



S.A Nos.704 and 705 of 2017

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.01.2023

CORAM:

THE HON'BLE MRS. JUSTICE T.V.THAMILSELVI
S.A Nos.704 and 705 of 2017
&C.M.P No. 18081 and 18082 of 2017

1.Natarajan

... Appellant in S.A Nos.704 and 705 of 2017.

Vs.

Palanivel (died)

1.kesavan

2.P.Elaiyappan

3.Azhakeswari

4.Rajalakshmi

... Respondents in S.A No. 704 of 2017.

1.Elaiyappan

2.Selvam

3.Ponnuvel

4.Vijayalakshmi

Muthayammal (died)

... Respondents in S.A No. 705 of 2017.

PRAYER in S.A No. 704 of 2017: This Second appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and decree dated



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10.07.2009 made in A.S No.8 of 2008 on the file of the Sub Court, Rasipuram confirming the judgment and decree adated 21.09.1999 made in O.S No.371/1997 on the file of the District Munsif Court,Rasipuram.

PRAYER in S.A No. 705 of 2017: This Second appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and decree dated 10.07.2009 made in A.S No. 9 of 2008 on the file of the Sub Court, Rasipuram confirming the judgment and decree dated 21.09.1999 made in O.S No.74/1998 on the file of the District Munsif Court,Rasipuram.

For Appellant : Mr.P.Tamilavel (in both appeals)

For Respondents: Mr.T.S.Baskaran (in both appeals)

COMMON JUDGMENT

The appellant herein/ plaintiff filed a Suit in O.S No. 371 of 1997, on the file of the District Munsif Court, Rasipuram, for the relief of permanent injunction against the defendants'(respondents' herein in S.A No. 704 of 2017) and also he is the fourth defendant in suit O.S No. 74 of 1998, on the file of the District Munsif Court, Rasipuram, filed by the defendants(respondents herein in S.A No.705 of 2017) for the relief of permanent injunction.



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2. The appellant Natarajan filed a suit O.S No. 371 of 1997 on

the file of the District Munsif Court, Rasipuram for the relief of permanent injunction against the defendants, claiming that suit property in patta No.32 R.S 6/3 with an extent of 85 cent with Well pumpset Saiko factory and also in R.S No. 6/2 an extent of Punjai acre 32 cent absolutely belongs to him.

3. The brief facts of the case are as follows:

The suit property originally belongs to Ganapathy paternal uncle of the plaintiff who died on road accident on 19.09.1991. While he was alive he executed a registered Will in favour of the plaintiff on 11.07.1986. As per the terms of the Will the plaintiff is succeeded to the suit properties immediately after the Ganapathy's death hence the plaintiff's entitled for the suit property and he is in possession and enjoyment of the same through the mother of Ganapathy and she was appointed as guardian to the plaintiff when he was minor. The said Ganapathy acquired title of the suit property through the partition deed dated 04.05.1970. The defendants 2 and 3 are the son of the first defendant/Ganapathy's brother. The fourth defendant is the wife of the deceased P.Ganapathy, she estranged from the said Ganapathy within few days after the marriage. From the 15.10.1991 the defendants 1 to 3 were attempted to trespass into the suit property. Hence



the suit.

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4. The fourth defendant remains exparte. The defendant 1 to 3 contested the suit and they submitted that the suit property is neither belongs to the plaintiff nor belongs to the Ganapathy since because during the life time of the Ganapathy he along with his brother(plaintiff's father) borrowed a loan from Subramani through pro-note then they failed to repay the same he filed O.S No. 546 of 1982 in which the decree was passed in favour of the said Subramani and he filed execution **R.E.P No. 202/83** and the said property was taken by Ramasamy on auction on **11.06.1987** hence the Ramasamy is the absolute purchaser of the suit property through Court auction nonetheless the plaintiff and his mother raised objection against the auction but the Court executed the sale in favour the said Ramasamy and the sale certificate also issued in favour of him on 03.05.1991. Thereafter the Panchayat was held on 15.05.1991 wherein as per that Ganapathy handed over the possession of the suit property to the said Ramasamy and from him Elaiyappan purchased the property through sale deed dated 15.10.1991 in the meanwhile on 19.09.1991 said Ganapathy died in the road accident but as per the sale deed the Elaiyappan was in possession and enjoyment of the property but the plaintiff created fabricated Will as if the Ganapathy



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created, and illegally claimed right over the suit property and also he has not in a position on the date of the alled Will. Hence he prayed to dismiss the suit.

5. Subsequent to the above suit Elaiyappan filed suit for permanent injunction in O.S No. 74 of 1998 in which he claimed himself as a absolute owner of the suit property and he stated that he purchased the suit property from one Ramsamy. The said Ramasamy acquired the suit property through Court auction dated 11.06.1987 from him the said Ealaiyappan purchased the suit property through sale deed dated 15.10.1991 and the also patta mutated in his favour. Except Saiko factory the said Elaiyappan cultivated 20 cent in suit property. The Defendants and the plaintiff/ Natarajan in O.S No. 371 of 1997 caused interference.

6. The Defendants in O.S No. 74 of 1998 contested the suit stated that the suit property is originally belongs to his paternal uncle/Ganapathy of the fourth defendant/Natarajan, during his life time the said Ganapathy executed a Will in his favour since because the said Ganapathy and his mother Muthayamal was under the care and custody of



the fourth defendant's/Natarajan father out of love and affection the said Ganapathy executed a Will in Narajan's favour in the year 1986 and the said Ganapathy died on 19.09.1991 after the death the fourth defendant is in absolute possession of the suit property. Further he denied the alleged Court auction through which the plaintiff's vendor Ganapathy acquired his title and the plaintiff's purchased. Hence he prayed to dismiss the suit.

7. Considering the nature of the case the both suits were tried jointly before the District Munsif Court, Rasipuram. After considering the oral and documentary evidence the Trial Court concluded that during the life of the Ganapathy the suit property was auctioned through Court and the same was purchased by said Ramasamay, in turn, he sold the same to the Elaiyappan. Thereafter, panchayat was held on 25.05.1991 in that said Ganapathy agreed to hand over the suit property to the Court auction purchaser Ramasamy accordingly the possession also taken by him. Thereafter the said property was sold to Elaiyappan on 15.10.1991 so during the life time of the said Ganapathy owing to Court auction he is not a owner of the suit property. Therefore alleged Will said to be executed by the Ganapathy has no legal sanguity hence neither the Ganapathy nor the plaintiff/ Natarajan entitled to right over the suit property, after the said



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Court auction and as per the purchase made by the Elaiyappan through sale deed dated 15.11.1991 from the Court auction purchaser Ramasamy he is absolute owner of the suit property, and also his possession also proved through material evidence. Thereby the suit filed by the Natarajan in O.S No. 371 of 1997 was dismissed and the another suit filed by the Elaiyappan in OS No. 74 of 1998 was decreed in his favour.

8. Aggrieved over the same, the appeal in A.S No. 8 of 2008 and A.S No. 9 of 2008 was filed by the plaintiff/Natarajan in O.S No. 371 of 1997 and the defendants in O.S No. 74 of 1998, before Subordinate Court, Rasipuram, wherein independently analysed the facts and evidence held that the though the parties approached the Court for permanent injunction and separate possession, they have not claimed the relief for declaration to declare their title over the property the Court is empower to decide the title. Furthert, It stated that during the life time of the Ganapathy the suit property was auctioned by the Court therefore the Will said to be executed by the said Ganapathy has no force at all for the reason that already property was auctioned hence the claim made by the said Natarajan about the Will not accepted. On the other hand the Elaiyappan proved his title through



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material evidence. Accordingly appeals were dismissed.

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9. Challenging the said findings the plaintiff/Natarajn in O.S No. 371 of 1997 and the defendants in O.S No. 74 of 1998 preferred these second appeals

10. The learned counsel for the appellant submitted that the both the Court below failed to taken note of the fact that the plaintiff proved the Will by examining attestors P.W.2 and 3 thereby he proved the validity of the execution of the Will therefore based on the Will he is absolute owner of the suit property but the Court below not appreciated the said aspects and erroneously dismissed the suit. Furthermore he also stated the based on advocate commissioner report the Court below erroneously concluded that defendant/Elaiyappan in possession of the suit property however it is settled proposition that factum of the possession of the suit property should not be decided based upon advocate commissioner report but the Court below failed to consider that and erroneously decreed the suit in favour of the Elaiyappan as such is unjust and liable to be set aside. Further he also pointed out that alleged Court auction purchaser Ramasamy not took



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possession of the property through Court of law and no such panchayat was held in respect of the suit property during the life time of the Ganapathy. The Court below failed to appreciate above aspects as such is liable to be set aside .

11. This Court admitted the case with the following substantial questions of law:

i. Are the Courts below justified in dismissing the suit O.S No. 371 of 1997 in spite of the fact that the appellant had proved the Will Ex.A2 in the manner known to law?

ii. Whether Court below was justified in granting decree in favour of respondent in O.S No. 74 of 1998 while respondent taken possession not in accordance with law?

iii. In both suit plaintiff/ Natarajan and the defendant/Elaiyappan claimed right over the suit property. For the sake of convenience Natarajan is referred as Plaintiff and Elaiyappan is referred as Defendant .

12. Admittedly both the parties not filed the suit for declaration.



In fact, in earlier suit filed by Natarajan he claimed for bare injunction based on the Will executed by the Ganapathy. On the other hand, Elaiyappan filed the suit for injunction based on the sale made by the Ramasamy. Both the parties vehemently denied each other's right over the suit property, they ought to have filed the suit for declaration but they failed. Further, there is no reason offered by them why they have not chose to filed the suit for declaration to declare their right over the suit property through Court of law. But the lower appellate Court while deciding the appeal held that Court can decide the title in bare injunction suit. It is no doubt the Court can decide the title of the property independently if there is no dispute over the title of the property. But case in hand plaintiff claim right over the suit property based on Will which was denied by the defendants. The defendant submitted that they have purchased the suit property from the Ramsamy who purchased the suit property from Court auction.

13. On seeing the facts it clearly reveals that both the parties vehemently denied the right of the property. **So it is not the case wherein title has to be decided instantly on the other hand title has to be decided and has to be declared who is rightful owner of the suit property but both the Court below failed to take note of this fact decided validity of**



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the Will as well as Ramasamy's purchase without framing the separate issues to adjudicate those facts as such is totally misconception of law and facts and the findings given by the Court below is perverse on that account it is liable to be set aside.

14. According to the plaintiff, he claimed right over the property based on the Will executed by one Ganapathy, to prove the Will, before lower Court he examined two witnesses who are attestor of the said Will. However, the both the Court below held that during the life time of the Ganapathy his property was auctioned hence, he has no right to execute the Will, therefore the said Will is not valid accordingly the evidence of the parties with regard to the Will was rejected. The contesting defendant Elaiyappan claimed right over the property based on purchased made from the Court through Court auction purchaser/Ramasamy. Accordingly during the life time of the said Ganapathy he along with his brother Ponnuvel borrowed loan from one Ramasamy as it was defaulted by them. Hence the said Ramasamy filed suit which was decreed in his favour, thereafter he filed E.P, through Court auction the said Ramasamy acquired the property and the sale certificate was also issued in his favour after rejecting the objection made by the Judgment debtor Ponnuvel and Ganapathy. As per the sale



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certificate dated 03.05.1991 the Court auction purchaser/Ramasamy became the absolute owner of the suit property thereafter the panchayat was held with Ganapathy in which Ganapathy was handed over the possession to the said Ramasamy in turn he sold the suit property to the Elaiyappan. Hence the Elaiyappan claimed that after the purchase from Ramasamy he is in possession of the property in which the plaintiff caused interference. He filed suit in O.S No. 74 of 1998 before the subordinate Court, Rasipuram.

15. The plaintiff not only declined the alleged Auction but also the alleged possession said to be taken by the auction purchaser. He contended that auction purchaser has not taken possession of the property through any Court of law. Moreover, plaintiff is not in possession of the suit property not he accepts that Elaiyappan's title and possession. Now both the parties claiming for bare injunction.

16. It is settled proposition that parties bound to prove that possession and enjoyment of the suit properties. In earlier suit the said Natarajan submitted that even during the life time of the Ganapathy he along with Ganapathy were enjoyed the property and after demise of Ganapathy he is in possession of the property to that effect he relied the exhibits which



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are marked as Ex.B1 to B56. Admittedly, the said Ganapathy died on 19.09.1991 but the contention of the defendant is that as per the panchayat the possession was given to the auction purchaser/Ramasamy by the Ganapathy. Therefore even during the life time of the said Ganapathy the defendant claimed that possession was handed over to the Ramasamy. Hence the defendant is bound to prove his vendor's title and the possession of the property. As per his contentition panchayat held on 25.05.1991, to prove the said panchayat on the side of the defendant D.W.2 and D.W. 3 were examined before the Trial Court. As per the evidence of D.W.2 Ramasamy who is the Court auction purchaser stated that through Court auction he purchased the suit property then after issuance of sale certificate, there was panchayat with Ganapathy, in which, the possession of the property was given to the Ramasamy. However, in respect of properties belongs to the Ponuvel possession was not handed over to him. Thereafter he enjoyed the property. As per the evidence of D.W.2 and D.W.3, there was dispute in respect of taking of possession of the property later which was solved in the panchayat accordingly auction purchaser took possession of the property from the Ganapathy but they have not get any receipt from the Ganapathy in respect of handing over of the possession of the suit property.



However, through D.W.2,3 and 4 the Court below held that possession was handed over to the auction purchaser/Ramsamy through panchayat was proved by the defendant.

17. But the contention of the plaintiff that even assuming that property was auctioned through Court of law possession was not taken by the defendant hence the defendant are not deemed to be a possessor of the property legally. But both the Court held that it is open to the parties to obtain possession of the property through Court of law accordingly objection of the plaintiff was rejected.

18. But the learned counsel for the appellant argued that Ganapathy was challenged the alleged Court auction during his life time and the suit property was not handed over by the Ganapathy as claimed by the defendant through alleged panchayat. Further, he stated that all the witnesses are interested witnesses of the defendants' but the Court below failed to appreciate these aspects.

19. By way of reply the learned counsel for the respondent/defendant submitted that the objection raised by the Ganapathy and the Ponnuvel was rejected during the execution proceedings. Thereafter



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sale certificate was issued in favour of the Ramasamy on 31.05.1991 subsequent to that Panchayat was held between the parties and the same was proved with independent witnesses.

20. Considering both side submissions and on perusal of records, it reveals that one Subrmani filed the suit against the Ganpathy and Ponnuvel based on the pro note in O.S No. 546/1982 which was decreed in his favour. Thereafter to execute the decree he filed R. E.P No. 202 of 1983 in that property belongs to the Ganapathy and Ponnuvel and the suit property was brought for sale both the judgment debtors appeared through counsel raised objection but they remains exparte. Then the property was auctioned one Ramasamy purchased the suit property. To cancel the said Auction the said Ganapathy and Ponnuvel filed his objection through their counsel before the execution Court and the same was dismissed and confirmed the sale in R.E.A 433 of 1987. Challenging the said findings the said Ganapathy and Ponnuvel filed C.M.A No. 8 of 1989 as they failed to appear which was dismissed on 30.01.1990 to restore the said C.M.A they filed application in I.A 63 of 1990, which was dismissed on 01.10.2021 for not appearance. Including above documents and other documents were marked as Ex.A3 to Ex.B14. On perusal of all these documents it is clear



that during the life time of the said Ganapathy and Ponnuvel (plaintiff's father) they contested the suit filed by the Subramani and other execution proceedings till his demise as well as auction proceedings. Further, he preferred C.M.A 8/89 challenging the Court auction before the Sub Court, Namakkal, and the same was dismissed for default on 01.10.1991. It is pertinent to note that on 19.09.1991 the said Ganapathy was died hence the fact reveals that till his demise he challenged the court auction strongly. The defendant Elaiyappan contended that there was panchayat held with Ganapathy on 25.05.1991 after issuance of sale certificate on 03.03.1991. The suit properties is belongs to Ganapathy and Ponnuvel which said to be purchased through Court auction by the Ramasamy/D.W.2. However, mere possession of the sale certificate alone not amount to auction purchaser is entitled to take possession of the property and he has to approach the Court to take possession within time prescribed even 12 years time was granted. But in this case auction purchaser contend that he took possession from the Ganapathy and not took possession of the properties belongs to the Ponnuvel. Further, D.W.3 and D.W.4 also deposed that Ganapathy agreed to hand over the possession of the property to the said Ramasamy therefore their evidence also indicate that with regard to suit properties auction



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purchaser not took possession of the property even there is no evidence as on date the Ramasamy took possession of the property from the Ponnuvel.

From all these facts clearly indicates that Ganapathy has no cordial term with the defendants' and Palanivel's family nor with the Court auction purchaser Ramasamy. Further the said Ganapathy vehemently opposed the Court auction by filing C.M.A before the Sub Court, Namakkal in 6 of 1989 till his death, in such circumstance it is unbelievable that said Ganapathy agreed to hand over the possession of the property to the Court purchaser/Ramasamy in the Panchayat. Even assuming that there was panchayat held with regard to taking of the possession of the property there is no written receipt/document obtained from the said Ganapathy/owner of the property by the defendant's. But on the other hand they contended that Ganapathy and Palanivel handed over possession orally. Even assuming that they took over possession of the property by orally from the Ganapathy through pachayat they ought to have informed the same to the Court about the alleged panchayat. Because on the date of alleged panchayat C.M.A 8 of 89 was pending before the Sub Court, Namakkal wherein both the parties appeared through their counsels but later it was dismissed for non appearance of the parties on 01.10.1991 before that the said Ganapathy



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was died on 19.09.1991 itself. Hence from the date of alleged Panchayat upto death of Ganapathy C.M.A was pending before the Sub Court for three months. But there is no reason was offered by the defendants as why they have not informed to the Court about alleged panchayat through Court of law. Even though, option was given before the Court auction purchaser to take possession through Court of law or from parties concerned. In the instant case even during the life time of the original owner Ganapathy there was dispute with regard to alleged auction and he preferred C.M.A 84 of 1981 neither court auction purchaser nor subsequent purchaser Elaiyappan proved that they taken over the possession of the property from the owner directly as discussed above admittedly there is no written document to show that Ganapathy handed over possession to the Ramasamy through panchayat. Further, there is no reason offered by the defendant that when CMA No. 8 of 1989 was pending before the Sub Court, Namakkal, as why the purchaser Ramasamy not taken steps to take possession of the property as per the sale certificate all these facts were not proved by the defendant with sufficient material evidence nor he assigned valid reason. Therefore, the alleged possession said to be taken through Panchayat is not been proved by the defendant beyond reasonable doubt. It is also unbelivable that



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Ganapathy orally agreed to hand over the possession of the property to Court auction purchaser/Ramasamy ever since he raised objection against Court auction by filing C.M.A before the Sub Court during his life time. Further the possession of the property also disputed by the plaintiff so the burden heavily upon the Elaiyappan to prove that he became absolute owner of the property as well as his possession and enjoyment of the property.

21. Having known that the plaintiff filed suit for injunction by relying Will said to be executed by the Ganapathy he should have filed suit for declaration instead he filed suit for injunction as such is not maintainable in law as discussed it is not a simple suit of injunction where title is to be decided instantly, it is the case where the title has to be adjudicated mainly.

22. Furthermore, on perusal of the records on either side both of them claimed that they are in possession of the property. The plaintiff claimed that he was in possession of the property. On the other side Elaiyappan/defendant produced documents that he is in possession of the property. Admittedly, the document relied by the defendant is after the filing of the suit on the date of filing of the suit the plaintiff was in possession of the suit property there is no valid document on the side of the defendant that they took over the possession of the property.



23 Normally this Court is not interfere with the findings of the

Court below in respect of findings. But when the facts reveals that the Court below not properly appreciated, this Court shall interfere with the findings. As discussed above, the Trial Court totally failed to appreciate the facts and circumstances surrounded in respect of the suit property. Admittedly, on the date of filing of the suit the plaintiff /Natrajanis in possession and enjoyment of the property but with regard to his claim of title he has to file separate suit. Moreover, in respect of Will which was relied by the plaintiff is to be decided by framing separate issues and not in the bare injunction suit hence the findings in respect of Will is set aside. In bare injunction suit when there is no issue to adjudicate in respect of Will, thus observation made by the Court below not acceptable one accordingly question of law A and B are answered. Though he is in possession, but his title not been proved. Hence, O.S No. 371 of 1997 dismissed as possession follows title. In respect of O.S No.74 of 1998 Elaiyappan proved his title through Court auction but not proved his possession on the date of suit.

24. In result, second appeals are partly allowed. Consequently suit filed by the plaintiff in O.S No. 371 of 1997 is dismissed and suit filed by Elaiyappan in O.S No. 74 of 1998 is dismissed as possession on the date



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of suit not proved. However liberty is given to the plaintiff to approach the Court for comprehensive relief to prove his title. Though defendant Elaiyappan proved his title, had not established his possession. So liberty given to him to take possession as per manner to law. There shall be no order as to costs. Consequentially connected miscellaneous petition is closed.

27.01.2023

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To

1. The Subordinate Court, Rasipuram.
2. The District Munsif Court, Rasipuram..
3. The Section Officer,
V.R Section,

T.V.THAMILSELVI,J.

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