



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 20.12.2018	Pronounced on: 02.01.2019
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Coram:

The Honourable Dr.Justice G.Jayachandran

Second Appeal No.581 of 2004

K.P.Narayanan,
S/o.Ponnan Chetty,
Kalingari House,
Cherumulli Post,
Gudalur,
The Nilgiris-643 211.

... Appellant/Respondent/
Plaintiff

/versus/

Munner Jamath Mosque,
rep. By its President,
Palapatty Kunjimohammed,
Cherumulli Post,
Gudalur,
The Nilgiris-643 211.

... Respondent/Appellant/
Defendant

PRAYER: This Second Appeal has been filed under Section 100 of Civil Procedure Code, praying against the judgment and decree dated 09.12.2003 and made in A.S.No.64 of 2002 on the file the District Judge, Nilgiris at Udhagamandalam reversing the judgment and decree dated 11.06.2002 and made in O.S.No.5 of 1995 on the file of District Munsif Court, Gudalur.

For Appellant : Mr.B.Ramamurthy

For Respondent : Mr.B.Soundarapandian

J U D G M E N T

The appellant herein is the plaintiff in O.S.No. 5 of 1994 on the file of District Munsif Court, Gudalur. The relief sought in the suit is to declare the plaintiff is the absolute owner of the suit property and consequently injunction against the defendant and his agents.

2. The Trial Court had dismissed the declaratory relief but granted permanent injunction against the defendant. Aggrieved by the judgment and decree passed by the trial Court partly allowing the suit in respect of relief of permanent injunction, the defendant has preferred the appeal before the District Judge, Nilgiris at Udhagamandalam in A.S.No.64 of 2002. The First Appellate Court had allowed the appeal. The judgment and decree passed by the trial Court and set aside the injunction relief granted in favour of the plaintiff. As a result, the plaintiff lost his suit in toto. Hence, the present Second Appeal.

3. The case of the appellant, in his plaint is that he is presently in possession and enjoyment of the suit property to an extent of 1.01.5 hectares of land comprising in R.S.No.587/1 of Cherumulli Village along with K.P.Achuthan and Kunjan Chetty for more than 3 decades. The suit land originally belong to erstwhile Nilambur Kovilakam. Through transfer of possessory right, it came into joint possession and enjoyment of the plaintiff along with others. Initially, the land was cultivated by his father Ponnann Chetty under the Nilambur Kovilakam since, then it is in peaceful possession and enjoyment of Ponnann Chetty and others.

4. While so, one Kunjimohammed who is predecessors in Office of the defendant/Muneer Jamath Mosque tried to trespass into the suit property owned by the plaintiff and others. Hence, a suit was filed against the defendant/Mosque before the District Munsif Court in O.S.No.19 of 1976 for injunction. The suit was decreed restraining the defendant from interfering with peaceful possession and enjoyment of the plaintiff and others. When E.P.No.14 of 1986 was filed, the predecessors in office of the defendant/Mosque gave an undertaking that they will not disturb the possession and enjoyment of the plaintiff in the suit schedule property. Recording the same, E.P was closed.

5. Pending suit, the Settlement Tahsildar has issued patta dated 23.07.1977 for the suit schedule property. Though, the defendant has no right, title or possession over the schedule property, the name of the defendant has been wrongly included in the patta issued by the Assistant Settlement Tahsildar, without taking into consideration, the pendency of the litigation in the Court. In such circumstances, on 01.10.1993, the defendant has attempted to alienate the property, which is not in their possession or title over the suit property. Without any interest or possession over the schedule property, the defendant threaten to trespass into the schedule property. Hence, the suit for declaration that the

plaintiff is the absolute owner with title to the suit property and consequential injunction against the defendant.

6. The schedule of the property is described in the plaint as below.

Registration District	: The Nilgiris
Registration Sub District	: Gudalur
Taluk	: Gudalur
Village	: Cherumulli
S.No.	: 587/1
Extent	: 60 cents
North	: Land in possession to K.P.Narayanan
South	: Land in possession to Ravunni Chetty
West	: Land in possession to Plaintiff's dry land in S.No.85/1A1
East	: Stream

7. The case of the defendant in the written statement filed before the trial Court is that as per patta issued by the Settlement Tahsildar, the defendant is entitled for an extent of 1 acre in the suit survey field. The patta has been granted to the defendant/Mosque and the defendant name is included in the patta. The Settlement Tahsildar is not bound by a decision of the District Munsif Court and therefore, the decree of the District Munsif Court and the undertaking given by the predecessors in the title of the defendant before the Execution Court is not binding on them. If the plaintiff is aggrieved by the inclusion of the defendant name in the patta in respect of the suit property, the remedy available to the plaintiff is to file an appeal before the Tribunal. After the order by the Settlement Authority, the decree in O.S.No.19 of 1976 has become "Null" and "Void". The defendant who has title and possession to an extent of 1 Acre in the suit Survey No.587/1, he is entitled to deal with the property in the manner they like. Without filing a suit for partition, the suit for declaration and consequential injunction is not maintainable in law. Further, the injunction cannot be granted against the co-owner. Therefore, the plaintiff is not entitled for any relief. It is also contended by the defendant in the written statement that the co-pattadar's are not arrayed as parties in the suit. So, suit is bad for non-joinder of necessary parties.

8. The Trial Court, based on the pleadings has framed following issues:

1. Whether the plaintiff is in possession and enjoyment of the suit schedule property.
2. Whether the plaintiff has title over the suit property.
3. Whether the plaintiff is entitled for declaration and injunction as prayed for.
4. Whether the decree passed in O.S.No.17/1976 is valid.
5. Whether the plaintiff is maintainable.
6. What are the relief the plaintiffs are entitled.

9. Before the trial Court, the plaintiff/K.P.Narayanan and one Joshi were examined as PW.1 and PW.2 respectively. Six documents were marked as Ex.A.1 to Ex.A.6 in support of the plaintiff. On the side of the defendant one Kunjimohammed, President of Munneer Jamath Mosque has examined as DW.1.

10. The trial Court, after considering the exhibits A.1 to A.6 has held that under Ex.A.1 patta has given to the plaintiff, defendant and 2 others jointly. As per the decree passed in O.S.No.19/76 injunction has been granted against the defendant predecessors, to show the possession of the property the plaintiff has produced the tax receipts Ex.A.4, therefore, the documents produced before the Court proves the possession of the suit property with the plaintiff. However, the plaintiff has failed to prove his source of title, hence disallowed the prayer of declaration regarding title and granted the relief of permanent injunction. The Trial Court has also held that the decree passed in O.S.No.19/76 is valid and enforceable decree.

11. While declining the relief of declaration, the trial Court has observed that originally the land belongs to Nilambur Kovilagam. By Jenman Estate (Abolition and conversion into Ryotwari) Act 1969, the Government has issued jenmam patta to the cultivators, therefore, Government is a necessary party. Without impleaded the Government, declaration regarding title cannot be granted.

12. The defendant aggrieved by the injunction granted against them in respect of the suit property has preferred appeal in O.S.No.64 of 2002 before the District Court, Ooty.

13. The Appellate Court has framed the following points for consideration.

1. Whether the plaintiff is in exclusive possession and enjoyment or the suit property.

2. Whether the plaintiff is entitled for declaration of an absolute owner of the title of the suit property.

3. Whether the plaintiff is entitled for consequential injunction as prayed for.

14. The Appellate Court has observed that the Settlement Tahslidar, Gudalur, after enquiry had granted ryotwari patta under Section 9 of the Act 24 of 1969 in respect of four claimants which includes the plaintiff as well as the defendant. Therefore, the plaintiff alone is not in exclusive possession of the property. Subsequently, there is no subdivision to the Survey No.587/1 though joint patta for larger extend (1.01.05 hectars) issued in the name of plaintiff, defendant and 2 others as co-pattadars. The document produced by the plaintiff is not sufficient, to prove the exclusive possession of the plaintiff over the suit property (60 cents out of 1.01.05 hectars). Therefore, the plaintiff is not entitled for an injunction against the co-owners. The First Appellate Court has referred the patta issued by the Settlement Tahslidar which is marked as Ex.A.1 and exhibits A.2 and Ex.A.3 and held that they does not support the case of the plaintiff regarding exclusive possession and enjoyment of the suit property. There is a statutory appeal remedy available against the patta issued by the Settlement Tashildar under Section 9 Jenman Estate (Abolition and conversion into Ryotwari) Act 1969, without restoring to the said appeal remedy, the plaintiff cannot take recourse to civil Court and rely upon the decree passed in the earlier suit. For the said reasons, the lower Appellate Court has allowed the appeal and set-aside the injunction relief granted by the trial Court.

15. Thus, having lost the suit in appeal, the plaintiff is before this Court by way of second appeal on the ground that the Lower Appellate Court has failed to consider the decree passed by the competent Civil Court, holding that the defendant is not in possession of the suit property. The Lower Appellate Court has failed to appreciate the undertaking given by the respondent predecessors before the Execution Court that they will not disturb the possession and enjoyment in respect of the suit property. The Lower Appellate Court has gone wrong in reversing the finding of the trial Court with regard to the possession without proper discussion about the document and oral evidence let in by the plaintiff/appellant.

16. At the time of admission, this Court has framed the following substantial question of law.

"Whether the finding of the lower appellate Court that the respondent/defendant is a co-owner along with the appellate herein insofar as the suit property is concerned is perverse in the facts and circumstances of the case."

17. The learned counsel for the appellant would submit that the patta Ex.A.1 issued by the Settlement Tashildar was in the year 1976, when suit for injunction was pending. Therefore, the patta is always subject to the outcome of the suit. Therefore, there is no necessity to prefer any statutory appeal against the inclusion of the defendant name in the patta issued for the entire Survey No.230/1 for larger extent of 1-01-5 hectares. In any event, the undertaking given by the defendant's predecessor before the Execution Court cannot be ignored. After giving a specific undertaking that they will not interfere with the peaceful possession of the suit property, which is 60 cents out of total extent of 1.01.35 hectares and the defendant himself claims only one acre, the area of land in possession of the respective parties also identified by the Advocate Commissioner in his Report [Ex.P.3], the lower appellate Court ought not to have allowed the appeal.

18. Based on the sketch and the undertaking given by the defendant predecessors, the trial Court has rightly held that the plaintiff is entitled, for the injunction in respect of the 60 cents of land, which is in exclusive possession of the plaintiff. The reasoning of the Lower Appellate Court that they cannot be injunction against the co-owner is erroneous and

factual fallacious.

19. According to the learned counsel appearing for the appellant would submit that the co-ownership is different from co-pattadars. At the most, Ex.A.1 shows the defendant is the co-pattadars in respect of the land in Survey No.587/1, they are not co-owners. Even if they are co-pattadars or co-owner, if a specific case is made out by the plaintiff that specific portion of the property which is in the exclusive possession and enjoyment of the plaintiff is attempted to be disturbed by the co-owner, injunction can be granted. Before the first appellate Court, in support of the above contention, the learned counsel has referred the following commentary by Mithra's on Co-ownership and Partition Fifth Edition page 127 and 128, which say the circumstances under which injunction against co-owner can be granted.

" The law is that the right of a co-owner to raise construction or to make other improvement on the common property really depends on the consent, express or implied, or on the sufferance of the other co-owners. And when one co-owner commences to build without seeking the consent of the others and in spite of the protest to the construction, the possession of the co-owner raising the construction at once becomes wrongful and the work will have to be stopped by an order of injunction. The wrongful possession or an ouster by a co-owner is itself an injury to the other co-owners and the latter would not be required to prove any other injury to them in order to sustain action for in-junction."

20. Per contra, the learned counsel appearing for the respondent would submit that the description of the property, as such does not warrant any relief of injunction. The defendants are co-pattadars. They are restricting their right to an extent of 1 Acre in the S.No.587/1 with an extent of 1.05.01 hectares. The Lower Appellate Court has rightly appreciated the facts dismiss the suit claim holding that the relief of injunction cannot be granted against the co-owner, in the light of joint patta issued to the plaintiff and defendant.

21. The learned counsel would also submit that if at all, the plaintiff is aggrieved, he should have either appealed

against the inclusion of the defendant name in the patta Ex.A.1 or should have sought for partition by including all the co-pattadars in the suit. Without restoring to these two alternative remedies, the suit for declaration in respect of title and injunction is not maintainable. While, the trial Court has rightly declined to grant declaratory relief but erroneously granted injunction, this error has been rectified by the Lower Appellate Court. Hence, there is no need to interfere with the finding of the Lower Appellate Court.

22. On hearing the respective counsels and perusal of the records, this Court finds the documents relied by the parties clearly indicates that even before grant of patta by the settlement Tahsildar, Gudalur vide proceedings dated 23.07.1997 which is marked as Ex.A.1, dispute regarding the enjoyment of the property has been cropped up between the plaintiff and defendant predecessors. In the Settlement Tahsildar proceedings the pendency of Civil suit has been recorded. The plaintiff herein has been examined as one of the witness in the settlement proceedings. On behalf of the defendant/Mosque one Kunjimohammed has been examined. The present land in Survey No.587/1 of Cherumulli Village was earlier under the old Survey No.86/3B. During the settlement proceedings, the plaintiff K.P.Narayanan son of Ponnan Chetty has putforth that he is in possession and enjoyment of 1.01.05 hectares of land in Survey No.587/1, for the past 10 years and has specifically deposed that in the Survey No.587/1 son of Krishnan Chetty, Velu Chetty and Muneer Jamath Mosque have no rights or enjoyment of cultivation. Contrarily, Kunjimohammed, President of Muneer Jamath Mosque examined as P.W.4 by the settlement Tashildar has deposed that the Mosque has purchased 1 acre of land from one Andi Chetty. Pendency of the suit, regarding possession and title between the plaintiff and the defendant Mosque has been brought to the notice of the Settlement Tahsildar. After considering the rival claims and pendency of suit, the Settlement Tahsildar has issued the proceedings including the name of plaintiff K.P.Achuthan, Kunjan Chetty and the President of Muneer Jamath Mosque as pattadars for the Survey No.587/1 to an extent of 1-01-05 hectares. Though the Settlement Tahsildar has discussed at length about the source of title claimed by the respective parties and their extent, he has not caused any measurement of the area which each of the pattadars hold. Further, the four persons to whom the joint patta has been issued by the Settlement Tahsildar under Ex.A.1 are not claiming their right through common source. They claim different extent of land from different source. While so, having known that there is a civil case pending regarding the possession and enjoyment, the Settlement Tahsildar without adverting to the fact the actual extent of land held under the cultivation by the

respective parties has issued the patta Ex.A.1 under Section 9 of the Act 24 of 1969, on condition that the trees standing on the land should not be removed without obtaining prior permission and consent.

23. The patta is a ryotwari patta allowed under Section 12 read with Section 9 of the Act. The proceedings also indicates that the enquiry commenced on 05.04.1977 and completed on 23.07.1977 culminating in the order of issuing joint patta in the name of 4 persons. The Trial Court had taken note of the patta issued by the Settlement Tashildar as well as the decree passed in O.S.No.19/76 wherein, the pattadars shown in the Ex.A.1 were all parties. The Trial Court has also considered the Commissioner's report which has specifically stated that the defendant has no land adjacent to the boundaries of the plaintiff suit land.

24. The specific case of the plaintiff in the earlier suit is that the defendant herein has forcibly entered into their land and tried to plough the land. In the Execution Petition filed by K.P.Narayanan, K.P.Achuthan, who was the plaintiff in O.S.No.19/76, the representatives of defendant/Mosque has given an undertaking that he will not enter into the suit property and he will bound by the decree granted by the Court in O.S.No.19/76. This undertaking has been given pursuant to the Commissioner's report filed in the Execution Petition. The Commissioner's report and sketch are marked as Ex.A.3 and Ex.A.5 in the present suit. While the fact being so, the Lower Appellate Court has miserably failed to properly appreciate the material records and the Law governing the issue.

He has been carried away by the patta issued by the Settlement Tahsildar issued pending suit. The Appellate Court has totally ignored the judicial proceedings between the parties, which was pending, when the patta Ex.A.1 was granted. In view of the undertaking given before the Court in the Execution Proceedings initiated by the plaintiff, the respondent is estoppel, from disobeying the decree passed against them in O.S.19/76 and commit breach of its own promise to the court.

25. The Lower Appellate Court has failed to analyse the evidence in a proper perspective and erred in holding that the plaintiff and defendant are co-owners of the suit property.

He has not only factually erred by holding so, also committed a legal error by reversing the judgment of the trial Court by setting aside the injunction decree granted against the defendant, on the premise that there can be no injunction against co-owner.

26. The Law of injunction is well settled. To the general-rule 'injunction cannot be granted against the co-owner', there are exceptions. When the possession and enjoyment of one owner is exclusive, the other co-owner cannot disturb the portion, which is under the co-owner exclusive enjoyment. If a clear case of trespass or disturbance of peaceful possession is established by one of the co-owner, there is no bare to granted injunction even against the co-owner, till the parties divide the property by metes and bounds.

27. In this case, the very inclusive of the defendant name in the patta, when the suit for declaration and injunction was pending itself is questionable. Further, Ex.A.1 patta does not disclose the extent of land under cultivation of each of the pattadars. It is not the case of the settlement Tahsildar that the entire extent of 1-01-05 hectares of land are jointly cultivated by all the four pattadars. In such circumstances, the Settlement Tahsildar should have made physical inspection to ascertain the extent of land under cultivation by each of the pattadars. Having failed to do so, the patta Ex.A.1 does not carry any merit for consideration in the present suit, which is specifically laid for injunction in respect of 60 cents of land only found to be in possession of the plaintiff and admitted by the defendant/Mosque in the earlier proceedings by way of undertaking that they will not interfere the plaintiffs peaceful possession of the suit portion.

28. In the light of the above discussion, this Court finds that the Lower Appellate Court has erred in reversing the finding of the trial Court by allowing the appeal filed by the defendant. Hence, it is liable to be set-aside. Accordingly, the Second Appeal is Allowed. The judgment of the trial Court is restored with costs.

सत्यमेव जयते -s/d-

Assistant Registrar(CSVIII)

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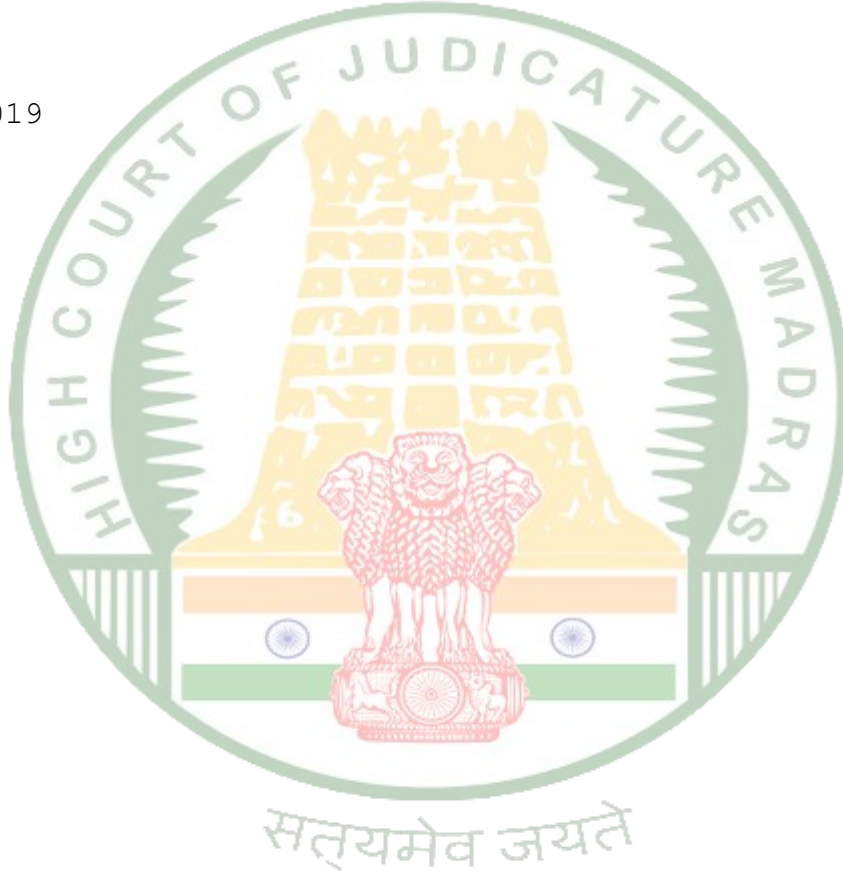
1. The Learned District Judge, Udhagamandalam, Nilgiris.
2. The Learned District Munsif, Gudalur.

+1 cc to M/s.B.Ramamoorthy Advocate sr79

+1 cc to M/s.B.Soundrapandian Advocate sr196

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