

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 05.03.2019

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

SECOND APPEAL NO.980 OF 2012

&

M.P.NO.1 OF 2012

Mr.R.Ranjithkumar

...Appellants

Vs

1. Mr.P.E.Jambulingam (deceased)
2. Mr.Varadarajan
3. Mrs.Mohanambal @ Mohanasundari
4. Mr.P.J.Shanmugasundaram
5. M.Suganya

(R.3 to R5 brought on record as LRs of deceased R1 vide Order of Court dated 21.02.2019 made in CMP.No.2132, 2135 and 2137 of 2019 in S.A.No.980 of 2012 (NSKJ))

.... Respondents

Prayer:-

Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree dated 29.08.2011 made in A.S.No.15 of 2010 passed by the Subordinate Judge, Ponneri confirming the judgment and Decree passed by the District Munsif, Ponneri, dated 30.07.2009 made in O.S.No.305 of 2003 and to set aside the same.

For Appellant : Mr.P.V.Muralidhar

For Respondents: Mr.V.Manisekaran - R3 to R5
No appearance - R2

JUDGMENT

Aggrieved over the concurrent finding of the Courts below in dismissing the suit for permanent injunction, this Second Appeal has been filed by the first defendant.

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

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

The suit property is a Government Vaikal Poromboke land. The plaintiff initially occupied the suit property for the past 28 years and cultivating in the property without any hindrance. The Government also issued B Memo receipts and he is also paying kist to the Government. The defendants are trying to dispose the plaintiff's possession. Hence, the suit.

4. The defendants have filed written statement denying the allegation that they had made an attempt to trespass in to the property of the plaintiff. It is the case of the defendants that in Survey No.595/3 58 cents originally belong to the plaintiff's wife and the same has been sold to the first defendant through the plaintiff's power agent. Thereafter, the plaintiff in order to gain unlawful gain filed the present suit. All the documents pertaining to the suit property have already been filed by the plaintiff in O.S.No.186 of 1999 in respect of the sale made in favour of the first defendant. Hence, prayed for dismissal of the suit.

5. The trial Court framed the following issues :

1. Whether the plaintiff is entitled for permanent injunction as prayed for?
2. To what relief the plaintiff is entitled?

6. On the side of the plaintiff, P.W.1 was examined and Ex.A.1 to Ex.A.18 were marked. On the side of the defendants, D.W.1 and D.W.2 were examined and Ex.C.1 and Ex.C.2 were marked.

7. The trial Court has found that the plaintiff is in possession of the property on the basis of B memo and the first appellate Court has also confirmed the finding of the trial Court, as against which the present Second Appeal came to be filed by the first defendant in the suit.

8. After hearing the arguments of the learned counsel for the appellant, the following substantial questions of law have been framed :

1. Whether any individual can claim exclusive right to 'vaikal poromboke' which is to be enjoyed in common?

2. Whether Courts below properly considered the Advocate Commissioner's Report i.e., C.1 and C.2

9. The learned counsel for the appellant vehemently contended that the suit property is a vaikal Government poromboke. The alleged possession of the plaintiff is nothing but falsehood and only to non suit the defendant and blackmail him to get more money from him in view of the sale of the property, which is situated in northern side of the property. The plaintiff was never in possession of the property. All the B memos are pertaining till the year 1994. There is no other document to show that the plaintiff is in possession of the property.

10. The learned counsel further submitted that the Commissioner Report and the plan clearly show that the alleged possession of the plaintiff in the suit property is nothing but his own imagination. The property, namely the vaikal poromboke has been converted to road and the property is not in existence. Therefore, merely, on the basis of the B Memo of the earlier years, the plaintiff cannot contend that they are in possession of the property. The trial Court and the first appellate Court has considered the evidence of P.W.1, but ignored the Commissioner's Report and the sketch filed by the Government surveyor. Hence, submitted that the decree and judgment of the Courts below are to be interfered. In support of his contention, he relied upon the judgments in

Balkrishna Dattatraya Galande Vs. Balkrishna Rambharose Gupta and another reported in CDJ 2019 Supreme Court 126,

L.Krishnan Vs. State of Tamil Nadu represented by its Secretary & others reported in CDJ 2005 MHC 1140 and

Chellammal Vs. Nallammal and others reported in CDJ 2010 MHC 713

11. Whereas, it is the contention of the respondent that the B memo itself clearly indicate that the plaintiff is in possession of the property. When possession is proved, he can protect his possession against anybody. The Commissioner Report also clearly indicate that only the plaintiff has cultivated the land. The trial Court and the first appellate Court had properly analysed the entire aspects and decreed the suit.

Hence, submitted that the judgment of the Courts below are well balanced and does not require any interference. In support of their contentions, relied upon the judgments in

Rama Gowda (D) by LRs. Vs. M.Varadappa Naidu (D) by LRs. and another reported in 2003 (8) Supreme 928,

Sunkamma (d) by LRs. Vs. S.Pushparaj (D) by LRs. reported in Manu/ SC/ 1632/2017 and

KARUPPA Gounder and two others Vs. Chenniappa Gounder (died) and others reported in 2016 (2) MWN (Civil) 371

12. The suit was originally filed for permanent injunction restraining the defendant from interfering with the plaintiff's possession of the property. It is not in dispute that the suit property is a vaikal poromboke land. It is the case of the plaintiff that the plaintiff is in possession of the property and cultivating the same. The pleadings filed by both sides indicate that northern side of the property belong to the plaintiff which was sold to the defendant. In respect of which, a suit has been laid subsequently by the plaintiff to set aside the above sale deed which is also not in dispute. Now the suit has also been dismissed. Be that as it may.

13. It is the main contention of the plaintiff that he is in possession of the property. To prove his possession, he filed Ex.A.1 to Ex.A.4, B memos. It is curious to note that the B memos were filed only upto the year 1994. Thereafter, no revenue documents have been filed to show that he continued to be in possession of the property. It is well settled that in a suit for permanent injunction, the onus lies on the plaintiff to establish his possession continuously, atleast on the date of the suit. The possession of the suit property is a condition precedent to maintain a suit for permanent injunction.

14. Admittedly, the trial Court has appointed an Advocate Commissioner in this case. The Advocate Commissioner has filed a report along with a detailed plan prepared by the Taluk Surveyor. It appears that the above report has not been objected by the plaintiff. In fact, objections have been filed by the defendant. The report is also marked Ex.C.1 and Ex.C.2. The Commissioner Report clearly indicate that the suit property i.e., in around 30 cents, for more than 12 cents a separate fence has been put up. It is actually acceded to the northern portion of the property which was sold to the defendant. Remaining 13 cents have been converted into mud road as per the Commissioner's Report. When the Government poromboke has already been put into use and converted as mud road, the

contention of the plaintiff that he is continuing in the possession of the property and cultivating in the property is highly improbable and cannot be countenanced.

15. The first appellate Court has found that in B Memo receipts, the nature of the crop has been mentioned. This Court is unable to comprehend as to how such entries normally find place in B memos. B Memo receipts normally issued to the encroachers in the Government land and such receipts will not contain any details of the crops raised by the concerned encroacher. However, the lower appellate Court was simply carried away by such entries in the B Memos without probing much on that aspect. Whether such entries are real one or correct one has not been probed by the first appellate Court. It is the normal practice that in B Memos, there will not be any details of the crops raised by the parties. Such an entry itself clearly indicate that these receipts are created only to prove the case for possession.

16. When the Commissioner Report itself clearly indicate that the property has already been converted for some other purpose, it is highly improbable to contend that plaintiff is cultivating the land. When the plaintiff contend that he is continuously in possession of the property, nothing prevented him from producing the latest revenue records, atleast on the date of the suit to show that he is continuously in possession of the property.

17. Further, the very pleadings in the plaint itself indicate that they have pleaded that they were initially in occupation of the suit property. The very nature of the pleading in the plaint itself clearly show that he was not in occupation of the property continuously. If really he was in continuous possession of the property without any hindrance and interference, there is no need for him to plead that he was originally in occupation of the suit property. That factum also cannot be ignored altogether. Therefore, as long as in a suit for permanent injunction, if the possession has not been established and the Commissioner Report reveals that the property has already been converted for some other purpose, the Courts below granting injunction on the basis of Ex.A.1 to Ex.A.4, cannot be sustained in the eye of law.

18. No doubt, in the judgment cited by the learned counsel for the respondent in Sunkamma (D) by L.Rs.Vs. S.Pushparaj (D) by L.Rs. reported in 2018 (12) Supreme Court Cases 647, the

Honourable Supreme Court has held that when a person is in settled possession of the property, even he failed in establishing his title, he can protect his possession against any one in the world except by due process of law. Even the owner of the property cannot evict such person, except by due process of law. Absolutely, there is no doubt over the above aspect.

19. Similarly, this Court in Chellammal Vs. Nallammal and others reported in CDJ 2010 MHC 713 has held as follows :

"Even though the appellant herein/plaintiff filed suit for possessory title in respect of Eri Poromboke, but as per the decision reported in (i) M.C.Mehta Vs. Union of India and Others (1997) 3 SCC 715 (ii) Elephant G.Rajendran Vs. The District Collector and others reported in (2008) 2 MLJ 1025 and (iii) unreported decision in W.P.No.1965 of 2008 and M.P.No.1 of 2008 after the dictum has been laid down by the Division Bench in the decision reported in (2005) 4 CTC 1 (L.Krishnan Vs. State of Tamil Nadu represented by its Secretary, Department of Revenue (Land Development), Fort, St.George, Chennai-600 009), the persons who are encroaching upon the water body will not be entitled to any protection before the Court. Since the encroachment is upon a water body, the suit is not maintainable as she is claiming possessory title. However, the Government is entitled to remove the encroachment after following due procedure of law. Till then, both parties are not entitled to any relief, since the suit itself is not maintainable. Hence I am of the opinion that even though the trial Court has granted decree and the 1st Appellate Court has allowed the appeal on 3.5.2002, the decision reported in (2005) 4 CTC 1 (L.Krishnan Vs. State of Tamil Nadu represented by its Secretary, Department of Revenue (Land Development), Fort, St.George, Chennai-600 009) has been rendered only in 2005. It is a recent development in Law. In the above circumstances I am of the opinion that the suit itself is not maintainable, since the possessory title has been claimed in respect of water body. Hence, this Second appeal is liable to be dismissed."

20. Admittedly, this suit has been filed for permanent injunction. The Commissioner Report clearly show that there is

a change in nature of the property. Hence, the contention of the plaintiff that he is continuously in possession of the property and cultivating crops in the property cannot be countenanced and the substantial questions of law are answered in favour of the appellant.

21. Accordingly this Second Appeal is allowed and the judgments of the Courts below are set aside. Consequently, the connected miscellaneous petition is closed. No cost.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

vrc

To

1. The Subordinate Judge,
Ponneri.
2. The District Munsif,
Ponneri.
3. The Section Officer,
VR Section, High court,
Madras-104

+1cc to Mr.P.V.Muralidhar, Advocate, S.R.No.20804
+2cc to Mr.V.Manisekaran, Advocate, S.R.No.20693

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RSV(CO)
CS/24/05/2019

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