

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 24.10.2019
Pronounced on: 10.12 .2019

CORAM:

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM

S.A.No.1346 of 2005

1. Veerappa Konar (Died)

...1st Appellant/1st Respondent/
1st Defendant

2. V.Jayalakshmi

3.V.Kannan

4.S.Kalavalli

5.V.Thamilselvan

6.V.Arivoli

7.V.Vijayaraghavan

..Appellants 2 to 7

(Appellants 2 to 7 brought on record as LRs of the deceased sole appellant vide order of Court dated 10.04.2019 made in C.M.P.No.7656, 7663, 7650/2019 in SA.No.1346 of 2005)

Vs.

Pandarinathan (died)

Sakuntala (died)

1. Varadarajan

2.Selvakumar

3.Selvarani

4.Nagarathinam

..Respondents 1 to 4/Appellants/Plaintiffs

(1 to 4 are the legal heirs of the deceased plaintiffs and all are residing at Rajapuram, Maruthur North, Vedaranyam Taluk, Nagapattinam)

5.Arulmigu Vedaraneeswarar Swamy Devasthanam,

Rep, by its Executive Officer,

Vedaranyam Taluk, Nagapattinam.

...5th Respondent/1st Respondent/
2nd Defendant

Prayer:- Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 21.03.2005, passed in A.S.No.98 of 2004, on the file of the Additional Subordinate Judge, Nagapattinam, reversing the Judgment and Decree dated 28.10.2003, passed in O.S.No.363 of 1999, on the file of the District Munsiff, Nagapattinam.

For Appellants

: Mr.T.Mathi

For Respondents 1 to 4 : Mr.M.Sudhakar

For R5 : Mr.S,K.Rakhunathan

J U D G M E N T

This second appeal has been originally filed by the first defendant Veerappa konar, against the Judgment and decree passed by the Additional Sub-Judge, Nagapattinam, in A.S.No.98 of 2004 dated 21.03.2005 reversing the Judgment and decree passed by the District Munsiff, Nagapattinam in O.S.No.363 of 1999 dated 28.10.2003. During pendency of this Second Appeal the first defendant Veerappa konar died and hence his LR's were brought on record as appellants 2 to 7.

2. One Pandarinathan had filed a suit in O.S.No.363 of 1999 on the file of the District Munsiff, Nagapattinam, to direct the 1st defendant to deliver the vacant possession of the suit property after removing the construction made in the said property. During pendency of the said suit, the original plaintiff Pandarinathan died and hence his legal representatives had been impleaded as the plaintiffs 2 to 6. The learned District Musiff, Nagapattinam, by the Judgment and Decree dated 28.10.2003 had dismissed the said suit without costs.

3. Aggrieved by the same, the plaintiffs filed an appeal in A.S.No.98 of 2004 on the file of the Additional Sub-Judge, Nagapattinam. The learned Additional Sub-Judge, Nagapattinam, by the Judgment and Decree dated 21.03.2005 had allowed the said appeal and set aside the Judgment and decree passed by the trial Court, directing the 1st defendant to deliver vacant possession of the suit Property within 3 months.

4. Feeling Aggrieved by the same, the 1st defendant namely Veerappa konar has filed the present second appeal. During pendency of the second appeal, the said Veerappa konar died and hence his legal representatives have been impleaded as appellants 2 to 7.

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

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

a) The suit Property belongs to the second defendant Devastanam. The new Survey Number for the suit Property is R.S.No.263/3. The said Survey Number comprising 65 cents. The 1st plaintiff's father Thambu samy Devar had been in possession and enjoyment of the said entire 65 cents from the year 1942 on the basis of Kudikani pathiyam. The said Thambu Samy Devar, out

of 65 cents, sold 26 cents on the western side to the 1st defendant under a registered sale deed dated 03.11.1960 and he retained 39 cents on the eastern side. The 2nd defendant has not raised any objection for selling the aforesaid Property. The plaintiffs have been in possession and enjoyment of the eastern side 39 cents by raising crops. To divide the 26 cents which was sold to the first defendant and the remaining 39 cents there is a fence and also a ridge. The plaintiffs have been paying regular rent to the 2nd defendant for the aforesaid 39 cents.

b) That being so, on 05.09.1999, the first defendant had dismantled the fence and tried to put up a construction in the suit property. After coming to know the aforesaid illegal act of the 1st defendant, the 1st plaintiff questioned the same in the presence of villagers. The 1st defendant stopped his activities shortly and again on 04.10.1999, he trespassed into the suit property and put up constructions. The 1st defendant is not entitled to do so and hence the 1st plaintiff filed a suit for recovery of possession.

7. The averments made in the written statement filed by the 1st defendant are in brief as follows:-

It is true that the total extent of the survey No.263/3 is 65 cents. It is false to say that the 1st plaintiff's father was in possession and enjoyment of the entire extent of 65 cents from the year 1942. The old Survey No. for R.S.No.263/3 was R.S.No.210/2. The 1st plaintiff's father Thambu Samy Devar was in possession of 26 cents only on the eastern side. In the remaining portion on the western side there was a pathway and a pond. After purchasing 26 cents, the 1st defendant immediately constructed the school building and he took possession of the remaining extent which is lying on the western side. Since the said land was not fit for cultivation, the 2nd defendant did not receive any rent from the 1st defendant. So, the entire extent of land in survey No.263/3 has been in possession and enjoyment of the 1st defendant from the year 1960 onwards. The 1st plaintiff's father Thambu Samy Devar got land only on the eastern side of the said Survey No. He gave the said land to his daughter Neela @ Seethalakshmi and the said property also purchased by the 1st defendant from her. So, the plaintiffs were not in possession in any portion of the property situated in R.S.No.263/3. The 1st plaintiff has filed the suit by giving wrong description of the property. The property which was purchased by the 1st defendant is situated on the eastern portion of Survey No.263/3. The allegation that the 1st defendant had purchased 26 cents only on the western side is not correct. The 1st plaintiff obtained order from the Thasildar to record his tenancy by giving false particulars, in collusion with Devastanam and after knowing the same, the 1st defendant had filed an appeal before the DRO, Thiruvavur and the same is still pending. Even in the order passed by the Thasildar, Vedaranyam

description of property not properly given. Therefore, the 1st plaintiff cannot rely upon the said document. The 1st defendant is in possession and enjoyment of the entire extent of 65 cents in survey No.263/3 for the past 40 years. The 1st plaintiff and his son were studied in the 1st defendant's school only and hence they are aware about the existence of the building from the year 1960 onwards. The suit has not been properly valued for the purpose of Court fees and jurisdiction. Therefore, the 1st defendant prayed to dismiss the suit.

8. The averments made in the written statement filed by the 2nd defendant are brief as follows:-

The suit land belongs to the 2nd defendant viz., Devastanam. The suit property measuring 39 cents were given to the 1st plaintiff on lease and the same has been recorded by the Thasildar, Vedaranyam, in the year 1998. The 1st plaintiff has been paying the rent to the 2nd defendant regularly. The 1st plaintiff has been in possession and enjoyment of the suit property. There are some constructions in the suit property. The 2nd defendant had enquired and came to know that the said constructions were made by the 1st defendant by trespassing into the suit property and hence, the first defendant has to deliver vacant possession of the suit property. Therefore, the 2nd defendant prayed to decree the suit as prayed for.

9. The averments made in the additional written statement filed by the 1st defendant are in brief as follows:-

It is false to say that the suit property belongs to the 2nd defendant. In Revenue records, the suit property is shown as promboke land. So, the 2nd defendant is not having any right over the suit property. So, it is not known how the 2nd defendant had leased out the suit property to the 1st plaintiff. In the plaint, it is mentioned as kudikani. Kudikani land is meant for residential purpose. Whereas the suit property is not a residential place and therefore the plaintiff's claim is not sustainable. The 1st defendant had purchased 26 cents on the eastern side in Survey No.263/3 under the sale deed dated 03.11.1960 from the 1st plaintiff's father. The property situated on further east belongs to one Neela @ Seethalakshmi. From the said Neela @ Seethalakshmi, the 1st defendant had purchased 17 cents in the year 1975. The 1st defendant had purchased 26 cents in Survey No.263/3 on the eastern side. Further, he purchased another land in the year 1964 from one Deivasigamani. A perusal of the said documents also would show that the 1st defendant had purchased 26 cents in Survey No.263/3 on the eastern side only. In the suit property there are four buildings worth about Rs. 6 lakhs. The land value is 40 lakhs but the plaintiff has not properly valued the suit for the purpose of Court fees and jurisdiction. Further, all the legal heirs of the 1st plaintiff were not impleaded as parties. So,

the suit is bad for non-joinder of necessary parties. Therefore, the 1st defendant prayed to dismiss the suit.

10. Based on the aforesaid pleadings, the learned District Munsif, Nagapattinam, framed necessary issues and tried the suit. During trial on the side of the plaintiffs, the plaintiffs 3 and 4 were examined as P.Ws.1 and 2. They marked Ex.A1 to A11 as Exhibits. On the side of the defendants, the 1st defendant was examined as D.W.1 and 5 more witnesses were examined as D.Ws. 2 to 6. Exs. B1 to B19 were marked as exhibits on the side of the defendants. Advocate Commissioner's report and plan and surveyor's plan were marked as Exs.C1 to C3 respectively.

11. The learned District Munsiff, Nagapattinam, after considering the materials placed before her found that the 1st plaintiff's father had sold 26 cents on the eastern side in Survey No.263/3 to the 1st defendant under Ex,A1 sale deed and the remaining 39 cents are situated on the western side and that on the said 39 cents pathway and pond are situated and that the 1st defendant had occupied the aforesaid 39 cents also, but in the suit, the plaintiff gave wrong description of the property. She further found that the plaintiffs failed to prove that they were in possession and enjoyment of the suit property at any point of time. She also found that the suit has not been properly valued for the purpose of Court fees. Accordingly, she dismissed the suit without costs.

12. Aggrieved by the same, the plaintiffs had filed an appeal in A.S.No.98 of 2004, on the file of the Additional, Sub-Judge, Nagappattinam, The learned Additional Sub-Judge, Nagappattinam, had allowed the said appeal and set aside the Judgment and decree passed by the trial Court and decreed the suit and directed the 1st defendant to deliver vacant possession of the suit property within 3 months after removing the construction made by him in the suit property. Feeling Aggrieved, the 1st defendant has filed the present second appeal. During pendency of the second appeal, the 1st defendant died and hence his legal heirs have been impleaded as appellants 2 to 7.

13. This Court at the time of admitting the second appeal has formulated the following substantial questions of law:-

A. Has not the court below seriously erred in holding that the respondents are having KUDIKKANI Pathiyam. When the same has been abolished by the Tamilnadu Minor inams (Abolition and Conversion into Ryotwari) Act 1963, more so when the respondents 1 to 4 themselves allege that they have been paying rent form the year 1981.

B. Is not the District Revenue officer's order dated 21.05.2003, to be set aside and thereby nullify the order passed by the Thasildar in his order dated 24.08.1998, whereby the respondents claim lease right in respect of Survey No.263/3, the Plaint Schedule property.

C.Has not the respondents of the deceased Pandarinathan lost their right, if at all, by not asserting or substantiating or proving the Kudikkani rights as per the provisions of the Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act, 1963.

D.Is not the suit deserves dismissal on the ground of non-joinder of necessary parties since one of the legal heirs was not brought on record, even after the same was brought to the knowledge of the respondent.

E. Is not the Theni Meddile School, an aided school, which is running at the alleged plaint schedule property a necessary party in the above suit and that for non-joinder of necessary party the suit deserves dismissal.

F.Is not the suit under valued since either under Section 7(G) or under Section 30 of Tamilnadu Court Fees and Suit Valuation Act, and is it on the market value of the suit property on which the suit should have been valued.

14. Heard Mr.T.Mathi, learned counsel appearing for the appellants, Mr.M.Sudhakar, the learned counsel appearing for the respondents 1 to 4 and Mr.S.K.Rakhunathan, the learned counsel appearing for the 5th respondent.

15. Substantial Questions of law A to F:-

The learned counsel appearing for the appellants has submitted that the First Appellate Court erred in reversing the well considered judgment of the trial Court. He further submitted that the First Appellate Court failed to consider that in the Commissioner's report and Plans (Exs. C1 to C3) it is stated that only 43 cents are in the possession and enjoyment of the 1st defendant. He further submitted that admittedly the 1st defendant had purchased 26 cents in Survey No.263/3 from the 1st plaintiff's father under Ex.A1 sale deed and in such a case, the 1st defendant is in excess of 17 cents only, but the First Appellate Court had mechanically reversed the findings of the trial Court and directed the 1st defendant to deliver 39 cents. He further submitted that the plaintiffs have not produced any documentary evidence to show that they have been in possession and enjoyment of the entire 65 cents in Survey No.263/3 from the period of their ancestors. The plaintiffs had filed the suit

based on the tenancy recording order passed by the Thasildar, Vedaranyam vide Ex.A2 dated 24.08.1998. If really the plaintiffs and their ancestors were in possession of the suit property from the year 1942, they would have registered the tenancy at early. He further submitted that the Ex.A2 order also has been set aside by the appellate authority vide Ex.B5 dated 21.05.2003. He further submitted that the plaintiffs had filed a writ petition No.30127 of 2003 before this Court, challenging the order passed by the District Revenue Officer, Nagapattinam dated 21.05.2003 and the said writ petition was also dismissed by this Court on 25.01.2018 for non-prosecution and hence the order passed by the District Revenue Officer, Nagapattinam under Ex.B5 has become final. He further submitted that since the order passed by the Thasildar under Ex. A2 has been set aside by the District Revenue Officer under Ex.B5, the plaintiffs cannot maintain the suit based on Ex.A2. He further submitted that the trial Court taking into consideration of the aforesaid facts had rightly dismissed the suit but the first appellate Court without considering the evidence in a proper perspective had mechanically set aside the judgment and decree passed by the trial Court and decreed the suit as prayed for and hence he prayed to allow the second appeal and set aside the judgment and decree passed by the first appellate court and restore the judgment and decree passed by the trial Court.

16. Per contra, the learned counsel appearing for the respondents 1 to 4 has submitted that as per the Ex.A1 sale deed, the 1st plaintiff's father Thambu Samy Devar had sold 26 cents on the western side in Survey No.263/3 but the 1st defendant claimed that he purchased 26 cents on the eastern portion and the same is not correct. He further submitted that the 1st defendant had purchased property under Ex.B1 and Ex.B3 in some other Survey Number and hence, the 1st defendant cannot claim that he purchased the entire extent of 65 cents in Survey No.263/3. He further submitted that the evidence of PW,.1 would clear show that only on 05.09.1999, the 1st defendant attempted to trespass into the suit property and when P.W.1 tried to prevent the same, the 1st defendant had lodged a false complaint before the Police on 18.09.1999 and based on the said complaint, the PW1 and his family members were arrested and remanded to judicial custody and before they were released on bail, the 1st defendant had trespassed into the suit property put up constructions in the suit property. The criminal case which was filed against the plaintiff's family members also ended in acquittal on 11.04.2003. He further submitted that a clerk of the 2nd defendant was examined as D.W.6 and his evidence would clear show that the entire extent of 65 cents in Survey No.263/3 was lease out to the plaintiffs family and they only paid rent to the Devastanam. He further submitted that the trial Court without taking into consideration the aforesaid facts and

evidence had erroneously dismissed the suit, but the first appellate Court after considering the evidence in a proper perspective had rightly interfered with the findings of the trial Court and decreed the suit and in the said factual findings, this Court cannot interfere and therefore, he prayed to dismiss the second appeal.

17. The learned counsel appearing for the fifth respondent/second defendant has adopted the arguments of the learned counsel for the respondents 1 to 4/plaintiffs.

18. According to the plaintiffs, the new Survey No.263/3 comprising 65 cents and the said property belongs to the 2nd defendant/Devastanam. Their, further case is that the entire extent of 65 cents in Survey No.263/3 was leased out by the 2nd defendant to the plaintiffs family several years ago and they have been in possession and enjoyment of the same on the basis of Kudikani pathiyam. Their, further case is that the 1st plaintiff's father Thambusamy Devar had sold 26 cents on the western side under the original of Ex.A1 sale deed dated 03.11.1960. Their, further case is that the remaining 39 cents on the eastern side was retained by the said Thambusamy Devar and he been in possession and enjoyment of the same and after his death, the plaintiffs have been cultivating the said land by raising punja crops. Their, further case is that on 04.10.1999, the 1st defendant trespassed into the said 39 cents and occupied the same and put up constructions.

19. The 1st defendant had admitted in his main written statement that the Survey No.263/3 comprising 65 cents. However, he denied the allegation that the entire extent of 65 cents were in possession and enjoyment of the said Thambu samy Devar from the year 1942. He further averred that the said Thambu Samy Devar was in possession and enjoyment of only 26 cents on the eastern side in the aforesaid Survey No263/3 and he sold the said 26 cents under Ex.B18 to him on 03.11.1960. At that time, there was a path away and pond on the western side and he occupied the same also. His further case is that since the said portion is not fit for cultivation, the 2nd defendant/Devastanam did not collect any tax or rent from him. So, it is clear that he admitted that the entire extent of 65 cents in Survey No.263/3 belongs to the 2nd defendant/Devastanam. Contrary to the aforesaid admission, he cannot take a plea that the aforesaid land does not belong to the 2nd defendant.

20. Though the plaintiffs pleaded in the plaint that the entire extent of 65 cents in Survey No. 263/3 was in possession and enjoyment of their family from the year 1942, they did not produce any documentary evidence to substantiate the aforesaid pleading. The rent receipts filed by the plaintiffs (Exs. A3 to

A10) would show that the plaintiffs started to pay rent to the 2nd defendant /Devastanam only from the year 1981. Even in the said receipts the Survey No.263/3 and the extent of 65 cents not found place.

21. Ex.A2 would show that the 1st plaintiff, approached the Thasildhar, Vedharanyam to register him as cultivating tenant in respect of 39 cents in Survey No.263/3. Based on the said application, Thasildhar, Vedharanyam has initiated proceedings and in the said proceedings, Devastanam(2nd defendant) had admitted the 1st plaintiff's contention and based on the same, Thasildhar had passed an order dated 24.01.1998 to record the 1st plaintiff as cultivating tenant. Though the 1st plaintiff has pleaded that he has been in possession and enjoyment of the property, from the year 1942, he has not taken steps to register him as tenant till 1998. Only on 15.06.1998 the 1st plaintiff has submitted his application before the Thasildar, Vedharanyam to register him as cultivating tenant.

22. It is also to be pointed out that as against the Ex.A2 order, the 1st defendant had filed an appeal before the District Revenue Officer, Nagapattinam, and that the District Revenue Officer by his order dated 21.05.2003 (Ex.B5) had set aside the Ex.A2 order. In Ex.B5, the District Revenue Officer has stated that out of 65 cents in Survey No.263/3, the 1st defendant had constructed the school building in 44 cents. He further stated that the said buildings are in existence for the past 32 years and hence, 1st plaintiff cannot be registered as cultivating tenant. So, the plaintiffs cannot lay their claims based on Ex.A2.

23. It is also to be pointed out that in Advocate commissioner's report and his plan and Surveyer's plan (Ex.C1 to C3), it is stated that school premise is surrounded by life fence on all four sides and the said premise is admeasuring 43 cents only. Further it is stated that on the northern side of the said premise in the same Survey No. 263/3 there is a pond admeasuring 22 cents. P.W.1 has admitted in his evidence that he has not filed any objections to the Commissioner's report. So, it has to be presumed that he has accepted the physical features noted by the Advocate commissioner. The Advocate Commissioner has stated in his report that he inspected the suit property on 14.05.2000 and that he found that on all four sides there is a life fence having trees. According to the plaintiffs, the 1st defendant trespassed into the suit property only on 04.10.1999 and put up constructions and that being so there will not be trees in the boundaries of the property which is in possession of the 1st defendant. Within seven months trees could not have grown up. Therefore, the contention of the plaintiffs that on 04.10.1999, the 1st defendant encroached the suit property cannot be accepted.

24. As already pointed out that as per Ex.B5 the extent of school premises of the 1st defendant is 44 cents and as per the commissioner's report, the said extent is only 43 cents. Admittedly, the 1st defendant had purchased 26 cents from the 1st plaintiff's father Thambu Samy Devar vide Ex.A1/B18 dated 03.11.1960 and that being so, the 1st defendant is in excess of 17 cents only. The Advocate commissioner's report would show that on the northern side in the same Survey No. there is a pond admeasuring 22 cents and that also would show that the plaintiffs could not have cultivated the said land. It appears that only to retrieve the land from the 1st defendant, the 2nd defendant instigated the plaintiffs to file the suit. Admittedly, the 2nd defendant is the owner of the land. If it feels that the 1st defendant is in Unauthorised occupation of any portion of land, it is for the 2nd defendant to take appropriate action to recover the said land. Since the plaintiffs failed to prove that they have been in possession of the suit property at any point of time, they are not entitled to file the suit for recovery of possession based on the previous possession. The trial court after considering the aforesaid facts in a proper perspective had dismissed the suit but the 1st appellate Court erroneously interfered with the findings of the trial Court and set aside the Judgment and decree of the trial Court and decreed the suit. Hence, this Court is inclined to allow the Second Appeal. Accordingly, the substantial questions of law are answered in favour of the appellants.

25. In the result, the second appeal is allowed. The Judgment and decree passed by the First Appellate Court are set aside. The Judgment and decree of the trial Court are restored. It is open to the second defendant to file a suit for recovery of possession of the property from the 1st defendant which is in his Unauthorised occupation. Considering the facts and circumstances of the case, the parties are directed bear their respective costs.

सत्यमेव जयते
-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

msrm

To:-

1. The Additional Subordinate Judge,
Nagapattinam.

2. The District Munsif,
Nagapattinam.

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

S.A. No.1346 of 2005

AD(CO)
SP(16/12/2020)



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