the behest of the defendant has identified the disputed area as "E" marked portion. Abutting this portion on the eastern side, the property of the defendants are located. On the northern side, the patta land of the plaintiff is located. On the west of disputed area, the plaintiff has occupied and in possession of it. It is admitted by the parties and also recorded by the Advocate Commissioner that there was an attempt by the plaintiff to encroach upon the vacant site abutting to his patta land, which was objected by the villagers as well as the defendants. Later, the parties have agreed to the villagers that he will restrict their claim to the "N" marked portion. There is a life fence observed by the Advocate Commissioner at the "N" marked portion. The plaintiff herein has filed the suit suppressing all these material facts. Particularly, the patta issued in respect of their portion in occupation, after survey and the compromise entered between the parties during panchayat. The plaintiff has relied upon the Ex.A.1 sale deed of the year 1945 which lacks proper description of the property and the source of title to his vendor. The house tax receipt Ex.A.2 was issued subsequent to the filing of suit. Further, there is no dispute regarding possession or enjoyment of the house by the plaintiff. The real dispute is over the vacant space which is marked as "E" in the Commissioner report. To prove his possession over this portion of vacant land the plaintiff has neither produced document to infer de jure possession or acceptable evidence to hold his defacto possession.

22. In the above said circumstances, the trial Court has rightly dismissed the suit holding that the plaint does not carry proper description of the property upon which the plaintiff claim right as a dominant owner. While so, the lower Appellate Court has totally ignored the inherent lacunae in the pleadings and unmindful of the Advocate Commissioners' report and the plan, which is not been objected by either of the parties in writing had reverse the judgment of the trial Court erroneously by concluding that the defendants have admitted 90% of the plaintiff case, therefore, the plaintiff is entitled for injunction, which is neither factually correct nor legally proper.

23. The defendant, in the written statement has only stated that he and the plaintiff are neighbours and the disputed land lying common in between their lands. The patta was issued for the respective portion of the land in occupation by the parties. While so, the plaintiff has no right to claim any right of possession and enjoyment in respect of "E" marked portion. This is neither an admission of the plaintiff case by the defendant nor an undisputed fact which could be relied upon without judicial scrutiny to satisfy the requirement of Section 17 and 21 of the Indian Evidence Act.

24. It is also the case of the defendant that the plaintiff has laid the suit for injunction without mentioning the actual extend of land in his possession. Therefore the suit is not maintainable. While so, the lower Appellate Court has erroneously held that the defendant has admitted the case of the plaintiff regarding possession and enjoyment, therefore, non-mentioning of the survey number and extend in the schedule of property will not dis-entitled the plaintiff from seeking the relief of permanent injunction.

25. It is well settled legal proposition of law that when a person seeks bare injunction based on title and possession, he has to prima facie establish his title and prove through evidence his actual possession. Particularly, when the defendant denies the title of the plaintiff. In this case, the sale deed Ex.A.1 of the year 1945 is without indicating the survey number and it lacks proper description. Much later, the patta issued for the suit property and adjacent land in the year 1988 with survey numbers and extent. The very factum of suppressing of his patta will dis-entitled the plaintiff from seeking relief of injunction as a dominant owner, because the sale deed (Ex.A.1) does not clearly indicate conferment of title to the plaintiff in respect of the suit property in dispute. More particularly, the present four boundaries of the land is dispute are entirely different from what was in the year 1945, when the sale deed Ex.A.1 was executed. The plaintiff is bound to mention the exact boundaries and the owners of the present four boundaries, while filing suit for injunction. The plaintiff has suppressed the actual owners of the four boundaries, more particularly the defendant who is the owner of the property east of the plaintiff land. This suppression cannot be taken as unintended omission. The plaintiff has made an attempt to make out a case that the suit land is abutting to his property and the plaintiff is nothing to do with the disputed portion. Contrarily, the evidence shows the defendant shares common boundary with the plaintiff. In Anathula Sudhakar

case cited supra, at paragraph 14 the Hon'ble Supreme Court has held as below:-

"But what if the property is a vacant site, which is not physically possessed, used or enjoyed? In such cases the principle is that possession follows title. If two persons claim to be in possession of a vacant site, one who is able to establish title thereto will be considered to be in possession, as against the person who is not able to establish title. This means that even though a suit relating to a vacant site is for a mere injunction and the issue is one of possession, it will be necessary to examine and determine the title as a prelude for deciding the de jure possession. In such a situation, where the title is clear and simple, the court may venture a decision on the issue of title, so as to decide the question of de jure possession even though the suit is for a mere injunction. But where the issue of title involves complicated or complex questions of fact and law, or where court feels that parties had not proceeded on the basis that title was at issue, the court should not decide the issue of title in a suit for injunction. The proper course is to relegate the plaintiff to the remedy of a full-fledged suit for declaration and consequential reliefs"

26. In the said circumstances, this Court finds no merit in the plaint. While, the trial Court has rightly dismissed the suit, the Lower Appellate Court without considering the denial of title and continuous enjoyment by the defendant has allowed the appeal by reversing the judgment of dismissal passed by the trial Court.

27. For the above said reasons, the judgment and decree passed by the Lower Appellate Court is set-aside. The judgment and decree passed by the trial Court is confirmed.

28. In the result, the Second Appeal is Allowed with costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

To

1. The Additional District Court/Fast Track Court No.IV, Bhavani, Erode.
2. The Second Additional District Munsif Court, Bhavani.

Copy to

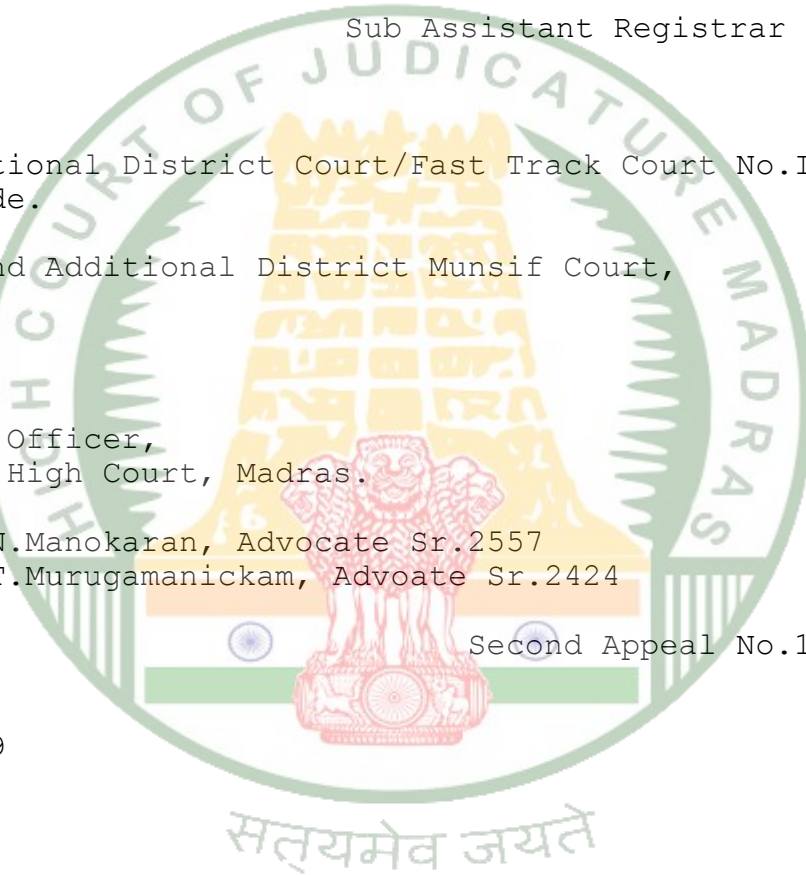
The Section Officer,
VR Section, High Court, Madras.

+1cc to Mr.N.Manokaran, Advocate Sr.2557

+1cc to Mr.T.Murugamanickam, Advocate Sr.2424

Second Appeal No.1329 of 2004

ssv[co]
srg 7/5/2019



WEB COPY