

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 12.02.2021

Pronounced on : 24.02.2021

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Coram:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

A.S.Nos.6 & 7 of 2013
& M.P.No.1 of 2013

1. S.Sundharamurthy,
2. Poongothai,

... Appellants
in A.S.No.6 of 2013/Defendants 4&5

/versus/

1. Kandhasami,
2. Devaneedhi,
3. K.P.Aravindhakshan,
4. Indira Aravindhakshan,

... Respondents
in A.S.No.6 of 2013/Plaintiff/ defendatns 1 to 3

Prayer: First Appeal is filed under Section 96 read with Order 41 Rule of C.P.C., against the judgment and decree dated 07.09.2012 passed in O.S.No.1557 of 1997 on the file of the II Additional District Judge, Thiruvallur, Poonamallee.

1. S.Sundharamurthy,
2. Poongothai,

... Appellants
in A.S.No.7 of 2013/Plaintiffs

/versus/

1. Kandhasami

... Respondent
in A.S.No.7 of 2013/Defendant

Prayer: First Appeal is filed under Section 96 read with Order 41 Rule of C.P.C., against the judgment and decree dated 07.09.2012 passed in O.S.No.171 of 2008 on the file of the II Additional District Judge, Thiruvallur, Poonamallee praying to set aside the same.

For Appellants : Mr.B.Hari Krishnan
in both cases

For R1 : Mr.G.Ilamuruga
in both cases

For R2 to R4 : exparte (not ready notice)
in A.S.No.6 of 2013



COMMON JUDGMENT

These two Appeals arise from the common judgment and decree passed by the Trial Court in O.S.No.1557 of 1997 and O.S.No.171 of 2008. Since the disputing parties are one and the same and the subject matter of the suit property purported to be the same, the Trial Court had tried both the suits together and rendered the common judgment.

2. In O.S.No.1557 of 1997:-

Kandasamy the respondent herein is the plaintiff. This suit was initially filed before the District Munsif Court, Poonamallee and numbered as O.S.No.2030 of 1993 later, it was transferred to District Munsif Court, Ambattur and numbered as O.S.No.1557 of 1997. Pending suit, the plaintiffs came to know about the fact that based on the settlement deeds executed by Aseervatham in favour of his son Devanithi, the 1st defendant/Devaneedhi has sold the property to one K.P.Aravindhakshan and his wife Indhira Arvindhakshan. Hence, the purchasers pendente lite were impleaded as 2nd and 3rd defendant (in O.S.No.1557/1997) on 28.03.2006. Later, when the plaintiff came to know that the 2nd and 3rd defendants in turn sold the property to S.Sundharamoorthy and S.Poongothai, those two subsequent purchasers were impleaded as 4th and 5th defendants.

3. In O.S.No.171 of 2008

This suit preferred by S.Sundaramoorthy and S.Poogothai, who are the 4th and 5th defendants in O.S.No.1557 of 1997. As per the plaint Sundaramoorthy and his wife Poogothai each purchased 1216 sq.ft of land from K.P.Aravindhakshan and his wife Indira Aravindhakshan respectively on 23.09.1999. They got building approval and constructed a building in the suit land as per the approved plan. They are living peacefully in the suit schedule property. While so, the defendant Kandasamy along with his men trying to disturb their possession and claiming title, hence suit for declaration and possession. Both suits tried together and allowed in favour of Kandasamy.

4. Facts in brief as stated in the plaint O.S.No.1557 of 1997:-

One Ponnusamy son of Mari had large extent of land at Mogappair Village, including 2.25 acres in S.No.196. He died in year 1960. After his death, his four sons namely Devapriyan, Thangaraj, Gabriel and Aseervatham divided the property by Koor Chit. Aseervatham got 0.87 cents of land in the eastern portion and rest was divided among other three sons. The said Aseervatham sold 0.87 acres in S.No.196 along with 1.04 acres in S.No.282/2A to one M.R.Sarangapani Mudaliar under registered sale deed dated 12.05.1972. The 0.87 Acres of land sold to



M.R.Sarangapani Mudhaliar was acquired by Housing Board and a compound wall has been put up. The other three sons of Ponnusami who held 1.38 acres in S.No.196 sold the property to various persons through their power agent after plotting out for the residential purpose. The suit property is about 5 cents of land in S.No.196. The power agent of Devapriyan, Gabriel and legal heirs of the deceased Thangaraj, sold 5 cents of land to the plaintiff (Kandhasami) on 12.09.1988. The land was subsequently classified and sub-divided and assigned as S.No.196/1A2 and Patta No.1723 was issued to the plaintiff. Being an absentee landlord, when he visited the suit property during the end of May 1993, he found a thatched superstructure had come up on the suit property. On verification, he come to know that one Devaneedhi son of Aseervatham had forced himself into the suit property and put up the thatched structure. Taking advantage of his absence, the 1st defendant has also managed to get electricity connection for the hut. On verification, he come to know that Aseervatham, who is the father of the 1st defendant/Devaneedhi had filed suit in O.S.No.1115 of 1993 on the file of District Munsif Court, Ambattur, for permanent injunction against him and one Mr.Murthy, from whom the plaintiff had purchased the suit property as power of attorney of Gabriel, Devapriyan and LR's of Thangaraj. Further, the plaintiffs also come to know that Aseervatham had created two settlement deeds in favour of his son Devaneedhi/1st defendant in order to grab the property and also got electricity service for the superstructure stealthily. The said Aseervatham had no right to execute the settlement deeds or claim right in any portion of the property in S.No.196. Hence, suit filed for declaration of title in respect of the suit property and for consequential recovery of possession after removal of the superstructure put up by the 1st defendant (Devaneedhi).

5. The plaint schedule in O.S.No.1557 of 1997 describes the property as below:-

"In Chengalput M.G.R.District, (Present Thiruvallur District) Saidapet Taluk, (present Ambattur Taluk), Mogappari Village.

An extent of about 5 cents in wet S.No.196/A2 bounded on the north by road, on the east by the Tamil Nadu Housing Board land and compound on the the South and West by the remaining extent in S.No.196/1 (thatched structure put up by the defendant is now in the said extent)."[underline added]

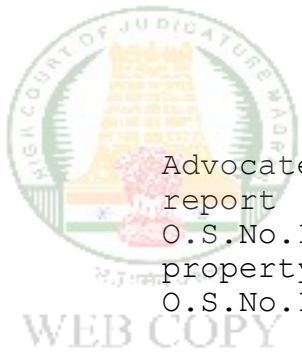
6. In the written statement filed by 4th and 5th defendant in O.S.No.1557 of 1997:-



Poonusami son of Mari had totally 3.45 acres of land in S.No.196 at Mogappair Village, out of which 1.20 acres of land initially acquired by the Government for Tamil Nadu Housing Board purpose and the balance 2.25 acres of land was divided between the sons of Ponnusami, as per the Koor Chit. Under the Koor chit, Aseervatham was allotted 0.87acres and balance 1.38acres was allotted to the other three sons of Ponnusami namely Gabriel, Devapriyan and Thangaraj. When the Government dropped the acquisition proceedings and returned back the 1.20 acres to the legal heirs of Ponnusami, they together plotted out the properties by way of layout and they individually sold the plots allotted under their respective shares.

7. The Plot No.459 in the layout was allotted to the share of Aseervatham and he was enjoying it absolutely. On 02.11.1993, Aseervatham divided the plot No.459 measuring 2432 sq.ft into two parts. Settled to his son Devaneedhi one part to an extent of 1216sq.ft of land under registered settlement deed 02.11.1993 and remaining 1216 sq.ft under registered settlement deed dated 10.11.1993. Devaneedhi in turn sold 1216sq.ft to one K.P.Aravindhakshan under registered sale deed 07.09.1994 and the remaining 1216sq.ft to Indira Aravindhakshan under sale deed dated 08.09.1994. K.P.Aravindhakshan sold the property to the 4th defendant/Sundaramoorthy under sale deed dated 23.09.1999 and Indira Aravindhakshan sold and delivered her property to the 5th defendant S.Poongodhai under sale deed dated 23.09.1999. The defendants 4 & 5 being husband and wife, they got joint patta in respect of entire plot No.459 measuring 2432 sq.ft and obtained building plan sanction. They have constructed building and obtained electricity service connection, water and sewage connection and enjoying the property absolutely. The property they purchased and put up construction is in plot No.459 to an extent of 2432sq.ft comprise in S.No.196/3 under patta No.2308 measuring 38feet in North - South and 64 feet in East - West bounded on the North by 30 feet road, South by Plot No.458, East by Navarathna flats and West by Plot No.460. The plaintiff has no right or title over this property. The Plaintiff's property as described in the plaint schedule is to an extent of 5 cents comprised in S.No.196/A2 bounded on the North by Road, on East by Tamil Nadu Housing Board H.I.G.Flats, Block No.I on South and West by the remaining land S.No.196/1. The suit property is different from the property which was purchased by 4th and 5th defendants from 2nd and 3rd defendants.

8. As far as the property of the defendants in plot No.459, the plaintiff have no right or title. The title document upon which the plaintiff claims right over the property was created using his influence and power as Engineer in TNHB. The defendants 4 & 5 had therefore, filed suit for declaration title and consequential injunction against the plaintiff in respect of land and building located at plot No.459 in S.No.196/3. The



Advocate Commissioner appointed in O.S.No.171/2008 had filed his report stating that the suit schedule property shown in O.S.No.1557 of 1997 is entirely different property and not the property of the respondents 4 & 5, who are the plaintiffs in O.S.No.171 of 2008.

9. In the written statement, it was also pointed out that suit is filed for 5 cents of land in S.No.196/A2. Whereas, the sale deed upon which the plaintiffs rely had conveyed only 1800sq.ft i.e., 4.1 cent in S.No.196. The patta relied by the plaintiff conveys only 3.7cents in S.No.196/1A2. Therefore, in view of discrepancy in the description of the property and inconsistencies in measurement, survey numbers and boundaries, relief of declaration of title and consequential injunction cannot be granted.

10. The allegation that P.Aseervatham, had no right or title in S.No.196 after division by Koor chit is wrong, since 1.20 acres of land in S.No.196 which was not part of earlier division later came into the hands of the legal heirs of deceased Ponnusami and the said land which they got back from the Housing Board was subjected to division and exchange, in which, the plot No.459 was given to Aseervatham. The property which the plaintiff claims declaration of title is not a vacant land but land and building constructed in the layout as per approval plan by these defendants.

11. Gist of plaint in O.S.No.171 of 2008 filed by P.Sundarmoorthy and Poongodhi against Kandasamy.

The averment in the plaint:- The suit property is a house site bearing plot No.459 measuring 2432 sq.ft in S.No.196/3 situated at No.59, Mogappair Village, Ambattur Taluk. The property originally owned by Aseervatham son of Ponnusami. The plot was divided into two equal portions one on northern side and another on the southern side and P.Aseervatham settled both the portions in favour of his son Devaneedhi under two registered settlement deed dated 02.11.1993 and 10.11.1993. Devaneedhi obtained building sanction from the authorities on 25.04.1994 in respect of plot No.459 and thereafter, sold the southern portion measuring 1216sq.ft on 07.09.1994 to one K.P.Aravindhakshan and the northern portion measuring 1216sq.ft on 08.09.1994 to one Indira Aravindhakshan. Aravindhakshan and his wife Indira Aravindhakshan, after purchasing the plot No.459 in two parts obtained joint patta for the entire 2432 sq.ft of land and sold it to S.Sundaramoorthy and Poongodhi, under two sale deeds dated 23.09.1999. The joint patta was issued to the plaintiffs vide proceedings No.2308/Dis.RPT/2964/2001-2002. The plaintiffs obtained building sanction plan to construct the building on the said plot No.459 on 13.09.2001. As per building plan, they have completed the



construction of the house and had obtained service connection and enjoying the same absolutely. On 19.07.2008, the defendant (Kandasami) along with others tried to dispossess the plaintiffs on the strength of a sale deed dated 12.09.1988. On verification of the said sale deed, the plaintiffs found that the sale deed doesn't relate to land and building in S.No.196/3 which is the subject matter of O.S.No.171 of 2008. However, the defendants claiming title over the plaintiff's property with wrong identification also trying to sell the property to third parties based on the alleged sale deed. The Survey number, extent, patta number and measurement of the suit property purchased by the plaintiffs are different from the property purchased by the 1st defendant vide sale deed dated 12.09.1988. Hence, suit for declaration and permanent injunction sought.

12. In the plaint schedule, the suit property is describes as below:-

"Building premises, bearing Plot No.459, Door No.196, under Assessment No.82189, together with MES service connection under S.C.Nos.042-12-581 and 042-12-622, water and sewage connection under No.05/925/0821000089, with house site, measuring 2432 sq.ft (1216 sq.ft to 1st plaintiff and 1216 sq.ft to 2nd plaintiff) in S.No.196/3, under joint patta No.2308, situated at No.59, Mogappair Village, Ambattur Taluk, Thiruvallur District, within the Sub-Registration District of Konnur.

MEASURING:

East to West on the Northern side - 38 feet

East to West on the Southern side - 38 feet

North to South on the Eastern side - 64 feet

North to South on the Western side - 64 feet

BOUNDED ON THE:-

North by - 30 feet Road

South by - Plot No.458

East by - Navaratna Flats &

West by - Plot No.460

With borewell pumpset, compound wall, gate, etc., within the Ambattur Municipality limit, which is clearly shown in the rough sketch of plaint document."



13. Written statement of Kandasamy in O.S.No.171 of 2008:-

In the written statement filed in suit O.S.No.171 of 2008, the defendant/Kandasamy contended that, the plaintiffs (S.Sundaramoorthy and S.Poongothai) are transferees, pending suit filed by him for declaration of title and permanent injunction. They are the subsequent purchasers claiming through the defendants 2 & 3 in O.S.No.2030 of 1993 on the file of District Munsif Court, Poonamallee, later transferred to District Munsif Court, Ambattur and renumbered as O.S.No.1557 of 1997. Aseervatham had no right in plot No.459 measuring 2432 sq.ft in S.No.196/3 of Mogappair Village. He had no right to execute the settlement deeds dated 02.11.1993 and 10.11.1993 in favour of his son Devaneedhi. The actual facts are,

a. Mr.Poonusami son of Mari of Mogappair Village owned 2.25 acres of land in S.No.196 of Mogappair Village.

b. Ponnusami dead around the year 1960.

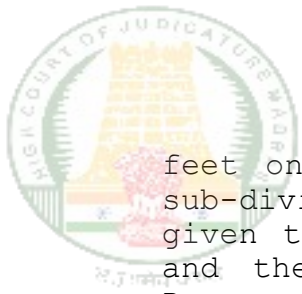
c. After his death his 4 sons namely Devapriyan, Thangaraj, Gabriel and Asirvatham divided the properties by Koor Chit. Land in S.No.196 was one of the properties. The details as to the other lands are not relevant for this suit.

d. Asirvatham was the youngest son of Ponnusami. He got the eastern most 87 cents in S.No.196 for his share.

e. Asirvatham sold the said 87 cents in S.No.196 and another land of 104 cents in S.No.282/2A to one Mr.R.Sarangapani Mudaliar of Mogappair Village under registered sale deed dated 12.05.1972.

f. Hence after 12.05.1972 Asirvatham had no right to any part of S.No.196. Mr.Sarangapani Mudaliar was entitled to the eastern 87 cents S.No.196. The remaining extent in S.No.196 was owned by the other brothers of Asirvatham.

14. Whereas, the defendant (Kandasamy) purchased 5 cents of land in plot No.459 from K.S.Moorthy and A.J.Ponniah the power agents of Devapriyan, Gabriel, Jayamani wife of Thangaraj on her behalf and as a guardian of her minor children Sarvagnanam son of Thangaraj. The said sale deed was duly registered on 12.09.1988. The linear measurement of the land purchased is East - West 24 feet and North - South 75 feet totally measuring 1800 sq.ft. Though, the plot shown to be 40 feet width, but in view of compound wall put up by Housing Board and 3 feet left for maintenance, he purchased only land of 24



feet on the East - West. The said land purchased by him was sub-divided and assigned as S.No.196/1A2 and patta No.1723 was given to him on 10.05.1993. The patta relied by the plaintiff and the building sanction of the year 1994 in the name of Devaneedhi and subsequent building plan approval in the name of the plaintiffs will not confer any right to the plaintiffs, when their predecessor-in-title/Aseervadham had no right or title in the land bearing S.No.196/3 after alienating his share of 87 cents to Sarangapani Mudaliar.

15. In the suit O.S.No.2030 of 1993 (renumbered as O.S.No.1557 of 1997) the Court appointed Advocate Commissioner to physically inspect the suit property and measure it. At the time of first visit, there was only a thatched house in the suit property and same has been noted by the Advocate Commissioner. The Second Advocate Commissioner was appointed in I.A.No.2309 of 1996 and he has also inspected the property and filed his report. The plaintiff's predecessor-in-title namely Aravindhakshan and Indira Aravindhakshan engaged the counsel and were fully aware of pendency of the suit filed by the defendant, seeking declaration of title. After entering appearance in the above suit, Aravindhakshan and Indira Aravindhakshan had sold the property to the plaintiff's in the year 1999.

16. The appellants in O.S.No.171 of 2008 were subsequently impleaded in O.S.No.1557 of 1997. Only on receipt of the notice, the present suit in O.S.No.171 of 2008 filed on 21.07.2008 with false allegation as if, the plaintiffs were threatened. The plaint suppressing the pendency of the earlier suit and application to implead them as defendants had laid the present suit with false allegation to undermine his right which he had been perusing for nearly 15 years before the Court of law.

17. With the above pleadings in the rival suits, the Court below framed issues and took up both the suits for joint trial

18. Issues in O.S.No.1557 of 1997:-

(i). Whether the plaintiff is entitled to the relief of declaration to declare that the plaintiff is the absolute owner of the suit properties?

(ii). Whether the defendants have to deliver the vacant possession of the suit land to the plaintiff after removing superstructure put up by them in the suit land?



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(iii). Whether the plaintiff is entitled to permanent injunction restraining the defendants from interfering with the plaintiff's peaceful possession of the suit land after such delivery of possession?

(iv). To what relief the plaintiff is entitled?

Issues in O.S.No.171 of 2008:-

(i). Whether the plaintiffs are entitled for declaration of title to the suit property?

(ii). Whether the plaintiffs are entitled to grant consequential injunction restraining the defendant from alienating or encumbering the suit property with the support of alleged sale deed No.6695 of 1988 dated 12.09.1988 registered at SRO Ambathur?

(iii). To what relief the plaintiffs are entitled?

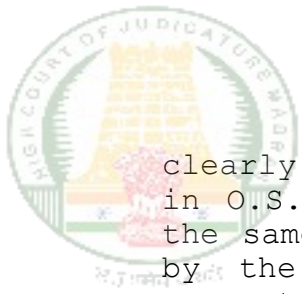
19. In the joint trial, evidence was recorded in the later suit O.S.No.171 of 2008. For clarity sake wherever necessary the parties are described by the name.

20. Before the Trial Court S.Sundaramoorthy (1st plaintiff in O.S.No.171 of 2008 and 4th defendant in O.S.No.1557 of 1997) was examined as P.W.1. Ex.A.1 to Ex.A.21 were marked in support of his case. S.Kandasamy (Plaintiff in O.S.No.1557/1997 and defendant in O.S.No.171/2008) was examined as D.W.1 and Ex.B.1 to Ex.B.11 were marked in support of his case. The Commissioner's report, rough sketch and Taluk Surveyor plan filed in O.S.No.171 of 2008 were marked as Ex.C.1 to Ex.C.2 respectively.

21. After appreciating the evidence, the Trial Court declared the title in favour of Kandasamy who is the plaintiff in O.S.No.1557 of 1997. Permanent injunction granted against the appellants herein described as 'Devaneedhi Vagayara' in the judgment. Three months time was granted for the appellants herein to remove the superstructure and handover the vacant possession. Consequentially dismissed the suit in O.S.No.171 of 2008 filed by the appellants herein.

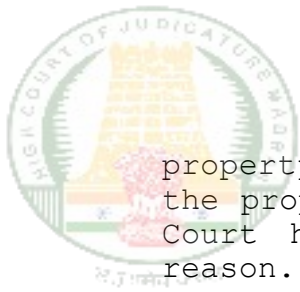
22. Aggrieved by the said decree and the common judgment, the two Appeals (A.S.Nos.6 & 7 of 2013) filed.

23. The Learned Counsel appearing for the appellants primarily assailed the trial Court judgment for discarding the Advocate Commissioner's report and sketch Ex.C.1 to Ex.C.3 which



clearly states that, the suit schedule properties as described in O.S.No.171 of 2008 and O.S.No.1557 of 1997 are not one and the same. The Trial Court failed to note that the relief sought by the respondent (Kandasami) was in respect of land and superstructure in S.No.196/1A2 in plot No.459 measuring about 5 cents. Whereas, the title document Ex.B.3 relied by Kandasami is only to an extent of 1800sq.ft. The suit laid by Kandhasami in O.S.No.1557 of 1997 with insufficient particulars and description of property ought not to have been entertained.

24. The Learned Counsel appearing for the appellant contended that the Trial Court failed to consider the insufficiency of particulars about the suit property while deciding the issue of title. Non-examination of the appellants vendor or his vendors vendor ought not to have been considered as fatal to the case of the appellants, when the documents relied by the appellants was sufficiently proves due conveyance of title. The vendor and vendors vendor were arrayed as defendants in O.S.No.1557 of 1997 but they remind exparte. Merely because the vendors remind exparte, the case of the appellants, who is the subsequent purchaser ought not to have been disbelieved. The Trial Judge had given extraneous reasons which are patently against the evidence available. The Trial Court erred in holding that Kandhasami had purchased the land in dispute under Ex.B.3 dated 12.09.1988 from the power agents, prior to cancellation of the power of attorney. In fact, the power of attorney deed Ex.B.2 dated 03.02.1979 in favour of K.S.Moorthy and A.J.Ponniah was cancelled on 28.05.1986 under Ex.A.21 by two of the principals and it was much prior to the sale deed Ex.B.3. Since the power agent from whom Kandhasami purchased the property were not the power agent of all the principals on the date of execution of Ex.B.3, therefore the sale in the name of Kandhasami is invalid. Out of 7 principals two have cancelled the power deed and four minors have attained majority on the date of executing Ex.B.3. Thus, the entire power of attorney deed became void. The trial Court failed to take note of the fact that after partition between the sons of Ponnusami, the land measuring 1.20 acres in S.No.217 acquired by the Government for Tamil Nadu Housing Board was reconveyed to Aseervatham under Section 48 of Land Acquisition Act, 1894, vide G.O. dated 02.01.1989. Hence, the legal heirs of Ponnusamy including Aseervatham had acquired additional extent of land after division through Koor Chit. Plot No.459 in S.No.196/3 was allotted to Aseervatham, who inturn settled 2432 sq.ft of land in two parts under two deeds in favour of his son Devaneedhi. The Court below ought not to have totally discarded the revenue documents namely the patta marked as Ex.A.7 and Ex.A.12 and the tax receipts. The Trial Court perversely rejected Ex.C.1 to Ex.C.3 which are reports and sketch along with Taluk Surveyor plan filed by duly appointed Advocate Commissioner. To over come the categorical finding of the Advocate Commissioner that the



property in possession and enjoyment of the appellants is not the property purchased by the respondent under Ex.B.3, the Trial Court had discarded Ex.A.1 to Ex.A.3 (Sale deed) for flimsy reason.

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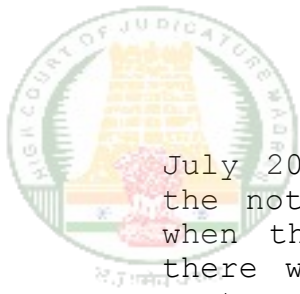
25. The Application filed by the respondents to appoint new Advocate Commissioner was rejected and no further steps was taken by the respondent challenging the order rejecting his request to appoint new Advocate Commissioner. The Trial Court erred in holding that the appellants are purchasers pendente lite. The fact that the suit filed by the respondent in O.S.No.2030 of 1993 on the file of District Munsif Court, Ponnammallee, (renumbered as O.S.No.1557 of 1997 on the file of District Munsif Court, Ambattur) was dismissed for default on 26.11.1998. The appellants herein purchased the property under Ex.A.9 & Ex.A.10 on 23.09.1999 when they purchased the property, there was no litigation pending. Hence, Section 52 of Transfer of Property Act, will have no application.

26. Even assuming the appellants are lis pendens purchasers, their purchase is not invalid, it is only subject to the result of the suit. The effect of the doctrine of lis pendens is not to annul all transfers effected by parties to a suit but only to render them subservient to the rights of the parties under the decree or order which may be in that suit.

27. In A.Nawab John and others -vs- V.N.Subramaniam reported in 2012(7) SCC 738, at paragraph No.18, the Apex Court has held,

"18. It is settled legal position that the effect of Section 52 is not to render transfers effected during the pendency of a suit by a party to the suit void; but only to render such transfers subservient to the rights of the parties to such suit, as may be, eventually, determined in the suit. In other words, the transfer remains valid subject, of course, to the result of the suit. The pendente lite purchaser would be entitled to or suffer the same legal rights and obligations of his vendor as may be eventually determined by the court."

28. Further, the respondent in his written statement filed in O.S.No.171 of 2008 had stated that these appellants were sought to be impleaded in O.S.No.1557 of 1997 on the file of the District Munsif Court, Ambathur, through an application in I.A.No.830 of 2008. In the said petition, private notice was ordered on 25.07.2008 and the notice was received by the appellants herein during the last week of June or beginning of



July 2008. Admittedly the pendency of the suit was brought to the notice of the appellants only in the year 2008. While so, when the appellants purchased the property in the year 1999, there was no suit pending. The suit dismissed for default was restored only after the purchase by the appellants. Therefore, the finding of the Trial Court that the purchase of the property by the appellants hit by principle of lis pendens therefore factually incorrect.

29. Per contra, the Learned Counsel appearing for the respondent would submit that the appellants herein have purchased the property from vendors who had no right or title to convey. The concocted documents such as settlement deeds executed by Aseervatham in favour of Devaneedhi marked as Ex.A1 and Ex.A.2 and subsequent sale deeds by Devaneedhi in favour of Aravindkashan and his wife Indira Aravindkashan through Ex.A.3 and Ex.A.4 are all subsequent to the purchase of the property by the respondent in the year 1988 under Ex.B.3

30. Aseervadham through whom the appellants trace their title had no right in the property. The moment he sold his share of 0.87cents in S.No.196 to Sarangapani Mudaliar on 12.05.1972 vide Ex.B.1 he lost right in S.No.196 whatsoever. Since 1993, there had been dispute in respect of the property. Devaneedhi the predecessor-in-title through whom the appellant claims title, caused caveat notice to this respondent expecting litigation. Subsequently suit for permanent injunction in O.S.Mo.1115 of 1993 was filed. The copy of caveat notice marked as Ex.B.7 dated 28.06.1993 and suit registered extract of O.S.No.1115 of 1993 on the file of District Munsif, Poonammalle, filed by Aseervatham and his son Devaneedhi against K.S.Moorthy (one of the power agent from whom the respondent purchased the property) and the respondent herein would clearly show that the earlier round of litigation initiated by Aseervatham and his son Devaneedhi against this respondent and another, was dismissed on 23.09.1994 and no further appeal was filed.

31. Therefore, the Learned Counsel for the respondent would submit that the trial Court has rightly dismissed the suit filed by the appellants herein and allowed the suit filed by the respondent in respect of declaration of title and other consequential relief.

Point for determination:-

Whether the Trial Court properly appreciate the evidence before it and given finding in consonance with the material evidence placed before it and whether the appellants are bonafide purchaser for value from rightful title holder?



32. Heard the Learned Counsel for the appellants and the Learned Counsel for the respondents. Records perused.

33. From the record, this Court finds that the first suit was presented before the District Munsif Court, Ambattur, during the month of December 1993 and numbered as O.S.No.2030 of 1993. Later, transferred to District Munsif Court, Poonamallee taken on file and renumbered as O.S.No.1557 of 1997. This suit was filed by Kandhasami against the defendant/Devaneedhi. Later K.P.Aravindhakshan and Indira Aravindhakshan were impleaded as defendant Nos.2 & 3 in I.A.No.2310 of 2006 vide order dated 20.08.2006. S.Sundarmoorthy and Poongodhi, who are the appellants herein were impleaded subsequently as defendants Nos.4 & 5 vide order in I.A.No.830 of 2008 dated 05.04.2009.

34. As per the averments made in the amended plaint, in O.S.No.1557 of 1997 through the power agent K.S.Moorthy and A.J.Ponniah vide sale deed dated 12.09.1988, the respondent/Defendant had Kandhasami purchased about 5 cents of land. This piece of land is from out of 1.38 acres of land in S.No.196 allotted to Devapriyan, Gabriel and the legal heirs of Ponnusami pre-deceased son Dhangaraj namely Jayamani wife of Dhangaraj, Krishnaveni, Dhangarajasu minor children of Dhangaraj (represented by her mother Jayamani) and Servananam son of Dhangaraj. The certified copy of the said sale deed is marked as Ex.A.19. The sale deed is executed by K.S.Moorthy and A.J.Ponniah. They have sold 1800 sq.ft of land in Plot No.459 marked in the general layout plan approved in LPDM/DTP 2/1975 by D.T&C.P. The schedule of property as found in the sale deed Ex.A.19. Specifically mentions the extent of the land conveyed is 1800 sq.ft. The boundaries and linear measurement are also provided in the said sale deed. The schedule of the property conveyed under the said sale deed describes the property as below:-

Schedule:- Piece and Parcel of vacant site forming Plot No.459 in the approved layout plan by LPDM/DTP 2/75 by D.T.&C.P situated at Mogapair Village, Saidapet Taluk, Chengleput District within the Registration District of Madras North, Sub-Registration on District of Ambattur marked in the plan attached hereunto and bearing survey number 196 bounded on....10....the north side by 30 feet road and extension of 40 feet road formed already by the Tamil Nadu Housing Board on the South side by Plot No.458, on the west side by Plot No.460 and on East side by the Tamil Nadu Housing Board H.I.G.Flats, Block No.1 measuring East to West 24 feet length on the Northern side as



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well as Southern side and North to South...75....feet length on western side as well as eastern side measuring total extent of 1800 sq.ft. Market value of the property is Rs.39,600/-.

35. The suit by Kandasami vest on the particulars found in the Ex.A.19 sale deed which describes the property by metes and bounds and extent along with linear measurements as stated above. Whereas, in the plaint the suit schedule property for which the trial Court has granted declaration of title is bereft of all those particulars and describe the property as below:-

In Chengalpattu MGR district (present Thiruvallur District) Saidapet Taluk (present Ambathu Taluk) Mogappair Village, an extent of about 5 cents in wet S.No.196/A2 bounded on the north by road, on the east by the Tamil Nadu Housing Board land and compound, on the South and west by the remaining extent in S.No.196/1 (the thatched structure put up by the defendant is now in the said extent).

36. The linear measurements of the suit property not mentioned in the plaint, plot number found in sale deed conspicuously absent in the plaint. The extent as per the sale deed is only 1800sq.ft whereas, in the plaint, declaration of title to an extent of 5 cents sought and granted. The description of the property in the pleadings does not tally with the description of title deed upon which the suit is filed by the respondent. This discrepancy not explained by the respondent in the manner acceptable to the judicial conscious. The trial Court has conveniently neglected to address this issue in spite of specific plea taken by the appellants herein.

37. The perversity of the trial Court judgment is also well exposed by rejecting the Advocate Commissioner's report, his sketch and the Taluk Surveyor plan marked as Ex.C.1 to Ex.C.3. The Lower Court has stated that, as per Order 26 Rule 10 of C.P.C., the Advocate Commissioner should sign the report. Whereas, in Ex.C.1 the Commissioner has not signed therefore, it is not worth the paper. Having declared that the Advocate Commissioner's report is not worth a paper since it is not signed, the Trial Court ought not to have gone further to discuss the Advocate Commissioner's report and rough sketch.

38. On perusal of Ex.C.1 to Ex.C.3, this Court finds that one Mr.J.Karthikeyan, the Advocate Commissioner has inspected the disputed property and measured it with the help of Taluk Surveyor. The rough sketch which he has filed along with the report contain his signature. It is true that, he has not



affixed his signature in the report but the said report is enclosed with the warrant, notice to the parties, rough sketch signed by him, the Taluk surveyor report signed by the Taluk Surveyor and the F.M. sketch of the field prepared and signed by Taluk Surveyor. In the report by the Taluk Surveyor, after inspection of the field, he has categorically stated that on measurement of the field, the land in S.No.196/3 to an extent of 2 ares stands in the name of S.Sundaramoorthy and Poongothai jointly and patta No.2308 issued to them. The land of the respondent falls in S.No.196/1A2 and located at a different place. In the F.M sketch Ex.C.3, the Taluk Surveyor has identified the property of the appellants and the property of the respondent lying at a two different location.

39. As pointed out earlier, the schedule found in the sale deed Ex.A.19 and schedule found in the plaint filed by the respondent in O.S.No.2030 of 1993 renumbered as O.S.No.1557 of 1997 are not one and the same and same has been proved through the Taluk Surveyor, report annexed with Field Map plan, rough sketch and Advocate Commissioner's report marked as Ex.C.1 to Ex.C.3.

Order 26 Rule 10 of C.P.C., reads as below:-

Order XXVI Rule 10 of Code of Civil Procedure 1908 "Procedure of Commissioner"

"(1). The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

(2). Report and depositions to be evidence in suit. The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3). Commissioner may be examined in person- Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further



inquiry to be made as it shall think fit."

40. The Advocate Commissioner report consists of the statement of the Surveyor, Field Map prepared by the Surveyor as per the revenue records, the rough sketch prepared by the Advocate Commissioner noting down the physical feature and the typed report of the Commissioner. In the above said documents, except the typed report of Advocate Commissioner in rest of the documents the author of the documents have signed. The Advocate Commissioner has signed in the rough sketch. Once the report is filed by the Advocate Commissioner appointed by the Court, it shall be part of evidence in the suit as per Order 26 Rule 10 (2) of C.P.C.

41. If the Trial Court had really not satisfied with the report without signature, it should have summoned the Advocate Commissioner and examined as per Order 26 Rule 10(3) of C.P.C but ought not to have declared it as worthless. This Court finds, the respondents herein has not raised any objection regarding the Advocate Commissioner's report. Even if there is no objection by the parties concern, if the Court not satisfied with the report, it is the duty of the Court to appoint a second Advocate Commissioner or remit the matter to the same Advocate Commissioner to implement the warrant. Unfortunately, the Trial Court has declared the Advocate Commissioner report as worthless just because he has not signed the report. The Trial Court ignoring the fact that Advocate Commissioner report is annexed with a rough sketch signed by the Advocate Commissioner, Taluk Surveyor report duly signed and the field map duly signed.

42. In K.Viswanathan -vs- D.Shanmugham Mudaliar and another reported in CDJ 1985 MHC 239, the Hon'ble Madras High Court, when the trial Court scrapped the Advocate Commissioner's report on the ground it does not contain material particulars, referring Order Rule 10 (2) and 10 (3) of C.P.C., held that,

"According to the District Munsif, he had now made it clear in the second order that the report was incomplete in the sense that it did not contain material particulars and therefore it was scrapped. The explanation and the order impugned in the civil revision petition overlooks the fact that under Order 26, Rule 10(2), C.P.C. the report of the Commissioner is evidence in the suit and forms part of the records. The report of the Commissioner has therefore evidentiary value and can be utilised by either of the parties as evidence in support of their case. This provision cannot be set at naught by scrapping the report. The

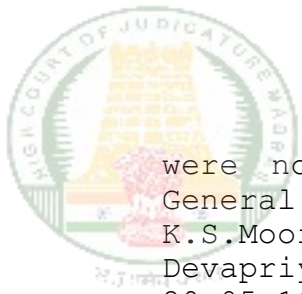


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effect of scrapping the report is that the report which is evidence in the case and part of the record ceases to be so and cannot be referred to by the parties. The mere fact that the Commissioner has failed to note certain features which according to the defendant were important does not mean that the whole report should be scrapped. Adequate provision to safeguard the interest of the parties concerned is made in sub-rule (3) of Order 26, Rule 10, C.P.C. which provides that 'where the court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit. 'In the previous order, specific attention of the trial Court was drawn to this provision. Instead of directing further inquiry by the same Commissioner or even by a Commissioner specially appointed, the District Munsif has directed that the report should be scrapped which is wholly impermissible by the provisions of Order 26, rule 10, C.P.C., Under sub-rule (3), there is power given to the Court to direct a further enquiry to be made. This provision itself implies that whatever report has been made must continue to remain part of the record, but if the report is lacking in particulars or is unsatisfactory, a further enquiry can be ordered. The order of the District Munsif scrapping the report is therefore wholly contrary to law."

43. It is a clear case where the title deed relied by the respondent herein does not tally with the description of the property for which he has filed the suit for declaration of title and succeeded. When property described in the title deed and the property for which declaration of title sought does not corresponds to each other, both by description as well as the extent, the report of the Advocate Commissioner gains utmost significance and ought not to have been ignored for want of signature in his report while in all other documents annexed to the report the signature affixed. More particularly, when the said report not been challenged as prepared illegally or improperly.

44. It is also pertinent to note that when the respondent purchased the property in the year 1988 under Ex.B.3 on 12.09.1988, the persons who have sold the property to him, claiming as power agent of Gaberiel, Devapriyan and T.Jayamani



were not really the power agents of all those persons. The General Power of Attorney document (Ex.B.2) in favour of K.S.Moorthy and A.J.Ponniah dated 12.09.1979 was revoked by Devapriyan and Gaberial by a registered revocation deed dated 29.05.1986 which is marked as Ex.A.21. So, on the date on which the respondent purchased the property under Ex.B.3 from K.S.Moorthy and Ponniah as power agents of Gaberial, Devapriyan and others. They ceased to be the power agents of Gaberial and Devapriyan.

45. The Court below with reference to Ex.A.21, has observed that this was not marked at the earliest point of time when P.W.1 was examined in chief and was introduced much later. Even if power of attorney was revoked by two of the principals, it will not affect the buyers right when termination of agency not put to notice of the buyer.

46. By saying so, again the trial Court erred ignoring the fact, both the power of attorney deed and revocation deed are registered documents. The buyers who enters into the contract with power agent ought to have ensured whether the registered power of attorney deed is still in force and whether the principals who have executed the deed are still alive. This power of attorney document is of the year 1979, whereas, the respondent herein had purchased the property through power agent. It is obviously clear that in the year 1988, after nearly 9 years of execution of power of attorney deed without exercising the minimum care, the respondent had purchased the property from power agent.

47. The Learned Counsel appearing for the respondent referring the judgment of Madhya Pradesh High Court rendered in Kulasekarapattinam Hand Match Workers Co-operative -vs- Radhelal Lalloolal and others reported in AIR 1971 MP 191 submitted that, the buyers right against the seller are not affected if the termination of Agency had not come to his knowledge at the time of transaction. The facts of the case cited relates to sale of goods by description namely match box of particular brand. Invoking Section 208 of the Indian Contracts Act, the above observation was made by the High Court of Madhya Pradesh.

48. As far as the facts of the instant case concern, it is an immovable property, the power of attorney deed duly registered in favour of K.S.Moorthy and A.J.Ponniah on 03.02.1979. In Ex.B.2, power of attorney deed, we find the principals include four minor children of late Thangaraj namely Krishnaveni aged 17 years, Amudavani aged 15 years, Yesu aged 14 years and Jaya Singh aged 7 years. They all were represented by their mother and natural guardian Jayamani. At the time when the respondent purchased property from the power agents K.S.Moorthy and A.J.Ponniah on 12.09.1988, all the minors had attained



majority. The day on which the minors attained majority, the power of attorney deed executed by the guardian on their behalf loses its force. In Ex.B.3 sale deed dated 12.09.1988, the recital does not indicate, the executants (K.S.Moorthy and A.J.Ponniah) have ratified the power of attorney deed immediately after the sons and daughters of late Thangaraj attained majority.

Section 201 of the Contract Act reads as below:-

"201. Termination of agency:- An agency is terminated by the principal revoking his authority, or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors"

49. The said section is not exhaustive. There are other modes of termination. The agency given by minor through his/her guardian on attaining majority by law gets terminated as in case of death or unsound mind unless, it is ratified or substituted with fresh power of attorney deed. In case minor principal attains majority by efflux of time, no notice of termination is required, it is well within the knowledge of the agent. The power of attorney deed gets terminated by operation of law.

50. Be it as it may, even if assuming the power of attorney deed Ex.B.2 valid and in force, the documents relied by the respondents indicate that the property which he has purchased falls only in S.No.196/1A2. So claiming right and title over the property in S.No.196/3 itself per se not maintainable.

51. The very rudimentary and fundamental error in mis-description of the property in the plaint in O.S.No.1557 of 1997 not being considered by the Court below. The Trial Court fully carried away by the fact that Aseervatham through whom the appellant claim title had sold away his share (0.87cents) of property in S.No.196 to Sarangapani Mudaliar as early as 12.05.1972 and therefore, even if Devaneedhi and Gabriel has revoked the power agent, the appellant cannot take advantage of it. This logic and reasoning is improper. The trial Court failed to note that after division of 2.25 acres of land in S.No.196, the legal heirs of Ponnusami got back additional land measuring 1.20 acres. The Court when try two suits tried jointly and parties claim right over a piece of land purchased through common source, the identity of the property becomes doubtful,



before declaring title, Court should ensure that the plaintiff had cleared marketable title without cloud over the title, particularly the identity of the property for which relief granted.

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52. Before declaring the title, the Court is bound to examine all the documents adduced as evidence to decide the merits of the case, applying the test of preponderance of probability. Ex.B.3 the title deed relied by the respondents bristles with infirmity viz., the power of attorney given to Moorthy and Ponniah was revoked by two of the principals in the year 1986 and the respondent has purchased the property subsequently from those power agents in the year 1988. Whereas, the title deed relied by the appellants herein starts from settlement deeds executed by Aseervartham in favour of his son Devaneedhi. In the said settlement deed, he has mentioned about the source of his right and title. He has explained how he got share in land measuring 1.20cents in old S.No.196 and new S.No.217 which was earlier acquired by the Government for Housing Board and later reconveyed to his father Ponnusami. It is correct that there is no reference about new S.No.217 in any of the revenue documents filed by the parties. At the same time, there is evidence to show that 1.20 acres of land originally held by Ponnusami was acquired by the Government for Housing Board and later, reconveyed to them. In the absence of contra evidence, the Court is left with available records to examine the title of the parties based on the documents relied by them.

53. As pointed out earlier, the description of the property as claimed by the appellants as well as respondent in their respective suits are not one and the same property. The view of the Court is well fortified and supported by the sketch filed by the Taluk Surveyor and his report. Though the Advocate Commissioner's report is not signed, the other two documents which are part of the report and signed by the Revenue Authorities based on revenue records provide enough material that the title document of the parties is in respect of different piece of land and not one and the same.

54. The respondent herein, who has purchased the property in the year 1999 is a bonafide purchaser for value. On the date of his purchase, there was no litigation. Admittedly, the suit in O.S.No.1557 of 1997 was dismissed for default on 26.11.1988 and got restored much later. When the appellants herein purchased the property on 23.09.1999 under Ex.A.9 and Ex.A.10 there was no litigation pending. The appellants herein are in possession of the property since 1999 and they have put up construction in the said property.



55. When the respondent filed suit in the year 1993, he has alleged that there was a thatched hut in the suit property and the occupants are trying to put up construction. The Advocate Commissioner had recorded the same in his report. The said report alleged to have been submitted by Advocate Commissioner in O.S.No.1557 of 1997, not available on record. It was not marked as Exhibits. Caveat notice Ex.B.7 dated 28.06.1993 and the Suit Register Extract (Ex.B.8) regarding O.S.No.1115 of 1993 reveals injunction suit filed by Aseervartham and Devaneedhi against Kandasamy the respondent herein as 2nd defendant and one of his vendor K.S.Moorthy as first defendant. The said suit was dismissed on 23.09.1994 but the description of the property as found in the suit register Ex.B.8 of O.S.No.1115 of 1993 is in respect of 15 cents of land situated in S.No.196/1A. There again, there is no clarity whether 15 cents of land for which the suit O.S.No.1115 of 1993 filed includes the land which is now the subject matter under consideration.

56. This Court, after examining the Exhibits and the schedule of the property finds that, the Trial Court has gravely erred by declaring title in favour of the respondent. The reason for the said conclusion is that his title deed is in respect of 1800 sq.ft in S.No.196 and plot No.459. Whereas, the suit is filed for 5 cents without any linear measurements in S.No.196/A2. The suit of the respondent ought to have been dismissed for not providing the proper description of the property when the relief for declaration of title filed without proper identity. Unfortunately, the Trial Court has missed the fundamental principle and erred declaring title without proof of title. The appellants herein have proved their title, possession and enjoyment of the property since 1999, the date of purchasing the property under Ex.A.9 & Ex.A.10. Hence, both the Appeal Suits are Allowed with costs. The judgment and decree passed in O.S.No.1557 of 1997 is set aside and suit stands dismissed. The suit in O.S.No.171 of 2008 filed by Appellants is Allowed and decreed as prayed for with costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To,

1.The II Additional District Judge,Thiruvallur, Poonamallee

2.The Section Officer,V.R.Section, High Court, Madras.

+1 cc to Mr.G.Ilamuruga, Advocate Sr.NO. 11142,11143

+1 cc to Mr.B.Hari Krishnan, Advocate Sr.NO. 11188,11189

A.S.Nos.6 & 7 of 2013

& M.P.No.1 of 2013

AK(CO)

A.SK(01.12.2021)