



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON
27.04.2022

DELIVERED ON
29.04.2022

WEB COPY

CORAM

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

Second Appeal No.506 of 2015
and
MP No.1 of 2015

Pazhamalai ...Appellant/Respondent/Defendant
Vs.
Muruganandam ...Respondent/Appellant/Plaintiff

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the decree and judgment made in AS No.24 of 2010 dated 30.10.2013 passed by the Subordinate Judge, Ariyalur, by reversing the decree and judgment in O.S.No.133 of 2001 dated 19.01.2010 passed by the District Munsif Court, Jayankondam.

For Appellant : Mr. G.Pugazhenth

For Respondent : Mr.S.Kanmani Annamalai
for M/s. Tamizh Law Firm

JUDGMENT

The defendant is the appellant in this Second Appeal.

2.The respondent/plaintiff filed a suit seeking for the relief of declaration of title and permanent injunction with respect to the 1st item of the suit property and for the relief of mandatory injunction with respect to the 2nd item of the suit property.

3.The case of the plaintiff is that his mother Povunammal, purchased a property measuring an extent of 5½ cents on 3.6.1972 from one AzhagaPadayatchi and this document was marked as Ex. A1. The further case of the plaintiff is that the property was measured with the boundaries described in Ex.A1 document and it was found that the total extent of the property was 9 cents. Thereafter, the plaintiff purchased the excess 3½ cents in Survey No. 246/1 from the legal heirs of Mottayapadayatchi on 13.11.1997 and this document was marked as Ex.A2.

4. The further case of the plaintiff is that the defendant had purchased 6 cents through sale deed dated 5.6.1985, marked as Ex.B1 in SF No.246/2, but, however the Survey Number was



wrongly mentioned as SF No. 246/1. Taking advantage of the same, the defendant attempted to encroach upon the property of the plaintiff and construct a house. He also proceeded to put up a thatched shed and was running a cycle shop in the 2nd item of the suit property and was preventing the access of the plaintiff. Left with no other option, the suit was filed seeking for the reliefs mentioned supra.

5. The case of the defendant is that the plaintiff could not have purchased 3½ cents in Survey No. 246/1 since the vendor did not have any right to convey this extent to the plaintiff. The further case of the defendant was that he had purchased 6 cents in SF No.246/1 through Ex.B1 sale deed from one Moorthy, Gopalaswami and Ponnuswami. Thereafter, the property was subdivided as 246/1 C2 and a separate patta was also issued in the name of the defendant in the year 1994. Thus, the defendant claimed that he is in possession and enjoyment of the property purchased by him. He alleged that it was the plaintiff who attempted to encroach upon his property and had constructed a bathroom and erected bore well and also installed dish antenna and hence the defendant filed an independent suit in O.S. No. 153 of 2001 for recovery of possession. Thus, the defendant sought for the dismissal of the suit.

6.The Trial Court, on considering the facts and circumstances of the case and on appreciation of the oral and documentary evidence, partly decreed the suit by rejecting the claim for declaration of title and mandatory injunction and by allowing the claim of permanent injunction sought for by the plaintiff. Aggrieved by the same, the plaintiff filed an appeal before the Sub Court, Ariyalur, in A.S. No. 24 of 2010 and the defendant filed a Cross-Appeal before the same Court being aggrieved by the grant of permanent injunction in favour of the plaintiff. The Lower Appellate Court on re-appreciation of the oral and documentary evidence and after considering the findings of the Trial Court was pleased to allow the appeal filed by the plaintiff and dismissed the Cross-Appeal filed by the defendant through a Common Judgment dated 30.10.2013. Aggrieved by the Judgment made in A.S. No. 24 of 2010, the present Second Appeal has been filed by the defendant.

7.When the Second Appeal was admitted, the following substantial question of law was framed for consideration:

Whether the Lower Appellate Court was right in granting decree for declaration of title, when the four boundaries of Ex.A1 and Ex.B1 indicate that there was no property left behind at the hands of the vendors of the plaintiff, in turn, the property covered under Ex.A1 and Ex.B1?

8.Heard Mr.G.Pugazhenth, learned counsel appearing for the appellant and Mr.Mr.S.Kanmani Annamalai, learned counsel



appearing for M/s.Tamizh Law Firm, for the respondent.This Court also carefully considered the materials available on record and the findings rendered by both the Courts below.

9.The learned counsel for the appellant submitted that SF No.246 consisted of a total extent of 22 cents which belonged to Mottayapadayatchi. He had four sons and on his demise, the property was inherited by his four sons equally and thereby each was entitled for 5½ cents. One of the sons sold his 5½ cents to the mother of the plaintiff through Ex.A1 Sale Deed. The branch of yet another son sold their respective shares totally measuring 5½ cents under Exhibits B9 and B10 Sale Deeds. The branch of one other son sold his share of 5½ cents through Ex.B11 Sale Deed. Only one son did not sell his share of 5½ cents and it was kept intact. The learned counsel also submitted that a joint patta was issued in favour of the mother of the plaintiff and the purchasers under Exs.B9 and B10 Sale Deeds and this patta was also marked as Ex.A7. By pointing out to all these facts, it was submitted that there was no excess land available for the legal heirs of Mottayapadayatchi to once again convey 3½ cents in favour of the plaintiff through Ex.A2 Sale Deed. It was further submitted that the plaintiff did not prove his possession in the suit property and the same is clear from the evidence of P.Ws. 2 to 6.

10.Per contra, the learned counsel for the respondent submitted that Ex.A2 Sale Deed was a genuine document and it was executed after receiving proper consideration from the plaintiff. There is a specific finding to that effect given by the Lower Appellate Court. The learned counsel further submitted that the plaintiff was in possession and enjoyment of the 1st item of the suit property and the same is clear from the Advocate Commissioner's Plan and Sketch marked as Exhibits C1 and C2. The learned counsel further submitted that the property purchased by the defendant under Ex.B1 is in no way connected with the suit property and hence the defendant does not have the right to interfere with the possession and enjoyment of the suit property of the plaintiff.

11.There is no dispute with regard to the fact that Survey No.246/1 consisted of a total extent of 22 cents. A specific finding to that effect has been given by the Lower Appellate Court. There is also no dispute with regard to the fact that the property originally belonged to one Mottayapadayatchi. He had four sons namely Azhagapadayatchi, Rangasami, Ramachandran and Rajagopal. On his demise, his four sons inherited the property in Survey No.246/1 and each got 5½ cents.

12.The first son namely Azhagapadayatchi, sold his share of 5½ cents to the mother of the plaintiff through Ex.A1. The next son Rangasami had two sons namely Venkatesan and Krishnamoorthy.



They were examined as P.W.6 and P.W.2 respectively. Their evidence coupled with Ex.B9 and B10 Sale Deeds shows that they had conveyed their respective share through these Sale Deeds in favour of one Pichai and Kaliyaperumal respectively. It can also be seen from Ex.A7 that a joint patta has been given for an extent of 11 cents (4.5ares) in favour of the mother of the plaintiff, Pichai and Kaliyaperumal.

13.The third son Rajagopal, left behind his wife and sons and they sold 5½ cents to one Mahalingapadayatchi, through Ex.B11 Sale Deed. The same is clear from the evidence of P.W.4 who was one of the son of Rajagopal. The balance 5½ cents which was inherited by Ramachandran was kept intact and his son Kaliyamoorthy who was examined as P.W.7 makes it very clear in his evidence.

14.The above factual scenario is sufficiently borne out by the documents and the evidence of various witnesses. Under such circumstances, the moot question would be as to where the legal heirs of Mottayapadayatchi got an excess of 3½ cents to sell it in favour of the plaintiff through Ex.A2 document. This is in view of the fact that the entire 22 cents has been properly accounted and the right has been traced and there is no material to show that the legal heirs of Mottayapadayatchi, apart from the 22 cents, had an excess of 3½ cents that could be conveyed to the plaintiff.

15.The principle of nemo dat quod non habet will squarely apply to the facts of the present case. The plaintiff is tracing his right for 3½ cents through Ex.A2 Sale Deed and this is exactly the portion which is under dispute between the plaintiff and the defendant. Under such circumstances, since the plaintiff is claiming for the relief of declaration of title for the 1st item of the suit property, the burden of proof is upon him to establish his title. The plaintiff has miserably failed to establish his right and title over 3½ cents which was not available for the legal heirs of Mottayapadayatchi.

16.The Lower Appellate Court while dealing with this issue did not give any convincing finding as to how the legal heirs of Mottayapadayatchi could have conveyed 3½ cents through Ex.A2 to the plaintiff when they themselves did not have any property in excess of 22 cents that was owned by Mottayapadayatchi. The Lower Appellate Court has basically attempted to pick holes on the case of the defendants. In a suit for declaration of title, the burden of proof is only upon the plaintiff to prove the title and this burden will never get shifted to the defendant till the plaintiff discharges his burden. Keeping this principle in mind, it can be safely held that the Lower Appellate Court failed to appreciate the crucial fact that the plaintiff was not able to establish his right and title through Ex.A2 sale deed.



17. There is yet another issue that was not properly dealt with by the Lower Appellate Court. Ex.A2 Sale Deed was not executed by all the legal heirs of Mottayapadayatchi and the same is clear from the evidence of P.W.5 to P.W.11. Under such circumstances, it is not known as to how the plaintiff can trace title for the 1st item of the suit property under Ex.A2 Sale Deed.

18. Even insofar as the possession over the suit property is concerned, the evidence of P.Ws.2 to 6, shows that they were in possession and enjoyment of the suit property till Ex.A2 document was executed in favour of the plaintiff and it is not known as to how they were in possession and enjoyment of a property which was not available for them to convey through Ex.A2 sale deed in favour of the plaintiff.

19. In view of the above discussion, this Court holds that the Lower Appellate Court was not right in granting the decree for declaration of title in favour of the plaintiff since there was no property left behind in the hands of the legal heirs of Mottayapadayatchi and they could not have conveyed what they themselves did not have through Ex.A2 Sale Deed. The substantial question of law framed by this Court is answered accordingly in favour of the appellant.

20. In the result, the Judgment and Decree passed by the Lower Appellate Court is hereby set aside and the Second Appeal is accordingly allowed. Considering the facts and circumstances of the case, there shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-VIII)

//True Copy//

Sub Assistant Registrar

jv
To

1. The Subordinate Judge, Ariyalur,
2. The District Munsif, Jayankondam
3. The Section Officer

VR Section, High Court Madras.

+1cc to Mr.G.Pugazhenth, Advocate, S.R.No.30251

+2cc to M/s.Tamizh Law Firm, Advocate, S.R.No.30196

Second Appeal No.506 of 2015
and MP No.1 of 2015

RSV(CO)
RGA(02/06/2022)