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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 22.08.2019

DATED: 27.08.2019

CORAM :

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

S.A. No. 104 of 2015

And

M.P.No. 1 of 2015

Xavier ... Appellant/Defendant

Vs.

Fathima Mary ... Respondent /Plaintiff

PRAYER: This Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and Decree in A.S.No. 17 of 2013 dated 18.08.2014 on the file of Sub Court, Mannargudi reversing the Judgment and Decree in O.S.No. 141 of 2011 dated 18.07.2012 on the file of the District Munsif Court, Mannargudi.

For Appellant : Mr. S.Thiruvengkatasamy

JUDGMENT

The defendant Xavier in O.S.No. 141 of 2011 on the file of the District Munsif Court, Mannargudi, is the appellant herein.

2. The plaintiff Fathima Mary had filed the suit seeking an order of permanent injunction restraining the defendant Xavier from interfering with her peaceful possession of the suit property. The suit property was described as land and thatched house measuring 1076 sq.ft., in S.No. 366/17, Old S.No. 366/8 in Uzuthukudi Village, Mannarkudi, Thiruthuraipoondi, Nagapattinam District.

3. In the plaint, she claimed that the suit property and the adjacent lands/properties originally belonged to Parijathalanezvarar Thirukovil, Thirukkanar village. The husband of the plaintiff had, with permission from the Temple, resided in the suit property. Thereafter the lands were acquired by the Government and patta was granted to the persons in occupation including to the husband of the plaintiff. Thereafter on survey, the land was measured and Natham patta was again granted. It was further stated that the plaintiff's husband has executed a settlement deed in favour of the plaintiff on 13.07.2011. The defendant Xavier



was the brother of the husband of the plaintiff. It was claimed that the defendant also claimed title and had attempted to interfere with the peaceful possession of the plaintiff. It was under those circumstances that the suit was filed.

4. In the written statement, the defendant denied the averments made in the plaint. It was claimed that the father Micheal Nadar originally resided in the suit property along with other lands/properties. Micheal Nadar had five sons, namely, Savarimuthu, Adaikalasamy, Arulanandam, Parisutham (plaintiff's husband) and Xavier (defendant). Savarimuthu died without any legal heirs. Adaikalasamy and Arulanandam also died. Micheal Nadar had divided the property during his life time and allotted separate portion to his sons/legal representatives of the sons. Accordingly, the defendant was residing in a portion of the land described in the suit schedule which was to the extent of 12½ kuzhis. Similarly, Rooban, son of Arulanandam was also residing in the portion allotted to them. The defendant had rented out his property taking the help of Rooban. The distinct Door number of the house of the defendant was 5/661. It was claimed that the husband of the plaintiff had surreptitiously obtained patta for the entire lands. The specific Door number of the house of the plaintiff was 5/660. It was claimed that there was no cause of action for institution of the suit and it was the further claimed that the suit was filed with mala fide intentions. It was therefore claimed that the suit should be dismissed.

5. On the basis of the said pleadings, the learned District Munsif framed necessary issues for trial and invited the parties to adduce oral and documentary evidence. Accordingly, the husband of the plaintiff Parisutham was examined as PW-1. On the side of the defendant, the defendant Xavier was examined as DW-1 and two independent witnesses were examined as DW-2 and DW-3 and Rooban was examined as DW-4. The plaintiff marked Exs. A-1 to A-4 including the settlement deed dated 13.07.2011 and thoraya patta as Ex.A-2 and house tax receipt as Ex.A-4. The defendant also marked thoraya patta as Ex.B-1 and house tax receipts as Ex.B-2.

6. On analysis of the oral and documentary evidence, the learned District Munsif found that Ex.A-1 settlement deed had been executed only for the vacant site and it was specifically mentioned that there was no house situated in the site. It was also found that the plaintiff had not produced any document to show enjoyment of thatched house. However, it was also found that the defendant had admitted that the plaintiff had a house in the suit property. The door number of the plaintiff's house was 5/660. The door number of the defendant's house was 5/661. They were two separate properties. It had been admitted by PW-1 that Door No. 5/661 was situated on the western side of his house. PW-1 had also admitted that he had only one house, namely, Door No. 5/660.



It was also found by the learned District Munsif as a fact that the house and Door No. 5/661 was not built by the plaintiff or her husband. PW-1 had also admitted that Door No. 5/661 had been leased out by Rooban, DW-4, to one Raman, who was residing there for the past 19 years. Rooban had been examined as DW-4 and he had categorically stated that he had maintained Door No.5/661 on behalf of the defendant. On the basis of the above evidence, the learned District Munsif held that Door No.5/661 was in the possession of the defendant and the plaintiff was in possession of Door No. 5/660 and that the suit schedule property covered both the said houses and consequently declined to grant the relief of permanent injunction and dismissed the suit.

7. The plaintiff had then filed A.S.No. 17 of 2013 which came up for consideration before the Sub Court, Mannarkudi. The learned Sub Judge had examined the object of the Tamil Nadu Occupants of Kudiyiruppu (Conferment of Ownership) Act, 1971 and had extracted Sections 2(1), 3, 12 of the Act. It was observed by the learned Sub Judge that Ex.A-2 was a patta in the name of the husband of the plaintiff. That was Natham patta or thoraya patta. The learned Sub Judge however held that the plaintiff had proved title and possession by producing the said patta. Consequently, the appeal was allowed and the Judgment of the trial Court was set aside.

8. The defendant then filed the present Second Appeal. The Second Appeal had been admitted on the following substantial questions of law:-

"a. Whether the Courts below were right in holding that the plaintiff is in possession of 0.01.0 ares of land when according to the defendant, there is no evidence at all to prove the extent?

b. Whether the Courts below were right in holding that the plaintiff is in possession of the entire extent of the suit property by relying on the documents except the Thoraya patta which do not show the extent of the property? and;

c. Whether the Courts below were right in decreeing the suit without ascertaining the extent of the property in possession of the plaintiff by appointing an Advocate Commissioner?"

9. In the Second Appeal though notice was directed to the respondent/plaintiff, the private notice had returned as refused on one occasion and the Court notice had also been returned as refused on another occasion. The name of the respondent/plaintiff has been printed in the cause list. Since the respondent/plaintiff had refused to receive the



notice, it had to be inferred that she was not interested in participating in the judicial proceedings.

10. Heard Mr.S.Thiruvengkataswamy, learned counsel for the appellant.

11. The learned counsel pointed out that the suit had actually been filed for an extent of 0.01.0 acres or 1076 sq.ft., in S.No. 366/17, Old S.No. 366/8 in Uzuthukudi Village, Mannarkudi Taluk, Thiruthuraipoondy, Nagapattinam District. Ex.A-2 dated 31.01.2011, namely thoraya patta in the name of the husband of the plaintiff did not mention the area of the holding of the plaintiff. On facts, the District Munsif had found that the entire area originally belonged to a temple and that Micheal Nadar resided there and thereafter had devolved on to his five sons, Savrimuthu, Adaikalasamy, Arulanandam, Parisutham (plaintiff's husband) and Xavier (defendant). The entire area was 12 ½ kuzhis. The District Munsif had found as a fact that the plaintiff was in possession of only 3½ kuzhis. It was also found that the plaintiff and the defendant had put up thatched houses and there were separate door numbers for both the houses and apart from that, Rooban, another grand son of Micheal Nadar was also in possession of the adjacent property. The door number of the house of the plaintiff was 5/660 and the door number of the house of the defendant was 5/661. This house was leased out by Rooban, acting on behalf of the defendant to one Raman, who was in possession for the past 19 years. These facts clearly establish that the plaintiff and the defendant have separate dwelling units and the suit had been filed for the entire land which also included not only their dwelling units but also the units of the other sons of Micheal Nadar. The discussion of the learned First Appellate Judge with regard to the provisions and scope of Tamil Nadu Occupants of Kudiyruppu (Conferment of Ownership) Act, 1971 was totally unwarranted since the patta produced by both the parties, namely Ex.A-2 and Ex.B-1 were patta granted to natham lands. On these facts, I hold that the District Munsif had correctly appreciated the evidence and that the learned First Appellate Judge, had for reasons best known, taken a very tangential view of the matter and his discussions went beyond the scope of the pleadings.

12. With respect to the first substantial question of law, I hold that the First Appellate Court was not correct in holding that the plaintiff was in possession of 0.01.0 area of land, particularly when there was no documentary evidence to substantiate the same. In this connection, it must also be pointed out that Ex.A-1 settlement deed related only to vacant land and not house. With respect to the second substantial question of law, I hold that the First Appellate Court was again not correct in holding that the plaintiff was in possession of the entire suit property particularly when Ex.A-2 did not mention the area of the land held by her. With respect to the third substantial question of law, I hold that the appointment of an Advocate Commissioner was not absolutely



essential and even if an Advocate Commissioner had been appointed and had surveyed the lands, he/she could at the most give a description physical features of the land and can never speak about either possession or the holding of the plaintiff / the defendant. I hold that the First Appellate Court had grossly erred in allowing the appeal and setting aside the Judgment of the trial Court without ascertaining the extent of the property in favour of the plaintiff.

13. The learned counsel for the appellant had relied on (2018) 18 SCC 330 [Jharkhand State Housing Board Vs. Anirudh Kumar Sahu and Others]. The Hon'ble Supreme Court had reaffirmed the position of law in a suit for injunction. The Court should only examine the fact of possession. In that particular case, the Hon'ble Supreme Court had held that the trial Court had also the High Court had erred in examining the title of the property and in granting declaration of title when it was not even sought by the plaintiff.

14. In the present case, the suit is only for permanent injunction and since it had been found as a fact that the plaintiff was not in possession of the entire area mentioned in the schedule to the plaint, she is not entitled for the relief sought for.

15. Accordingly, the Second Appeal is allowed. The Judgment and Decree of the First Appellate Court in A.S.No. 17 of 2013 dated 18.08.2014 is set aside and the Judgment and Decree of the Trial Court in O.S.No. 141 of 2011 dated 18.07.2012 is restored. No costs.

Sd/-

Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

vsg

To

- 1.The Sub Judge, Mannargudi.
- 2.District Munsif Court, Mannargudi.
- 3.The Section Officer,
VR Section, High Court,
Madras.

+1cc to Mr.S.Thiruvengkatasamy, Advocate, S.R.No.73173

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