



S.A(MD).No.41 of 2011

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED: 28.06.2022

CORAM: **JUSTICE N.SESHASAYEE**

S.A(MD).No.41 of 2011

and

M.P(MD).No.1 of 2011

1.Pannerselvam
2.Sakundala
3.Sumathy

...Appellants/Appellants/Defendants

Vs

N.Nagarajan(died)
1.N.Santhi
2.K.Kasthuri
3.N.Ravichandran
4.N.Chitra
5.N.Devi
6.N.Ramesh
7.N.Suresh
8.N.Viji
9.N.Raghu
10.N.Madhu
11.N.Subha
12.N.Suguna
13.The Commissioner,
Thanjavur Municipality,
Gandhiji Street, Thanjavur.

....Respondents 1 to 12/ Respondents 2 to 13/Plaintiffs 2 to 13

Prayer : Second Appeal filed under Section 100 of Code of Civil Procedure, to set aside the decree and judgment passed in A.S.No.8 of 2009 dated 30.11.2009 on the file of the Additional Subordinate Court,



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Thanjavur, set aside the decree the judgment passed in O.S.No.103 of 2004 dated 30.12.2008 on the file of the District Munsif Court, Thanjavur.

For Appellants : Mr.K.Guhan
For Respondents : Mr.G.Karnan (for R1 to R12)
Mr.J.Parekh kumar (for R13)

JUDGMENT

The defendants in O.S.No.103 of 2004 on the file of the District Munsif Court, Thanjavur, having suffered a decree successively both before the trial Court as well as in the First Appellate Court in A.S.No.8 of 2009 are the appellants herein. The suit is laid for declaration of plaintiffs' title, for prohibitory injunction to protect possession and also for a mandatory injunction directing the fourth defendant/ Municipality to correct its survey map and other Municipal records. For narrative convenience, the parties shall be referred to as per their rank before the trial Court.

2.1 The facts are:

- The suit property is described as a vacant site measuring 61 ft. East - West x 9.75 ft. North-South. This property, and the property to its south originally belong to one Palaniyayi. The plot which Palaniyayi owned measured 61 feet East-West x 20 feet North-South. While so,



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under Ext.A1-sale deed, dated 25.09.1918, Palaniyayi sold the northern half of this property (measuring 61 feet East-West x 10 feet North-South) to one Kuttyammal. Subsequently, on 29.08.1943 Vide Ext.A.2, Kuttyammal sold this plot to one Srinivasampillai. On 29.10.1970, Srinivasampillai executed Ext.A.16-Will in favour of the plaintiff. On 19.01.1974 the testator died, whereupon the plaintiff obtained the suit property under the Will. During the pendency of the suit before the trial Court, the plaintiff passed away, and his legal representatives were impleaded as plaintiffs.

2.2 Turning to the defendants' title, they claim right to the portion to the south of the property belonging to the plaintiff. Their title is that the same Palaniyayi Vide Ext.A.7 sale deed, dated 28.06.1910 sold the southern half of the property that she held (measuring 61 feet East-West x 10 feet North-South) to one Sivapackiathammal. This property came to be partitioned among the descendants of Sivapackiathammal Vide Ext.B.1-partition deed, dated 31.10.1980, in which, the property came to be allotted to the share of first defendant. Subsequently, on 09.07.1986 Vide Ext.B.2, the first defendant settled the property in favour of his wife /the second defendant in the suit.



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3.1 The dispute arose between the parties in the following way:

- It is an unassailable fact that Palaniyayi was entitled to a plot measuring 61 feet East-West x 20 feet North-South. It is also an unassailable fact that she sold the southern half of her property under Ext.A.7 to Sivapackiathammal in 1910 and thereafter, she sold the northern half Vide Ext.A.1 to Kuttyammal in 1918. The dispute, however, has arisen while describing the southern half of the property in Ext.B.1-partition deed among the family members of the first defendant, where North-South boundary measurement to the southern plot covered under Ext.A.7, is given as 13 feet instead of 10 feet. While the plaintiffs' northern plot is vacant, the defendants are stated to have put up a small construction in the southern portion. The dispute is over the differential 3 feet.

3.2 The Municipality was arrayed as fourth defendant and it is called upon to defend the relief regarding the mandatory injunction for correcting the survey plan to be in line with the title of the plaintiffs. It has filed written statement in which it has taken up a plea that correcting the survey plan belongs to the revenue department and hence, the suit pertaining to mandatory injunction sought against the Municipality is not maintainable.



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4.1 The matter went to trial and before the trial Court, for the plaintiffs, 7th plaintiff was examined as P.W.1. For the defendants, the third defendant, and daughter of defendants 1 and 2 was examined as D.W.1. They also examined one Mathivanan as D.W.2. Both sides have produced ample amount of documentary evidence, of which, the material documents on both sides have been already referred to. The other documents are essentially tax receipts on either side. Besides, the trial Court has also appointed an Advocate Commissioner for local inspection and his report was received on record as Ext.C.1 to Ext.C4. Indeed the Commissioner and the Surveyor, who assisted the Commissioner, were examined as P.W.2 and P.W. 3(whereas they ought to have been examined as C.W.1 and C.W.2).

4.2 After evaluating title of either side based on the title document made available before it, the trial Court decreed the suit, and it came to be confirmed by the First Appellate Court. Hence, the defendants 1 to 3 are before this Court in this appeal.



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5. The Second Appeal is admitted for considering the following substantial questions of law:

i) Whether the courts below have committed an error in holding that Ex.A1-Will was admissible and could be used as evidence, even though not even one of the attestors of the said 'Will' had been called for, for the purpose of proving its execution and there was no proof that none of the attestors was alive and subject to the process of the court and capable of giving evidence?

ii) Whether the courts below have committed an error in holding that the appellants/defendants have not perfected title by adverse possession even though they have produced documents showing their possession itself from the year 1980?

6. Heard both sides. The learned counsel appearing for the defendants submitted that the plaintiff claimed title on the basis of Ext.A.16-Will, dated 29.10.1970 alleged to have been executed by Srinivasampillai, the father of the plaintiff. This Will was not formally proved by examining its attestor in the manner provided, when Ext.A.16 goes necessarily in favour of plaintiff's title. Secondly, the defendant has pleaded prescription of title by adverse possession and this has not been adequately appreciated by the Courts



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below. The defendants claimed title based on Ext.B.1-partition deed, dated 31.10.1980 and this is supported by the revenue records and this would indicate that the defendants have prescribed title by adverse possession.

7. This Court hardly would appreciate these twin arguments despite the valiant efforts made by the learned counsel for the defendants. Turning to Ext.A.16-Will is concerned, it is something within the family of the plaintiff, and the defendants, being a stranger to the family of the plaintiff, has no locus standi to raise this plea. Turning to the plea of adverse possession, admittedly, the property of the plaintiff is a vacant land and in all such cases, possession follows title, and when once title is found to be in favour of the plaintiff, necessarily he is presumed to be in possession, and unless the plaintiff is put on notice by the defendants asserting a hostile right in the property of the plaintiff, there is no way for the defendant to establish prescription of title by adverse possession. Here, the Court finds that the defendants have not adequately pleaded or proved the basic criteria *nec vi, nec clam, nec precario* to establish title by the adverse possession. Ultimately, this Court finds that neither of the substantial questions herein can be held in favour of the defendants and consequently, this Court does not find any merit in the appeal.



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8. Accordingly, this Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

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Index : Yes/No

Internet: Yes/No

Rmk

To

1. The Additional Subordinate Judge, Thanjavur.

2. The District Munsif, Thanjavur.

3. The Section Officer,

VR Section,

Madurai Bench of Madras High Court,

Madurai.



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N.SESHASAYEE, J.,

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