

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.02.2019

PRONOUNCED ON : 14.03.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No.1561 of 2005

1.Arumugham
2.Anbazhagan

....Appellants/Defendants 4 & 5

Vs.

1.Sankara Mudaliar1st Respondent/Plaintiff
2.Vazhaimuthu
3.Ganesan
4.Seeman
5.Ramamurthy
6.Pachaiammal ...Respondents 2 to 6/Defendants
Respondents 2 to 6 are given up.

Prayer:

Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 20.09.2005 in A.S.No.12 of 2005 on the file of Sub court, Panruti, confirming the judgment and decree dated 03.02.2005 in O.S.No.184 of 1990 on the file of the District Munsif Court, Panruti.

For Appellants : Mr.R.Sunil Kumar

For Respondent : Mr.A.Damodaran for R1

JUDGMENT

In this Second Appeal, challenge is made to the judgment and decree dated 20.09.2005 passed in A.S.No.12 of 2005 on the file of the Subordinate court, Panruti, confirming the judgment and decree dated 03.02.2005 passed in O.S.No.184 of 1990 on the file of the District Munsif Court, Panruti.

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

"a) Whether the court below did not err in applying the principle that the boundaries prevailed over the extent, failing to note

when specific extent was given and not shown to be merely approximate, the extent described in the sale deed could not be enlarged by mere reference to a wrong description of the boundary?

b) Whether the courts below did not err in granting a decree for the plaintiff, failing to note that as per the Advocate Commissioner's report the plaintiff is already in possession of the extent purchased by him and the claim to a larger extent was clearly untenable?

c) Whether the courts below did not err in failing to note that the suit was one for ejectment and when the defendants have proved possession for continuous period of nearly 20 years, the courts are bound to apply the doctrine of relation back for the period when the defendants could not produce the relevant documents?

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. The Parties are referred to as per their rankings in the trial Court for the sake of convenience.

5. Suffice to state that the plaintiff has laid the suit against the defendants for the reliefs of declaration and recovery of possession. The suit property is described as lying in dry survey No.536/6 acres 0.10 (0.04.0) out of acres 0.89 lying to the north of the property of Ramamurthy purchase land, to the south of the property of Muthu Kannu, to the east of road and to the west of the property of Ramachandran and Bhoorasamy Vagaiyara (included in new S.No.340/5, 0.23.0).

6. The defendants resisted the plaintiff's suit on the various grounds set out by them in the written statement and put forth the case that the plaintiff is not entitled to the reliefs prayed for and accordingly prayed for the dismissal of the plaintiff's suit.

7. In support of the plaintiff's case P.Ws.1 and 2 were examined Exs.A1 to A25 were marked. On the side of the defendants D.Ws.1 and 2 were examined and Exs.B1 to B47 were marked. Furthermore, Exs.C1 and C2 and Exs.X1 and X2 were also marked.

8. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial court has held that the suit property belongs to the plaintiff and accordingly he is entitled to seek the relief of declaration with reference to the same and determined that the suit property had been encroached into by the defendants 4,5 and 7 and accordingly directed the abovesaid defendants to deliver the vacant possession of the suit property to the plaintiff within a particular point of time and accordingly disposed of the plaintiffs suit. Challenging the judgment and decree of the trial court, the defendants 4 and 5 alone have preferred the first appeal and the first appellate court has also, in toto, concurred with the judgment and decree of the trial court in all aspects and however determined that it is only the defendants 4 and 5 and not the 7th defendant who had encroached into the suit property and they alone are liable to hand over the vacant possession of the same to the plaintiff accordingly, on that premise, confirmed the relief of declaration granted by the trial court in favour of the plaintiff, however, modified the relief of recovery of possession granted by the trial court and directed that only the defendants 4 and 5 are liable to deliver the vacant possession of the suit property to the plaintiff and accordingly disposed of the appeal preferred by the defendants 4 and 5. Challenging the same, the defendants 4 and 5 have preferred the present second appeal.

9. After hearing the arguments of the counsel for the appellants and the respondents in all, in my considered opinion, the issues involved between the parties being centered only on the factual aspects of the matter one or way or the other and nothing is pertaining to any legal aspect of the same, as such, it is found that no substantial question of law is found to be involved in the second appeal.

10. From the materials placed on record, it is found that the entire extent of 89 cents in survey No.536/6 originally belonged to Kumarasamy Padayachi, the husband of the first defendant and father of the defendants 2 to 6 . As regards the abovesaid position, there is no dispute between the parties. The plaintiff claims title to the suit property based on the sale deed dated 16.05.1970, the certified copy of which has been marked as Ex.A1. Materials placed on record go to show that out of the abovesaid total extent of 89 cents in survey No.536/6, it is seen that 25 cents of land had been gifted to the panchayat for the formation of road and the same could be gathered from the document marked as Ex.A25 and the abovesaid fact is also not in dispute amongst the parties. Following the same, it is found that the road had been formed north-south by the panchayat in the abovesaid 25 cents of land gifted to it by way of Ex.A25 deed. Furthermore, it is also noted that to the west of the

abovesaid north-south road, an extent of 14 cents in the abovesaid survey number had been alienated to one Rasu Padayachi by the defendants and the same could be gathered from the evidence adduced by the parties in the matter. As rightly determined by the first appellate court, inasmuch as we are concerned only with the lands lying to the east of the abovesaid road and not to the west of the abovesaid road, it is not necessary to dwell upon the abovesaid alienation of 14 cents of land to Rasu Padayachi by the defendants for determining the issues involved in the matter. However, on ground, as to what is the actual extent of land gifted to the panchayat and alienated to Rasu Padayachi, there is no reliable and acceptable material. Assuming the abovesaid extent is true excluding the abovesaid extent of 25 cents and 14 cents in the abovesaid survey number, it is found that, to the east of the abovesaid north-south road, an extent of 47 cents is available. It is admitted by both the parties that the seventh defendant's father Deivakannu, had acquired an extent of 5 cents of land on the southern side out of the 47 cents by way of a sale deed dated 09.03.1970 marked as Ex.B1 / Ex.A2. It is further noted and also not in dispute that Deivakannu had also acquired an extent of 3 cents of land to the north of the abovesaid 5 cents acquired by him by way of Ex.B1 / Ex.A2 from the defendants by way of the sale deed marked as Ex.B11/Ex.A3. It is found to the north of the property comprised in Ex.B11/A3, the plaintiff is found to have acquired the remaining extent of land in the abovesaid survey number by way of Ex.A1 sale deed on 16.05.1970 from the defendants 1 to 6. A perusal of Ex.A1 sale deed would go to show that the plaintiff had acquired the abovesaid land within the specific boundaries as described therein. As rightly found by the courts below, the document Ex.A1 does not indicate that the defendants 1 to 6 had retained any portion of the land in the abovesaid survey number after alienating the property to the plaintiff by way of Ex.A1 sale deed.

11. As abovenoted, by way of Ex.B1/Ex.A2, the first defendant and others had alienated an extent of 5 cents of land to Deivakannu, the father of the seventh defendant. On a perusal of the abovesaid document, as rightly determined by the courts below and as could be seen from the recitals contained in the said document, the vendors, namely, the first defendant and others had recited that the abovesaid 5 cents of land is lying to the south of the lands retained by them in the abovesaid survey number and also described the same lying to the east of the panchayat road, west of Parasamy's land, north of Chinna durai lands. Thus, it is found that by way of Ex.B1/Ex.A2, the southern 5 cents of land had been alienated to Deivakannu and thereafter, it is found that they have alienated 3 cents of land lying to the north of the abovesaid 5 cents of land to Deivakannu by way of Ex.B11/Ex.A3 on 16.05.1970 and on the same

date they had alienated the remaining extent of land in the abovesaid survey number to the plaintiff under Ex.A1 sale deed. In Ex.A1 sale deed, the vendors, namely, the defendants 1 to 6 had clearly mentioned that the property conveyed to the plaintiff lies to the west of the land belonging to Ramachandra Padayachi to the south of Manicka Padaiyachi punjai to the east of panchayat board road and to the north of Deivakannu Padayachi punjai. Therefore, it is seen that the northern boundary has been shown only as the property of Manicka Padayachi and not as belonging to the defendants 1 to 6 in Ex.A1. In Ex.B11/Ex.A3 also, while conveying 3 cents of land to Deivakannu, the said document recites that the said extent of 3 cents lies to the north of Deivakannu Punjai to the west of Purasamy punjai to the east of panchayat board road and to the south of Shankara Mudaliar i.e. the plaintiff's purchased land and in such view of the matter when by way of the abovesaid sale transactions namely Ex.B1/Ex.A2 and Ex.B11/Ex.A3 and Ex.A1, the extent of land owned by the defendants 1 to 6 in the abovesaid survey number had been alienated to the abovesaid persons as found, the contention of the defendants that even thereafter they had retained certain portion of the land in the abovesaid survey number, as such, cannot be readily accepted sans any material pointing to the same. Therefore, the case projected by the contesting defendants that they are having some more property in survey No.536/6 even after the alienation of the abovesaid lands and also after the gifting of certain lands to the Panchayat and the alienation of certain lands on the eastern side of panchayat road to Rasu Padayachi, as such, cannot be accepted in the absence of any material projected by the defendants pointing to the same. The courts below, therefore, had rightly assessed the abovesaid materials projected in the matter in the proper perspective and determined that the case of the defendants that they are still owning the land in survey No.536/6 is false and in such view of the matter, the claim of the contesting defendants that the suit property is in their lawful possession and enjoyment, had been rightly rejected by them and the same do not warrant any interference as such.

12. As could be seen from the materials projected in the matter, the plaintiff, out of the property acquired by him by way of Ex.A1 sale transaction is found to have alienated a total extent of 35 cents of land to the seventh defendant by way of the documents marked as Ex.A4/B2, Ex.A5/B3, Ex.A6/B4, the last transaction made by the plaintiff is found to be the sale transaction covered in Ex.A6/B4 and on a perusal of the same, the plaintiff has clearly recited therein that the extent of 5 cents of land conveyed by him under the said document lies to the south of the land retained by him and the abovesaid recitals clearly go to indicate or point out that only after retaining the northern property in the abovesaid survey number, out of the lands acquired by him by way of Ex.A1 sale deed, the plaintiff

had alienated the extent of 35 cents to the seventh defendant by way of the abovesaid sale deeds as mentioned supra.

13. Furthermore, as could be seen from the evidence adduced in the matter through P.W.2 Muthu Kannu, it is found that as at present, to the north of the suit property the land belonging to Muthu kannu is lying. The same could be gathered from the documents marked as Exs.X1 and X2 also. As above noted, in Ex.A1 sale transaction, when the defendants conveyed the land to the plaintiff by way of the same, they have described the property comprised in the said sale deed as lying to the south of Manicka Padayachi punjai. Therefore, on the plaintiff alienating 35 cents of land to the seventh defendant as above noted, retaining the north portion of the property still with him purchased under Ex.A1 in the suit survey number, naturally to the north of the said plaintiff's property, only the property belonging to Manicka Padayachi land would be lying. Materials placed on record go to show that Manicka Padayachi had sold his abovesaid land to one samydurai during 1971 and thereafter from samydurai, the said land had been purchased by P.W.2 Muthukannu and the same could be gathered from the sale deeds marked as Exs.X1 and X2. In this connection, the fourth defendant examined as D.W.1 has, during the course of cross examination, has admitted that it is correct to state that the property belonging to Manicka Padayachi lying to the north of the property purchased by the plaintiff, had been purchased by Muthukannu and it is only Muthukannu who is enjoying the said property. Therefore, it is evident that the defendants had not retained any portion of the land in the suit survey number after the abovesaid sale transactions and have clearly admitted also that the property conveyed by them by way of Ex.A1 sale deed lies only to the north of Manicka Padayachi land, presently own by Muthukannu (P.W.2). Therefore, the case projected by the defendants that even after the abovesaid sale transactions still they own the property in the suit survey number, as such, cannot be countenanced in any manner and rightly rejected by the courts below.

14. However contending that they still own certain land in the suit survey number, the defendants appear to have projected certain revenue documents such as thoraya patta, etc., and when the abovesaid revenue documents cannot be construed as equivalent to valid document of title and when the defendants have not established that they still own any extent of land in the suit survey number after various alienations effected by them as noted supra, in such view of the matter, the courts below are totally found to be justified in not taking into consideration the revenue documents projected by the contesting defendants for contending that they still own lands in the suit survey number as putforth by them.

15. The title deed of the plaintiff marked as Ex.A1 reads that an extent of 40 cents of land had been conveyed to the plaintiff by the defendants 1 to 6. As above noted, it is the case of the plaintiff that after alienating 35 cents to the seventh defendant as above pointed out, he is still retaining the suit property on the northern extreme of the suit survey number and contending that the contesting defendants had encroached into the same and accordingly seeking their removal and the recovery of the possession of the same, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs. According to the contesting defendants, in the line of the abovesaid transactions, when the plaintiff is found to have conveyed only 35 cents of land, he cannot claim to have acquired 45 cents of land by Ex.A1 sale transaction and when the said document recites that only 40 cents is covered under the same,, he cannot claim 45 cents of land by way of Ex.A1 sale deed. However, countering the same, according to the plaintiff, within the specific boundaries conveyed to him, he has acquired an extent of 45 cents of land and therefore, putforth the case that when there is a doubt as regards the actual extent conveyed by way of the sale transaction and when the boundaries in the sale transaction are found to be clear and without any ambiguity, in such view of the matter, it is putforth that only the boundaries would prevail than the extent in such a scenario and accordingly, on that principle, urged the court to hold that he has acquired 45 cents of land lying within the boundaries recited in Ex.A1 and the same found acceptance with the courts below.

16. Insofar as this case is concerned, it is seen that the commissioner had been appointed by this court and he has inspected the properties and measured the same with the help of the surveyor and filed his report and plan marked as Exs.C1 and C2. The documents marked as Exs.C1 and C2 are not put in serious challenge as such. In Exs.C1 and C2 read together, the commissioner after measuring the suit property with the help of the surveyor and measured the various properties alienated based on the boundary recitals contained in Ex.A2 and the recitals found in the saletransactions referred to above and noted that the plaintiff's property is shown as DEJK in the plan in new survey number 340/5C and according to the commissioner DEJK portion measures 0.0135 square meters equivalent to 3.37 cents. The commissioner has also further noted that the property of the seventh defendant acquired by him from the plaintiff as well as derived from his father Deivakannu Padayachi is lying within the portion covered under ABCDMK and according to the commissioner, the abovesaid portion measures 0.1377 square meter equivalent to 46.92 cents. Furthermore, on ground, the commissioner has also noted, an extent of land in

the occupation of the contesting defendants in the suit survey number, which according to the plaintiff, had been encroached by them and the same is shown as EFIJ in the plan and EFIJ portion is shown to be measuring 0.0188 sq. meter equivalent to 4.70 cents. Therefore, as rightly determined by the trial court, when the seventh defendant is found to be entitled to only 43 cents of land alone by way of his purchase and inheritance from his father Deivakannu Padayachi, on ground he is found to be in the occupation of 46.92 cents and therefore, he is found to be in occupation of more extent of land in the suit survey number than to which he is legally entitled to and thus determined that the seventh defendant had also encroached into the suit property belonging to the plaintiff one way or the other after the institution of the suit and accordingly the seventh defendant having been impleaded in the suit for the abovesaid reason, rightly determined that the seventh defendant is also liable to hand over the excess portion in suit survey number to the plaintiff as prayed for. In this connection, the seventh defendant has also tendered evidence as D.W.2 and admitted that excluding 43 cents of land owned by him, he has no objection in granting the relief in favour of the plaintiff as prayed for. Accordingly, when on ground, the seventh defendant is found to be in the occupation of excess land other than 43 cents of land validly owned by him i.e 46.92 cents, the trial courts is fully justified in directing the seventh defendant to deliver the possession of the excess land to the plaintiff. Inasmuch as the contesting defendants are not entitled to any land in the suit survey number and still they are found to be in the occupation of an extent of 4.70 cents of land and when the contesting defendants had not shown their lawful entitlement to the same and on what basis they are in the occupation of the same, the inevitable conclusion would be that as putforth by the plaintiff, inasmuch as they had unlawfully encroached into the same and put a superstructure thereon, accordingly it is found that the plaintiff had been necessitated to lay the suit for the recovery of possession of the encroached land from them as claimed in the said plaint. As above noted, considering the land acquired by the plaintiff by way of Ex.A1 sale transaction and when according to the plaintiff he has acquired an extent of 45 cents of land within the boundaries mentioned in Ex.A1 and accordingly the plaintiff has laid the suit with reference to an extent of 10 cents of land and considering the excess land in the occupation of the seventh defendant and the unlawful possession of the contesting defendants having an extent of 4.70 cents and the plaintiff is found to be in the possession of only 3.37 cents of land, adding altogether, it is found that by way of Ex.A1 sale transaction it is only the plaintiff who has title to the suit property and accordingly entitled to recover the possession of the excess of property in the occupation of the contesting defendants, namely, the defendants 4, 5 and 7.

17. In the light of the abovesaid discussions, it is found that the trial court had analysed the issues involved between the parties by considering the sale transactions effected with reference to the same, as above pointed out, in detail and also considering the report and plan of the advocate commissioner, in all, noting that the contesting defendants, namely, the defendants 4, 5 and 7 are in the occupation of the lands belonging to the plaintiff and the plaintiff is found to be the owner of the suit property as abovenoted, rightly determined that the plaintiff is entitled to recover the possession of the suit property from the contesting defendants, namely, the defendants 4, 5 and 7.

18. The first appellate court has also, on all aspects, rightly discussed the points at issue in detail, however, erred in holding that the seventh defendant is not liable to hand over the possession of the suit property, when on ground the seventh defendant is found to be in the occupation of the excess extent in the suit survey number and when the seventh defendant himself has admitted that he is having title only to 43 cents of land but on the other hand he is found to be in the occupation of more extent of land as noted by the advocate commissioner, in such view of the matter, the first appellate court has erred in negating the relief of possession sought for by the plaintiff from the seventh defendant also. In addition to that, when the seventh defendant, in particular, has not challenged the judgment and decree of the trial court by preferring any appeal or cross objection in the manner known to law, directing him also to hand over the possession of the suit property in his occupation to the plaintiff, the first appellate court is found to have erred in reversing the said judgment and decree of the trial court as determined against the seventh defendant. On that aspect also, the judgment and decree of the first appellate court in setting aside the judgment and decree of the trial court as against the seventh defendant is found to be not in accordance with law.

19. The counsel for the respondent in support of his contentions placed reliance upon the decision reported in 2016 SCC Online Mad 17960 (Paramasivan v.s Pandian). The principles of law outlined in the abovesaid decision are taken into consideration as applicable to the case at hand.

20. As above noted, this matter involves only the appreciation of the factual aspects of the transactions pertaining to the suit survey number as above noted and no substantial question of law is found to be involved, as such, in the same and therefore, the contention of the appellant's counsel that the courts below had erred in upholding the

plaintiff's case do not merit acceptance in any manner and on the other hand, the courts below had rightly gone into the materials placed on record, both oral and documentary, in the right perspective and appreciating the same correctly, both factually as well as legally, in all aspects, rightly granted the reliefs in favour of the plaintiff and in such view of the matter, the substantial questions of law formulated in this second appeal are accordingly answered against the contesting defendants/appellants and in favour of the plaintiff.

21. In the light of the above discussions, the judgment and decree dated 20.09.2005 passed in A.S.No.12 of 2005 on the file of Subordinate court, Panruti, is reversed only to the extent as regards the determination that the seventh defendant is not liable to hand over the suit property to the plaintiff and in other aspects, the judgment and decree of the first appellate court are confirmed and resultantly the judgment and decree dated 03.02.2005 passed in O.S.No.184 of 1990 on the file of the District Munsif Court, Panruti, granting the reliefs in favour of the plaintiff as against the seventh defendant is also restored.

22. With the abovesaid determination, the second appeal is dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS-IV)

//True copy//

Sub Assistant Registrar

bga

To

1. Sub court, Panruti

2. District Munsif Court, Panruti.

Copy to

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

+1cc to Mr.R.Sunil Kumar, Advocate SR.No.24122

+1cc to Mr.A.Damodaran, Advocate SR.No.24144

S.A.No.1561 of 2005

CNR(CO)

GMV(03/06/2019)