

Reserved on :19.03.2019
Pronounced on :28.03.2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Second Appeal No.1257 of 2011 &
M.P.No.1 of 2015

1. Mr.Sekar
2. Ms.Ms.Banumathi
3. Ms.Vijaya
4. Ms.Shanthi
5. Mr.Arumugam

... Appellants &
Applicants in M.P.No.1 of 2015 /
Plaintiff 2 to 6

Vs

1. Mr.Selvaraj
2. Mr.Pandian
3. Mr.Anbalagan
4. Mrs.Suseela Ammal
5. Mrs.Kalavathi Ammal

... Respondents &
Respondents in M.P.No.1 of 2015/
Defendants 2 to 6

Prayer in S.A.No.1257 of 2011 :- Second Appeal has been filed under Section 100 of C.P.C. against the judgment and decree dated 09.08.2011 passed in A.S.No.27 of 2007 on the file of the Additional Subordinate Court, Tiruvannamalai in confirming the judgment and decree dated 25.01.2007 passed in O.S.No.180 of 2002 on the file of the Additional District Munsif Court, Tiruvannamalai.

Prayer in M.P.No.1 of 2015 : This petition has been filed under Order 41 Rule 27 of Code of Civil Procedure Code to receive the additional documents in the Second Appeal.

For Appellants : Mr.A.R.Nixon

For Respondents: Mr.G.Rajan - R4
No appearance - R1, R3, & R.5
Not ready in notice - R2

JUDGMENT

Aggrieved over the concurrent finding of the trial Court decreeing the suit for permanent injunction in respect of east to west 20 ft and north 15 feet and north to south 151 ft. the plaintiff has filed the present Second Appeal.

2. The parties are arrayed as per their own ranking before the trial Court.

3. The brief facts leading to filing of this Second Appeal is as follows :

It is the case of the plaintiff that the suit property is an ancestral joint family property of Kanjamalai's father of Pachiyappan. The said Pachiyappan had two brothers namely Munusamy and Chinnasamy. Munusamy had no legal heirs and hence Pachiyappan and Chinnasamy orally partitioned the suit property about 60 years back. Eastern half is allotted to Chinnasamy and western half is allotted Kanjamalai. Chinnasamy died intestate leaving behind his wife Lakshmi Ammal and two sons namely Samikannu and Elumalai as his legal heirs. Lakshmi Ammal and her two sons sold their share in the suit property for valuable consideration under a registered sale deed dated 25.03.1950 to Kanjamalai. Kanjamalai was allotted western side in the oral partition and Kanjamalai purchased the other half for his convenient enjoyment and from the date of purchase he has been in possession and enjoyment of the suit property till his demise. After his demise, the plaintiffs are in possession of the suit property as absolute owners. As per actual measurement East to West on the southern side is 22ft. and 20ft. on the north side and north to south 151 ft. While executing the sale deed by Lakshmi Ammal, it was approximately stated as 9 ft. east to west and north to south 90ft. But Kanjamalai was enjoying 22ft. east to west and 151 ft. north to south in the suit property. The plaintiff is enjoying the same after the demise of Kanjamalai.

4. The defendants are having their house on the eastern side of the suit property. They have no right, or title or interest in the suit property. The Eastern portion adjacent to the suit property namely Survey No.506/B has been enjoyed by the plaintiff for a long time. The defendants attempted to trespass into the suit property. The plaintiff have already filed a suit against the defendants in O.S.No.150 of 1999 on the file of the I Additional District Munsif, Tiruvannamalai for declaration

and for permanent injunction. However, the suit was dismissed on 19.07.2001. In the previous suit, the defendants had admitted the title of the plaintiff in respect of the suit property. Taking advantage of the earlier suit in O.S.No.151 of 1999 ended in their favour, the defendants have attempted to trespass into the suit property in the second week of June, 2002. Hence the suit.

5. The defendants denying the allegation in the plaint submitted that Kanjamalai and his brother was in possession of 18 ft east to west, on the south 15 ft on the north. The said Kanjamalai mortgaged the same in favour of one Selvi under the mortgage deed dated 27.02.1983. The plaintiffs and their predecessor in title are not in possession and enjoyment of the suit property measuring 22 ft. east to west on the south and 20 ft. on the north and the same has been decided in O.S.No.150 of 1999. The first defendant was in possession and enjoyment of the thatched house and vacant and same measures east to West 22 ft. on the south 15 $\frac{1}{4}$ feet on the north and north to south 161 ft. The first defendant has settled the property in favour of the fourth defendant on 10.02.1999. It is the contention of the defendant that the defendant is in possession and enjoyment of the suit property and 15 ft on the north. The dispute in O.S.No.151 of 1999 is that in respect of injunction of the south of the suit property. In the above suit it is decided that the plaintiffs are in possession of 90ft north to south and hence, they are now estopped from claiming 151 north to south. The plaintiffs do not have more than 90 ft north to south and on the north of the suit property the extent available is 15 ft. east to west. It is also denied the allegation that they have attempted to trespass into the suit property.

6. The trial Court has framed the following issues for consideration in the suit :

1. Whether the plaintiffs are in possession and enjoyment of the entire suit property?
2. Whether the suit is barred by resjudicate?
3. Whether the plaintiffs re entitled to the relief of permanent injunction?
4. To what relief?

7. On the side of the plaintiffs P.W.1 has been examined and 8 documents have been marked and on the side defendants D.W.1 has been examined and 4 documents have been marked and Ex.C.1 and Ex.C.2 have also been marked.

8. The trial Court granted decree in favour of the plaintiffs in respect of east to west 20 ft and on the north 15 ft and north to south 151 ft. The first appellate Court confirmed the finding of the trial Court. As against which the present Second Appeal has been filed.

9. The Second Appeal has been admitted on the following questions of law :

1. Whether in law the plaintiffs are entitled to the relief of permanent injunction on the basis of UDR patta when the suit property is situated in gramamatham and being enjoyed by the plaintiffs and their ancestors and UDR patta has been issued considering their possession of the entire suit property?

2. Whether the 4th defendant is entitled to claim possession larger extent on the basis of Ex.B.3 settlement deed dated 10.02.99 when the settlor (1st defendant) purchased and enjoyed lesser extent as stated in Ex.A.6 sale deed dated 02.01.198 and A7 mortgage deed dated 01.07.1971?

10. During the pendency of the Second Appeal, an application has been filed under Order 41 Rule 27 to file the following 13 documents :

1. Copy of Sale Deed bearing document No.314 of 1940, dated 03.11.1939
2. Copy of Sale Deed bearing document No.2736 of 1961, dated 17.04.1961
3. Copy of Sale Deed bearing document No.4479 of 1966, dated 12.08.1966
4. Copy of Sale Deed bearing document No.564 of 1969, dated 05.04.1969
5. Copy of sale deed bearing document No.527 of 1969, dated 29.04.1969
6. Copy of Death Certificate of the petitioner's father dated 10.04.1997.
7. Settlement deed bearing document No.108 of 1999, dated 10.02.1999
8. Copy of Adangal dated 31.10.2014
9. Copy of Encumbrance Certificate, dated 21.01.2015

10. Letter from the District Collector, Tiruvannamalai to 5th petitioner with 'A' Register copy in Village survey Number 215/10, dated 03/02/2015.

11. Letter from the District Collector, Tiruvannamalai to the 5th petitioner with 'A' Register copy in Village Survey No.494 and 495, dated 16.02.2015.

12. Copy of old sketch in Block No.7

13. Copy of new sketch in Block No.7

11. It is the contention of the appellant that the suit property exclusively belong to the plaintiffs' father Kanjamalai as per the sale deed dated 25.03.1950. The respondent's father Appasamy Pillai has obtained UDR patta in the year 1996 by tampering with the revenue records and the patta has been modified in favour of the respondent's father. The respondents' father is the owner of 11 cents land in survey No.507. Whereas the petitioners property comprise in Survey No.506 to an extent of 8 cents. The Possession Certificate and 'A' register are in the name of the petitioner's father. The petitioner got the 'A' register from the Office of the Collector of Tiruvnnamalai on 16.02.2015. The petitioner's father got UDR patta in Survey No.506/A1. The survey No.506 has been sub divided into 506/B 25 sq. meters out of 506/A1 were transferred in the name of Appasamy Pillai. The petitioners could be able to get the UDR register on 04.02.2015 from the Office of District Collector, Tiruvannamalai. From the original records of revenue authorities, it is found that Survey No.506/A and 506/B has been sub divided and transfer in the name of Appasamy Pillai mentioning as if he is the legal heir of the petitioners' father. The petitioner applied for chitta adangal of the entire extent of the land and got the same on 14.10.2014. It is his further contention that those documents were not available with the petitioner and hence, he has not produced the same before the Court. Hence, those documents are very much essential for deciding the suit. Hence, prayed for allowing the application.

12. The learned counsel appearing for the appellant submitted that the trial Court has granted injunction only in respect of 20ft on the east to west in the suit property and 15 ft on the north side and North to South 151 ft. whereas the trial Court did not consider the surveyor sketch and the same clearly indicate that he is entitled to 22 ft east to west and north side the plaintiff is entitled to more than 18 ft. The trial Court has granted injunction only in respect of 15 ft. which is not correct. It is his further contention that the

documents now filed as additional evidence also prove the title of the plaintiff in respect of the entire suit property. The trial Court has not properly considered the documents. Ex.B.3 settlement deed clearly indicate that the first defendant has purchased only smaller extent of property and executed larger extent under the Settlement Deed Ex.B.3. This aspect has not been considered by the trial Court. Further the trial Court has not considered the UDR patta issued on the basis of enjoyment. The UDR patta clearly show that the plaintiff is entitled for injunction of the entire extent as prayed for in the suit. Hence, submitted that the additional documents now filed is necessary to be looked into. The learned counsel for the respondent submitted that the Courts below considered the facts and granted injunction as per actual enjoyment of the parties. Hence, submitted that the same does not require any interference.

13. Now to deal with the application filed under Order 41 Rule 27 in M.P.No.1 of 2015, though several documents including title deeds have been filed as additional documents, it is not the case of the petitioner that these documents are not at all available at the time of trial. He must also establish to exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produce the same before this Court. On compliance of the condition imposed under Order 41 Rule 27, the additional documents can be received by the appellate Court. Though the appellate Court can also receive the documents for enabling it to pronounce the judgment or for any other substantial cause, the documents filed by the petitioner are only title deeds.

14. It is to be noted that the documents filed are already in possession of the plaintiffs. Since the suit itself has not been filed for declaration of title and the suit has been filed on the basis of the possession of the parties, the documents filed along with the application filed under Order 41 Rule 27 is not necessary for deciding the lis between the parties and the petition for receiving documents is liable to be dismissed.

15. The suit has been filed for injunction in respect of New Survey Nos.506/A with specific boundaries and measuring east to west 25 ft. on the southern side and 20 ft. on the northern side and north to south 151 ft, thatched house and vacant site with electric service connection. The trial Court considered the evidence of P.W.1 and Commissioner's Report and the Report of the Engineer and found that the plaintiff is entitled to

injunction in respect of 20ft from east to west and 15ft on the northern side and north to south 151 ft. Though the plaintiff has claimed 22 ft. east to west, the trial Court restricted the injunction only to 20 ft. Though the plaintiff has claimed injunction for 20 ft. on the northern side, the plaintiff is in possession of only 15 ft on the northern side. In respect of 151 ft from north to South, the trial Court has accepted the contention of the plaintiff. The first appellate Court is concurrent with the finding of the trial Court and confirmed the judgment of the trial Court.

16. It is further to be noted that the plaintiff has filed the suit contending that the suit property measuring east to west 22 ft and 20 ft. on the north side and north to south 151 ft. It is the case of the plaintiff that the suit property has been purchased by the first plaintiff's husband Kanjamalai. It is the further case of the plaintiff that while purchasing the property, the measurement is mentioned as 9 ft east to west and north to south 90 ft. The plaintiff mainly relied upon Ex.A.2 UDR patta dated 30.10.1996. The trial Court has specifically considered the admission of P.W.1 wherein she has categorically admitted that her father has purchased only 9 ft east west and north to South 90 ft under Ex.A.1. It is also the case of the plaintiff that the defendant had obtained patta illegally and subdivided the property as 506(B). In respect of the above patta, the plaintiff has already filed a suit in O.S.No.150 of 1999 as against the defendant and the above suit has been dismissed. The trial Court has considered the fact that survey No.506/B is in possession of the defendant. The trial Court has also considered the admission of P.W.1 that the suit property is 18 ft and the same has been admitted in the plaintiff in the previous suit in O.S.No.150 of 1999 and also admitted that the present suit has been filed including 4ft which was subject matter in Survey No.506/B, which was the dispute in the earlier suit.

सत्यमेव जयते

17. Further, the trial Court has considered the Commissioner Report Ex.C.1 and Ex.C.2. In fact the Commissioner was appointed to file a report. The plaintiff has not objected the Commissioner Report. The trial Court has also clearly found that in the earlier suit filed by the plaintiff against the defendant in O.S.No.150 of 1999, the suit property measurement is given as 18 ft. east to west. The above suit in O.S.No.150 of 1999 had reached finality and the trial Court has granted decree only in respect of 20 ft. east to west and 15 ft on the north and north to south 151 ft. The above conclusion is mainly based on the actual enjoyment of the parties as per the report of the Commissioner. Further, the plaintiff himself has

admitted in the earlier suit that the suit property is only 18 ft east to west and found that the defendant is entitled to injunction only 20ft on the east to west and 15 ft on the north and north to south 151 ft.

18. The first appellate Court appreciated the entire facts and has come to the conclusion that the plaintiff has claimed injunction for the entire extent in order to get over the judgment and decree passed against them in O.S.No.150 of 1999 and no objection has also been filed for the Commissioner's Report and finally had come to the conclusion that the trial Court judgment is correct and confirmed the findings of the trial Court.

19. It is further to be noted that in fact Ex.A.1 sale deed, for lesser extent has been purchased by the plaintiff. Whereas, they have sought relief for larger extent. Further they have already lost the suit in O.S.No.150 of 1999. It is also admitted by the plaintiff that the suit property is only 18 ft on the east to west. When the surveyor plan and report clearly indicate the actual possession of the parties in the suit property and no other document has been filed to establish their possession, the trial Court is right in granting injunction only in respect of 20 ft on the east to west and 15 ft on the north side. Now they cannot non suit the previous judgment by placing earlier documents. Hence, all these facts cannot be decided in the present suit.

20. Merely because UDR patta has been issued in the name of the plaintiff in respect of the extent shown in the plaint, that cannot be ground to decide his possession, particularly when a portion of the property has been sub divided as 506 and based on which a suit has also been filed in O.S.No.150 of 1999 by the plaintiff and against the same defendants and the suit has also been dismissed and no appeal has been filed. Therefore, the plaintiff now cannot contend that they are in possession in pursuant to the UDR patta Ex.A.2. The trial Court and the first appellate Court have infact has considered all these aspects and also considered the previous judgment and admission of P.W.1. When the both Courts have factually arrived at a finding and found that the plaintiff is entitled to injunction only in respect of the area mentioned in the decree, this Court is of the view that there is no error or illegality in the judgment of the Courts below and the substantial questions of law are answered against the appellants.

21. Accordingly, this Second Appeal is dismissed and the judgment and decree of the Courts below are confirmed. The miscellaneous petition in M.P.No.1 of 2015 is dismissed. No cost.

Sd/-
Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

vrc

To

1. The Additional Subordinate Judge,
Tiruvannamalai.
2. The Additional District Munsif,
Tiruvannamalai.
3. The Section Officer,
VR Section, High Court, Madras.

+1 cc to Mr.A.R.Nixon, Advocate, S.R.No.30551

+1 cc to Mr.G.Rajan, Advocate, S.R.No.30238

Second Appeal No.1257 of 2011

AK(CO)
SSM(17/07/2019).

WEB COPY