



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 16.09.2020

Pronounced on: 18.09.2020

WEB COPY

CORAM

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

S.A.No.704 of 2010
& M.P.No.1 of 2010
& C.M.P.No.9638 of 2020

1. The Assistant Divisional Engineer,
Highways Department,
Tiruppattur. Vellore District.
2. The Divisional Engineer,
National Highways,
No.18, Thulasilingam Street,
Sankaranpalayam, Vellore - 632 001. ... Appellants

Appellant No.2 amended the cause title vide order of Court dated 09.09.2020 made in C.M.P.No.9638 of 2020 in S.A.No.704 of 2010 (Dr.GJJ)

/versus/

1. Mymoon Bi, (Died),
S.M.Ahmed Basha.

(Memo dated 10.09.2020 filed by the Additional Government Pleader (CS), the Learned Counsel for the Appellant. Death of First respondent Mymoon Bi recorded. The Respondents Nos.2 to 6 are recorded as the LR's of the deceased first respondent.)Vide order of this Court dated 18/09/2020.

2. Chaan Basha,
S/o.S.M.Ahamed Basha.

(1 & 2 respondents are residing at No.4, Sounthamiyan Street, Thiruppattur).

3. S.A.Agram Basha,
S/o.Ahamed Basha.
4. M.Nasirum Begam,
W/o.Syed Moideen.
5. Nawab Basha,
W/o.Bakruddin.



6. S.F.Madina Begam,
W/o.Bakruddin.

... Respondents

(3 to 6 respondents are residing at No.134A,
Palanisamy Road, Tiruppattur).

Prayer: Second Appeal is filed under Section 100 of the Civil Procedure Code, praying against the judgment and decree dated 28.04.2006 made in A.S.No.94 of 2005 on the file of Sub Court, Thiruppattur which was reversed by the judgment and decree made in O.S.No.256 of 1997, dated 01.09.2005 on the file of Sub Court, Thiruppattur, Vellore District.

For Appellant : Mr.N.Manikandan,
Special Government Pleader (CS)

For R2 to R6 : Mr.V.Jeevagiridharan,

For R1 : died

J U D G M E N T

(The case has been heard through video conference)

The Appellant herein is the Additional Divisional Engineer, State Highways Department. The Second Appellant has been impleaded pending appeal since the suit subject road now been upgraded as National Highways. Aggrieved by the Lower Appellate Court judgement and decree, the instant Second Appeal is filed.

2. The respondents herein 2 to 6 filed the suit seeking the relief of permanent injunction in respect of the property situated at Thirupattur Town of erstwhile North Arcot District, in Survey Number No.334/5, Block No 13, Ward 1 abutting the Vaniyambadi Road. The suit came to be filed alleging that the staff and Officials of the Highways Department threatening to demolish the shops in the Suit schedule property alleging that it has been encroached upon the Highways road. Whereas, the property is a Patta land in their possession and enjoyment.

3. Earlier the tenants in the suit property filed a suit for permanent injunction in O.S.No.919/1987. Interim relief of injunction against the Highways Department was obtained. After 10 years, the suit was dismissed as not maintainable. Thereafter, the present suit O.S.No.256/1997 was filed by the respondents herein for permanent injunction based on the title.

4. The title over the property is traced by the plaintiffs from the patta allegedly issued in the name of Mohammed Usain Sahib in the year 1937 for S.No334. Subsequent



to his death, his wife and children partitioned it in the year 1958. From two of the sharers namely Ajiya Bibi and Amma Bibi @ Kathoonbivi, one T.N.Sheik Moideen, purchased the suit portion property. The legal heirs of T.N.Sheik Moideen, filed partition suit O.S.No.11/1983 on the file of Subordinate Court, Thirupattur. In the final decree, the suit property was allotted to the plaintiffs. The plaintiffs relying upon the EB service connection in the name of one Salavudeen, a tenant and the tax receipts in the name of Sheik Moideen, the plaintiffs vendors predecessor had laid the suit.

5. In the written statement filed by the defendant, maintainability of the suit is questioned on the ground that the suit lack cause of action. It is filed without issuing the statutory notice under section 80 C.P.C. Also, it is bad for non-joinder of the Municipality, which has assessed tax to the plaintiff property and maintaining the records of the public road. The suit is a vexatious litigation filed to prevent the Highways Department from removing the encroachment, hence to be dismissed with exemplary costs.

6. Before the Trial Court, the defendant had taken out an application for Advocate Commissioner to visit the suit property and to note down the physical features. The Advocate Commissioner, accordingly had inspected the suit property and had filed report indicating that the plaintiffs' shops are about 7 feet on the Highways road, which is in S.No. 334/1.

7. The Trial Court dismissed the suit holding that, the plaintiffs have not filed patta upon which they trace the title. The Commissioner report Ex.C-1 to Ex.C-4, proves the plaintiffs have title documents in respect of S.No.334/5 only. Whereas, the Vaniyambadi road which is 54 feet width is in S.No.334/1. Near the plaintiffs property, the width of the road has narrowed by 7 feet. Hence, they are not entitled for a relief over the Highways property. Further, the suit is bad for non-joinder of necessary party namely the Thirupattur Municipality. While dismissing the suit, the Trial Court has also observed that, the Highways Department is permitted to evict the encroachment if any, leaving the plaintiffs portion, after measuring the disputed site with surveyor.

8. The plaintiffs dissatisfied with the Trial Court judgment and decree, had preferred Appeal before the Subordinate Court, Thirupattur. The Lower Appellate Court set aside the Trial Court judgement and decree. Allowed the Appeal and granted permanent injunction against the Appellant herein.

9. The Lower Appellate Court has held that, when no relief is sought against the Municipality, they are not necessary parties and the suit is not bad for non-joinder of necessary party. The plaintiffs have been in possession and enjoyment of the property for more than 30 years, hence, they



have perfected the title by adverse possession. If the Highways Department need the portion of the property, they should resort to land acquisition proceedings.

10. On perusing the records and impugned judgement, this Court under Section 100 C.P.C., formulated the following substantial questions of law:-

a). Whether the suit is maintainable against the Government for not issuing notice under Section 80 of Civil Procedure Code?

b). Whether the suit is liable to be dismissed for non-joinder of necessary parties?

c). Whether the Lower Appellate Court traversed beyond the scope of the suit by framing an issue as if the suit for declaration of title followed by adverse possession, when the suit was filed for permanent injunction?

11. The Defendant in the suit is the Assistant Divisional Engineer, Highways Department, Thirupattur. The suit is not against him in his personal capacity but in his Official capacity. As the representative of the Highways Department, he has been arrayed as the Defendant. Under Section 80 C.P.C, there is a statutory bar to institute a suit against the Government or against a Public Officer in respect of any Act purporting to be done by such Public Officer in his Official capacity, until expiration of two months, next after notice in writing delivered or left at his Office.

12. The exception to this condition is provided under subsection (2) of Section 80 of C.P.C, wherein, the plaintiff has to get the leave of the Court for filing the suit without compliance of the statutory requirement mentioned in subsection (1). In alternate, the person for whose benefit the provision stands should have implicitly or explicitly waived the said right. In the instant case, the suit is laid against the defendant in his Official capacity. The plaintiff has not issued the statutory notice under Section 80 C.P.C before instituting the suit. He has neither obtained the leave of the Court under Section 80(2) C.P.C. In the written statement, the defendant has specifically stated that, the suit is not maintainable since pre-suit notice under Section 80(1) of C.P.C, which is mandatory not issued.

13. If the notice under Section 80 C.P.C is defective or erroneous, the plaintiff cannot be non suited in view of subsection (3) of Section 80 C.P.C inserted by Act 104/1976. If there is no notice at all, the suit is liable to be rejected.



14. In Gangappa Gurupadappa Gugwad -vs- Rachawwa and others reported in AIR 1971 S.C. 442, wherein, it has been held that where the plaintiff's cause of action is against a Government and the plaint does not show that notice under Section 80 of C.P.C was served, it would be duty of the Court to reject the plaint.

15. In Bishandayal and Sons -vs- State of Orissa reported in AIR 2001 SC 544, the Hon'ble Supreme Court observed that, " there was an Issue pertaining to Notice under Section 80, the Trial Court should have dealt with this aspect. The Trial Court failed to do so. It was then pressed before the Appellate Court. In our view the finding in the impugned Judgment that the suit based on this claim was not maintainable is correct and requires no interference."

16. In the instant case, the Trial Court, de hors of the non compliance of the mandatory requirement under Section 80 C.P.C and specific plea of objection regarding maintainability raised in the written statement, had proceeded to decide the suit on merits and had rightly dismissed the suit, since the suit is bad for non-joinder of necessary party and the plaintiffs claim is contrary to the Survey Field Register Ex.B-2 and Commissioner's report and sketch Ex.C.1 to Ex.C.4. Contrarily, the Lower Appellate Court has traversed beyond the pleadings and had reversed the Trial Court judgment misconstruing the scope of the suit.

17. The case of the plaintiffs is that, they have title over the land in S.No.334/5, which is assessed to tax by the Local Authority and that property is attempted to be disturbed by the defendant. The Trial Court, after careful consideration of the title documents Ex.A-1, Ex.A-2 and Ex.A-3 coupled with the decree passed in O.S.No.11/83, partition suit had held that the plaintiffs are not entitled for any injunction since they failed to prove interference of the peaceful enjoyment of their property. If they are in possession of land owned by the defendant Department, that portion is bound to be retrieved by the Department since nobody can be allowed to encroach upon the public road causing inconvenience to the general public. In spite of holding the suit is bad for non-joinder of necessary parties and for not causing statutory notice, the Trial Court though dismissed the suit for injunction as devoid of merits, the lawful possession of the plaintiffs in respect of their property has been protected by the Trial Court.

Section 99 of C.P.C reads as under:-

"No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction"

No decree shall be reversed or substantially varied, nor shall any case be



WEB COPY

remanded in appeal on account of any misjoinder or non-joinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court.

Provided that nothing in this Section shall apply to non-joinder of a necessary party.

18. The Suit besides demerits, also found not sustainable since it is bad for non-joinder of necessary parties. Contrarily, the Lower Appellate Court has held the Municipal Authorities are not necessary parties. Further, it has framed a point for consideration regarding limitation and adverse possession, which was not pleaded by the plaintiffs nor it was the case of the plaintiffs. In fact, they have sought injunction based on title and not on adverse possession. The suit property is building consisting of two shops having separated door numbers. While so, the Lower Appellate Court has erroneously held that, the title of the suit property to the plaintiffs followed by possession and they have perfected the title by continuous undisturbed possession with the knowledge of the Department for more than 30 years.

19. The Lower Appellate Court has miserably failed to note that, there was earlier round of litigation instituted by the tenants of the disputed premises in the year 1987 with very same allegations and it came to an end only in the year 1997. The Tax receipt marked as Ex.A-9 to Ex.A-12 are not in the name of the plaintiffs but in the name of Sheik Moideen. The tax receipt does not speak about the extend. It is the Municipality, which has assessed the tax will be the best person to speak about the property for which the Tax collected. The plaintiffs had deliberately omitted to implead the Municipality.

20. Though no relief is sought against the Municipal Authorities, the plaintiffs having relied upon the Tax receipts issued by the Municipal Authority, the Tirupattur Municipality is the proper and necessary party to speak about the property for which the Tax receipt issued and its relevancy to the suit property.

21. The Lower Appellate Court has referred to Ex.A-13, the counter filed by the Highways Department in the previous suit O.S.No.919/1987 and has held that the statements made in the said counter will Act as estoppels against the defendant Department under section 115 of the Indian Evidence Act. This observation of the Lower Appellate Court is also perverse in law.

Section 115 of the Indian Evidence Act reads as follow:-



WEB COPY

"Section 115 Estoppel. -When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

Illustration A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it. The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title."

22. The previous suit was not between the same parties. It is not the case of the plaintiffs that declaration or act or omission of the defendant as found in Ex.A-13, induced or made to belief a thing as true and they acted upon such belief. Estoppel under section 115 of the Indian Evidence Act, will attract only if the condition mentioned in the said Section gets satisfied. The Lower Appellate Court even without pleadings and evidence has perversely reversed the well considered judgment of the Trial Court by stating that the plaintiffs have perfected title by adverse possession and the defendant Department is estopped from claiming right over the public road.

23. In the result, the Substantial questions of law are answered as under:-

(i). The suit is not maintainable against the Public Authority representing the Government Department without notice under Section 80(1) of C.P.C., or without formal order of the Court granting leave to dispense the statutory period of 60 days under section 80(2) of C.P.C.

(ii). The pleadings and the documents relied by the plaintiffs indicates the Municipality which has issued the Tax receipts to the property are proper and necessary parties to adjudicate the dispute. The identification of the property and its extend for which relief of injunction sought could be ascertained from the records maintained by them for assessing and collecting the tax.

(iii). The Lower Appellate Court had traversed beyond the scope of the suit. Without any pleadings, in the suit for permanent injunction, the Lower Appellate Court has conferred title over the disputed portion by invoking principle of adverse possession over the Highways land.



24. In view of the above answers to the Substantial questions of law, the Lower Appellate Court judgment and decree passed in A.S.No.94 of 2005 dated 28/04/2006 is set aside. The judgement and decree of the Trial Court passed in O.S.No.256/1997, dated 01/05/2004 is restored. Consequently, the Suit for injunction dismissed. As a result, the Second Appeal No.704 of 2010 is Allowed. Consequently, connected Miscellaneous Petition is closed. With costs throughout.

Sd/-

Assistant Registrar (CS-IX)

//True Copy//

Sub Assistant Registrar

bsm

To

1. The Sub Judge,
Thiruppattur.
2. The Section Officer,
VR Section, Madras High Court.

+1cc to the Additional Government Pleader(CS), S.R.No. 30604

S.A.No.704 of 2010
& M.P.No.1 of 2010
& C.M.P.No.9638 of 2020

GJ(CO)
GN(25/08/2021)