



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 25.02.2021

CORAM :

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A (MD) No.7 of 2015

V.N.R. Subbiah

..Appellant / Appellant / defendant

Vs.

R. Kanagaraj (died)

1. Avudaithai

2.K. Rajadurai (died)

(Memo in USR No.402 dated 05.01.2021

is recorded as R2 died and R1 who is already on record

as LR of the deceased R2 vide Court order dated

19.01.2021)

3.K.Gayathri.

4.K. Suganthi

: Respondents /Respondents/Plaintiffs

Prayer: Second Appeal filed under Section 100 CPC against the decree and Judgment dated 19.02.2014 passed in A.S.No.52 of 2011, on the file of the Sub Court, Kovilpatti by concurrent Judgment and decree passed in O.S.No.31 of 2007, dated 08.07.2011, on the file of the District Munsif Court, Kovilpatti.

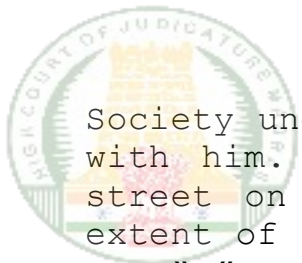
For Appellant : Mr. L. Prabahar

For respondents : No appearance

JUDGMENT

The defendant in O.S.No.31 of 2007 is the appellant. Challenge is to the decree for declaration of title and mandatory injunction granted by the trial Court and affirmed by the first Appellate Court in A.S.No. 52 of 2011, on the file of the Sub Court, Kovilpatti.

2. According to the plaintiff, the suit "A" schedule property belonged to his grand father Kandhasamy Naicker, who had sold the portion of it to the Venkateshwarapuram Co-operative



Society under Ex.A1, dated 25.08.1952 retaining the remaining land with him. Claiming that the defendant had encroached upon the street on the western side of the suit property as well as an extent of 10 Feet over the "A" schedule property, which was shown as "B" schedule property, the plaintiff had sought for declaration of title and for consequential permanent injunction and mandatory injunction directing the defendant to remove the Car shed that has been put up by the defendant by encroaching upon the street and a portion of the "A" schedule property.

3. Resisting the same, the defendant has contended that the plaintiff has no title to the suit "A" schedule property. It was also pointed out that when the father of the plaintiff is alive, the plaintiff who is the grand son of Kandasamy Naicker is not entitled to the suit property. It was claimed that there was no street on the Eastern side and the defendant is entitled to the property, over which he had put up the car shed.

4. At trial, the plaintiff examined himself as PW.1 and three other witnesses, who are the owners of the property on the north of the suit property were examined as PW.2 to PW.4. The defendant was examined as DW.1 and one Gnana Sundaram was examined as DW.2. While Exs. A1 to A14 were marked on the side of the plaintiff, Exs. B1 to B3 were marked on the side of the defendant. A Commissioner was appointed and his report and plan were marked as Exs.C1 and C2.

5. The trial Court, upon considering the evidence on record, particularly, the recitals in EX.A1 sale deed, concluded that the larger extent of 23 Gajams East-West and 57 Gajams North - South belonged to the grand father of the plaintiff and he had sold an extent of 7 ½ Gajams North - South and 5 ½ Gajams East West to the Co-operative Society and retained the remaining land with him. The trial Court has also relied upon Exs.A10 to A12 sale deeds in respect of the properties on the North of the defendant's property, which showed the existence of the road on the western side of their property and the defendant's property also to conclude that the defendant had encroached upon the road as well as the portion of the plaintiff's property, which is the suit "A" schedule property. Upon the said conclusion, the trial Court had decreed the suit as prayed for. Aggrieved, the defendant preferred an appeal in A.S.No.52 of 2011, the appellate Court on reconsideration of the evidence on record, concurred with the findings of the trial Court and dismissed the appeal. Hence, the Second Appeal.

6. At the time of admission following substantial questions of law has been framed:



1. Whether the Ex.A1 marked by the respondents / respondents / plaintiffs herein, be considered to be a valid deed for proving the title to them?

2. Whether a grand-son, seek the relief of declaration in his favour in respect of an ancestral property without impleading his father who is alive at the time of institution of the suit?

3. Whether, a person, be entitled to the reliefs of declaration and permanent injunction without producing any document to prove either his title or possession or enjoyment?

4. Whether the courts below right in considering a vacant site as pathway contrary to the revenue records and FMB Sketch?

5. Whether " Manaivari thoraya Patta", a document to establish the possessory right of a person in Naham lands against persons who had no valid title over the property concerned?

6. Whether the relief of declaration, be granted even if it was not sought, by the plaintiff?

7. Will, possession get converted into title when neither party is vested with title through valid documents?

8. Whether the relief of mandatory injunction, be sought in respect of an alleged street,, which is not indeed in existence topographically, without impleading concerned panchayat board as a party to the suit?

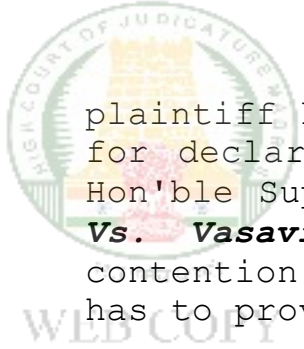
9. Whether the name of the street in a deed prevail over topographical existence and FMB Sketch?

10. Whether, a conclusion of considering one of the suit properties as a pathway only on the basis of oral evidences and recitals found in the documents of the further witnesses, be arrived at?

7. I have heard Mr. L. Prabhakar, learned counsel appearing for the appellant.

8. Despite the service, the respondents have not chosen to appear before this Court either in person or through counsel, duly instructed.

9. Mr.L. Prabhakar, learned counsel appearing for the appellant elaborating on the substantial questions of law would vehemently contend that Ex.A1 which is a sale deed executed by the grandfather of the plaintiff in favour of the Cooperative Bank cannot be taken as a document of title for the purpose of granting a declaration of title in favour of the plaintiff with regard to "A" schedule property. He would further contend that when the father of the plaintiff was alive on the date of the suit, the



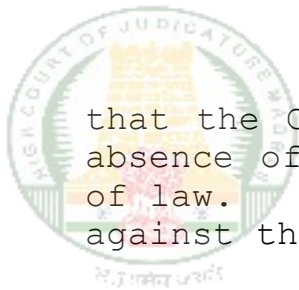
plaintiff has no right over the property and cannot seek a decree for declaration. He would also rely upon the Judgment of the Hon'ble Supreme Court reported in **2014(4) CTC 471 (Union of India Vs. Vasavi Co-op. Housing Society Ltd.,)** in support of his contention that when the plaintiff seeks declaration of title he has to prove his title beyond reasonable doubt.

10. Ex.A1 sale deed is of the year 1952. Both the Courts below have considered the recitals in Ex.A1 had come to the conclusion that the plaintiff's grandfather Kandasamay Naciker was entitled to a larger extent of property and he had after selling a small extent of land to the Co-operative Bank, retained the remaining portion of the land with him. I do not think that this Court can interfere with the factual findings unless they are perverse. I find the said conclusion is in tune with the recitals in the documents and it cannot be termed as perverse. A perusal of Ex.A1 would support the conclusion of the Courts below to the effect that the plaintiff's grand father Kandasamy Naicker was a owner of the larger extent of the property. He had sold a smaller extent of property and he has retained the remaining portion with him. Hence, the first substantial question of law regarding the failure of the title under Ex.A1 is answered against the appellant.

11. As far as the second question of law is concerned, it does not actually survive as on today. Though the learned counsel appearing for the appellant vehemently contended that since the petitioner's father was alive, the suit was incompetent on the date of institution. Now, it is admitted that the plaintiff and his father died pending the suit and the LRs were brought on record even in the suit and therefore, the claim of the appellant that the suit ought not to have been decreed for declaration cannot be countenanced. The Courts have to taken in to account the subsequent events and granted the relief in accordance with law.

12. The appellant counsel would vehemently contend that in the absence of the title deed, the Courts below were not right in granting the declaration of title.

13. I am constrained to observe that the said contention cannot be accepted as a legal preposition. In civil cases, the Courts are entitled to go by preponderance of the probabilities and grant a decree for declaration of title. It is not mandatory for a person seeking declaration of title to produce a document of title in his favour. The Hon'ble Supreme Court in the Larger bench decision has laid down that even a person in adverse possession can seek declaration of title. Therefore, I do not think that the contention of the learned Counsel the appellant



that the Courts below cannot grant a declaration of title in the absence of a title deed can be accepted as a general proposition of law. Hence, the third substantial question of law is answered against the defendant.

14. The 4th substantial question of law relates to the right of the pathway. The sale deeds viz., Exs. A10 to A12 show that there was a pathway mainly for the northern owners to reach their property from the pathway on the south. The existence of the pathway has been spoken to by PW.2 to PW.4. Exs.A10 to A12, have clearly demonstrated the existence of a pathway. Therefore, even though the description to Ex.B1 sale deed shows that it is a Grama Natham land. The recitals in Exs. A10 to Ex.A12 and the evidence of PW.2 to PW.4 would demonstrate that there was a pathway which has been encroached upon by the defendant. The fourth substantial question of law answered against the appellant.

15. The learned counsel appearing for the appellant would contend that Ex.B3 would establish his title to the property in question. Ex.B3 relates to land in S.No.269/34. Both the Courts below have considered the effect of the said patta and found that the same will not confer any title on the appellant. More over, Ex.B3 is only the draft patta (தேராய பட்டா) hence the Courts below were justified in rejecting the same.

16. The plaintiff has sought for declaration of title to his "A" schedule property excluding the extent of East West 5 ½ Gajams and North south 7 ½ Gajams situated on the south eastern corner of the larger extent. When the plaintiff has sought for declaration of his title, the 6th substantial question of law strictly does not arise.

17. Since the first substantial question of law is answered against the appellant concluding that the plaintiff has made out a valid title to the "A" schedule property, 7th question of law becomes irrelevant.

18. As regards impleading of the Panchayat Board, there was no plea taken or issue framed before the Courts below. It is settled position of law that the issue relating to non joinder of necessary parties has to be taken at the earliest point of time and hence, I do not think that the appellant could be permitted to raise non joinder of necessary party as an issue in the second appeal. The boundary description in EXs.A10 to A12 would demonstrate the existence of pathway in the western side of the defendant's property, which has been encroached upon by the defendant by putting up a car shed. The 8th question of law is answered against the appellant.



19. In view of the answer to the 8th substantial question of law, 9th substantial question of law becomes in consequential.

20. The Boundary recital in documents can be relied upon to show the nature of the grandfather's property if the persons concerned with those documents are examined to prove the said recitals. In the case on hand, the boundaries recital in Exs.A10 to A12 have been proved by examining the parties or the successor in interest of parties to those documents. Hence, the 10th substantial question of law is also answered against the appellant.

21. In view of the answers given to all the above substantial questions of law, the Second appeal fails and the same is dismissed. There shall be no order as to costs.

Sd/-

Assistant Registrar (T&P)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

trp

To

1. The Sub Judge, Kovilpatti.

2. The District Munsif, Kovilpatti.

Copy to

The Section Officer, VR Section-2 copies

Madurai Bench of Madras High Court, Madurai.

S.A (MD) No.7 of 2015

25.02.2021

KM(18.05.2021) 6P 5C