

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.09.2019

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.239 of 2016 and
C.M.P.No.4759 of 2016

1. Mari
2. Manickam

..Appellants/Appellants/Defendants

Vs.

1. Thangavel
2. Maniraj

..Respondents/Respondents/Plaintiffs

PRAYER: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree of the learned Additional District, Sessions and Chief Judicial Magistrate, Ariyalur, dated 06.01.2016 in A.S.No.13 of 2015, confirming the judgment and decree of the learned Principal District Munsif (Incharge), Ariyalur, dated 12.01.2011 in O.S.No.186 of 2002.

For Appellants : Mr.P.Valliappan

For Respondents : No appearance

J U D G M E N T

The defendants in O.S.No.186 of 2002 are the appellants. The said suit was filed by the respondents seeking declaration of title and consequential injunction.

2. According to the plaintiffs, the suit properties belonged to the plaintiffs' family and they have been in possession of the same for more than 20 years prior to the partition and about 20 years ago, they divided the suit property amongst themselves and are residing therein by constructing houses. Recognizing their possession, the Government also issued patta in the year 1995 in favour of the plaintiffs. While things stood thus, the 1st defendant had filed a suit in O.S.No.322 of 1988 against the father of the plaintiffs, Palani, seeking declaration of his title and permanent injunction. The Commissioner appointed in the said suit noted the physical features of the property and found that the plaintiffs in the present suit are in possession of the property.

3. Subsequently, the 1st appellant herein who was the plaintiff in O.S.No.322 of 1988 withdrew the suit with liberty

to file a fresh suit on the same cause of action. It is the further case of the plaintiffs that the defendants does not have any right over the suit property. The Patta issued in favour of the defendants in the year 1961 does not relate to the suit property. It is their further claim that the land that was assigned to the 1st defendant in the year 1961 by the Government was acquired in 1975 and road was formed therein and in lieu of the said land, the defendants were granted Patta in Survey No.417/36 and the defendants have constructed a house in the land assigned to them and are residing there. The defendants again filed another suit in O.S.No.289 of 1996 pursuant to the leave granted in O.S.No.322 of 1988 against the father of the plaintiff and the said suit came to be decreed ex-parte. The defendants are now attempting to interfere with the possession of the plaintiffs in execution of the decree obtained by them in O.S.No.289 of 2006. Therefore, the plaintiffs had filed the present suit in O.S.No.186 of 2002 seeking declaration of their title and consequential injunction restraining the defendants from interfering with their possession of the property.

4. The suit was resisted by the defendants contending that the plaintiffs are not the owners of the suit property. The suit property is the separate property of the 1st defendant having been assigned by the Government as early as in the year 1961. The plaintiffs' father encroached upon the house put up by the defendants and hence the defendants were forced to file the suit against the father of the plaintiffs which ended in a decree. The plaintiffs in the present suit were aware of the proceedings in the earlier suit.

5. It was also claimed that the remedy of the plaintiffs who want to prevent the execution of the decree is to claim a right before executing under Order XXI Rules 97 to 99 of the Code of Civil Procedure and they cannot not maintain a separate suit. It was also claimed that Natham Survey Patta granted in the year 1995 will not confer any right on the plaintiff. The trial Court upon consideration of the evidence on record concluded that the plaintiffs have established their claim of title over the suit property. The trial Court chose to rely upon the Natham Patta granted in the year 1995 marked as Exs.A1 and A2 in preference to claim of the defendants that the suit property was assigned to even in the year 1961. Though the decree in O.S.No.289 of 1996 was filed as Ex.B1 and the petition under Order XXI Rule 97 to 99 of C.P.C., filed by the present plaintiffs in E.P.No.43 of 2001 filed as Ex.B2, the trial Court did not consider the effect of these documents. Based on the evidence adduced by the plaintiffs, the trial Court found that the plaintiffs are the owners of the property and decreed the suit as prayed for.

6. Aggrieved, the defendants preferred an appeal in A.S.No.13 of 2015. The lower appellate Court also without considering the effect of the decree in O.S.No.289 of 1996 and the effect of filing of an application in execution proceedings under Order XXI rule 97 to 99 and the bar enacted under Order XXI Rule 101 of C.P.C., dismissed the appeal confirming the Judgment of the trial Court.

7. Aggrieved , the defendants have come up with this second appeal.

8. At the time of admission, the following substantial questions of law are framed:

1. whether the suit is barred by the principles of resjudicata enumerated under Section 11 of the Code of Civil Procedure, in view of the decree passed in the earlier suit in O.S.No.289 of 1996?

2. Whether the Courts below are correct in law in ignoring the admissions made by PW1 & 2, which would prove the contention of the appellants?

9. After hearing the counsel for the appellants, the following additional question of law is framed:

Whether the suit is maintainable in view of the bar enacted under Order XXI Rule 101 of C.P.C.,?

10. I have heard Mr.P.Valliappan, learned counsel for the appellants. Though the respondents were served, they have not appeared in person or through counsel duly instructed. The names of the respondents have been printed in the cause list.

11. Elaborating on the questions of law, Mr.P.Valliappan, learned counsel appearing for the appellant would contend that once the suit in O.S.No.289 of 1996 filed by the defendants seeking a declaration of title and recovery of possession had been decreed against the father of the present plaintiffs, the claim of the plaintiffs is barred by res judicata. He would also point out that the plaintiffs herein had filed an application under Order XXI Rule 97 to 99 of C.P.C., to obstruct the execution of the decree in O.S.No.289 of 1996 setting up an independent title in themselves. Therefore, according to him, in view of Order XXI Rule 101 of C.P.C., the present suit is bared.

12. I have considered the submissions of the learned counsel for the appellants.

13. It is the case of the plaintiffs that the suit property was in possession of the family of the plaintiffs and there was a partition amongst plaintiffs about twenty years prior to the filing of the present suit in O.S.No.186 of 2002. This would impliedly mean that the partition took place in the year 1982. Till then the property remained undivided and in joint possession. It is admitted that the 1st appellant had filed a suit in O.S.No.322 of 1988 against the father of the plaintiff and the same was withdrawn with liberty to file a fresh suit and the second suit is instituted in the year 1996. Therefore, there was a dispute even from the year 1988. The Patta, Ex.A1 relied upon by the plaintiffs had been issued in the year 1995 during the currency of the dispute. The suit in O.S.No.289 of 1996 came to be decreed ex-parte vide Ex.B1 on 27.07.1999. The ex-parte decree has become final. No steps have been taken to have it set aside. The decree in O.S.No.289 of 1996 declares the title of the appellants to the suit property. The father of the respondents was the sole defendant in the said suit. Even if it is exparte decree, the same would operated as res judicata.

14. The defendants are precluded from claiming title of the very same property which is the subject matter in O.S.No.289 of 1996 in view of the fact that the title of the appellants/plaintiffs has been declared in O.S.No.289 of 1996. I am therefore of the considered opinion that the Courts below fell in error in not examining the effect of the decree in O.S.No.289 of 1996 and upholding the title of the respondents.

15. In view of the above, 1st question of law answered in favour of the appellant. On the additional question of law framed, Mr.P.Valliappan, learned counsel would contend that Ex.B2 shows that the respondents herein/plaintiffs in O.S.No.186 of 2002 had infact invoked Order XXI Rule 97 to 99 of C.P.C., and obstructed the execution of the decree. The law is now well settled that a person who intends to obstruct execution of the decree, setting up independent title need not wait for actual dispossession. He could move the Court under Order XXI Rules 97 to 99 of C.P.C. apprehending dispossession. Once such application is filed, the obstructors will have to prosecute the same. Order XXI Rule 101 C.P.C., provides that the Executing Court can determine all questions relating to right, title and interest of the obstructors in the said application itself for the purposes of deciding the said question, the Court which hears the application shall be deemed to have jurisdiction to decide those questions. Order XXI Rule 101 C.P.C., reads as follows:

"101. Question to be determined

All questions (including questions relating to right,

title or interest in the property) arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions "

16. A perusal of the above provision would show that all questions relating to the right, title and interest arising between the parties to the proceedings namely an applications under Order XXI Rules 97 to 99 are the representations, shall be determined by the Court dealing with such application, "not by way of a separate suit" emphasized.

17. Therefore, the remedy to the person who is sought to be dispossessed in execution of decree to which he is not a party has to move the executing Court under Order XXI Rules 97 to 99 and prove his independent right. It is not open to such a person to institute a separate suit for the said purpose. From the evidence on record, it can be seen that the respondents have approached the executing Court, invoking provisions under Order XXI Rules 97 to 99 of C.P.C., by filing an application as evidenced by Ex.B2.

18. It is stated across the bar that the said application was dismissed as default and the same was prosecuted further. Once an application under Order XXI Rules 97 to 99 of C.P.C., is filed and the bar under Order 21 Rule 101 would automatically apply and the applicants/obstructors are interdicted from filing a separate suit raising the same contention or setting up independent title in themselves. The plain language of Order XXI Rule 101 of C.P.C., has not been considered by the Courts below.

19. Unfortunately, both the Courts below have not adverted to Exs.B1 or B2. The failure on the part of the Courts below advert to the documentary evidence had led to them passing a decree which ought not to have been granted. Therefore, the additional question of law is answered in favour of the appellants concluding that the very suit namely the suit in O.S.No.186 of 2002 is not maintainable in view of the bar enacted under Order XXI Rule 101 of C.P.C.,

20. In view of the answer of the 1st question of law and additional question of law, the 2nd question of law framed at the time of admission does not arise for consideration. The second

appeal is therefore allowed setting aside the judgment and decree of the Courts below. The suit in O.S.No.186 of 2002 will stand dismissed. Since the respondents have not appeared, there shall be no order as to costs. Consequently connected miscellaneous petition is closed.

-s/d-

Assistant Registrar

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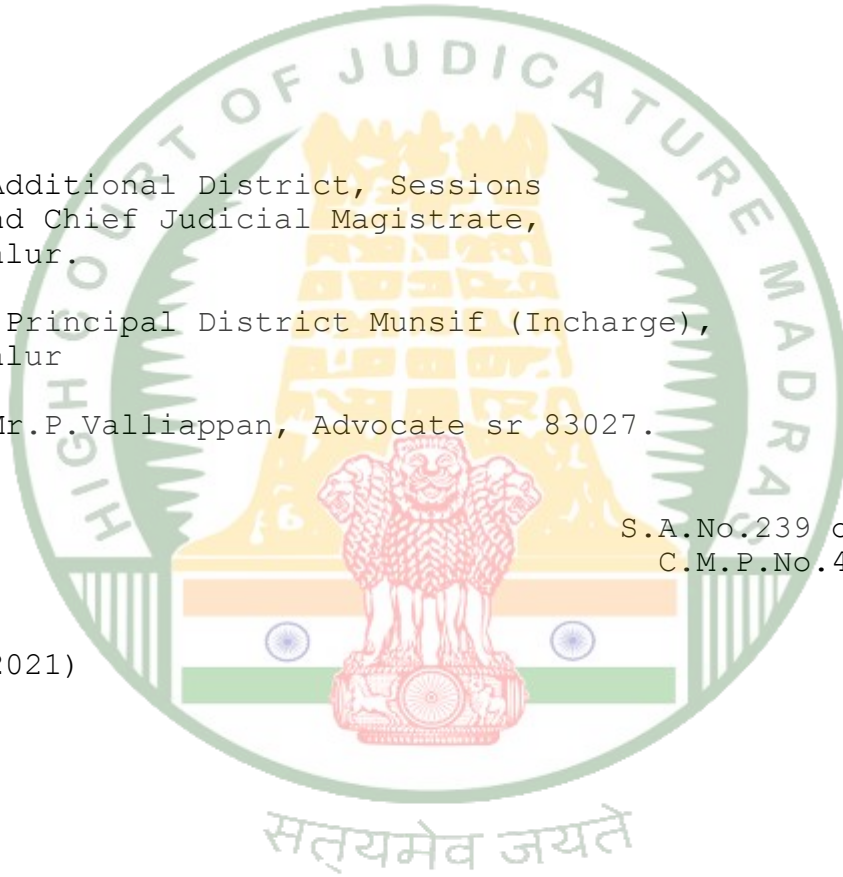
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To

1. The Additional District, Sessions and Chief Judicial Magistrate, Ariyalur.
2. The Principal District Munsif (Incharge), Ariyalur

+1 CC to Mr.P.Valliappan, Advocate sr 83027.

S.A.No.239 of 2016 and
C.M.P.No.4759 of 2016

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