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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 26.07.2019

DELIVERED ON : 27.08.2019

CORAM

THE HONOURABLE MRS. JUSTICE R. THARANI

S.A.(MD)No.930 of 2009

1.Alagu Nadar
2.Rajasekar .. Appellants

Vs.

1.Velu
2.Karuppiah
3.V.Marimuthu .. Respondents

(Third Respondent is brought on record as legal heir of deceased first respondent vide Court order dated 05.07.2019 made in C.M.P.(MD)Nos.5952 to 5954 of 2019 in S.A.(MD)No.930 of 2009 by RTJ)

Prayer :Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the Judgment and Decree passed in A.S.No.39 of 2008 dated 22.11.2008 on the file of the learned Subordinate Judge, Ramanathapuram partly confirming the judgment and decree made in O.S.No.7 of 2006 dated 11.04.2008 on the file of the learned District Munsif, Thiruvadanai.

For Appellant : Mr.K.Mohamed Sirajudeen
For Mr.M.Md.Ibrahim Ali
For 1st Respondent : Died
For Respondents 2 and 3 : Mr.S.Visvalingam

JUDGMENT

Heard the learned counsel appearing on both the side.

2.This appeal is filed against the Judgment and Decree passed in A.S.No.39 of 2008 dated 22.11.2008 on the file of the learned Subordinate Judge, Ramanathapuram partly confirming the judgment and decree made in O.S.No.7 of 2006 dated 11.04.2008 on the file of the learned District Munsif, Thiruvadanai.

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3.The appellants herein are the plaintiffs and the respondents herein are the defendants in the suit. The appellants herein have filed a suit in O.S.No.7 of 2006 before the learned District Munsif, Thiruvadanai for declaration and for injunction. The trial Court dismissed the suit. Against that Judgment and decree, the appellants have preferred an appeal in A.S.No.39 of 2008 before the learned Sub Judge, Ramanathapuram. The Sub Judge partly allowed the appeal by modifying the Judgment and decree of the learned District Munsif. Against which, the appellants herein have preferred this second appeal.

4.The case of the plaintiffs is that the suit property is comprised in survey number 24/33 in Kannarendal Village, Manakkudi group, Patta No.57 an extent of 00470 sq. metre. The suit property consists of a hut and vacant site. Both the plaintiffs are blood brothers. The suit property is the ancestral property of the plaintiffs. Plaintiffs' father Kalimuthu Nadar constructed a hut in the suit property. Fire woods were stored in the vacant place. During 1991, during natham survey patta was given to the plaintiff's father, Kalimuthu Nadar. The dilapidated thatched hut was repaired by the plaintiffs. A tiled house and a thatched house were constructed by the plaintiffs. The tiled house is bearing the door No.4/112. The plaintiffs are paying house tax to the said houses. The plaintiffs are enjoying the vacant site as cow shed, work yard and for storing fire wood. They fenced the suit property. The second plaintiff is under the care and control of 1st plaintiff.

5.The defendants are no way connected with the suit property. The Second defendant is the close relative of first defendant. With malafide intention, the first defendant filed a petition before the Revenue Divisional Officer. Plaintiffs received summons and the patta proceedings are pending. The defendants raised objection for issuance of patta. There is a pathway on the northern side of the suit property. The first defendant's house was further north of the said pathway. The defendants attempted to remove the hut of the plaintiff on 28.01.2005. The same was timely prevented by the plaintiffs. Therefore the plaintiffs had filed a suit for permanent injunction in O.S.No.9 of 2005 before the Thiruvadanai District Munsif Court. The defendants entered appearance and they objected the title of the plaintiffs. Therefore, the plaintiffs filed a petition in I.A.No.455 of 2005 to withdraw the suit with liberty to file a fresh suit on the same cause of action. The said petition was allowed on 28.10.2005. Therefore this suit is filed for declaration and for injunction.

6.The brief averments of the defendants is that the plaint allegation are false and the description of the property is wrong. It is false that the plaintiffs' father Kalimuthu obtained patta in the year 1991 and enjoyed the suit property. It is equally false to state that after the demise of Kalimuthu, plaintiffs are enjoying

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the property by constructing a house. It is false to state that the plaintiffs are paying kist to the Government. The alleged cause of action on 28.01.2005 is wrong. The suit property is the ancestral property of the defendants. During UDR scheme, patta was wrongly issued in the name of the plaintiffs. The defendants filed a petition before the RDO. The revenue proceedings were initiated prior to this suit and it ended in favour of the defendants and an appeal is pending before the District Revenue Officer.

7.Infact, the suit properties were the ancestral properties of this defendants. They were enjoying the property by planting trees and by storing fire woods. The suit property originally belongs to Alagu, who was the ancestor of defendants. The said Alagu had two daughters namely Lakshmi and Karuppayee. Alagu bequeathed the properties during 1916 to her daughters. Both the sisters were married to one Muniappan. Karuppayee died without any issue. Alagu was the only legal heir of Lakshmi. Alagu mortgaged the property to one Savarimuthu, through an othi deed in the year 1939. The said Alagu had got 4 issues namely, Chittu, Velu, Karuppaiah and Valli. The said Velu is the first defendant herein. Karuppaiya and Valli were married and were out of station. Cittu and Velu were enjoying the property jointly. Chittu died four years ago leaving behind Karuppaiya, Alagu, Subramaniyan, Kuppu, Sankar Ganesh and Nagavalli. Velu also died leaving Ramu, Marimuthu, Karuppaiya, Muthumani as his legal heirs. Heirs of Chittu and heirs of Velu are enjoying the property jointly. The defendants are having major male children, they were not added as parties to the suit. Hence, the suit is bad for non-jointer of necessary parties. But patta entry was wrongly made in the name of the plaintiffs during UDR scheme. Therefore revenue proceedings were initiated by the defendants. The R.D.O. passed an order on 11.05.2005. Against that order, the plaintiffs preferred an appeal and the same is pending before the D.R.O. The above said facts were suppressed by the plaintiffs. The report of the exparte commissioner report is wrong. Therefore the plaint is to be dismissed.

8.On the basis of the pleadings, the trial Court framed the following issues:

"(i)Whether the suit property belongs to plaintiffs an an ancestral property ?

(ii)Whether the plaintiffs have been in possession and enjoyment of suit property ?

(iii)Whether the suit property belongs to defendants and Karuppaiah, Valli and their children ?

(iv)Whether the defendants have been in possession and enjoyment of the suit property ?

(v)Whether the suit suffer by non-jointer of necessary parties ?

(vi)Whether the plaintiffs have suppressed the revenue Court proceedings ?

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(vii)Whether the plaintiffs are entitled to get the relief of declaration ?

(viii)Whether the plaintiffs are entitled to get permanent injunction ?

(ix)What are the other reliefs available to plaintiff's ?"

9.Two witnesses were examined as P.W.1 and P.W.2. 16 documents were marked as Exs.A1 to A16 on the side of the plaintiffs. Three witnesses were examined as D.W.1 to D.W.3 and 8 documents were marked as Exs.B1 to B8 on the side of the defendants. Court documents were marked as Exs.C1 and C2. After trial, the trial Court dismissed the suit.

10.Against which, the appellant filed an appeal in A.S.No.39 of 2008 before the learned Subordinate Judge, Ramanathapuram. In the grounds of appeal, it is stated that D.W.1 had admitted in his evidence that the plaintiffs have constructed a house in the eastern portion of the suit survey No.24/33. This fact was elicited from the Commissioner's report and plan, Ex.C1 and Ex.C2. D.W.3 in his evidence had admitted that the four boundaries for the suit property was correct and it was in the enjoyment of the plaintiffs. Without considering these vital points the trial court wrongly dismissed the suit. The physical features of the suit property mentioned in Exs.C1 and C2 proves the possession of the plaintiffs. But the trial Court failed to consider the same. Though notice given by the Commissioner was refused by first defendant, it was received only by the second defendant. Though time was granted to the parties to file their objection, no objection was raised by defendants, under this circumstances the trial Court failed to consider the Commissioner's report as an exparte one.

11.The suit property belongs to the plaintiffs ancestrally that's why the plaintiff was not granted either Samasthana patta on settlement patta. The possession is in the hands of plaintiffs. Under this circumstances burden of proof shift to the defendants as per Section 110 of Indian Evidence Act. The revenue proceedings was initiated at time of filing of the suit and the same was mentioned in the plaint. It reached finality by the R.D.O. after the suit. Therefore, the findings for the 6th issue was wrong. The four boundaries in Ex.B2 did not tally with suit properties. The defendants side documents were not connected with the suit properties. Under this circumstances the trial Court ought to have decreed the suit. But the trial Court wrongly dismissed the suit. Therefore the judgment and decree of the trial Court is to be set aside.

12.On the basis of the pleadings, the first appellate Court framed the following issues:

"(i)Whether this appeal is to be allowed ? Or not ?"

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13.After hearing both the sides, the appeal was partly allowed by holding that the plaintiffs are entitled for an extent of 00270 square metres in the suit property and the appeal is dismissed with regard to the remaining extent of 00200 square metres in the suit property. Against which, the appellants herein has preferred the second appeal.

14.In the grounds of this second appeal, it is stated that the portion of the judgment of the first appellate Court and the entire judgment of the trial Court are contrary to law. The first appellate Court erred in holding that the appellant has not produced any documents to show the title over the suit schedule property. The trial Court failed to give findings as to the title of the defendants. The first appellate Court failed to note that the appellants and their father are in possession of the suit property.

15.In the reply to the grounds of second appeal filed by the respondents 2 and 3, it is stated that the appellants have not produced any record before the District Munsif Court, Thiruvadanai that the property in question is his ancestral property. In the absence of any such records, the dismissal of the suit by the District Munsif, Thiruvadanai cannot be disputed. The first appellate Court has recorded specific findings as to the measurement of the property of the appellant and decided the issue very justly based on the actual possession and enjoyment and based on the correct findings of the revenue authorities. The appellants have not produced any document to show their title over the suit schedule property.

16.It is not fair on the part of the appellants to allege that the appellate Court has not considered the observations of the trial Court. The first appellate Court discussed the observations of the trial Court, orders of the revenue authorities, Commissioner's report and decided the issue according to the enjoyment of the land by the appellants. Therefore there is no need to interfere with the orders of the Revenue authorities.

17.This Court by its order dated 14.10.2009, has admitted the second appeal and has framed the following substantial questions of law:-

"Whether the appellate Court's finding based on the order of the reveune authorities, which is the subject matter in the writ petition in W.P.No.4011 of 2009, is correct ?"

Issue :

18.On the side of the appellants, it is stated that the first appellate Court gave a findings based on the order of the revenue authorities and the revenue records will not confer any title and that the first appellate Court has to allow the appeal in its

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entirety. Without allowing the appeal in its entirety, the first appellate Court partly allowed the appeal by giving a finding that the plaintiffs are entitled only for an extent of 00270 square metre in the suit property and that the respondents are entitled for 200 sq. ft in the suit property.

19.On the side of the appellants, it is stated that the suit property was the ancestral property of the appellants and their predecessors in title. During UDR, survey in the year 1991, patta was issued in the name of Kalimuthu Nadar who was the appellants' father. The appellants father put up a construction and the construction was not opposed by the respondents. In the year 2003, patta was cancelled by the Revenue Divisional Officer and the appellants filed an appeal and that the Divisional Revenue Officer confirmed the order of the Revenue Divisional Officer. The Commissioner report clearly reveals that the plaintiffs are in enjoyment of the property and the Commissioner had given a findings that the suit property was in possession of the plaintiffs. Though the respondents refused to receive the notice issued by the Commissioner, the respondents were aware of the visit of the Commissioner. They had not raised any objection to visit of the Commissioner or to Commissioner's report.

20.On the side of the respondents, it is stated that the suit property is a natham house site. The Tahsildar issued patta in favour of the appellants and an objection petition was filed by the respondents. The Revenue Divisional Officer inspected the property, verified the area and cancelled the earlier patta and he issued patta only for an extent of 274 square metres. The appellants filed an appeal before the District Revenue Officer but the District Revenue Officer confirmed the order of the Revenue Divisional Officer. Against that order, the appellants filed a suit before the learned District Munsif for declaration of title over 470 sq. m. The suit was dismissed by the trial Court but the first appellate Court modified the same by confirming the order of the Revenue Divisional Officer and the Divisional Revenue Officer.

21.The appellants raised a question in W.P.No.4011 of 2019 but no documents regarding the above said proceedings was filed by the appellants. There is no such pleadings raised by the appellants/plaintiffs. The appellants cannot raise a new plea at the second appellate stage. Regarding the other aspects, a discussion as to the factual matrix is required.

22.On the side of the appellants, it is stated that the trial Court failed to consider the house tax and kist receipts. Exs.A2 to A7 are house tax receipts. Admittedly the appellants are residing in the southern portion of the property. Exs.A10 and A11 are kist receipts for patta no.57. Ex.A1 is the disputed patta. Exs.A13 to A16 are documents regarding the earlier suit. Ex.A8 is the status

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quo order passed by the Revenue Divisional Officer. Ex.A9 is the notice calling upon the plaintiffs to attend the interview. All the documents will not confer any title to the plaintiffs.

23.In Exs.C1 and C2, it is stated that the disputed property was in the possession of the plaintiffs/appellants. On the side of the appellants, it is stated that the lower Courts failed to consider Exs.C1 and C2 and merely based on the order of the District Revenue Officer, the first appellate Court has allowed the appeal in part. The dispute is with regard to 200 sq. metres. The appellants are in possession of door no.4/1. The area in dispute is a vacant site. In Ex.B6, dated 08.10.2004, the Tahsildar has mentioned the disputed area as vacant house site. Ex.B8 also mentioned the disputed area as vacant. The Commissioner cannot decide anything regarding the possession of the property. The Court Commissioner cannot conduct an enquiry as to possession. Hence, the finding of the Commissioner in Exs.C1 and C2 is not helpful to the appellants.

24.On the side of the respondents, it is stated that the status quo order passed by District Revenue Officer dated 08.09.2005 was marked as Ex.B1. Similar order was passed by the Revenue Divisional Officer dated 23.12.2004 (Copy of Ex.A8) was marked as Ex.B5. Similar order passed by the Tahsildar dated 08.10.2004, was marked as Ex.B6. Objections filed by the respondents before the Sub Collector was marked as Ex.B4. The case cannot be decided on the basis of this documents.

25.Ex.B2 dated 11.03.1916 is a Will. Ex.B8 dated 17.07.1939 is a mortgage (odhi) Deed. Ex.B3 is a demand notice for the year 1967 in the name of Chittu, the predecessor of the respondents. In Ex.B7, the Revenue Official gave a findings that the disputed area was in the possession of the respondents. The respondents claim title through this documents.

26.The Court Commissioner failed to give measurement in his report and plan and possession cannot be decided on the basis of the Commissioner report. No title deeds are filed on the side of the appellants. How the appellants are entitled for 470 sq. metres is not clearly proved by the appellants. The first appellate Court relied on the order of the District Revenue Officer in Ex.B7 has modified the judgment and decree of the trial Court. The District Revenue Officer has not given any specific measurement or boundary for the land in possession of the appellants. The burden is upon the plaintiffs to prove the case. In the above circumstances, irrespective of the question of limitation, the plaintiffs are given liberty to file a fresh suit on the same cause of action.

27.Hence, with the above observation, the second appeal is dismissed and the judgement and decree passed by the learned Sub Judge, Ramanathapuram, modifying the judgment and decree passed by

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the District Munsif, Thiruvadanai in O.S.No.7 of 2006 dated 11.04.2008 is confirmed. No Costs.

Sd/-

Assistant Registrar ()

// True Copy //

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Sub Assistant Registrar(CS)

Mrn

To

1.The Subordinate Judge, Ramanathapuram.

2.The District Munsif, Thiruvadanai.

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

+1 CC to Mr.S. VISVA LINGAM, Advocate (SR-83461[F]dated 27/08/2019)

+1 CC to Mr.MOHAMED IBRAHIMALI, Advocate (SR-83527[F] dated 27/08/2019)

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