



SA.No.1520 of 2005

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : **19.12.2023**

PRONOUNCED ON : **20.12.2023**

CORAM

THE HON'BLE Mr.JUSTICE **C.KUMARAPPAN**

S.A.No.1520 of 2005

Chinnasamy Gounder (Died)

2. Natarajan

(A2 brought on record as LR of the Sole appellant
vide order dated 15.03.2023 made in CMP.Nos.4295,
4296 & 4297 of 2022)

... Appellants

- Vs -

1. Nachappagounder (died)

2. Ammasai Gounder (Died)

3. N.Muthusamy

4. S.Poongothai

5. S.Prakash

6. A.Subramani

7. T.Pappathi

(R3 to R5 and R6 & R7 brought on record as LRs of the
deceased R1 & R2 respectively vide order dated 15.03.2023
made in CMP.Nos. 2094, 2095 & 2096 and 20, 22 & 25 of 2022)

... Respondents

Second Appeal is filed under Section 100 of the Civil Procedure Code
against the judgment and decree dated 04.04.2005 made in A.S.No.4 of 2005
on the file of the Sub Court, Dharapuram, reversing the judgment and decree



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dated 29.11.2004 made in O.S.No.123 of 2002 on the file of the District
Munsif Court, Kangayam.

For Appellants : Mr.N.Manokaran

For Respondents : R1 & R2 – Died (steps taken)
R3 to R7 – No Appearance.

JUDGMENT

This Second Appeal has been filed at the instance of the defendant.
The respondents herein are the plaintiff before the Trial Court.

2. For the sake of convenience, the parties will be referred to according
to their litigative status before the Trial Court.

The brief facts, which give rise to the instant second appeal is as follows:-

3. The plaintiffs are the brothers. According to the plaintiffs, the suit property belongs to the plaintiffs 1 and 2 as per the family partition deed dated 07.02.1980. On the western side of the suit property, the defendants property is situate. In between the plaintiffs and defendant's land, there is no fence. In the western portion of S.F.No.601, there is a bund, which is within the S.F.No.601 belongs to the plaintiffs. Since the defendants tried to



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encroach the plaintiffs' land, they were taking steps to survey the land in the year 1999. The defendant was not willing to fix the boundary. Hence, he filed a suit in O.S.No.266 of 1999. In that suit, the plaintiffs took a Commission along with the Surveyor. Similarly, the defendant herein, who was the plaintiff in O.S.No.266 of 1999 has also taken a Commission, in which, it has been found that the defendants have encroached the plaintiffs' B schedule property. The plaintiffs submit that the defendant has no title or right over the B schedule property. Therefore, the plaintiffs came forward with a suit for declaration and for delivery of possession of B schedule property.

4. The said suit was resisted by the defendant by contending that he has purchased the property bearing S.F.No.1171/A to an extent of 0.70 acres with a specific boundary under registered Sale Deed dated 22.05.1994 from one Mr.A.P.Nachimuthu Gounder. On the date of purchase itself, this defendant was put in possession of property bounded with fence and ridges on the eastern side. The defendant submits that he has been using the ridges and fence without any interference for the past 28 years. It is his case that in the northern portion of the ridges, 30 years old Kiluva fence and unja trees are standing. The defendant has also planted coconut trees on the eastern



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side of the ridges and the age of the coconut trees is 35 years. It is the submission of this defendant that the plaintiffs have encroached the defendants' property, which is in the enjoyment of the defendant for the past 50 years. It is also further submission of the defendant that the Resurvey Authorities are wrongfully changes the existing features without any notice to them. Hence, this defendant prayed to dismiss the suit.

5. He has also filed an additional written statement stating that the defendant has been in physical possession and enjoyment of the property for more than 30 years. Therefore, the question of encroaching the suit property during 1999 does not arise.

Evidence, Documents and Finding of the both the Court below:-

6. Before the Trial Court, the plaintiffs have marked 8 documents as Exs.A1 to A8 and on behalf of the defendants, 15 documents have been marked as Exs.B1 to B15. As the third party document, Ex.X1 has been marked and as a Court document, Exs.C1 and C2 have been marked. On behalf of both the plaintiffs and the defendants, 3 witnesses were examined as PW1 to PW3, and DW1 to DW3 respectively.

7. The Trial Court, after having gone into various aspects, has ultimately dismissed the suit. The Trial Court has also found that the



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defendant has perfected the title by way of adverse possession, and ultimately, dismissed the suit. Aggrieved with the said order, the plaintiffs preferred an appeal, wherein the First Appellate Court reversed the finding of the Trial Court and decreed the suit as prayed for. Aggrieved with the same, the defendant is before this Court.

Substantial Question of Law:-

8. At the time of admission on 23.12.2005, this Court has formulated the following substantial question of law:-

“1. Whether the lower appellate Court is correct in law in holding that the appellant/defendant had not established his right to the suit property by adverse possession overlooking the factum of open and continuous possession without any attempt at concealment, even though it was not specifically brought to the knowledge of the owner who admittedly usurped his right over the suit property?

2. Whether the First Appellate Court was legally right in negating the claim of the defendant of his possession merely on the basis of some stray answers given in the cross examination of DW1., especially when physical features of the suit property projected under Ex.B7, Ex.B15, Ex.C1 and Ex.C2 falsifies the cause of the plaintiffs?”



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Submission of either side counsel:-

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9. The learned counsel for the appellant/defendant would submit that ever since the date of purchase, the defendant has been in physical possession and enjoyment of the B Schedule property, which factum could be established through the Commissioner's report, and the trees standing on the ridges. Therefore, the learned counsel for the appellant would submit that the findings recorded by the Trial Court that the defendants have perfected title by way of an adverse possession is based on evidence. Therefore, prayed to restore the judgment of the Trial Court. In support of his contention, the learned counsel relied upon the judgments of the Hon'ble Supreme Court in ***Union of India and others Vs. Vasavi Cooperative Housing Society Limited and others*** reported in (2014) 2 SCC 269 and ***Nazir Mohamed Vs. J.Kamala and others*** reported in (2020) 19 SCC 57.

10. Despite the name of the respondents printed in the cause list, no one has appeared on behalf of the respondents.

11. I have given my anxious consideration to the submissions made by the learned counsel for the appellants.



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Analysis of the submissions:-

12. The main contention put forth by the learned counsel for the appellant/defendant is that, ever since the date of purchase through Ex.B1-Sale Deed, the defendant has been in physical possession and enjoyment of the B Schedule property. Therefore, they have perfected title by way of an adverse possession. In this regard, the Trial Court, in O.S.No.266 of 1999, has given a finding in favour of the plaintiffs based upon the Commissioner's report and also based upon the trees, which are standing in the field.

13. If we look at the pleadings, the defendant in his written statement, has stated that on the northern portion of the ridges, there are 30 years old Kiluva fence, and also unja trees standing on its southern end. Therefore, the existence of Kiluva fence for more than 30 years would establish their adverse possession. However, it is pertinent to mention here that admittedly, the suit property is situate in S.F.No.601. When the defendant was cross examined, he has categorically admitted that he do not have any right in S.F.No.601. The relevant portion of the admission is as follows:-

“அதில் நான் வாங்கிய பூமிக்கு கீழ்ப்புற செக்குபந்தியாக க.ச.1152/ஏ க்கு மேற்கு என்றுதான் எழுதப்பட்டுள்ளது. அதனால் எனக்கு பழைய க.ச.1152/ஏ விலும், அதன் புதிய க.ச.601 லும் எந்த பாத்தியமும் இல்லை. அதற்கு மேல்புறம் உள்ள பூமிதான் எனக்குப் பாத்தியம் ஆகும்.”



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14. It is further relevant to see the admission made by the defendant:-

“வரப்பிலிருக்கும் ஊஞ்சைமரம், குழுவை மரம், பப்பாளிமரம், சீமைப்புல் எல்லாம், 2ம் வாதி அம்மாசை கவுண்டருக்குப் பாத்தியம் என்று சொன்னால் சரியில்லை. அது பொதுவில்தான் பாத்தியம்.”

15. Therefore, from the above admissions made by the defendants, it is amply clear that the defendant's *animus possidendi* is not within the principles of *nec vi, nec clam, nec precario*, as the defendant himself admits that the trees standing on the ridges belongs to both of them. This portion of the admission is in dichotomy to the another admission that he do not have any right in S.F.No.601, as these trees are admittedly standing in the portion of S.F.No.601.

16. While seeing the written statement, the defendant has not stated as to when from his possession become adverse and his *animus possidendi* to have the property as his own property. If really the defendant had got any *animus possidendi* to own the property, he would very well approach the Revenue Authorities, so as to make necessary corrections in the Revenue records so as to bring the B schedule property as the property belongs to the defendant.



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17. Here, the main contention is based upon the presumption drawn from the existence of Kiluva fence and unja trees. This Court is having its own apprehension to rely upon the existence of the trees for determining the adverse possession, that too when the defendant has stated that such trees are jointly belongs to both the plaintiffs and the defendants. Therefore, as rightly found by the First Appellate Court that there are no material available before this Court to prove the adverse possession in favour of the defendant. Further, the findings recorded by the First Appellate Court that, the inaction on the part of the defendant to get sub division in his name in respect of the B schedule property would also a factor to decide the question of adverse possession against the defendant.

18. At this juncture, it is relevant to mention here that, it is the contention of the plaintiffs that the defendant has encroached the property only during 1999. Which factum was evidently proved by the plaintiff through the filing of the suit in O.S.No.266 of 1999. Therefore, it covertly and overtly projects the plaintiffs' objection against the defendant's encroachment over the suit property.

19. The learned counsel for the defendant relied upon the judgment of the Hon'ble Supreme Court in *Vasavi's* case [cited supra]. The relevant



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portion of the said judgment is paragraph 19 and the same reads as follows:-

“19. The legal position, therefore, is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. We are of the view that even if the title set up by the defendants is found against (sic them), in the absence of establishment of the plaintiff's own title, the plaintiff must be non-suited.”

20. In the case on hand, by oral evidence and admissions made by the defendant, the plaintiffs have established that they have been in possession and enjoyment of the suit property viz., S.F.No.601. Therefore, this Court is of the view that the plaintiffs have proved their possession and their right over the suit property.

21. In respect of the adverse possession, the learned counsel for the appellant also relied upon the judgment of *Nazir Mohamed's* case [cited supra]. The relevant portions of the said judgment are paragraphs 46, 47 and 48 and the same read as follows:-

“46. In the facts and circumstances of this case, where the appellant-defendant was owner of only a portion of the suit property but has admittedly been in possession of the entire suit property, and the appellant-defendant has, in his written statement, claimed to be in



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continuous possession for years as owner, the defence of the appellant in his written statement was, in effect and substance, of adverse possession even though ownership by adverse possession had not been pleaded in so many words. It is, however, not necessary for this Court to examine the question of whether the appellant-defendant was entitled to claim title by adverse possession or not.

47. A person claiming a decree of possession has to establish his entitlement to get such possession and also establish that his claim is not barred by the laws of limitation. He must show that he had possession before the alleged trespasser got possession.

48. The maxim “possession follows title” is limited in its application to property, which having regard to its nature, does not admit to actual and exclusive occupation, as in the case of open spaces accessible to all. The presumption that possession must be deemed to follow title, arises only where there is no definite proof of possession by anyone else. In this case, it is admitted that the appellant-defendant is in possession and not the respondent-plaintiff.”

22. By relying the above judgment, the learned counsel would submit that the maxim of “possession follows with title” is having only a limited application, having regard to its nature and such presumption would arise only when anyone else are in possession. Whereas, in the case on hand, the defendants have established their possession over the suit property through the Commissioner's report, and the existence of the trees. Therefore, submitted that since because there is a title with the plaintiff in respect of



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S.F.No.601, it will not be sufficient to hold that suit property is in plaintiffs' possession. However, this Court is not persuaded with the submissions made by the learned counsel for the appellant, as the claim of the appellant is on the basis of adverse possession, which claims right upon the other man's property, in pursuance of the sustained encroachment committed upon the other man's property. Therefore, when a person approaches the Court to declare such encroachment has enlarged into possessory title after statutory period, it is mandatory on the part of the defendant to prove each and every fact meticulously and cannot proceed based upon the presumption and assumption. Therefore, this Court is of the indubitable view that the findings recorded by the First Appellate Court is well considered one and the same is based on the evidence on record.

23. In view of the above discussion, the substantial question of law are answered in favour of the respondents. In the result, this Second Appeal is dismissed. There shall be no order as to costs.

20.12.2023

kmi

Index : Yes

Speaking Order : Yes

NCC : Yes



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To

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1. The Sub Court,
Dharapuram.
2. The District Munsif Court,
Kangayam.



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