

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :24.04.2019

Pronounced on :23.05.2019

CORAM:

THE HONOURABLE MR. JUSTICE P.RAJAMANICKAM

S.A.No.331 of 2013

and

C.M.P.Nos.2 of 2013 & 7818 of 2019

1.K.Pattammal

2.K.Venugopal

3.Latha

4.Nandagopal

5.Yuvaraj

..Appellate/Appellants/2nd Plaintiff
and Lrs of 1st Plaintiff

Vs.

1.Paramasivam

2.Gnanamurthy

...Respondents/Respondents/Defenants

PRAYER:Second Appeal filed under Section 100 of C.P.C., against the decree/judgment dated 29.08.2011 passed in A.S.No.4 of 2010 on the file of the Sub Court, Ponneri confirming the judgment and decree dated 06.02.2009 passed in O.S.No. 73 of 2003 on the file of District Munsif Court, Ponneri.

For Appellants : Mr.Krishna Ravindran

For Respondents : Mr.V.Rajendran

JUDGMENT

This second appeal has been filed by the plaintiffs against the judgment and decree passed by the Sub Judge, Ponneri in A.S.No. 4 of 2010 dated 29.08.2011, confirming the judgment and decree passed by the District Munsif in O.S.No.73 of 2003.

2.The appellants herein filed a suit in O.S.No.73 of 2003 on the file of the District Munsif, Ponneri for the relief of permanent injunction restraining the defendants, their agents, etc. from interfering with their peaceful possession and enjoyment of the suit property. The learned District Munsif, Ponneri by the judgement dated 06.02.2009 had dismissed the said suit with cost. Aggrieved by the same, the plaintiffs had filed an appeal in A.S.No.4 of 2010 on the file of the Sub Judge, Ponneri. The learned Sub Judge, Ponneri by the judgment dated 29.08.2011 had dismissed the said appeal with cost and thereby, confirmed by the judgment and decree passed by the Trial Court. Feeling aggrieved, the plaintiff has filed the present second appeal.

3.For the sake of convenience, the parties are referred to as described before the trial court.

4.The averments made in the plaint are, in brief, as follows:

a) The first plaintiff is the husband and the second plaintiff is the wife. The defendants are sons of one Subramania Pandithar. The Said Subramania Pandithar for himself and as guardian of his then minor children (defendants herein) sold a certain extent in Gramanatham Survey No.137/1 of Thiruvellavoyal village to one Munusamy Naidu under a registered sale deed dated 24.11.1977. The said Munuswamy Naidu was in possession and enjoyment of the suit property from the date of purchase. He got a separate patta for his property on 31.05.1995. The said Munuswamy Naidu sold 5 cents of land to the plaintiffs 1 and 2 under a registered sale deed dated 28.10.1999 and handed over the possession to them. The said property is the suit property. On the northern side of the suit property, there is a ridge with live demacration of various trees. one Umakanthan had purchased the site on the east of the suit property and he had put up fencing. So, there is a fencing on the eastern side of the suit property. The plaintiffs have put up fencing on the southern side of the suit property. The rough sketch is also filed along with the plaint and the same to be read as part and parcel of the plaint. While so on 06.04.2003, the defendants attempted to interfere with the peaceful possession of the plaintiffs, though they are not having and right over the suit property. They are having their property only on the northern side of the suit property. Hence the plaintiffs were constrained to file the above suit for the relief of permanent injunction.

5.The averments made in the written statement filed by the defendants 1 and 2 are in brief as follows:

The averments in the plaint that the plaintiffs had purchased the suit property under a registered sale deed dated 28.08.1999 are not aware of by the defendants. Admittedly, the suit property is a vacant site. The defendants are not aware of any such possession and enjoyment of the plaintiffs as there was no visible exercise of right over a suit property. The averments that the plaintiff's vendor Munuswamy Naidu had purchased a portion of land on 24.11.1977 in the land comprised in Survey No.137/1 in Thiruvellavoyal Village, from the father of the defendants are also not aware of by the defendants because the said Munuswamy Naidu did not do any act in respect of the property. The property comprised in survey No.137/1 of Thiruvellavoyal Village is the Gramanatham and the same was given as inam lands to the defendants' ancestors several decades ago for the service rendered to the people of the village and so it is an ancestral property of the defendants' family. The defendants father Subramania Pandithar had no right to sell or other wise dispose of the suit lands to anyone except enjoying the same. Hence the sale deed dated 24.04.1977 in favour of the said Munuswamy Naidu is void ab initio and not binding on the defendants and consequently, the plaintiff could not derive any tittle to the suit properties through the sale deed dated 28.10.1999. The defendants are taking steps to set aside the sale deed dated 24.11.1977. The suit property said to have been purchased under registered sale deed dated 28.10.1999 is not in fact, part of the lands comprised in sale deed dated 24.11.1977 and therefore, the plaintiffs derived no tittle through the said sale deed dated 28.10.1999. On the other hand, taking advantage of the sale deed and misusing the judicial process, the plaintiffs, attempted to encroach upon the vacant site of the defendants. The issuance of patta in favour of Munuswamy Naidu could not confer any tittle on him. The defendants are taking steps to cancel the said patta. The defendants are denying the averments that the plaintiffs are in possession and enjoyment of the suit property. Therefore, the defendants prayed to dismiss the suit.

6. Based on the aforesaid pleadings, the learned District Munsif, Ponneri had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the first plaintiff examined himself as P.W.1. The plaintiffs have marked Ex.A1 to A3 as exhibits. On the side of the defendants, the second defendant was examined as D.W.1 and one more witness was examined as DW.2 and they had marked Ex.B1 to B3 as exhibits.

7. The learned District Munsif, Ponneri, after considering the materials placed before him, found that the plaintiffs failed to prove that they had purchased the suit property from one Munuswamy Naidu and also failed to prove that they are in possession of the suit property. Accordingly,

he dismissed the suit with cost. Aggrieved by the same, the plaintiffs had filed an appeal in A.S.No.4 of 2010 on the file of the Sub Judge, Ponneri. The learned Sub-Judge, Ponneri held that the plaintiffs have not filed any document to prove their possession of the suit property. Accordingly, she dismissed the appeal with cost, thereby, confirmed the judgment and degree of the trial Court. Feeling aggrieved, the plaintiffs have filed the present appeal.

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

a) when the suit property is a vacant site, whether the Courts below are right in holding that the plaintiffs had not proved the possession by means of any other evidence when the well established principle of law is that in respect of of a vacant site, always possession is presumed in favour of a person in whose name the title stands?

b) Whether the Courts below are right in holding that mere production of primary evidence would not be sufficient to prove the possession claimed by the plaintiffs.

9. During the pendency of this second appeal, the appellants/plaintiffs have filed a petition in C.M.P.No. 2 Of 2013 under order 41 Rule 27 of CPC seeking permission of this Court to recall the plaintiff's witness to mark the sale deed dated 24.11.1977 executed by Subramania Pandithar and his sons (defendants) and the settlement, patta stands in the name of Munuswamy Naidu issued by the Special Tashildar vide his proceedings dated 31.05.1995. They also filed another petition in C.M.P.Nos.7818 of 2019 under order 41 Rule 27 of CPC seeking permission of this Court to receive patta bearing No. 258 issued by Zonal Deputy Tashildhar as additional documentary evidence. The respondents opposed the said petitions by filing counter. The said petitions also have been taken up for hearing along with the second appeal.

10. Heard Mr.Krishna Ravindran for, Mr.B.Manoharan and Mr.A.Charles Darwin the learned counsel for the appellants and Mr.V.Rajendren and Mr.K.S.Praphakar the learned counsel for the respondents.

11.The learned counsel for the appellants has submitted that the suit property and other properties originally belonged to the defendants' family and that the defendants' father Subramania Pandithar for himself and as guardian of his then Minor children (defendants herein) had sold 22 cents in Gramanatham survey No.137/1 of Thiruvellavoyal Village with specific boundaries under a register sale deed dated 24.11.1977 to one Munuswamy Naidu. He further submitted that the said Munuswamy Naidu got patta on 31.05.1995 for the aforesaid property. He further submitted that the said Munuswamy Naidu, out of 22 cents which he had purchased under the registered sale deed dated 24.11.1977, on the northern side, had sold 5 cents with specific boundaries to the plaintiffs under a registered sale deed dated 28.10.1999 and from that date onwards, the plaintiffs are in possession and enjoyment of the said 5 cents (suit property).

12.The learned counsel for the appellants further submitted that at the time of selling the suit property to the plaintiffs, their vendor Munuswamy Naidu gave a xerox copy of his sale deed dated 24.11.1977 and a xerox copy of the patta which stands in the name of Munuswamy Naidu and the said documents were filed along with the plaint, but inadvertently, they were omitted to mark as exhibits. He further submitted that after purchasing the property, the plaintiffs have not taken steps to subdivide the same and hence, no separate patta has been issued in favour of the plaintiffs in respect of the suit property, however, the physical features noted by the Advocate commissioner in his report and plaint (Exs. C1 and C2) would show that the suit property can be identified easily. He further submitted that even though the defendants have stated in their written statement that they are taking steps to set aside the sale deed dated 24.11.1977 and also the patta which was granted in the name of Munuswamy Naidu, but they have not produced any documentary evidence to show that they have taken steps for setting aside the sale deed and patta. He further submitted that admittedly the suit property is a vacant site and that being so, the principle that the possession follows title will apply, but the Courts below erred in holding that the plaintiffs have not produced any document to show their possession. He further submitted that even though the plaintiffs have produced a registration copy of the sale deed dated 24.11.1977, which stands in the name of Munuswamy Naidu and marked as Ex.A3, the Courts below erred in holding that the plaintiffs failed to prove as to how the said Munuswamy Naidu got properties.

13.The learned counsel for the appellants further submitted that now the appellants are able to get the original sale deed dated 24.11.1977 from the said Mununswamy Naidu and also the original patta dated 26.04.2013 which stands in the name of Munuswamy Naidu and also Xerox copy of the patta, dated 31.05.1995 which stands in the name of Munuswamy Naidu and the said documents are very vital documents to prove the fact that the plaintiffs' vendor Viz., Munuswamy Naidu got valid title over the suit property and also he was in possession of the suit property and hence, the said documents may be received as additional documentary evidence and to mark the said documents and that the plaintiffs may be permitted to recall P.W.1 and examine further.

14. Per contra, the learned counsel for the respondents/defendants has submitted that the defendants have specifically denied the title of the plaintiff and their vendor and as such, the suit for bare injunction is not maintainable. He further submitted that the defendants have specifically stated in their written statement that the sale deed dated 24.07.1977 and the patta issued dated 31.05.1995 are exfacie illegal and void, but the plaintiffs have not taken any steps to prove the validity of those documents by producing the original deed of the said document or by examining the vendor. He further submitted that now the appellants, with a view to fill up the lacuna, have come forward with the aforesaid petitions seeking permission of this Court to adduce additional oral and documentary evidence. He further submitted that the said Munuswamy Naidu had also disposed of 22 cents of land, which he purchased under the sale deed dated 24.11.1977 and as such, he could not have sold the suit property under Ex. A1 sale deed to the plaintiff. He further submitted that the plaintiffs have not marked the sale deed dated 24.11.1977, though a copy of the said sale deed was produced along with the plaint. He further submitted that even at the first appeal stage also they have not taken any steps to mark those documents. He further submitted that the plaintiffs wantonly keeping away the original sale deed from perusal of the Court. He further submitted that for the reason known to them, they now turn around to file the present petitions. He further submitted that the plaintiffs failed to satisfy the conditions mentioned under order 41 rule 27 of CPC. Hence, the aforesaid petitions cannot be allowed.

15. The learned counsel for the respondents further submitted that since the defendants have disputed the title of the plaintiffs, the suit for bare injunction is not maintainable. He further submitted that the suit is for bare injunction and that the Court below held that the plaintiffs failed to prove their possession and under the said circumstances, even if the original sale deed dated 24.11.1977 is received that would not improve the case of the appellants/plaintiffs and therefore, he prayed to dismiss the said petitions. He further submitted that the Courts below, taking into consideration the materials produced by both parties concurrently found that the plaintiffs have not proved their title and possession and in the said factual concurrent findings this Court cannot interfere and therefore, he prayed to dismiss the second appeal. In support of the aforesaid contentions, he relied upon the decision in: ANATHULA SUDHAKAR VS P.BUCHI REDDY (DEAD) BY LRS. AND OTHERS (2008) SSC 594.

16. According to the plaintiffs, they had purchased the suit property under Ex.A1-sale deed dated 28.10.1999 from one Munuswamy Naidu. It is their further case that the said Munuswamy Naidu had purchased 22 cents including the suit property under a registered sale deed dated 24.11.1977 from one Subramaniya Pandithar and his minor sons (defendants herein). They have produced a registration copy of the said sale deed dated 24.11.1977 and marked as Ex.A3, but now they want to produce the original sale deed itself. If the said document is received that would not cause any prejudice to the defendants, because already the registration copy of the document has been produced and marked as Ex. A3. Apart from the said document, the appellants want to produce a Xerox copy of the patta dated 31.05.1995 issued to their vendor Munuswamy Naidu. On perusal of the plaint, it is seen that the plaintiffs have produced the said document also along with the plaint. According to the plaintiffs, inadvertently they failed to mark the said document as exhibits before the trial Court. Since the said document was already filed along with the plaint, if the said document is received that it would not cause any prejudice to the respondents/defendants. Further the appellants/plaintiffs want to produce the patta in respect of the remaining extend of the property, which has been issued in the name of the said Munuswamy Naidu on 26.04.2013. The said document has been obtained only during pendency of the second appeal and hence the plaintiffs would not have produced the said document before the trial Court.

17. In ANATHULA SUDHAKAR VS P.BUCHI REDDY (DEAD) BY LRS. AND OTHERS (2008) SSC 594 (CITED SUBRA) the Hon'ble Supreme Court in parra 16 as held as follows:

16. But what if the property is a vacant site, which is not physically possessed, used or enjoyed? In such cases the principle is that possession follows title. If two persons claim to be in possession of a vacant site, one who is able to establish title thereto will be considered to be in possession, as against the person who is not able to establish title. This means that even though a suit relating to a vacant site is for a mere injunction and the issue is one of possession, it will be necessary to examine and determine the title as a prelude for deciding the de jure possession. In such a situation, where the title is clear and simple, the Court may venture a decision on the issue of title so as to decide the question of de jure possession even though the suit is for a mere injunction. But where the issue of title involves complicated or complex questions of fact and law, or where Court should not decide the issue of title in a suit for injunction. The proper course is to relegate the plaintiff to the remedy of a full-fledged suit for declaration and consequential reliefs.

18. From the aforesaid decision it is clear that if the property is a vacant site, which is not physically possessed, used or enjoyed, the principle that possession follows title will apply. If two persons claim to be in possession of a vacant site, one is able to establish title there to will be considered to be in possession, as against the person, who is not able to establish the title. In this case, in the written statement, the defendants have stated that the property comprised in survey No.131/1 was given as inam land to their ancestors for the service rendered to the people. Further, they have stated that their father Subramaniya Pandithar had no right to sale the said land to anyone except to enjoying the same and hence, the sale deed dated 24.11.1977 in favour of the Munuswamy Naidu is not binding on them and consequently, the plaintiffs would not derive any title to the suit property through the sale deed dated 28.10.1999. They also stated that they are taking steps to set aside the sale deed dated 24.11.1977 which was executed in favour of Munuswamy Naidu. So, it is clear that they have admitted that their father had executed the sale deed dated 24.11.1977 in favour of Munuswamy Naidu, but their contention is that their father had no right to sell the said property and hence, they are taking steps to set aside the said sale deed, but they have not produced any evidence to show that they have taken steps to set aside the said sale deed.

19. The second defendant while examining himself as D.W.1, has deposed that the said Munuswamy Naidu while purchasing the property from their father did not obtain any

permission from the Court and hence, the sale in favour of the said Munuswamy is not valid. The said plea has not been raised in the written statement. Further, even according to the defendants, the suit properties are their ancestral properties and in such a case, in view of Sections 6 and 12 of Hindu Minority and Guardianship Act, 1956, the father of the defendants being an adult member who was in management of the joint Hindu family property, he need not obtain permission from the Court for selling undivided interest of the minors in the joint Hindu Family Property. Only for disposing of the minors separate property as per Section 8 of the Hindu Minority and Guardianship Act, 1956, the natural guardian has to obtain permission from the Court. Even in such case also as per sub section 2 of Section 8 of the said Act, the said transaction is only a voidable at the instance of the minor. In the case of voidable transaction, that should be challenged within three years from the date of execution of the said document or from the date of attaining majority by the minors. In this case, though the defendants have stated in their written statement that they are taking steps to set aside the said sale deed, they have not produced any evidence to show that they have taken any steps to set aside the said document. Therefore, the said document will bind upon them. Once it is held that the said document will bind upon the defendants, they cannot question the sale deed executed by the said Munuswamy Naidu in respect of the suit property in favour of the plaintiffs.

20. It is also to be pointed out, that the defendants in para 6 of their written statement stated that taking advantage of the sale deed and misusing the judicial process, the plaintiffs attempted to encroach upon the vacant land of the defendants, which is situated adjacent to the lands comprised in the sale deed dated 24.11.1977. The aforesaid statement also would show that they have not disputed the title of the plaintiffs. But their contention is that taking advantage of the sale deed in their favour, the plaintiffs are attempting to encroach their lands which is situated adjacent to the lands covered under Ex. A3 sale deed dated 24.11.1977. So, it is clear that the dispute is only with regard to identify of the properties. In this case though an Advocate Commissioner was appointed before the trial Court and a report and plan also received, the Advocate Commissioner has not measured the properties with reference to the documents of both the parties and located the suit property. Therefore, this Court is of the view that the matter has to be remitted back to the trial Court with a direction to reissue the commission warrant to the Advocate Commissioner to measure the properties of both the parties with reference to sale deeds dated 24.11.1977, 28.10.1999, filed measurement plan and other revenue records and locate the suit property. Further, as already pointed out that the documents, which are now sought to be produced by the appellants, except the patta dated

24.03.2013, were already filed before the trial Court. The patta dated 26.04.2013 also only in respect of the remaining extend of the properties, which stand in the name of Munuswamy Naidu. If the said documents are allowed to be produced that would not cause any prejudice to the respondents. Hence, this Court is inclined to allow C.M.P.Nos. 2 of 13 and 7489 of 2019. Accordingly, the said petitions are allowed. For the purpose of marking those documents also, this Court is of the view that the matter has to be remitted back to the trial Court.

21. In the result C.M.P.Nos.2 of 2013 and 7818 of 2019 are allowed. The second appeal is also allowed. The judgments and decrees of the Courts below are set aside. The matter is remitted back to the trial Court. The Trial Court is directed to reissue the commission on warrant to the same Advocate Commissioner or to some other Advocate Commissioner with a direction to measure the properties of both the parties with reference to the sale deeds dated 24.11.1977 (Ex.A3) and 28.10.1999 (Ex.A1) with field measurement plan and with other revenue records, with the help of the qualified surveyor and locate the suit properties. After receipt of the Commissioner's report and plan, as aforesaid, the trial Court has to give opportunities to both parties to adduce additional oral and documentary evidence including the documents which were filed before this Court and dispose of the case in accordance with the law.

Sd/-

Assistant Registrar (CCC)

//True copy//

Sub Assistant Registrar

tta

To

1. The Subordinate Judge, Ponneri.
2. The District Munsif, Ponneri.

Copy To:

The Section Officer,
VR Section, High Court, Madras

+1cc to Mr. Krishna Ravindran, Advocate SR.No.44327

S.A.No.331 of 2013

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