



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 20.11.2020

Pronounced on: 24.11.2020

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Coram::

THE HONOURABLE Dr. JUSTICE G.JAYACHANDRAN

S.A.No.1023 of 2009
& M.P.No.1 of 2009

1. Kandan, (Died)
2. Thangammal,
3. Thangaraj,
4. Santhanavel, (Died)
5. Banumathi,
6. Balakrishnan,
7. Soundarajan,
8. Rajendran, (Died)
9. C.Shanthi,
10. Annadurai.

... Appellants/Defendants 3 and 4

Appellants 3 to 10 brought on record as LR's of the deceased first appellant viz., Kandan vide Court order dated 06.11.2020 made in C.M.P.No.14491 of 2016 in S.A.No.1023 of 2009.

Appellants 4 and 8 died recorded as per the Memo dated 19.11.2020 & vide order dated 24.11.2020 made in SA No.1023 of 2009 & MP No.1 of 2009.

/versus/

1. Pappayee,
2. Government of Tamil Nadu,
Represented by District Collector, Namakkal,
Krishnapuram, Thiruchengode Road,
Namakkal Taluk, Namakkal District.

3. The Tahsildar,
Namakkal -2, Namakkal Town,
Namakkal District.

... Respondents/Plaintiffs/
Defendants 1 and 2

Prayer: Second Appeal is filed under Section 100 of C.P.C., praying against the judgment and decree dated 19.11.2008 in A.S.No.156 of 2005, passed by the Learned Subordinate Judge of Namakkal, confirming the judgment and decree dated 28.06.2005 in O.S.No.76 of 2003 passed by the Learned Additional District Munsif of Namakkal.



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For Appellant : Mr.K.Ramanraj

For R1 : No appearance

For R2 & R3 : Mr.N.Manikandan

Special Government Pleader (C.S)

JUDGMENT

(The case has been heard through video conference)

This Second Appeal is preferred by the 3rd and 4th defendant in Original Suit No.76 of 2003 on the file of the District Munsif court at Namakkal. Pappayee, the first respondent herein filed suit for declaration of title and permanent injunction in respect of the suit schedule property based on the sale deed dated 02.02.1968. She had also sought for a further relief to declare the classification of the suit property as government porambockku as void and consequential relief of mandatory injunction to remove the structure put up by the 3rd and 4th defendants in the suit property. Permanent injunction restraining the defendant Nos.3 and 4 from interfering the plaintiff possession of the suit property. The District Collector of Namakkal, the Tashildar of Namakkal and the Appellants 1 and 2 herein were the defendants in the said suit. The Trial Court, allowed the suit and passed decree as prayed.

2. Challenging the Trial Court judgment and decree, the appellants 1 and 2 preferred appeal suit. The said first appeal dismissed confirming the Trial Court judgment and decree. Hence, the Second Appeal against the concurrent finding. Pending appeal, the first appellant/3rd defendant died. His legal representatives were brought on record as appellants 3 to 10. When the appeal was taken for final hearing, the Learned Counsel for the Appellant filed a memo dated 18.11.2020 stating that 4th and 8th appellants died. Pursuant to the arrangement between the family members, the 10th appellant alone is the contesting appellant. The death of 4th and 8th appellants was recorded.

3. Brief fact leading to the second appeal:

The subject matter of the suit property is the titled house measuring approximately 17 x 9 feet (elbow measure) equivalent to 26 x 14 feet and the vacant land appurtenant to it, in Namakkal Town, Bajanai Madam Street, Ward-C, Block-3, Town Survey No.30, old door No.66-B, New door No.39 bounded by: South of the stage put up by the Panchayat Board; West of the Street; East of Ponnibayan wife Pappayee and Defendant house; and North of the street leading to Mariamman Koil.



4. The plaintiff case is that, the suit property originally owned by on Varthammal, who got the property under a sale deed dated 29.07.1943. Later it was purchased by Kozhuntha Gounder on 07/09/1960. The plaintiff purchased the property vide sale deed dated 02.02.1968 executed by Kozhuntha Gounder. At the time of her purchase, it was a vacant site. The plaintiff put up a thatched house and living in it. During a fire accident, the hut got gutted and the documents got destroyed in the fire accident. The plaintiff is residing in the property bearing door No.36-B, New door No.39. The defendants 3 and 4, who are husband and wife, when they tried to prevent the plaintiff putting up a construction on the west, within her boundary, she filed O.S.No.6/1998. During the trial of that suit, the Village Officer deposed that the suit land is classified as Government Poramboke. Therefore, she withdrew the suit O.S.No.6/1998 with liberty to file fresh suit impleading the Government as a party defendant. It is averred in the plaint that, the classification of the suit land as Government Poramboke without causing notice to the plaintiff is bad. The said classification will not bind the plaintiff who have valid title over the property under the sale deed.

5. The Second Defendant Tahsildar, Namakkal, on his behalf and on behalf of the 1st defendant District collector in the written statement had denied the claim of the plaintiff regarding the title over the suit land. As per the revenue records, the property in S.No.30 shown as Chellandiamman Temple land. Its previous Survey number is 355/75-B classified as Government Poramboke. Adjacent to the S.No.30, there is a vacant land and then a titled house. The owner of the said titled house is not found in the record. The plaintiff have no patta and no evidence to show their vendors had any patta. By paying house tax, the land will not belong to the plaintiff. With the intention to grab the government land mentioned as Chellandiamman temple, the suit has been filed. The plaintiff as well as the defendants 3 and 4 are in the fight of garbing the government land. They are encroacher's of the government land.

6. The 3rd and 4th defendants, in their common written statement had contended the land in Namakkal Town Ward-C, Block-3, T.S.No.30 is a public pathway. The plaintiff encroaching upon the pathway had put up construction and through this suit trying to get title over the Government Poramboke land without any basis. The plaintiff had constructed house obstructing the street. Hence, she has no cause of action to maintain the suit.

7. The Trial Court framed the following issues:

1. Whether the plaintiff is entitled



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for the relief of declaration in respect of the suit property and the compound wall raised by her?

2. Whether the plaintiff is entitled for the declaration in respect of Ward-C, Block-3, T.S.No.30 and mandatory injunction as prayed ?

3. Whether the plaintiff is entitled for the mandatory injunction to remove the structure put up by the defendants 3 and 4 ?

4. Whether the plaintiff is entitled for any compensation ?

5. What relief the parties entitled ?

8. On behalf of the plaintiff one witness examined and 8 exhibits were marked. On behalf of the defendants 2 witnesses examined and 3 exhibits marked. The Trial Court relying upon the boundaries mentioned in the deeds Ex.A-1, Ex.A-2 and Ex.A-3 granted the relief sought in the plaint. It rejected the revenue records on observing that though the A-register of the village marked as Ex.B-1, the Adangal Ex.B-2 and Field map Ex.B-3 show that Namakkal Town Ward-C, Block 3, T.S.No.30 is part of S.No.355/5 and mentioned as Chellandiamman Koil land there is no Temple or Temple like structure shown in the field map. The defendants 1 and 2 failed to prove that the land was classified as Government Poramboke, after due enquiry and affording opportunity. Hence, allowed the suit as prayed.

9. The Government represented by 1st and 2nd defendants did not file any appeal. The 3rd and 4th defendants filed the first appeal. The First Appellate Court dismissed the appeal holding that the suit land was initially a Zamin land and after Zamin abolition before classifying it as government land, no record to show notice given to the plaintiff. Therefore, the classification of the suit land as government Poramboke is erroneous. The defendants failed to prove how the suit land belongs to Chellandiamman temple, when there is no Chellandiamman Temple in the field. The First Appellate Court had also pointing out the fact that the defence put against the plaintiff that the suit land is government Promboke - Chelliamman Temple land. But the Government through 1st and 2nd defendants had not filed any appeal or cross appeal. It is the private parties, who are the 3rd and 4th defendants preferred the appeal to set aside the decree passed against the 1st and 2nd defendants. These appellants are not entitled to file appeal against the decree passed adverse to other defendants.

10. On considering the records and impugned judgments, this Court formulated the following substantial questions of law for consideration:-



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“(A) Whether the burden of proving the right, title and interest in the suit properties pleaded by the plaintiff under Exhibits A1 to A3 have been discharged in accordance with law to entitle to the plaintiff to the relief of declaration?

(B) Whether the suit is maintainable in law when no proceedings have been initiated to challenge the settlement of the suit property as poromboke land by the revenue authorities?

(C) Whether the appeal filed by the appellants in A.S.No.156 of 2005, on the file of the Subordinate Judge of Namakkal is not maintainable in law merely because the respondents 2 and 3, the Collector and Tahsildar having jurisdiction of the suit properties, have not preferred any appeal, and whether Order 41 Rule 33 is not applicable to the case?”

11. The Courts below, on comparing the schedule found in Ex.A-1 to Ex.A-3 in respect of the suit property had concluded that the plaintiff had proved her title. In these three Exhibit, the property conveyed was vacant land measuring East-West 17 (elbow measure) x North-South 9 (elbow measure). Whereas, in the plaint schedule the prayer is for the titled house measuring approximate 26 x 14 feet and the vacant land appurtenant to it. Even assuming the plaintiff had constructed the tiled house in the vacant land purchased under Ex.A-1, no land beyond the said measurement was conveyed to her under this sale deed. Nor her vendors had any right beyond the measurements mentioned. While so, the Courts below ought not to have held that the property for which relief of declaration sought is the same property purchased under Ex.A-1.

12. The Courts below also erred in relying the commissioner report Ex.A.8 which was filed in the earlier suit, in which, the government was not a party. This sketch ought to have been compared with Ex.B-3, the Field map for the T.S.No.30. The evidence of the D.W-1, VAO and the revenue records goes to show that land of Chellandiamman koil is the subject matter of the suit. Without giving due credit to this document, the Courts below have passed the decree of declaration. When there is no evidence of conveyance of the suit property by the rightful owner, the Courts below ought to have dismissed the suit since Ex.A-1 to Ex.A-3 does not convey the extent pleaded in the plaint.



13. It is candidly admitted by the plaintiff that the compound wall attempted to put up by her on the extreme Western corner running North-South. The scrutiny of the boundaries shown in Ex.A-1. We find the western boundary is the houses of Perumal and Balan. The Northern boundary is shown as East-West street. In Ex.A-2, the Northern boundary is shown as the stage constructed by the Panchayat Board; the Western boundary is shown as Ponnibayan and Pappayee house. When Ex.A-1 conveyed only to the extent measuring 17 x 9 elbow measure, the suit is laid for a larger extent, which includes the vacant land appurtenant to this measurement. The Trial Court has erroneously given a finding that the measurements in the title document and the suit claim are one and the same.

14. The relief sought is beyond the area conveyed to her under Ex.A-1. Ex.B-1 to Ex.B-3, the revenue records proves that the plaintiff as well the defendants 3 and 4 (the appellants herein) are fighting over the government promboke land under use of Chellandiamman temple as pathway. Therefore, the reason given by the Trial Court that there is no chellandiamman temple shown in the Field map and the reasoning given by the First Appellate Court that the aggrieved government respondent 1 and 2 did not challenge the Trial Court order is not facts relevant to decide the title. The First Appellate Court ought to have exercised its power given under Order 41 Rule 33 of C.P.C and reversed the perverse finding of the Trial Court rendered contrary to facts on records particularly the embellishment in the suit property extent contrary to the sale deed and for ignoring the entries in revenue records. Instead, it has wrongly held that Order 41 Rule 33 C.P.C is not applicable to the appellants herein.

15. Order 41 Rule 33 of C.P.C reads as below:-

33. Power of Court of Appeal:- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees.



16. The evidence available clearly proves that through the suit the plaintiff wants to gain title to the larger extent of property to which she does not have even a semblance of title. The larger extent includes the common pathway to the Chellandiamman temple. The defendants 3 and 4 are also encroachers of the pathway to Chellandiamman temple. Even if the Government not preferred Appeal, the Appellate Court ought to have allowed the appeal filed by the private parties by dismissing the suit and cleared the way for the Government to remove the encroachment by the plaintiff as well as the defendants 3 and 4.

17. In view of the erroneous appreciation of the facts in issue, the Courts below had miserably failed to render right decision. Hence, the judgment of the Trial Court as confirmed by the First Appellate court is hereby set aside. In the result, Second Appeal is Allowed. No order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS-IV)

//True copy//

Sub Assistant Registrar

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To:

1. The Subordinate Judge, Namakkal.
2. The Additional District Munsif, Namakkal.
3. The District Collector, Namakkal, Government of Tamil Nadu, Krishnapuram, Thiruchengode Road, Namakkal Taluk, Namakkal District.
4. The Tahsildar, Namakkal -2, Namakkal Town, Namakkal District.
5. The Section Officer, V.R.Section, High Court, Madras.

+1cc to Mr.K.Ramanraj, Advocate SR.No.37666

+1cc to Additional Government Pleader(C.S) SR.No.38044

S.A.No.1023 of 2009
& M.P.No.1 of 2009

SS(CO)
GMY(02/09/2021)