

(2011) 12 MAD CK 0129

In the Madras High Court

Case No : S.A. (MD) No. 330 of 2008 and M.P. (MD) No's. 1 of 2008 and 1 of 2009

Trichirappalli City Municipal Corporation

APPELLANT

Vs

Senthilkumari

RESPONDENT

Date of Decision : 16-12-2011

Acts Referred:

Madras Revenue Recovery Act, 1864 — Section 25

Penal Code, 1860 (IPC) — Section 183, 186, 188

Tamil Nadu Land Encroachment Act, 1905 — Section 14, 3, 3A, 5, 5B

Citation : (2012) 1 LW 834

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Advocate : P. Srinivasan, for the Appellant; T.R. Rajagopalan Senior Counsel for Mrs. Krishnaveni, for the Respondent

Final Decision : Dismissed

Judgement

G. Rajasuria, J.—This Second Appeal is focussed by the original defendant animadverting upon the judgment and decree dated 15.11.2002, passed in A.S. No. 246 of 2001 by the learned Principal District Judge, Tiruchirappalli, in reversing the judgment and decree dated 17.07.2001, passed in O.S. No. 465 of 1998 by the learned Subordinate Judge, Tiruchirappalli. The parties, for the sake of convenience, are referred to hereunder according to their litigative status and ranking before the trial Court.

2. A summation and summarisation of the relevant facts absolutely necessary and germane for the disposal of this second appeal would run thus:

The respondent/plaintiff filed the suit seeking the reliefs of permanent injunction and recovery of a sum of Rs. 40,000/- (Rupees Forty Thousand only) towards damages on the ground that earlier the Government wanted to acquire a part of the plaintiff's property measuring 5200 square feet in S. No. 4045/1, Puthur Village out of the total extent of 66 cents belonging to the plaintiff. Subsequently,

as per the order of the Madras High Court in W.P. No. 17 of 1955 dated 26.04.1956, the proceedings for acquisition were quashed. However, without taking into consideration the fact that the proposal for laying road through the land of the plaintiff was quashed, the defendant Municipality without even adhering to the procedure contemplated in law high-handedly demolished the suit structure. In fact one Dhanalakshmi and others tried to encroach into the suit property, whereupon, the suit O.S. No. 209 of 1996 was filed on the file of the Sub Court, Tiruchirappalli by the plaintiff and the said Dhanalakshmi and others also filed 4 suits in O.S. Nos. 353, 356, 359 and 404 of 1997 on the file of the said Court. The trial Court by a common judgment decreed the suit of the plaintiff and dismissed the suits filed by Dhanalakshmi and others and the appeals filed against the common judgment and decrees were also dismissed by the Hon'ble High Court in A.S. Nos. 233 of 234 of 2000 dated 10.07.2007. While so, the defendant without any manner of right demolished the structure put up by the plaintiff in the suit property and hence, the suit.

3. Per contra, the defendant filed the written statement resisting the suit on the ground that the suit property forms part of a Municipal Road and at no point of time the plaintiff was the owner of the suit property and suppressing the material facts and by mis-description of the property, the suit has been filed. No private party could become the owner of a road. Accordingly, the defendant prayed for the dismissal of the suit.

4. Whereupon, the relevant issues were framed by the trial Court.

5. During trial, on the side of the plaintiff, P.Ws. 1 and 2 were examined and Exs. A. 1 to A. 22 were marked. On the side of the defendant, D.Ws. 1 and 2 were examined and Exs. B. 1 and B. 6 were marked. On the side of the Court Exs. C. 1 to C. 3 were marked.

6. Ultimately, the suit was dismissed by the trial Court, as against which the appeal was filed by the plaintiff.

7. Whereupon the first appellate Court reversed the judgment and decree of the trial Court and decreed the suit granting injunction without granting damages as the appellant/plaintiff did not press for it.

8. Challenging and impugning the judgments and decrees of the first appellate Court, the defendant preferred this Second Appeal on various grounds and also suggesting the following substantial questions of law:

(a) Whether the suit for bare injunction would be maintainable without a prayer for declaration in the face of the entries made in the town survey records that dispute the title of the plaintiff?

(b) Whether the decree obtained against a third party can be used against the appellant when the corporation was not made as a party to the same?

(c) Whether the lower appellate court is right in reversing the well considered

findings of the trial court particularly without any proof of being in possession?

(d) Is not the lower appellate court barred from considering the documents of which no originals were filed?

(e) Is not the plaintiff bound to fail without any proof of continuous enjoyment upto the filing of the suit in view of the contrary entries in the survey register?

(Extracted as such)

9. My learned Predecessor framed the following substantial question of law:

(i) Whether the Judgment and decree of the First Appellate Court is perverse on account of its failure to consider the contention with regard to non maintainability of the suit for injunction without seeking the relief of declaration?

(Extracted as such)

10. On hearing both sides, I also formulated the following additional substantial question of law:

Whether the findings of the trial Court was perverse and whether the first appellate Court rectified the error properly or without any basis, in view of the trial Court having developed doubt as to the identity of the property?

11. Heard both sides.

12. The learned counsel for the appellant/ defendant would put forth and set forth his arguments, which could tersely and briefly be set out thus:

The first appellate Court proceeded on the footing as though the property sought to be acquired and the suit property are one and the same. The records produced on the side of the defendant would evince and evidence that the suit property was not a private property but a road. The land sought to be acquired was different from the suit property described in the plaint. Survey No. 4045 was sought to be acquired earlier, whereas the suit property is referred to as S. No. 4045/1. As such the distinction referred to supra was not taken into account by the lower appellate Court. The trial Court correctly pointed out that there was no proof to show that the land sought to be acquired and the suit property were one and the same or forms part of the said land sought to be acquired. The suit was bad for want of a prayer for declaration. Accordingly, he prayed for setting aside the judgment and decree of the first appellate Court and for restoring the judgment and decree of the trial Court.

13. In a bid to mince meat and shoot down, torpedo and pulverise the arguments as put forth and set forth on the side of the defendant, the learned Senior Counsel for the plaintiff would pilot his argument, the pith and marrow of it would run thus:

The first appellate Court appropriately and correctly took into account the fact that absolutely there was no dispute relating to the identity of the property. The

property sought to be acquired was only in S. No. 4045/1 and not simply S. No. 4045 as tried to be projected by the learned counsel for the appellant/defendant. The High Court quashed the acquisition proceedings. The deposition of D.W. 2 would unambiguously and unequivocally highlight and spotlight the fact that the case of the plaintiff was virtually admitted by D.W. 2, who was the Assistant Engineer. The suit filed by the plaintiff against Dhanalakshmi and others for injunction was decreed and the suits filed by them were dismissed and the appeals filed by them were also dismissed vide judgment of this Court dated 10.07.2007 made in A.S. Nos. 233 and 234 of 2000 and Tr. AS. Nos. 1027 to 1030 of 2001. The said copy of the judgment has been filed into Court as additional evidence by filing M.P. (MD) No. 2 of 2009. The structure which was demolished by the defendant belonged to the plaintiff and the photographs with negatives Ex. A. 6 would project and demonstrate, convey and display that the Municipality demolished the structure in the suit property put up by the plaintiff. The first appellate Court also considered the pros and cons of the matter and set aside the judgment and decree of the trial Court and decreed the suit granting injunction, which warrants no interference in Second appeal.

14. The aforesaid substantial question of law and the additional substantial question of law are taken up together for discussion as they are inter-linked and interwoven, entwined and intertwined with one another.

15. The broad proposition of law is that if there is a serious title dispute between the plaintiff and the defendant and such a dispute is found referred to in the plaint, necessarily a declaratory relief should be sought for by the plaintiff. However, in this case, the facts are somewhat different. The plaintiff apprehended that the defendant was trying to high-handedly trespass into the suit property and take possession of it. The important fact is that the defendant happened to be the municipal authority, which is expected to act in accordance with law and for the purpose of getting immediate relief, the plaintiff did choose to file the suit for permanent injunction.

16. My mind is reminiscent and redolent of the decision of the Honourable Apex Court in *Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by LRs. and Others*, . Certain excerpts from it, would run thus:

17. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under:

(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally

the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in *Annaimuthu Thevar* (supra)]. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.

17. A bare perusal of the aforesaid decisions would indicate and exemplify that a person in established possession can seek for injunction. The public body like the Municipality is expected to invoke the provisions of law before taking possession of the property under the occupation of a private individual.

18. I would like to refer to the provisions of Sections 5, 6 and 7 of The Tamil Nadu Encroachment Act, 1905, including Section 14 of it, from which one could infer and understand that if a public authority like Municipality resorts to legal action under the Act, no suit could be entertained in view of the embargo contained in Section 14 of the Act. The above said Sections are extracted hereunder for ready reference:

5. Liability of person unauthorisedly occupying land to penalty after notice. - Any person in any area other than the transferred territory liable to pay assessment u/s shall also be liable at the discretion of the Collector, or subject to his control, the Tahsildar or Deputy Tahsildar to pay in addition by way of penalty-

(i) if the land be assessed land, a sum not exceeding five rupees or, when ten times the assessment payable for one year u/s 3 exceeds five rupees, a sum not

exceeding ten times such assessment, provided that no penalty shall ordinarily be imposed in respect of the unauthorized occupation of such land for any period not exceeding one year;

(ii) if the land be unassessed, a sum not exceeding ten rupees, or when twenty times the assessment payable for one year u/s 3 exceeds ten rupees, a sum not exceeding twenty times such assessment.

5-A. Liability of person unauthorisedly occupying land to penalty after notice in the transferred territory.- Any person in the transferred territory liable to pay assessment u/s 3-A shall also be liable at the discretion of the Collector or subject to his control, the Tahsildar or Deputy Tahsildar, to pay in addition by way of penalty, whether the land is assessed or unassessed a sum not exceeding two hundred rupees.

5-B. Notice before proceeding u/s 5 or section 5-A - Before taking proceedings u/s 5 or section 5-A, the Collector or Tahsildar or Deputy Tahsildar or Revenue Inspector, shall cause to be served in the manner provided in section 7 on the person reputed to be in unauthorised occupation of land being the property of Government a notice specifying the land so occupied and calling on him to show cause before a certain date why he should not be proceeded against u/s 5 or section 5-A:

provided that where the notice under this section is caused to be served by the Revenue Inspector, he shall require the person reputed to be in unauthorised occupation of the land to show cause against such notice to the Tahsildar or Deputy Tahsildar having jurisdiction and shall also make a report in writing containing such particulars as may be specified in rules or orders made u/s 8 to the Tahsildar or Deputy Tahsildar having jurisdiction.

6. Liability of person unauthorisedly occupying land to summary eviction, forfeiture of crops etc. - (1) Any person unauthorisedly occupying any land for which he is liable to pay assessment u/s 3 or section 3-A may be summarily evicted by the Collector or subject to his control, by the Tahsildar or Deputy Tahsildar or any other officer authorised by the State Government in this behalf (hereinafter referred as the Authorised Officer) and any crop or other product raised on the land shall be liable to forfeiture and any building or other construction erected or anything deposited thereon shall also, if not removed by him after such written notice as the Collector or subject to his control, the Tahsildar or Deputy Tahsildar or authorised Officer may deem reasonable, be liable to forfeiture. Forfeitures under this section shall be adjudged by the Collector or subject to his control by the Tahsildar, or Deputy Tahsildar, or authorised Officer and any property so forfeited shall be disposed of as the Collector or subject to his control the Tahsildar or Deputy Tahsildar or authorised officer) may direct.

(2) An eviction under this section shall be made in the following manner namely:
- By serving a notice in the manner provided in section 7 on the person reputed

to be in occupation or his agent requiring him within such time as the Collector or the Tahsildar or Deputy Tahsildar or Authorised Officer may deem reasonable after receipt of the said notice to vacate the land, and, if such notice is not obeyed, by removing or deputing a subordinate to remove any person who may refuse to vacate the same, and if the officer removing any such person shall be resisted or obstructed by any person, the Collector or the Tahsildar, or Deputy Tahsildar or authorised officer shall hold a summary inquiry into the facts of the case, and if satisfied that the resistance or obstruction was without any just cause and that such resistance or obstruction was without any just cause and that such resistance or obstruction still continues, may issue a warrant for the arrest of the said person and on his appearance commit him to close custody in the office of the Collector or of any Tahsildar or Deputy Tahsildar or authorised officer for such period not exceeding 30 days as may be necessary to prevent the continuance of such obstruction or resistance or may send him with a warrant in the form of the schedule for imprisonment in the civil jail of the district for the like period:

Provided that no persons so committed or imprisoned under this section shall be liable to be prosecuted under sections 183, 186 or 188 of the Indian Penal Code in respect of the same facts.

(3) Any authorised officer taking proceedings under this section shall make a report in writing containing such particulars as may be specified in rules or orders made u/s 8 to the Collector, Tahsildar or Deputy Tahsildar having jurisdiction.

7. Prior notice to person in occupation. - Before taking proceedings u/s 6 the Collector or Tahsildar or Deputy Tahsildar or Revenue Inspector or any authorised officer or any other officer specified by the State Government in this behalf (not being an authorised officer) (hereinafter referred to as the specified officer as the case may be shall cause to be served on the person reputed to be in unauthorised occupation of land being the property of Government a notice specifying the land so occupied and calling on him to show cause before a certain date why he should not be proceeded against u/s 6.

Such notice shall be served in the manner prescribed in section 25 of the Tamil Nadu Revenue Recovery Act, 1864, or in such other manner as the State Government by rules or orders u/s 8 may direct.

Provided that no such notice shall be necessary in the case of any person unauthorisedly occupying any land, if he had been previously evicted from such land u/s 6 or if he has previously vacated such land voluntarily after the receipt of a notice u/s 5-B under this section:

Provided further that where the notice under this section is caused to be served by any Revenue Inspector or any specified officer he shall require the person reputed to be in unauthorised occupation of the land to show cause against such notice to the collector, Tahsildar, Deputy Tahsildar or authorised person having

jurisdiction, as the case may be and shall also make a report in writing containing such particulars as may be specified in rules or orders made u/s 8 to the Collector, Tahsildar, Deputy Tahsildar or authorised person having jurisdiction, as the case may be.

14. Bar of jurisdiction of court s. - Notwithstanding anything contained in any law for the time being in force no order passed or proceeding taken by any officer or authority or the State Government under this Act shall be called in question in any court, in any suit or application and no injunction shall be granted by any court in respect of any action taken or to be taken by such officer or authority or the State Government in pursuance of any power conferred by or under this Act.

Construction of references. - In the application of any rule, by-law, regulation notification, form or order made or issued under the Principle Act, any reference to the Board of Revenue shall, unless the context otherwise requires, be deemed to be a reference to the Commissioner of Land Administration.

19. Learned counsel for the appellant placed reliance on Sections 180 to 182 of the District Municipalities Act, which are extracted hereunder for ready reference:

180. Prohibition against obstructions in or over s treets. - No one shall build any wall or erect any fence or other obstruction, or projection, or make any encroachment in or over any street, except as hereinafter provided.

180-A. Public s treets open to all. - All streets vested in or to be vested in or maintained by a municipal council shall be open to persons of whatever caste or creed.

181. Prohibition and regulation of door s, ground-floor windows and bar s opening outwards. - (1) No door, gate, bar or ground-floor window shall, without a licence from the executive authority, be hung or placed so as to open outwards upon any street.

(2) The executive authority, may, by notice, require the owner of such door, gate, bar or window to alter it so that no part thereof when open shall project over the street.

182. Removal of encroachments.-

(1) The executive authority may, by notice, require the owner or occupier of any premises to remove or alter any projection, encroachment or obstruction other than a door, gate, bar or groundfloor window situated against or in front of such premises and in or over any street.

(2) If the owner or occupier of the premises proves that any such projection, encroachment or obstruction has existed for a period sufficient under the law of limitation to give any person a prescriptive title thereto or that it was erected or made with the permission or licence of any municipal authority duly empowered in that behalf, and that the period, if any, for which the permission or licence is valid has not expired, the municipal council shall make reasonable compensation

to every person who suffers damage by the removal or alternative of the same.

Those sections empower the municipal authorities to summarily remove the encroachments.

20. The learned Senior Counsel for the respondents would submit that the structure found in the suit property was badly damaged, as revealed by the photographs Ex. A. 6 and there is nothing to indicate that the municipality resorted to any legal action by issuing notice prior to such action in demolishing part of the structure in the suit property.

21. I would like to make a distinction between the summary eviction contemplated u/s 182 of the District Municipalities Act, with that of the legal action envisaged under the Tamil Nadu Land Encroachment Act, 1905. If there is any small encroachment of the road or there is any projection over the road, then Section 182 of the District Municipalities Act, can be invoked and at that time also necessarily prior notice should be issued. However, in this case, the suit property is measuring an extent of 10.6 cents and in such a case, in my opinion, the proper course would be to resort to the provisions of the Tamil Nadu Land Encroachment Act, 1905, but that was not adhered to.

22. The learned counsel for the defendant was not correct in projecting the case that the acquisition was relating to S. No. 4045 and not to S. No. 4045/1, because during the cross-examination, D.W. 2, candidly and categorically without mincing words admitted that the suit property originally was bearing survey No. 4045 and subsequently, it was assigned number as S. No. 4045/1. I could straight away refer to Ex. A. 5, the award passed by the Sub Court in O.P. No. 76 of 1958, relating to the acquisition proceedings. It would at once dispel and disambiguate the doubt that the land sought to be acquired for the municipality was in S. No. 4045/1 and not barely S. No. 4045. Over and above that D.W. 2 also admitted that the land acquisition proceeding was relating to S. No. 4045/1. As such, the first appellate Court was correct in holding that there was no dispute regarding the identity of the property. The suit property measures 10.6 cents forming part of the entire extent of 66 cents in S. No. 4045/1, over which the plaintiff claims right.

23. The first appellate Court, as correctly highlighted by the learned Senior Counsel for the respondent/plaintiff that unauthorisedly the Register concerned was corrected and thereby Exs. B. 1 and B. 2 emerged and they were nullified by Exs. B. 7 and B. 8. Thus the unauthorised corrections were rectified and the cumulative fact of those documents is to the effect that the revenue authorities themselves corrected the mistake by pointing out that the original owner Rajagopal name was wrongly struck off from the register earlier and subsequently, it was re-incorporated. Absolutely, there is no iota or shred, shard or miniscule, pint or jot of evidence to display and convey as to why all those unauthorised corrections were made in the records concerned. The trial Court based on hyper technicalities misdirected itself and declined to grant injunction.

To the risk of repetition and pleonasm, but without being tautologous, I would like to point out that a person in established possession could very well seek for injunction to the effect that he should not be disturbed otherwise than in accordance with law.

24. I recollect and call up the maxim " Inre dubia magis infitatio quam affirmatio intelligenda" [In a doubtful matter, the negation is to be understood rather than the affirmation.], which means that when evidence is lacking, the negative should be presumed and not the affirmative.

25. Not to put too fine a point on it, on the side of the Municipality, there is no document to indicate and expatiate that the suit property is part of the road, but on the other hand as appropriately and correctly highlighted by the learned Principal Subordinate Judge, Tiruchirappalli the plaintiff had proved his possession over the land. There is no question of seeking declaration in this factual matrix arises, because the plaintiff wanted to protect his bare possession.

26. Accordingly, the substantial question of law and the additional substantial question of law are answered to the effect that the judgment and decree of the first appellate Court is not perverse in view of absence of a prayer for declaration and the findings of the trial Court were perverse and the first appellate Court rectified it properly and there is no doubt about the identity of the suit property. In the result, the Second Appeal is dismissed. However, there is no order as to the costs. Consequently, connected M.P.(MD) Nos. 1 of 2008 and 1 of 2009 are dismissed.