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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.04.2021	PRONOUNCED ON: 17.04.2021
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CORAM:

THE HONOURABLE MS.JUSTICE R.N.MANJULA

S.A.NO.397 OF 2010

1.Sundaramurthy
2.Umapathy
3.Lakshmipathy .. Appellants/Plaintiffs/Respondents

..Vs..

1.Manickkavelu
2.Rukmani
3.Padmavathy
4.Deivanayaki
5.Kanchana
6.Thirupurasundari .. Respondents/Defendants/Appellants

PRAYER: This Second Appeal is filed under Section 100 of C.P.C against the judgement and decree of the First Appellate Court passed in A.S.No.97 of 2008 dated 07.12.2009 on the file of Principal Sub Judge, Chengalpattu, by confirming the judgement and decree of the District Munsif cum Judicial Magistrate, Thirukkalukundram in O.S.No.25 of 2003 dated 31.10.2008.

For Appellants : Mr.R.Vijayaraghavan
For Defendants : Mr.T.P.Shankaran

J U D G M E N T

This Second Appeal has been preferred against the judgement and decree of the First Appellate Court passed in A.S.No.97 of 2008 dated 07.12.2009 on the file of Principal Sub Judge, Chengalpattu, by confirming the judgement and decree of the District Munsif cum Judicial Magistrate, Thirukkalukundram in O.S.No.25 of 2003 dated 31.10.2008.



2. The plaintiffs are the appellants herein.

3. The short facts of the case is that the suit property belongs to the plaintiff and they are in possession and enjoyment of the same. The suit property is a vacant site under the maintenance of the plaintiffs and they used to remove the bushes periodically. Patta for the suit property is issued in the name of the plaintiffs in Patta No.2102. The defendants are the relatives of the plaintiffs. The 1st defendant is the paternal uncle of the plaintiff and the 2nd defendant is the son of the 1st defendant. They have their property adjacent to the plaintiffs property. Without the knowledge of the plaintiffs the defendants put up a compound wall in the suit property in the year 1997 which is shown as 'A B C D' in the suit plan. They have also fixed an electricity meter box in the compound wall. When the plaintiffs requested them to remove the compound wall and the electricity meter box, they refused to do so. The plaintiffs tried to take steps through the revenue authorities and the electricity department. Since the defendants continued to deny to remove those constructions, the plaintiffs have filed this suit for mandatory injunction directing the defendants to remove the compound wall which was shown as 'A B C D' in the plaint plan and remove the electricity box and also for permanent injunction to restrain the defendants from anyway altering the physical features of portion shown as 'C D E F' in the plaint plan. During the pendency of the suit, the 1st defendant died and defendants 3 to 7 have been added as legal representatives of the deceased 1st defendant.

4. The short facts of the written statement filed by the 1st defendant is as under:

The plaintiffs are not entitled to any relief as claimed by them. The defendants have encroached the suit property in the year 1934 and reclaimed it. The suit property is known as Kallankuthu poramboke land. The defendant has put up hay-rick on the suit property. They are also having their motor mechanical shed there. In between the shed and the suit property, a small portion has been let out to 3rd parties. The defendant has kept granite stone in line around the suit site as a compound wall and the same was admitted by the defendants themselves. The plaintiffs have neither title nor possession over this suit property. An extent of 4 cents of Gramanatham in survey No.51/1 was purchased in the name of the plaintiffs father Thirukkamu Naicker, who is in his capacity as the Manager of the joint family under a registered sale deed dated 11.07.1960. In the said sale deed the survey No. has been wrongly mentioned as Survey No.48/8 instead of 51/1 in the suit property. The suit property has been shown as the Eastern



boundary and the name of the defendant is shown as the owner of the properties on the eastern side. The said 4 cents purchased in Survey No.51/1 fell to the share of the 1st defendant in a family oral partition. The family oral partition was later reduced into writing on 20.07.1961 and the suit property is shown in it as 'B' schedule. The plaintiffs father, plaintiff and his sisters have already filed a suit in O.S.No.14/90 before the District Munsif Court, Chengalpattu in respect of 0.06 cents in old survey No.48/17. In that suit the western boundary has been shown as the property of the 2nd defendant. When the suit was pending, the plaintiff managed to get a Gramanatham patta in his name by annexing the western side of the property. The defendants have taken steps to cancel the same. The plaintiff suppressed the earlier suit and filed this suit by suppressing the material facts. This suit is barred under Order 2 Rule 2 of CPC. 'A B C D' as shown in the plan is not a compound wall but it is a huge wall of the shed. The electricity meter box is fixed in the wall. By making use of the patta, the plaintiffs try to encroach the suit property. There is no cause of action for the suit. The plaintiffs are not in possession of the suit property. This suit itself is not maintainable without a prayer for declaration of title. The suit is barred by res-judicata and is not maintainable. Hence the suit has to be dismissed.

5. During the trial, on the side of the plaintiffs 3 witnesses were examined as P.W.1 to 3 and Exs.A1 to A7 were marked. On the side of the defendants 2 witnesses were examined as D.W.1 and D.W.2 and Exs. B1 to B25 were marked.

6. After the conclusion of trial, the Trial Court decreed the suit as prayed for. Aggrieved over that the defendants have filed the first Appeal before the Sub Court, Chengalpattu and the First Appellate Court, has allowed the First Appeal by setting aside the judgment and decree of the trial Court. Aggrieved over that the plaintiffs have filed this Second Appeal. The Second Appeal has been admitted on the following substantial questions of law:

"1.Whether the lower appellate Court has committed an error in holding that the suit for permanent injunction is not maintainable without there being a prayer for declaration?

2.Whether the lower appellate court has committed an error in rejecting the prayer for mandatory injunction on the sole ground that no prayer for recovery of possession was made?



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3. Whether the lower appellate court has committed an error in holding that the present suit was barred by Order II Rule 2 CPC in view of the decision of the District Munsif Court, Thirukazhukunram in O.S.No.55/1996?"

7. The learned First Appellate Judge revised the judgment of the trial Court and observed that the respondents/defendants have denied the title of the appellants/plaintiffs over the suit property and hence the suit ought to have been filed for the relief of declaration along with permanent injunction. But it is submitted by the learned counsel for the appellants that the suit properties are the Poramboke properties for which no one can claim title and pattas are given basing on the possession. It is true that pattas for government property is like Natham Poramboke or other Poramboke lands are issued to the respective persons in possession of the same at the relevant point of time. The respondents/defendants claimed that their ancestors had actually occupied the suit property and had been in enjoyment of the suit property for a long time.

8. The learned counsel for the appellants had attracted the attention of this Court to the evidence of D.W.1, wherein he has stated that the property which was occupied by his father measures 4 cents and its survey No. is 48/5B/5A. The plaintiffs claimed that the suit properties are in the Gramanatham in Survey No.48/17 and it measures 6 cents.

9. In fact, the appellants/plaintiffs have produced the patta in respect of the suit property. The contention of the respondents/defendants is that the plaintiffs have filed an earlier suit in respect of the same suit property in O.S.No.55/96 and did not prosecute the same and it was dismissed for default. It was admitted by the appellants/plaintiffs also that the earlier suit in O.S.No.55/96 was filed by them in respect of the suit property for the relief of permanent injunction and it was dismissed for default.

10. However, it is claimed by the plaintiffs that the cause of action for the suit arose on 05.11.1990. So far as the reliefs of permanent injunction is concerned for each of such case, there may be different interferences and the respective cause of action could also be different. Just because the plaintiffs had not pursued the earlier suit which was filed on the basis of the earlier cause of action due to an interference, he can not be precluded from filing this suit. Though the earlier suit is not a bar for the present suit for permanent injunction,



it has to be seen whether the suit is not maintainable for non inclusion of the prayer for declaration also.

11 . The suit property being a poramboke land, no one can claim title and any one who is aggrieved that their possession is disturbed by any third party, can get a remedy to safeguard his possession only. If the Government recognizes long possession of a person, it might issue a patta in favour of him. Even such pattas cannot be the document of title and the ownership of such lands always vests with the Government only.

12. In such circumstances, the appellants/plaintiffs cannot be expected to file a suit for declaration of title. Even though the defendants had denied their title, since the suit is between two private parties and not against the Government who is the true owner, the appellants/plaintiffs cannot seek a relief for declaration as against the respondents/defendants alone.

13. However, there are other reasons for the First Appellate Court to dismiss the suit of the appellants/plaintiffs. The first Appellate Court had observed that the plaintiffs have filed the suit for mandatory injunction without a prayer for recovery of possession. The appellants /plaintiffs have been claiming all along that they are in possession of 6 cents in Survey No.48/7, which has been assigned with the new Survey No. 649/4. Even D.W.1 did not deny the same.

14. This patta was issued in the year 1996 itself. The respondents/ defendants have submitted that the plaintiffs managed to obtain patta by leaving the earlier suit for dismissal and they have filed the present suit for the same relief on the strength of the patta obtained. In the earlier suit the relief for mandatory induction was not claimed. But it was alleged by the appellants /plaintiffs in the suit as well as in their evidence that the respondents/defendants have encroached the suit property and raised the compound wall 'A B C D' as shown in the plan and thus tried to enhance their possession by including of the portion which got covered within the compound wall.

15. The learned First Appellate Judge has observed that despite the cause of action for mandatory injunction has arisen in the year 1997 itself, the suit has been filed only in the year 2003 and that too without a prayer for recovery of possession and hence the suit itself is barred by limitation.



Since the period of intimation for the relief of mandatory injunction is 3 years from the date when the cause of action arose, it was observed that the time is barred. No explanation has been given on the side of the appellants for this observation made by the First Appellate Judge on the point of limitation. The appellants /plaintiffs themselves have admitted that there was an electricity meter box fixed on the 'A B C D' compound wall and service connection has also been obtained. That will show that there was not only a construction of compound wall but also an occupation and possession.

16. When a relief for mandatory injunction is prayed in the suit for removing any structures, proving of such structures within the specific description of boundaries and measurements is essential. In such cases, the report of the commissioner will be of great help and it could reduce the oral evidence. But in this case neither of the parties had filed a petition for appointment of commissioner. Even if the existence of compound wall which sought to be evicted is not denied by the defendants, its measurement needs to be proved in order to get an executable decree for mandatory injunction. The measurement of the portion which got covered within the compound wall is also essential in order to know the area of the site which was occupied by the defendants through encroachment.

17. In such case, the relief of recovery of possession should also have been prayed and the relief of mandatory injunction could have been consequent to that. Since the limitation for the relief of recovery of possession is 12 years, the suit would not have got barred by limitation. Failure to do so has rendered the suit as time barred. Even though the prayer for declaration is not essential for the relief of permanent injunction, in the given context of the matter, the prayer for recovery of possession is essential along with the relief of mandatory injunction.

18. Even though there are some admissions in the evidence of the respondents/defendants, the plaintiffs have got a duty to prove that the suit is well within limitation.

19. The learned First Appellate Judge has rightly analysed the factual matrix of the subject matter combined with the law on the point of limitation. The reasons pointed out by the learned First Appellate Judge are satisfactory to set aside the judgment and decree of the Trial Court. Hence, I find no reason to interfere with the judgment of the First Appellate Court.



In the result, this second Appeal is dismissed. The judgement and decree of the First Appellate Court is confirmed. No costs. Connected miscellaneous petition if any, are also closed.

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Sd/-
Assistant Registrar(CS IX)

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Sub Assistant Registrar

jrs

To

1. The Principal Sub Judge,
Chengalpattu.
2. The District Munsif cum Judicial Magistrate,
Thirukkalukundram.

Copy To

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

S.A.No.397 of 2010

SRA(CO)
CS/18/10/2021