



Second Appeal No.978 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.02.2024

CORAM :

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

Second Appeal No.978 of 2013
and M.P.No.1 of 2013

Kesavan Appellant

-Vs-

Kumararaja Respondent

Prayer : Second Appeal under Section 100 of C.P.C., against the judgment and decree dated 09.07.2013 made in A.S.No.91 of 2012 on the file of the learned Principal Subordinate Judge, Mayiladuthurai confirming the judgment and decree dated 06.08.2012 made in O.S.No.86 of 2011 on the file of the learned Additional District Munsif, Mayiladuthurai.

For Appellant	: Mr.B.Jawahar
For Respondent	: Mr.C.Vigneshwaran for Mr.Govi Ganesan

J U D G M E N T

The plaintiff is the appellant. The Second Appeal arises out of the judgment and decree of the Court of Principal Subordinate Judge in Mayiladuthurai in A.S.No.91 of 2012 dated 09.07.2013 in confirming the



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judgment and decree of the Court of the Additional District Munsif at Mayiladuthurai in O.S.No.86 of 2011 dated 06.08.2012.

For the sake of convenience, the parties are referred to as per their rank in the suit.

2. O.S.No.86 of 2011 was filed by the appellant herein for the relief of permanent injunction. The case of the plaintiff is simple. The property originally belonged to one Muthukumar who sold the property in favour of one Varadarajan on 18.11.2009. The plaintiff Kesavan purchased the said property from the said Varadarajan on 07.04.2011. The issue in the present suit relates to the western boundary of the property. The defendant is the neighbour on the western side. Since he removed the live fence that divided the property between the plaintiff and the defendant and as the plaintiff felt that he would be dispossessed, he came forward with the suit for injunction.

3. The case of the defendant is that, he is in absolute possession and enjoyment of the property over 30 years and therefore there is no requirement for him to encroach upon the property. He also pleaded that he has prescribed title to the property by adverse possession. According to him, the property belonged to one Thirupal Pannayar and therefore the purchase of the plaintiff is



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not correct. He would state that the defendant is enjoying the property and therefore the suit has to be dismissed.

4. On the basis of these pleadings, the learned trial Judge framed an issue as to whether the plaintiff is entitled to permanent injunction.

5. On the side of the plaintiff, he examined P.Ws.1 to 3 and marked Exs.A1 to A4. On the side of the defendant, he examined himself as D.W.1 and two other witnesses as D.Ws.2 and 3. No documentary evidence were marked on the side of the defendant. Pending the suit, an Advocate Commissioner was appointed, who visited the suit property and he filed Ex.C1 and plan Ex.C2. The parties went to trial on the pleadings.

6. The learned trial Judge extracted a portion of the evidence of P.W.1, which is set forth hereunder:

" இந்த தாவாவில் வரதராஜனிடம் இருந்து நான் கிரயம் பெற்ற இடம் எனக்கு வேண்டும் என்று தான் இந்த வழக்கு தாக்கல் செய்துள்ளேன்

. எனது இடத்தை பிரதிவாதி குமாரராஜா ஆக்கிரமித்ததால் தான் நான் அந்த இடம் எனக்கு வேண்டும் என்று வரதராஜனிடம்



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இருந்து கிரயம் பெற்றது எனக்கு வேண்டும் என்று வழக்கு
தாக்கல் செய்துள்ளேன். தாவா இடம் எனக்கு பாத்தியப்பட்டது
என்பதற்கு கிரய சாசனத்தை தவிர வேறு ஆவணம் எதுவும்
தாக்கல் செய்யவில்லை. நான் கேட்ட பரிகாரம் எனக்கு
வழங்கத்தக்கதல்ல என்றால் சரியல்ல...."

and came to the conclusion that, since the plaintiff had admitted the defendant is in possession of the property, the remedy of the plaintiff is to sue for recovery of possession and the suit for bare injunction is not maintainable and therefore dismissed the suit.

7. Aggrieved by the said decree, the plaintiff filed A.S.No.91 of 2012, which came to be confirmed. Against the concurrent findings, the present Second Appeal has been preferred to this Court.

8. Originally this Court ordered notice of motion on 01.10.2013. Thereafter, on 23.02.2022 the Second Appeal was admitted on the following substantial questions of law.

(a) Where the plaintiff has sought for the relief of permanent injunction based on his title in a vacant suit property, whether both the courts below went wrong in not following the principle



"possession follows title" and were not right in dismissing the suit?

(b) Whether the findings of both the Courts below can be termed as perverse due to improper appreciation of the oral and documentary evidence.

9. On service of notice, Mr.Govi Ganesan entered appearance on behalf of the respondent. Today, I heard Mr.B.Jawahar learned counsel for the appellant and Mr.C.Vigneswaran, for Mr.Govi Ganesan, learned counsel for the respondent.

10. Mr.B.Jawahar would submit that the plaintiff had proved his title to the property by filing Ex.A1 and the document of the predecessor-in-title under Ex.A2. He would point out that insofar as immovable property, which is vacant, the principle that applies is 'possession follows title'. In this particular case, he would submit that the evidence of P.W.1 cannot be read as an admission that the defendant is in possession of the property.

11. Per contra, Mr.Vigneswaran learned counsel for the respondent/ defendant would argue that the evidence of P.W.1 should lead me to the conclusion that P.W.1 is not in possession of the property and that by examining two other witnesses, the defendant has proved that he is in possession and occupation of the same for more than 30 years.



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12. I have carefully considered the arguments advanced on either side. For the sake of convenience, the questions of law are taken together and answered.

13. The sale in favour of the plaintiff was on 07.04.2011. The cause of action for the present suit arose because, within ten days of the purchase, the plaintiff alleges that the defendant had removed the live fence which existed between his property and that of the defendant. He has produced the registered sale deed from the predecessor B.Muthukumar in favour of his vendor Varadarajan as Ex.A2. Therefore, the plaintiff has given convincing proof with respect to his title to the property.

14. Now, turning to the Advocate Commissioner's report, the Advocate Commissioner has specifically found that the live fence which divided the plaintiff's property and the defendant's property has been disturbed. But, he goes on to point out in his report that there was already an old fence between the lines marked M to M1. A look at his plan shows that on the western side there have been trees which have been planted in order to demarcate the



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property of the plaintiff and the defendant. This existence of live fence itself shows that the defendant has not been in occupation of the property. This is because, had the defendant been put in occupation of the property, the question of dividing his own occupation by live fence would not arise.

15. Further more, I have to take note of the fact that the defendant has not produced even a single document to show that he was in possession of the property even prior to the presentation of the plaint. No explanation is forthcoming from the defendant as to why he could not file any document to prove that he was in possession of the property even on the date of purchase by the plaintiff, though the defendant pleads that he had been in occupation of the property for a period of 30 years.

16. The story of 30 years too is unbelievable as pointed by Mr.Jawahar because, on the date the defendant has given evidence before the trial Court, he was aged about 38 years. It is unfathomable that a child of 8 years would have trespassed into neighbour's property and would have been using it for the purpose of storing of hay.

17. It is too well settled, yet I have to merely recall the settled position of law that 'possession follows title to the property'. In this particular case, the



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plaintiff had proved his possession by filing Ex.A1 and A2. This presumption can no doubt be defeated by the defendant if he is able to show that he has been in possession of the property prior to such purchase by marking some evidence before the Court to establish that fact. There is absolutely no evidence forthcoming from the side of the defendant in order to disbelieve this presumption that the plaintiff is in possession of the property by virtue of his sale dated 07.04.2011.

18. Now turning to the alleged admission, an admission in order to defeat the case of the plaintiff must go the whole hog without giving any room for interpretation. A reading of the evidence shows that the plaintiff has merely deposed before this Court that he is asserting the right over the property. This does not mean that the plaintiff had admitted the defendant is in possession of the property. This is more so in the light of Exs.C1 and C2 which shows that there was a live fence and the disturbance thereto. After reading Ex.C1 and C2 along with the averments made in the plaint and depositions, I am able to conclude that there was a live fence which divided the properties of plaintiff and the defendant and that was removed by the defendant, which constrained the plaintiff to approach the Court by filing the suit.

19. The reading of the evidence as an admission is a perverse finding,



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which requires interference at the hands of this Court. In the light of Ex.A1 and A2, I conclude that the plaintiff is the owner of the property. I am only going into the ownership of the plaintiff incidentally and I am not declaring his right over the property. For the purpose of injunction, the plaintiff will have to prove that he is in lawful possession of the property and this has been established by the two documents. Therefore, I am constrained to interfere with the judgment of the Courts below.

20. In fine, the Second Appeal is allowed. The judgment and decree of the Court of the Principal Subordinate Judge, Mayiladuthurai dated 09.07.2013 in A.S.No.91 of 2012 in confirming the judgment and decree of the Additional District Munsif, Mayiladuthurai in O.S.No.86 of 2011 dated 06.08.2012 is set aside. The suit in O.S.No.86 of 2011 shall stand decreed as prayed for. Consequently, connected miscellaneous petition is closed. Considering the fact that the parties are neighbours, I am not ordering costs.

19.02.2024

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



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V.LAKSHMINARAYANAN, J.

KST

To

1. Principal Subordinate Judge,
Mayiladuthurai.
2. Additional District Munsif,
Mayiladuthurai.

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