

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 25.03.2019

Delivered on: 22.05.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.76 of 2013
and
M.P.No.1 of 2013

D.Mahalingam

... Appellant/
Appellant/Plaintiff

Vs.

1.Kuppan
2.Ravi

... Respondents/
Respondents/Defendants

PRAYER:

Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 23.08.2012 made in A.S.No.71 of 2011 on the file of the Sub-court, Kancheepuram by modifying the judgment and decree in O.S.No.79 of 2008 dated 27.06.2011 on the file of the District Munsif-cum-Judicial Magistrate, Uthiramerur.

For Appellant : Mr.N.Kumar Rajan
for M/s.Kumaran and Baskar

For Respondents : R1 and R2 -set exparte

JUDGMENT

This Second Appeal has been filed by the plaintiff against the judgment and decree passed by the Sub-Judge, Kancheepuram in A.S.No.71 of 2011 dated 23.08.2012 confirming the judgment and decree passed by the District Munsif-cum-Judicial Magistrate, Uthiramerur in O.S.No.79 of 2008, dated 27.06.2011.

2. The appellant herein had filed a suit in O.S.No.79 of 2008 on the file of the District Munsif-cum-Judicial Magistrate, Uthiramerur for the relief of permanent injunction to restrain the defendants, their men, etc., from interfering with his peaceful possession and enjoyment of the suit property. The learned District Munsif-cum-Judicial Magistrate, Uthiramerur by the judgment dated 27.06.2011 had dismissed the said suit, however, he directed the parties to bear their respective

costs. Aggrieved by the same, the plaintiff had filed an appeal in A.S.No.71 of 2011 on the file of the Sub-Judge, Kancheepuram. The learned Sub-Judge, Kancheepuram by the judgment dated 23.08.2012 had dismissed the said appeal with cost and thereby confirmed the judgment and decree of 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 schedule of property covering full extent of 1088 sq.ft., shown as 'ABCDEFGA' in the plaint rough sketch is the ancestral property of the plaintiff. The plaintiff's grand father Kuppu Udaiyar and his five brothers, namely, Kali Udaiyar, Poongavana Udaiyar, Kathirvel Udaiyar, Kumarasamy Udaiyar and Chinnathambi Udaiyar were co-owners in respect of their joint family properties situated at Kavanoorpuducherry Village. During their life time, by the year 1958, they effected family arrangement, in and by which, the schedule of property covering full extent of 1088 sq.ft., was jointly allotted to Kuppu Udaiyar, Kali Udaiyar, Poongavana Udaiyar and Chinnathambi Udaiyar. Immediately, the said four co-owners effected oral partition, in and by which, the schedule of property covering 272 sq.ft., shown as 'BCDHB' in the plaint rough sketch, was allotted to the plaintiff's grand father Kuppu Udaiyar. The said Kuppu Udaiyar died long back leaving behind him Duraisamy Udaiyar (plaintiff's father), Arumuga Udaiyar and Panchatchara Udaiyar as his only legal heirs. Thus, each of them were entitled to 1/12th share in the schedule of property. Since, then, the said three co-owners had been in actual and exclusive possession and enjoyment of the schedule of property as co-owners. While so, the said Panchatchara Udaiyar sold his 1/12th share to one Sarojammal and Irusappan, who in turn, sold the same to the plaintiff as per the registered sale deed dated 17.07.1988. So also, Adhimoolam Udaiyar (the only legal heir of the said Arumuga Udaiyar), sold his 1/12th share to the plaintiff as per the registered sale deed dated 16.12.1987.

(b) The plaintiff's father Duraisamy Udaiyar died in or about 2000. During his life time, in the year 1987, he allotted agricultural fields to the plaintiff's sisters for their share in the joint family property and allotted the 1/12th share in 272 sq.ft. of the schedule of property to the plaintiff. Thus, in

view of his purchase of the remaining two 1/12th share of Kuppu Udaiyar's branch, the plaintiff has become the absolute owner with actual possession and enjoyment of the schedule of property covering 272 sq.ft. Two Velikathan trees standing in the schedule of property absolutely belong to the plaintiff. The defendants are utter strangers in respect of the schedule of property. While so, on 01.07.2008 and again on 18.07.2008 the defendants attempted to cut the Velikathan trees and hence, the plaintiff was 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 above suit is the second round of litigation by which the above suit is barred by the principles of resjudicata. The plaint plan is not giving a clear and correct picture. The measurement given in the plaint plan is totally inconsistent with regard to the sale deed filed along with the plaint. There is no extent or boundaries stated in the sale deed are available on the land. Only to get over the previous plaint plan filed by the sister Maniammal and her daughter and son in O.S.No.951 of 1993 on the file of the District Munsif Court, Kancheepuram, this suit has been filed. In that suit, the plaintiff therein claimed right based on the sale deed dated 15.02.1987 and in the said suit, the defendants' father Munusami Thambiran was the defendant in that suit and after full trial, the said suit was dismissed, as against which, the appeal was filed in A.S.No.38 of 1997 on the file of the Fast Track Court-II, Kancheepuram and the same was dismissed on 31.07.2002. In the sale deed dated 16.12.1987, it is not specifically stated that 1/12th share was sold to the plaintiff. Likewise, the recitals mentioned in the sale deed dated 17.07.1988 also are not correct. Only to circumvent the previous judgment and decree, the plaintiff has filed the present suit. The suit for bare injunction is not maintainable. The defendant's father Munisami Thambiran on 22.05.1992 purchased 4 ½ cents in gramanatham in S.No.130/1 with boundaries from one Vijayakumar and others and he was in possession and enjoyment of the same till his life time and after his death, the defendants are in possession and enjoyment of the same. Therefore, the defendants prayed to dismiss the suit.

6. Based on the aforesaid pleadings, the learned District Munsif-cum-Judicial Magistrate, Uthiramerur, had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1 and marked Exs.A1 and Ex.A2 as exhibits. On the side of the defendants, the first defendant examined himself as DW1 and also marked Exs.B1 to Ex.B9 as exhibits.

7. The learned District Munsif-cum-Judicial Magistrate, Uthiramerur, after considering the materials placed before him, found that in Exs.A1 and Ex.A2 sale deeds, the extent of the property is not mentioned but in the sale deed produced by the defendants in Exs.B1 to Ex.B3 extent has been mentioned. He further found that in Ex.A1 and Ex.A2 only 1/12th share has been mentioned and based on the said document, it cannot be said that the plaintiff is in exclusive possession of the extent of 272 sq.ft., which is mentioned as 'BCDHB' in the plaint rough sketch. Accordingly, he dismissed the suit. Aggrieved by the same, the plaintiff had filed an appeal in A.S.No.71 of 2011 on the file of the Sub-Judge, Kancheepuram. The learned Sub-Judge, had dismissed the said appeal with costs and thereby confirmed the judgment and decree of the trial Court. Feeling aggrieved, the plaintiff has filed the present Second Appeal.

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

" 1.Whether the Courts below are correct and justify in come to the conclusion that the appellant herein should have filed the suit for declaration and for recovery of possession, when the suit is itself for only a bare injunction regarding the possession to the property?

2.Whether the Courts below correct and justify in rejecting the documents filed by the appellant herein regarding the title to the property and rejected the same on the ground that the Advocate Commissioner should have been appointed to identify the suit schedule property?

3.Whether the Courts are correct and justify that in conforming tittle of the property in favour of the respondents herein in the suit filed by the appellant herein?"

9. Even though repeatedly notices were sent to the respondents, the said notices were not served and hence, substituted service by paper publication was ordered by this Court and accordingly paper publication was effected and the same has been recorded by this Court on 01.02.2019. Hence, the name of the respondents 1 and 2 have been printed in the cause list but even thereafter, they have appeared neither in person

nor through counsel and hence, they have been set exparte. Hence, after hearing the arguments of the learned counsel for the appellant/plaintiff and perusing the records, judgment is being passed in the Second Appeal.

10. Substantial Questions of law 1 to 3 :

The learned counsel for the appellant/plaintiff has submitted that the Courts below failed to consider that the plaintiff has proved his possession and enjoyment of the suit property by producing the sale deeds. He further submitted that the Courts below failed to see that since the suit property is a vacant site, the principle of possession follows title will apply. He further submitted that in this case, the plaintiff has proved his title over the suit property by purchasing Ex.A1 and Ex.A2 sale deeds and once title is proved, since it is a vacant site, it has to be presumed that the plaintiff is in possession of the suit property. He further submitted that the first Appellate Court erred in holding that the plaintiff had not taken any steps for appointing an Advocate Commissioner to identify the disputed property. He further submitted that there is no difficulty in identifying the suit property with the available evidence and therefore, he prayed to allow the Second Appeal and set aside the judgments and decrees passed by the Courts below and decree the suit as prayed for.

11. According to the plaintiff, out of total extent of 1088 sq.ft which has been shown as 'ABCDEFGF' in the plaint rough sketch, he is entitled to 272 st.ft., which is shown as 'BCDHB' in the plaint rough sketch. His further case is that out of the aforesaid 1088 sq.ft., his grand father Kuppu Udaiyar is entitled for $\frac{1}{4}$ th share and his grand father Kuppu Udaiyar had three sons namely, Duraisamy Udaiyar (his father), Arumuga Udaiyar and Panchatchara Udaiyar. His further case is that out of total extent of 1088 sq.ft., he purchased $\frac{1}{12}$ th share by virtue of sale deed dated 16.12.1987 from Adhimoola Udaiyar son of Arumuga Udaiyar and likewise, he purchased another $\frac{1}{12}$ th share from the said Panchatchara Udaiyar and hence, he is entitled for $\frac{3}{12}$ th share and the said $\frac{3}{12}$ th share comes to 272 sq.ft., and the same is shown as 'BCDHB' in the plaint rough sketch and the said portion is the suit property.

12. The sale deed dated 16.12.1987 has been marked as Ex.A1. It appears that the last item is relating to the property which is mentioned as 'ABCDEFGFA' in the plaint rough sketch. Likewise under Ex.A2 also, the last item is the property which is mentioned as 'ABCDEFGFA' in the plaint rough sketch. In Ex.A1, the total extent of the aforesaid item is mentioned as 1090

sq.ft. In Ex.A2, it is mentioned as only 1088 sq.ft. Since for the aforesaid property east - west measurement is shown as 16 ft., and north-south measurement is shown as 68 sq.ft., the total extent would be only 1088 sq.ft., and that is why the plaintiff also claimed only 1088 sq.ft., in the plaint. Under Ex.A1, out of the total extent of 1090 sq.ft., (the correct extent is 1088 sq.ft.) common 1/12th share has been sold. In Ex.A2 also out of 1088 sq.ft., common 1/12th share was sold. So, it is clear that the plaintiff had purchased under Ex.A1 and Ex.A2 only 2/12th common share in 1088 sq.ft. The plaintiff has not stated that after the said purchase, his share has been divided and separately allotted to him.

13. According to the plaintiff, the aforesaid 1088 sq.ft., belongs to four families. But there is no evidence that a partition took place between the aforesaid four families in respect of 1088 sq.ft. Under the said circumstances, the plaintiff cannot claim that he is entitled to the portion which is mentioned as 'BCDHB' in the plaint rough sketch. He is having only a common share in the entire extent of 1088 sq.ft. He cannot claim that he is in exclusive possession of a particular extent. So, he cannot maintain a suit stating that he is in exclusive possession of the portion which is mentioned as 'BCDHB' in the plaint rough sketch. Unless the plaintiff shows that he is in exclusive possession of the portion which is shown as 'BCDHB' in the plaint rough sketch he cannot maintain a suit for permanent injunction. Taking into consideration of all the aforesaid facts, the Courts below concurrently found that the plaintiff has failed to prove that he is in exclusive possession over the 'BCDHB' portion and hence, he is not entitled for the relief of permanent injunction. In the said factual concurrent findings, this Court cannot interfere. Accordingly, the substantial questions of law are answered against the appellant/plaintiff.

14. In the result, the Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-
Assistant Registrar(CS IV)

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Sub Assistant Registrar

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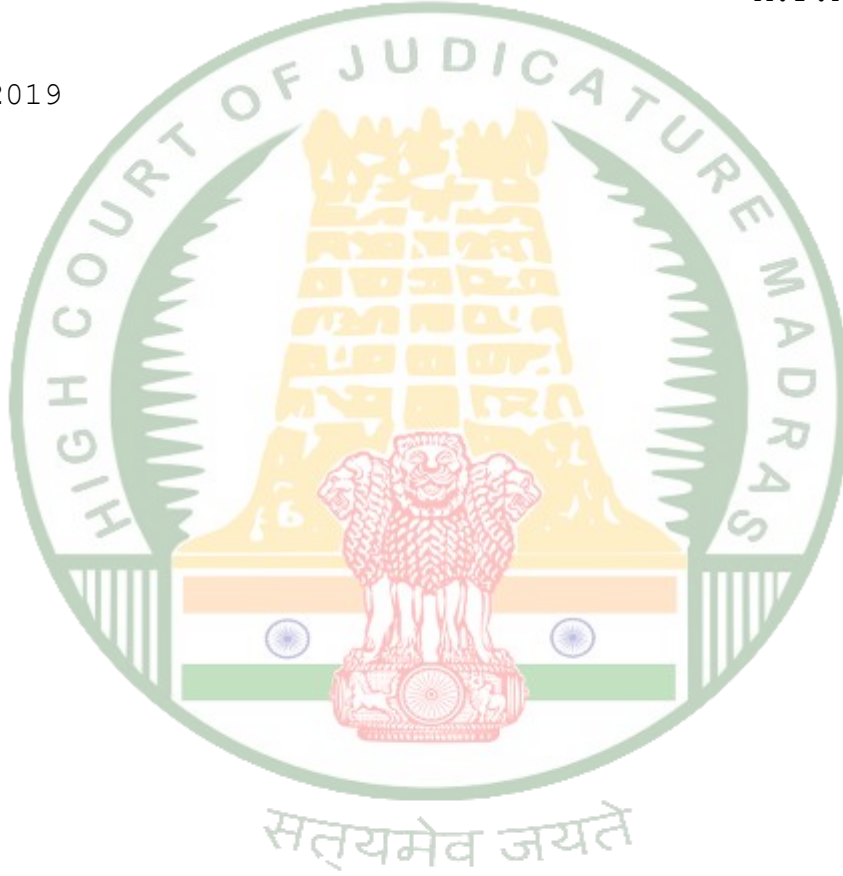
To

1. The Subordinate Judge, Kancheepuram.
2. The District Munsif-cum-Judicial Magistrate,
Uthiramerur.

+1cc to M/s.Kumaran and Baskar, Advocate, S.R.No.44136

S.A.No.76 of 2013
and
M.P.No.1 of 2013

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