



Second Appeal No.553 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.07.2024

CORAM :

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

Second Appeal No.553 of 2019

1.Swaminathan

2.Govindaraj

.... Appellants

-Vs-

1.Mani (Died)

2.Rajini

3.M.Vasantha

4.M.Murugan

5.M.Krishnamurthy

6.M.Deepa

(RR 3 to 6 are brought on record as
the legal representatives of the
deceased R1 vide court order dated
07.03.2024 made in CMP No.2865 of 2023
in S.A.No.553 of 2019 by PBBJ)

.... Respondents

Prayer : Second Appeal under Section 100 of C.P.C., against the judgment and decree dated 10.09.2018 made in A.S.No.8 of 2016 on the file of the Subordinate Judge at Thirupathur, as confirming the judgment and decree dated 06.11.2015 made in O.S.No.245 of 2011 on the file of the District Munsif at Thirupathur.

For Appellants : Mr.Bhagawath Krishna

For Respondents : Mr.M.Sivavarthanan
for RR 2 to 6



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J U D G M E N T

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The present Second Appeal arises against the judgment and decree of the Court of the Subordinate Judge at Tirupattur in A.S.No.8 of 2016 dated 10.09.2018 in confirming the decree of the Court of the District Munsif at Tirupattur in O.S.No.245 of 2011 dated 06.11.2015.

For the sake of convenience, the parties will be referred to as per their ranking in the suit.

2. O.S.No.245 of 2011 is a suit for declaration of title and for recovery of possession insofar as the first item of the suit schedule mentioned property. The claim of the plaintiffs is that the suit schedule mentioned properties are the ancestral properties of the first plaintiff Swaminathan. The second plaintiff is none else than his son. Swaminathan had got the property under Ex.A1. Patta was granted by the Government of Tamil Nadu for suit item Nos.1 and 2 in favour of Swaminathan and since the defendants had encroached upon the property in suit item No.1, he was constrained to present the suit for the aforesaid reliefs.

3. The defendants entered appearance and filed a detailed written



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statement. According to them, Survey No.312/2 in entirety belongs to their family ancestrally. By virtue of a division in the family, the property had been given to one Arumuga Gounder and the defendants being the legal heirs of the said Arumuga Gounder, are entitled to continue to be in possession of the same.

4. On the basis of these pleadings, the trial Judge framed the following issues:

1. வழக்கு சொத்தில் வாதிகளுக்கு உரிமை உள்ளதா ?
2. வழக்கில் கோரியுள்ள விளம்புகை பரிகாரம் வாதிகளுக்கு அளிக்கத்தக்கதா ?
3. வழக்கில் கோரியுள்ள சுவாதீன மீட்பு பரிகாரம் வாதிகளுக்கு அளிக்கத்தக்கதா ?
4. வேறு என்ன பரிகாரம் வாதிகளுக்கு அளிக்கத்தக்கது ?

5. On the side of the plaintiff, the second plaintiff entered the witness box and examined himself as P.W.1. He examined his mother Deivanai as P.W.2 and one Ramalingam as P.W.3. On the side of the plaintiffs, Exs.A1 to A9 were marked. On the side of the defendants, the second defendant examined himself as D.W.1 and a neighbour as D.W.2.

6. On consideration of the overall perspective of the case, the learned trial Judge came to a conclusion that there is no cause of action for the suit and



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consequently dismissed the suit in its entirety.

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7. Aggrieved by the same, a regular appeal was preferred before the learned Subordinate Judge at Tirupattur. The learned Subordinate Judge received the appeal as A.S.No.8 of 2016 and in and by way of a judgment dated 10.09.2018, the lower appellate Court confirmed the judgment and decree of the trial Court.

8. Against the concurrent findings, the present Second Appeal. This Court had ordered notice regarding admission on 20.04.2019. On service of summons, Mr.Sivavarthanan entered appearance for the contesting respondents / defendants.

9. I admitted and heard the Second Appeal on the following substantial questions of law:

1. Has the lower appellate court and the trial court failed totally in its analysis to come to a conclusion that the suit property has not proved the possession of the appellants?
2. Whether the advocate commissioner report and the documents of appellants with regard to the possession were disproved by the defendants before the lower appellate court and trial court?
3. Whether the written statement filed by the defendant is



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disproving the possession of the appellants?

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10. Mr.Bhagawath Krishna, learned counsel appearing for the appellants would submit that a bare perusal of Ex.A1 should have led the Courts below to the conclusion that the plaintiff had been benefitted with a Patta in S.No.312/2O1 as early as on 23.02.1982. He would then invite the attention of the Court to Ex.A2 being the Patta Pass Book issued in the name of the first plaintiff in Patta No.262 for S.Nos.312/2O and 313/1, and joint Patta for the property in Patta No.1143 for S.No.313/2. Relying upon the same, he would state that the evidence of P.W.1 read with evidence of P.W.3 and the documents should have persuaded the Courts below to grant a decree in favour of the plaintiffs.

11. Mr.Sivavarthanan would refer to Ex.C4 and Ex.A1 to point out that there has been an insertion in the document Ex.A1 that is relied upon by the plaintiffs. He would point out that the property which has been given to the first plaintiff under Ex.A1 is situated in S.Nos.312/1 and 313/1 and not in S.No.312/2O as pleaded by the appellants.

12. I have heard the arguments on both sides. In terms of the order passed by this Court on 02.02.2022, the original records have been placed before me. I have gone through Exs.A1, A2 and C1 to C4, the crucial documents on



which the entire case has to be decided.

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13. A perusal of Ex.A1 would show that S.No.312/20 and S.No.313/1 had been given to the first plaintiff by the Special Tahsildar on 23.02.1982. However, a perusal of the measurement and plan given for the said property under Ex.A1 would show that the property in S.No.313/1 is surrounded by the following survey numbers viz., S.Nos.310, 311, 309, 314, 312/2A, 312/2B and 312/2G. When this is compared with Ex.C4, the FMB for the S.Nos.312 and 313, it becomes clear that the Patta that was given to the first plaintiff is situated to the North of the first item of the suit schedule mentioned property. The properties abutting the first item of the suit schedule mentioned property viz., S.No.312/20 are surrounded by S.Nos.312/2K, 2L, 2M, 2N and 313/1. The extent of the property that was given to the first plaintiff by the Special Tahsildar is to an extent of 49.6 mtrs in the West, 56 mtrs in the East and 14.8 mtrs in the South, whereas the suit schedule mentioned property as per the Commissioner as well as the Firka Surveyor's report is 98 mtrs in the North, 94.2 mtrs in the South and 9 mtrs in the East. Neither the measurement nor the location tally with the plan, on the basis of which Mr.Bhagawath Krishna has strenuously argued. Having obtained the benefit of assignment in S.No.312/1, the plaintiffs seem to take advantage of the handwritten error of the survey numbers in the first page of Ex.A.1.



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14. Though the trial Court has not given satisfactory reasons to dismiss the suit, the lower appellate Court has correctly analysed the position and has tallied Ex.A1 with Ex.C4 and has come to a correct conclusion. The argument of Mr.Bhagawath Krishna that the Advocate Commissioner has submitted a report stating that the defendants had encroached the property does not help the plaintiffs at all. An Advocate Commissioner can submit a report identifying the property and about the physical features of the same. It is the duty of the Court to come to a conclusion whether the defendants have encroached on the property. This essential duty that has to be performed by the Court cannot be delegated to the advocate commissioner and therefore the reliance placed on the report of the advocate commissioner on Ex.A1 is misplaced.

15. Mr.Bhagawath Krishna would refer to the third question of law to argue that the defendants having not been in a position to prove their title over S.No.312/201, he would state that the plaintiffs are entitled to a decree. It is the plaintiffs who have come forward before this Court seeking for declaration of title. I would assume an extreme case if the defendants had received the summons and remained exparte, even then it is the duty of the plaintiffs to prove that they are the owner of the property in S.No.312/20.



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16. As discussed above, what the first plaintiff is entitled is only to S.No.312/1 and he does not have any assignment in his favour with respect of the property situated in S.No.312. Therefore, for the fact that the defendants had not proved title to the property, does not mean the plaintiffs are entitled to a decree. If I were to accept the submission of Mr.Bhagawath Krishna, it will be turning the burden of proof on its head and therefore I am not willing to accept the same.

17. Having come to the conclusion that the first plaintiff has not proved his title with respect to the first item of the suit schedule mentioned property, I have to add, there are three other items as suit schedule mentioned properties. Insofar as S.No.313/1 is concerned, the plaintiff under Ex.A1 is entitled to the same. The extent of that property mentioned in Ex.A1 tallies with Ex.C4. Similarly, insofar as the other three items of the suit property are concerned, the defendants have not raised any claim over the same. The advocate commissioner has also found that in S.No.313/2, there is an oil motor pump together with some trees. Therefore, the Courts below had erred in dismissing the suit in its entirety, when there is no contest with respect to item Nos.2 to 4 of the suit schedule mentioned properties.



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18. In the light of the above discussion, the judgment of the Courts below in dismissing the suit insofar as item No.1 is concerned is confirmed. The plaintiff is declared to be the owner for item No.2 and the suit will be decreed with respect to item No.2 and since there is no dispute with respect to the pathway right or to the property situated in S.No.313/2, the plaintiff will be entitled for a declaration insofar as those properties are concerned.

19. In fine, the judgments of the Courts below insofar as item No.1 stands confirmed. There shall be a declaration insofar as item Nos.2 to 4 of the suit schedule mentioned properties are concerned with respect to the plaintiffs. The Second Appeal is partly allowed. As the parties are neighbours, I am not inclined to impose any costs. Consequently, connected miscellaneous petition is closed.

24.07.2024

Index : Yes/No
Neutral Citation : Yes/No
Speaking Order / Non-speaking order
KST

To

1.The Subordinate Judge, Thirupathur.



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2.The District Munsif, Thirupathur.

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