



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

JUDGMENT RESERVED ON : 01.02.2022

JUDGMENT PRONOUNDED ON : 08.02.2022

CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

S.A(MD) .No.324 of 2005

1.Amirtha Bai

2.Jayasekar

3.Rajasekar

4.Malika

5.Sukuna

6.VijayalathaAppellants/Respondents 1 to 6
/Defendants 1 to 6

Vs

1.Ganasigamony Nadar ...Respondent/Appellant
/Plaintiff

2.Rajayyan Nadar

3.Samraj

4.Sundar

5.John EdwardRespondents 2 to 5
/Respondents 7 to 10
/Defendants 7 to 10

PRAYER : Second Appeal is filed under Section 100 of C.P.C, against the judgment and decree dated 15.02.2005 passed in A.S.No.34 of 2003 on the file of the Subordinate Judge, Padmanabhapuram whereby setting aside the judgment and decree dated 27.02.2003 passed in O.S.No.51 of 2001 on the file of the District Munsif Court, Padmanabhapuram.

For Appellants : Mr.V.M.Bala Mohan Thmapi

For R1 : Mr.H.Thayumanasamy

For R2 to R5 : Given up



JUDGMENT

The defendants 1 to 6 are the appellants.

2.The plaintiff filed O.S.No.51 of 2001 before the District Munsif Court, Padmanabhapuram for permanent injunction and mandatory injunction. The suit was dismissed by the trial Court. The defendants filed A.S.No.34 of 2003 before the Sub Court, Padmanabhapuram. The learned Subordinate Judge was pleased to allow the appeal and granted a decree in favour of the plaintiff. As against the same, the defendants 1 to 6 have filed the present second appeal.

3.The plaintiff had contended that the old Survey No.3667/B is having a total extent of 1 acre and 28 cents as per records. But, as per lie, the total extent is 1 acre and 6 cents. The plaintiff had further contended that the eastern most 50 cents in the above said 1 acre and 6 cents is the suit schedule property. The plaintiff further contended that the suit schedule property was originally owned by one Kamalam and Balammal. They have alienated the suit schedule property in favour of the plaintiff and his father under Exhibit A12 on 27.10.1976. After the death of the plaintiff's father, Rasslayyan, the plaintiff became the absolute owner of the suit schedule property. The plaintiff had further contended that the present seventh defendant and his brother Chellaian Nadar disturbed the possession of the plaintiff over the suit schedule properties. Hence, he along with his father filed O.S.No.706 of 1979 before the Additional District Munsif Court, Padmanabhapuram for the relief of declaration of title, possession and permanent injunction for the suit schedule property. The said suit was decreed as prayed for. The present seventh defendant and his brother Chellaian Nadar had filed A.S.No.180 of 1980 before the Sub Court, Padmanabhapuram. The learned Subordinate Judge confirmed the judgment and decree of the trial Court excluding the house property of the present seventh defendant and his brother Chellaian Nadar. Not satisfied with that, the said defendants filed A.S.No.2260 of 1983 before the High Court, Madras. This Hon'ble Court has dismissed the second appeal on 15.10.1997. Hence, the title of the plaintiff with regard to the suit schedule property has already been confirmed by this Hon'ble High Court.

4.The plaintiff had further contended that one of the judgment debtors in the previous suit namely Chellaian Nadar died on 04.02.2001. The defendants 1 to 6 in the present suit are the legal heirs of the said Chellaian Nadar. They attempted to bury the body of Chellaian Nadar in the suit schedule property. Despite the police complaint and complaint to the revenue authority, the plaintiff could not prevent the defendants 1 to 6 from burying the dead body of Chellaian Nadar in the suit schedule property. Now, the suit has



been filed by the plaintiff seeking a decree for permanent injunction and for mandatory injunction for removal of the dead body buried in the suit schedule property.

5.The defendants 1 to 6 filed a written statement and contended that the actual extent of Survey No.3667/B is only 1 acre and not 1.06 acres as contended by the plaintiff. The defendants further contended that the suit schedule property does not belong to the plaintiff. The defendants further contended that the resurvey number of suit schedule property is 578/4 and it belongs to Chellaian Nadar. Hence, after his death on 04.02.2001, his body was buried in resurvey No.578/4. They further contended that though the plaintiff has lodged a complaint, there was no interference from the police. They further contended that already a tomb has been constructed over the said burial. Hence, they prayed for dismissal of the suit.

6.The trial Court after considering Exhibits A9 to A11 and A15 kist receipt came to a conclusion that the plaintiff is having only half share in the suit schedule property. The trial Court further arrived at a finding that the plaintiff has not produced the correlation certificate with regard to Old Survey No.3667/B correlating with the present survey numbers. The trial Court further found that the Advocate Commissioner who identified the suit properties could not complete his inspection, in view of the disturbance created by the plaintiff. Hence, the Court is not in a position to arrive at a finding whether the tomb is located in the suit schedule property or not. Based on the said findings, the trial Court dismissed the suit.

7.The First Appellate Court relied upon the judgment and decree in the previous proceedings in O.S.No.706 of 1979, A.S.No.180 of 1980 and judgment in the second appeal in S.A.No.2260 of 1983 and arrived at a finding that the plaintiff has established his title and possession over the suit schedule property. The First Appellate Court found that though the defendants 1 to 6 have filed a written statement disputing the title of the plaintiff, they have not chosen to examine any one on their side to prove their case. The First Appellate Court also found that no title deed has been filed on the side of the defendants to establish that the defendants are the owners of the suit schedule property. The First Appellate Court also found that the defendants have not established their right to bury the dead body of the Chellaian Nadar in the suit schedule property. Based upon the said findings, the First Appellate Court reversed the judgment and decree of the trial Court and decreed the suit as prayed for.

8.As against the same, the present second appeal has been filed. The second appeal has been admitted on the following substantial question of law:

<https://hcservices.ecourts.gov.in/hcservices> whether the suit for mandatory injunction is



maintainable when there is a cloud over the title to the plaint schedule property?

(ii)whether the finding of the lower appellate Court that the suit is not barred by res judicata is correct?"

9.The learned counsel for the appellants contended that the defendants have specifically disputed the resurvey number mentioned in the suit schedule property and the plaintiff has not correlated the old survey number with the resurvey numbers. He further contended that the suit schedule property in the previous proceedings are not the same in the present suit. Pending second appeal, a commissioner was appointed to inspect the suit schedule property to find out whether the tomb is located in the suit schedule property or not. The Advocate Commissioner has filed a report. As per the report of the Advocate Commissioner, the disputed tomb is located within the suit schedule property. The Advocate Commissioner has also filed a plan to indicate that the disputed tomb is located within the suit schedule property along with the Commissioner's report. A survey sketch has also been marked which indicate that the disputed tomb is located within the suit schedule property. The learned counsel for the appellants as well as the respondents have objected to the commissioner's report.

10.According to the learned counsel for the appellants, the commissioner has not ascertained and fixed the north, south and western boundary of the suit schedule property, as per Exhibit A2, a final decree plan. According to the learned counsel for the appellants, the Commissioner's report does not show the three houses that were excluded from the decree made in the previous proceedings. He further contended that the specific case of the first respondent is that the old survey number 3667/B correlates to resurvey numbers 578/4, 577/8, 577/10 and 71. But, the Advocate Commissioner has only measured resurvey numbers 577/14 part, 13 part, 12 part, 11(c) part and 10 part. According to the learned counsel for the appellants, the Advocate Commissioner has not clearly identified the suit with reference to Exhibit A2 final decree plan. The learned counsel for the appellants further contended that the commissioner's report cannot be the sole basis for granting an order of interim injunction or mandatory injunction when the plaintiff has not identified the suit schedule property in accordance with Exhibit A2 final decree and the commissioner's plan attached to the final decree.

11.Per contra, the learned counsel for the first respondent contended that the suit schedule property in the previous proceedings namely O.S.No.706 of 1979 and the present suit are one and the same. He further contended that the present seventh defendant was the third defendant in the previous suit. The fourth defendant in the previous suit was one Chellaian Nadar and his legal heirs are the defendants 1 to 6 in the present suit.

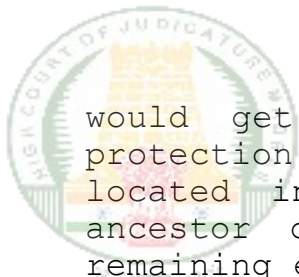


12. When the defendants have lost their suit in O.S.No.706 of 1979, their legal heirs cannot now again re-agitate the same issue in the present suit. He further contended that the plaintiff has categorically established that the disputed tome has been constructed high-high-handedly by the defendants 1 to 6 in the suit schedule property without any right title or possession. He further contended that the title and possession of the plaintiff has already been confirmed by this Court in S.A.No.2260 of 1983 in which, the suit schedule survey number has been specifically mentioned. Hence, he prayed for confirming the judgment and decree of the First Appellate court.

13. I have carefully considered the submissions made on either side.

14. It is the specific case of the plaintiff that the present suit schedule property is the subject matter of the previous suit in O.S.No.706 of 1979 on the file of the Additional District Munsif Court, Padmanabhapuram. In the said suit, the plaintiff and his father had prayed for declaration of title, possession and permanent injunction. The said suit has been decreed in entirety by the trial Court. However, on appeal filed by the defendants 3 and 4 in the said suit, the First Appellate Court slightly modified the judgment and decree of the trial Court. The decree for declaration of title, possession and permanent injunction were confirmed excluding the house property of the 3rd and 4th defendants therein. The said judgment and decree was challenged in S.A.No.2260 of 1983 before the High Court, Madras. This Court has confirmed the judgment and decree made in A.S.No.180 of 1980.

15. A perusal of the suit schedule property and judgment in the previous proceedings clearly indicate that the present suit schedule property was the suit schedule property in the previous suit also. The defendants 3 and 4 in the previous proceedings are none other than the brothers of the present plaintiff's father Rasslayyan. In the previous proceedings, the present seventh defendant and the ancestor in title of defendants 1 to 6 had contended that the suit schedule properties were purchased in the name of Rasslayyan on 21.10.1976 only on the ground that he is the eldest male member of the family. However, the sale deed standing in the name of Rasslayyan would enure to the benefit of the entire family. Hence, they contended that the said Rasslayyan and his son (the present plaintiff) would not be entitled to a decree for declaration of title and other two brothers namely Rajayyan Nadar and Chellaian Nadar are entitled to 2/3rd share. The said contention of the brothers namely Rajayyan Nadar and Chellaian Nadar was rejected by the trial Court in the previous proceedings and held that the suit schedule properties are the absolute properties of the father of the present plaintiff. The said finding was confirmed in the second appeal also. The only concession that the present seventh defendant and the ancestor in title of the present defendants 1 to 6



would get in the previous proceedings was to the extent of protection of their house property. Except the house property located in old survey number 3667/B, the defendants or their ancestor do not have any right, title or possession over the remaining extent.

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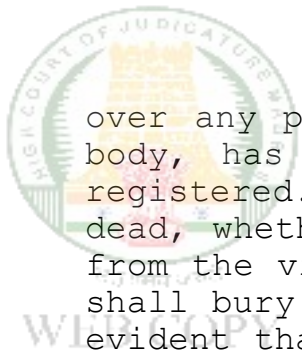
16. Even in the present proceedings, though the defendants have disputed the title of the plaintiff over the suit schedule property, they have not chosen to examine any one of their side. The defendants have also not chosen to produce any title deed disputing the title of the plaintiff. Hence, in view of the judgment in the previous proceedings and non-examination of the defendants in the present proceedings, this Court can safely come to a conclusion that the plaintiff has established his title and possession over the suit schedule property.

17. The seventh defendant and ancestor in title of the defendants 1 to 6 have lost the proceedings before the High Court in S.A.No.2260 of 1983 in a judgment dated 15.09.1997. Thereafter, except their respective house properties, the defendants do not have any right, title or possession over any portion of the suit survey number. The ancestor in title of the defendants 1 to 6 had passed away on 04.02.2001. The defendants 1 to 6 have chosen to bury the dead body of the said Chellaian Nadar in the suit schedule property only to wreck vengeance for their failure in the previous proceedings. It is seen from the records that the defendants are continuously creating disturbance to the plaintiff and his family right from the year 1979 onwards. The defendants have chosen to bury the dead body of the Chellaian Nadar in the suit schedule property only to disturb the possession and to bring down the value of the property held by the plaintiff.

18. The First Appellate Court has properly appreciated the judgment and decree in the previous proceedings and has arrived at a finding that the disputed tomb is located only in the suit schedule property. The Commissioner's report in the present suit also indicate that the disputed tomb has been erected only in the suit schedule property. The defendants do not have any right, title or possession in the suit schedule property except their house property as per judgment in their previous proceedings. Hence, if the tomb is located in any portion of the suit survey number, it would affect the rights of the plaintiff.

19. No person is entitled to bury or cremate a dead body in a private property. The burial or cremation of a dead body can be conducted only in a place designated by the local authorities. Anything done in violation of the said statutory provisions, has to be strongly condemned and liable to be removed.

20. In Rule 4 of the Tamil Nadu Village Panchayats (Provision of Burial and Cremation in the Burial Grounds) Rules, 1999, a person having control



over any place used as a place for burying or burning of the dead body, has to apply to the village panchayat to have such place registered. No new place can be used for burying or burning the dead, whether private or public unless a licence has been obtained from the village panchayat on application. As per Rule 7, no person shall bury or burn or cause to be buried to any place. Hence, it is evident that burying or burning a dead body in a place out side the licensed area is prohibited in the above said rules and any contravention attracts fine under Rule 7 (7) of the said rules. This Hon'ble High Court in a judgment reported in **2007 (6) MLJ 264** has held that the practice of burying and burning dead persons in private lands is contrary to legal provisions. The defendants have no right whatsoever to bring the dead body of Chellaian Nadar in a private patta land ignoring the statutory provisions.

21.Hence, viewed from any angle, the judgment and decree of the First Appellate Court does not warrant any interference.

22.In view of the above said discussion, the substantial questions of law are answered as follows:

(i)In view of the judgments under Exhibits A5, A6 and A7, there is no cloud over the title of the plaintiff and hence, the present suit for mandatory injunction is maintainable without a prayer for declaration of title.

(ii) Though the defendants have mentioned two suit numbers in their written statement and contended that the present suit is barred by res judicata, the defendants have not chosen to produce either the pleadings or the judgment and decree in those suits. Hence, the findings of the First Appellate Court that the suit is not barred by res judicata is correct.

23.In view of the above discussion, all the substantial questions of law are answered as against the appellant. The second appeal is dismissed. No costs.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

msa



To

1.The Subordinate Judge,
Padmanabhapuram

2.The Principal District Munsif
Padmanabhapuram.

3.The Section Officer
V.R.Section
Madurai Bench of Madras High Court
Madurai

+1 CC to M/s.H.THAYUMANASWAMY, Advocate (SR-4656[F] dated
08/02/2022)

+1 CC to M/s.V.M.BALAMOHAN THAMBI, Advocate (SR-4841[F] dated
08/02/2022)

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KMK (CO)
KB (02.03.2022) 8P 7C