



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On : 22.08.2019

Delivered On : 15.11.2019

CORAM

THE HONOURABLE MRS. JUSTICE R. THARANI

S.A.(MD)No.216 of 2009

WEB COPY

1.Manoharan

2.Kuppan

.. Appellants/Appellants/Defendants 1 & 2

Vs.

1.Karthiga Devi

2.Veil Murugan

.. Respondents 1 &2/Respondents 1 &2/Plaintiff

3.Rajaram

.. 3rd Respondent/3rd Respondent/3rd Defendant

Prayer :Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the Judgment and Decree dated 23.10.2008 rendered in A.S.No.134 of 2007 on the file of the learned second Additional Subordinate Judge, Madurai confirming the Judgment and Decree dated 24.08.2007 rendered in O.S.No.226 of 1998 on the file of the learned District Munsif, Thirumangalam.

For Appellants

: Mrs.P.Jeesi Jeeva Priya

For Respondents 1 and 2

: Mr.R.Aravindan

For Third Respondent

: Ms.K.Divya for Ms.V.Jasmine

JUDGMENT

Heard the learned counsel on both the side.

2.This appeal is filed against the judgment and decree passed in A.S.No.134 of 2007 dated 23.10.2008 on the file of the learned second Additional Subordinate Judge, Madurai confirming the Judgment and Decree dated 24.08.2007 rendered in O.S.No.226 of 1998 on the file of the learned District Munsif, Thirumangalam.

3.The appellants herein are the defendants 1 and 2, the respondents 1 and 2 herein are the plaintiffs and the third respondent herein is the third defendant in the suit. The respondents 1 and 2 herein have filed a suit in O.S.No.226 of 1996 before the learned District Munsif, Thirumangalam for a prayer of declaration and for injunction. The suit was decreed by the trial Court. Against which, the appellants herein have filed an appeal in A.S.No.134 of 2007 before the second Additional Sub Judge, Madurai. The learned second Additional Sub Judge, Madurai dismissed the appeal by confirming the Judgment and Decree of the trial Court. Against that judgment and decree, the appellants herein have filed this second appeal. As per the order passed in C.M.P.(MD)No.12441 of 2018, this Court decided to receive two documents as Exs.B15 and B16.

4.The case of the plaintiff herein is as follows:

The suit property comprised in old Paimash No.320 new

S.No.199/5A 1A of Thanakkankulam village with an extent of 20 cents



with specified boundaries originally belonged to one Chellamuthu and that he sold the same to one Bose on 26.03.1990. The plaintiffs purchased the property on 10.07.1995 from Bose by way of a registered sale deed for valuable consideration. The plaintiffs and their predecessors in title are in continuous possession and enjoyment of the suit property for more than 20 years. Patta was also transferred in their name. The defendants are strangers to the suit property and they have attempted to interfere with the peaceful possession and enjoyment of the plaintiffs over the suit property on 15.05.1998 and therefore, the plaintiffs have filed the present suit seeking for a declaration of title over the suit property comprised in old Paimash No.320 re-survey No.199/5A 1A of Thanakkankulam Village and for a consequential permanent injunction, restraining the defendants from in any way interfering with the plaintiffs peaceful possession and enjoyment of the suit property and for other related reliefs.

5.The averments of the written statement filed by the first defendant and adopted by the defendants 2 and 3 is as follows:

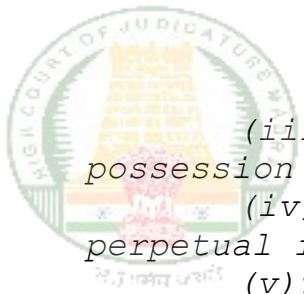
All the averments stated in the plaint are false except those that are specifically admitted and that the sale deeds in favour of the plaintiffs and their predecessor in title are fraudulent transactions as the original vendor viz., Chellamuthu himself has no right to deal with the suit property and that it is false to state that the plaintiffs and their predecessor in title alone are in continuous possession and enjoyment of the suit property. The defendants are in possession and enjoyment of the suit property, as they purchased the same from one Pitchai Pillai, through a sale deed dated 27.10.1981 and that it is false to say that the defendants attempted to interfere with possession of the plaintiffs over the suit property. Before issuing patta in favour of the plaintiffs, the Revenue Authorities had not conducted any enquiry nor gave notice to the defendant and the appeal filed by the defendants as against the aforesaid patta is still pending and hence, the suit is liable to be dismissed.

6.In the additional written statement filed by the defendants, it is stated that the patta with regard to the suit property has been issued only in the name of the defendants and the plaintiffs are not in possession of the suit property and hence, prayed for dismissal.

7.On the above said pleadings, the following issues were framed:

"(i)Whether it is true that the suit property comprised in old Paimash No.320 and new S.No.199/5A1A at Thanakkankulam village as alleged by the plaintiffs ?

(ii)Whether the plaintiffs are entitled to the relief of declaration as prayed for ?



(iii) Whether it is true that the plaintiffs are in possession and enjoyment over the suit property ?

(iv) Whether the plaintiffs are entitled to the relief of perpetual injunction as prayed for ?

(v) To what other relief the plaintiffs are entitled for ?"

WEB COPY

8. Four witnesses were examined as P.W.1 to P.W.4 and 14 documents were marked as Exs.A1 to A14 on the side of the plaintiffs and two witnesses were examined as D.W.1 and D.W.2 and 14 documents were marked as Exs.B1 and B14 on the side of the defendants. After considering the evidences and arguments, the trial Court decreed the suit. Against which, the appellants herein have preferred an appeal in A.S.No.134 of 2007. On the aforesaid pleadings, the following issues were framed:

"(i) Whether the old Paimash No.320 and new S.No.199/5A1A at Thanakkankulam village relates to the suit property as pleaded by the plaintiffs ?

(ii) Whether the plaintiffs are entitled to the relief of declaration as prayed for ?

(iii) Whether the plaintiffs are entitled for permanent injunction as prayed for ?

(iv) Whether the appellants are entitled to the relief as prayed for ?

(v) To what other relief the appellants are entitled for ?"

9. The first appellate Court dismissed the appeal filed by the appellant. Aggrieved by the judgment and decree, the appellants herein have preferred this second appeal.

10. In the grounds of second appeal, it is stated that the plaint description of the property does not tally with the title deed. The title deed itself contain different survey numbers. Both the lower Courts failed to consider that when there is neither pleading nor evidence to the effect that Paimash number is wrongly printed. Decision of the lower Courts that the Paimash number in the title deed could have been only a mistake is wrong. When the title deed disclosed different Paimash number, interpreting a document is erroneous and illegal. Both the lower Courts failed to consider the present nature of the suit property on ground and have decided the issue only based on the plaintiffs' title deeds. No local inspection was conducted by the Advocate Commissioner. Identifying the property was to be done by on plaintiff. The lower Courts consider that the four boundary recitals in title deeds, Es.B6 to B8 tally with the description of the property in Exs.A1 and A2, which result in miscarriage of justice. Both the lower Courts failed to consider that in the settlement proceedings in Exs.A10 and A11, the names of the predecessors in title of the respondents were not at all referred to in respect to survey No.199/5A1A or even in the entire survey No.199/5, whereas in respect to S.No.199/5 the settlement proceedings the names of the predecessors in title of the appellants



found place. There is no attempt on the part of the respondents to correlate Paimash No.220 or 320 with the new re-survey numbers. The respondents have failed to prove the actual location of the property which was purchased by them. The respondents did not seek for an appointment of Commissioner to inspect and locate the suit properties. No correlation documents was filed by the respondents.

11.This Court by in its order dated 01.02.2019, has admitted the second appeal and has framed the following substantial questions of law:

"(a)When there is no rectification on the title deed relied on by the plaintiffs and when there was neither a pleadings nor evidence that the mentioning of the survey Number was wrong, mistake is the Court right to uphold the claim of the plaintiffs on the basis of the title deed containing such wrong description ?

(b)When there is a dispute with regard to the identity of the suit property, is it not obligatory for the Court either suo motu or by directing the plaintiff to file proper application for the appointment of an Advocate Commissioner for his inspection and location of the property by taking the assistance of the Surveyor ?"

Issue Nos.(a) and (b):

12.On the side of the appellants, it is stated that when there is no rectification deed for the title deed relied on by the plaintiffs and when there was neither pleadings nor evidence that the mentioning of the survey number is wrong, it is wrong on the part of the lower Courts to come to a conclusion that the title deeds of the plaintiffs contain wrong Paimash number by mistake.

13.On the side of the appellants, it is stated that the plaintiffs claim title through Exs.A6 to A8, A2 and A1. Ex.A6 is the parent title deed of the year 1962 and Paimash number stated in Ex.A6 is 320. Ex.A7 is dated 24.10.1963, the description of the property is stated as Paimash No.320. Ex.A8 also contain only Paimash No.320. Whereas in Exs.A2 and A1, the Paimash number is stated as 220 and not 320. No rectification deed is filed and that the plaintiffs have not examined any witness to prove that the Paimash number is wrongly stated in Exs.A1 and A2. The trial Court considered the only point that all the description of the property mentioned in Exs.A6 to A8 co-relates the description of properties in Exs.A1 and A2 and came to a conclusion that the suit property belong to the plaintiffs and that the Paimash number in Exs.A1 and A2 are stated as 220 by mistake.

14.On the side of the appellants, it is stated that the defendants purchased the property from one Pitchai Pillai who in turn purchased the property from one Ramasamy Pillai. Ramasamy Pillai purchased the property from Vetri Thevar and others on 02.12.1962. The sale deeds executed by Vetri Thevar and others in favour of Ramasamy Pillai was marked as Exs.B14 and B15. The



property mentioned in Exs.B14 and B15 is in Paimash No.315. Ramasamy Pillai sold the property to Pitchai Pillai under Ex.B2 on 19.02.1963. Pitchai Pillai executed a sale deed Ex.B1 in favour of the first defendant. The sale deed executed by Pitchai Pillai in favour of the second defendant was marked as Ex.B9. In all the documents, Paimash No.315 is stated. The proceedings of Madurai South Tahsildar in R.T.R.No.2678/03-04 in the name of the first defendant was marked as Ex.B5. Kist receipt in the name of the first defendant was marked as Ex.B8. Kist receipt in the name of second defendant is marked as Ex.B11. The Encumbrance Certificate for the property in survey No.199/5A1 was marked as Exs.B3 and B10.

15.On the side of the respondents, it is stated that Tahsildar, Madurai South Taluk issued proceedings in R.T.R.No.835/95-96 in the name of the plaintiffs which was marked as Ex.A3. Kist receipt in the name of the plaintiffs was marked as Ex.A5. Patta No.668 in the name of the plaintiffs was marked as Ex.A9. On the side of the respondents, the proceedings of the Assistant Settlement Officer, Madurai - 2 in S.R. 11(a)8/MDU/68 were marked as Exs.A10 and A11. The Final Enquiry report regarding the Settlement for survey No.199/3 in patta No.478 was marked as Ex.A12.

16.On the side of the appellants, it is stated that an appeal is preferred against the issuance of patta in the name of the plaintiff. In Ex.B6, 'A' register for Survey No.199/5A1A, dated 26.11.1999, the names of the defendants were stated as the pattadars. The defendants filed Revision Petition No.9 of 2001 before the District Revenue Officer, in which the District Revenue Officer passed an order, Ex.B4. In Ex.B4, District Revenue Officer cancelled the patta issued by the Tahsildar, South Taluk. A copy of classification register for survey No.184/4 was marked as Ex.B7. Wherein Survey No.184/4 is stated as a portion of old Paimash No.220. The case of the plaintiff is that instead of Paimash No.320, Paimash No.220 is wrongly stated in Exs.A1 and A2. In support of his contention, the judgment passed by this Court in the case of **K.Thirunavukkarasu and others v. Loganathan (Deceased) and others** reported in **2018 (5) CTC 883** is cited.

17.Ex.A13 is the proceedings of the Assistant Settlement Officer in respect of Survey Nos.188 and 199 and other properties. In the proceedings Ex.A13, the name of the predecessor in title of the plaintiffs did not find place. But, the name of the predecessor in title of the defendants, Andiyapillai found place. As per Ex.A14, a land in Paimash No.220 was sold by Bose in favour of Karthiga Devi and Veyil Murugan. Their names did not find place in Ex.A13.

18.It is seen that case of the plaintiffs is that the Paimash number is wrongly stated as 220 instead of 320. However, Paimash no.220 co-relates only to survey No.184 and not to the suit property. The name of the vendor of the plaintiffs did not find



place either in the Paimash No.220 or in the Paimash No.320. Since the property belong to the defendants there is no chance for the description of property in Ex.B1 to tally with Exs.A1 and A2 which are sale deeds of the plaintiffs. The Commissioner was not appointed and the boundaries available on ground is not considered by the both the lower Courts. The plaintiff has not preferred any appeal against the order of the District Revenue Officer. The learned District Munsif in his judgment in paragraph no.30 did not give any reason as to why he did not accept the order passed by the District Revenue Officer and failed to consider that no appeal was filed against the order of the District Revenue Officer and the order of District Revenue Officer has become final.

19.On the side of the respondents, it is stated that boundaries will prevail over the survey number and both the lower Courts are correct in deciding the case in favour of the plaintiffs. The learned counsel appearing for the respondents relied on the judgment passed by this Court in the case of **S.Syed Abubakkar (Died) and others v. Sardhar** reported in (2011) 4 MLJ 744, which reads as follows:

"The law as it stood at one point of time was that boundaries will prevail over extent. But subsequently, this Court took a view that in all cases blindly such a proportion cannot be ushered in and it all depends upon facts and figures. Here the total extent is specified as 1-1/4 cents of land, whereas specifically within the boundaries what is available is lesser, so to say an extent of 370 sq. ft. as found detailed and set out in para No.5 of the plaint. In such a case, I am of the view that boundaries shall prevail over the extent and the defendant is bound to sell whatever extent available within the said boundaries specified in Exhibit A-1 in favour of the plaintiff and receive the sale consideration proportionately at the rate of Rs.23,500/- per cent."

20.This reported judgment is not relevant to the facts of the present case. It is well settled that the recitals in the boundaries will prevail over the measurement. This judgment is not applicable to a dispute regarding survey number.

21.On the side of the appellants, it is stated that it is the duty of the plaintiffs to prove his case and the plaintiffs cannot take advantage of the weakness of the case of the defendants. The sale deed of the predecessor of the defendants was marked as Ex.B15 and that Paimash No.315. The proceedings of the Assistant Settlement Officer was marked as Ex.A13. Paimash No.315 is co-relating survey No.199/3. This survey No.199/3 was further sub divided into survey No.199/5A1. No co-relating document is produced to show that Paimash



No.320 is relating to the suit property. Both the lower courts concentrate only on the recitals of the boundaries mentioned in the sale deed and never considered whether the paimash number co-relates the suit survey number.

22. On the side of the respondents, it is stated that there is no question of law involved in this case and there is no necessity for this Court to interfere in the well-considered judgments of the lower Courts. The learned counsel appearing for the respondents relied on the judgment passed by the Hon'ble Supreme Court in the case of **Anathula Sudhakar v. P.Buchi Reddy (Dead) by lrs. And others**, reported in **(2008) 4 Supreme Court Cases 594**, which reads as follows:

"We are therefore of the view that the High Court exceeded its jurisdiction under Section 100 CPC, firstly, in re-examining questions of fact, secondly, by going into the questions which were not pleaded and which were not the subject-matter of any issue, thirdly, by formulating questions of law which did not arise in the second appeal, and lastly, by interfering with the well-reasoned judgment of the first appellate Court which held that the plaintiffs ought to have filed a suit for declaration."

23. Though this appeal is against the concurrent judgment of the lower Courts, there is some necessity to go through the facts of the case to come to a correct conclusion. A perusal of the judgment of the lower Courts reveals that both the lower Courts failed to consider that paimash number given in Exs.A1 and A2 are admittedly wrong when there is no specific rectification deed to that effect and when there is no co-relating document to prove that Paimash No.320 is pertaining to the suit property, both the lower Courts came to a conclusion that the property belong to the plaintiffs. It is the duty of the plaintiffs to file document such as SLR copy, to prove that Paimash No.320 is relating to the suit survey number. The suit property is a vacant land. The plaintiffs had not filed kist receipt except one. The plaintiffs have not taken any steps for appointment of an Advocate Commissioner to locate the suit property to prove that the boundary of the suit property co-relates with the recitals in his title deeds and with the suit property on ground. Without considering the ground realities and without considering the property in dispute on ground, both the lower Courts decided the case on the basis of the boundary recitals in plaintiffs' documents alone ignoring Ex.A13, which did not support the case of the plaintiff. When there is a dispute regarding the identity of the property, both the lower Courts fail to appoint a Court Commissioner to inspect the suit properties.

24. Hence, there is an apparent error in the judgment and decree of both the lower Courts which requires interference by this Court.



25. With the above observation, this second appeal is allowed of by setting aside the judgment and decree passed in A.S.No.134 of 2007 dated 23.10.2008 on the file of the learned second Additional Subordinate Judge, Madurai and thereby dismissing the suit in O.S.No.226 of 1998 on the file of the learned District Munsif, Thirumangalam. No Costs.

Sd/-

Assistant Registrar

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

Mrn
To

- 1.The Second Additional Subordinate Judge, Madurai
- 2.The District Munsif, Thirumangalam.

Copy to:

The V.R.Section, (2 copies)
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.A.BHUVANESHWARI, Advocate (SR-98708[F]

S.A.(MD)No.216 of 2009

SMA/09/01/2020/8P/6C