

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.07.2015

CORAM

THE HONOURABLE MS. JUSTICE R. MALA

S.A.No.2007 of 2003
and C.M.P.No.18348 of 2003

Judgment reserved on 15.07.2015	Judgment pronounced on 22.07.2015
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R.Appadurai ... Appellant/Defendant

Vs

T.K.Samikkannu ... Respondents/Plaintiff

Prayer: Second appeal filed under Section 100 of CPC against the judgment and decree dated 22.10.2002 in A.S.No.130 of 2002 on the file of the Additional District Court-cum-Fast Track Court, Ariyalur, confirming the judgment and decree dated 30.06.1998 in O.S.No.361 of 1994 on the file of the Principal District Munsif Court, Ariyalur.

For Appellant : Mr.R.Venkatesulu for
Mr.G.R.Swaminathan

For Respondent : Mr.G.Perumal

JUDGMENT

The second appeal arises out of the judgment and decree dated 22.10.2002 in A.S.No.130 of 2002 on the file of the Additional District Court-cum-Fast Track Court, Ariyalur, confirming the judgment and decree dated 30.06.1998 in O.S.No.361 of 1994 on the file of the Principal District Munsif Court, Ariyalur.

2.The averments made in the plaint are as follows:-

(i)The suit property is the portion of the plaintiff's garden and the plaintiff is in possession of the same openly, continuously and uninterruptedly from 1967 onwards and the same was shown as "B C E F" in the plan. The defendant is constructing a house on the northern

side of the house property and garden of the plaintiff and the land belonging to the defendant is a Government poramboke land. The defendant made an attempt to interfere with the plaintiff's possession stating that the defendant has right over 3 ½ feet on the southern side of "B C" wall, which was shown as suit property. Further, the defendant put up two windows on the suit property and also 1 ½ feet slab which is protruding into the southern side of the suit property. Therefore, the plaintiff constrained to file the suit for permanent injunction restraining the defendant from interfering with the plaintiff's peaceful possession and enjoyment of the suit property and for mandatory injunction to remove the slab which is protruding into the plaintiff's property. Thus, he prayed for decree.

3.The gist and essence of the written statement filed by the defendant are as follows:

(i)The plaintiff has no right over the suit property. The plaintiff has not filed any relevant documents to prove that the suit property is in the survey number which mentioned in the plaint is belonging to him. Further, the plaintiff has not entitled to right over the property namely, the vacant land situated on the northern side of his property.

(ii)The defendant has right over the suit property which is measuring 3 ½ feet and 2 feet on its southern side. The plaintiff has alone constructed a wall on the 'A B ' line, for which, the defendant has lodged a complaint. One Varadarajan, Panchayat President allotted the lands measuring 30 feet from the north to south to the plaintiff and others and separate pattas were given to each of them. One Rasu, who is the Barber, was allotted the land in between the lands of the plaintiff and defendant. The plaintiff has encroached upon the land of Rasu and constructed a building ad measuring 14 feet from north to south. Since the plaintiff is working in the Court, the said Rasu unable to evict him, has given the balance land with an extent of 16 ½ feet from the north to south to the defendant on 29.06.1991 orally by receiving Rs.6,000/-.

(iii)Since the plaintiff has not filed the suit for declaration of title, the suit itself is not maintainable. Therefore, he prayed for dismissal of the suit.

4.The Learned Trial Judge after considering the averments both in the plaint and written statement and arguments on either side counsel, has framed necessary issues and on perusing the oral and documentary evidence viz., P.W.1, P.W.2, D.W.1, D.W.2 and Exs.A1 to A28, Exs.B1 to B6 and Exs.C1 to C4, decreed the suit. Aggrieved against the judgment and decree passed by the trial court, the defendant preferred an appeal in A.S.No.130 of 2002 on the file of the Additional District Court-cum-Fast Track Court, Ariyalur.

5.The learned First Appellate Court has considered the arguments advanced on either side, framed necessary point for consideration, confirmed the Judgment and Decree passed by the Trial Court. Against the Decree and Judgment passed by the first Appellate Court, the present second appeal has been preferred by the defendant/appellant.

6.At the time of admission, the following substantial questions of law have been framed:

1.Whether the judgments of the courts below are vitiated on account of the wrong casting of onus and burden of proof on the defendant instead of the plaintiff?

2.Whether the decisions of the Courts below are liable to be reversed on the ground of failure to apply the correct principles of law for interfering adverse possession?

3.Whether the Courts below ought to have declined the relief of mandatory injunction on the ground of acquiescence?

4.Whether the suit for injunction filed by the respondent is maintainable without praying for the relief of declaration?"

7.Challenging the concurrent findings of both the Courts below, learned counsel for the defendant/appellant submits that the suit without prayer for declaration of title, itself is not maintainable. For the reason, he relied upon the decision of this Court reported in (2011) 5 MLJ 413 (T.R.Thangappan v. Chitra); He further submits that since the respondent/plaintiff has sought for the relief of mandatory injunction, he has to furnish a specific description of the property as per Order 7 Rule 3 of C.P.C. Since the respondent/plaintiff has not furnished specific schedule of property for mandatory injunction, if mandatory injunction is granted, it cannot be executed. For the reason, he relied upon the following decisions:

- (i)2012 (1) CTC 708 (Arulmighu Kothandaramasamy Koil, Thirupuvanam, rep. by its Managing Trustee Jayaprakash) v. Vairam and others);
- (ii)(2007) 5 MLJ 1228 (V.Ranga Durai and others v. S.Jayalakshmi and another);
- (iii) 2012 (3) CTC 48 (P.K.Kasee Sah v. P.T.Hiru Shah);
- (iv) 2009-2-LW 546 (Anathula Sudhakar v. P.Buchi Reddy (Dead) by legal heirs and others);
- (V)(2005) 3 MLJ 495 (Kandasamy and others v. Savithri (died) and another);

8.Learned counsel for the appellant/defendant further submits that the plaintiff/respondent has stated that he is in possession of the suit property openly, continuously and uninterruptedly from 1967 onwards and hence, he is claiming adverse possession and on that basis, he sought for injunction. But no person can claim declaration of title on the basis of adverse possession. For the reason, he relied upon the decision of the Apex Court reported in (2014) 1 SCC 669 (Gurdwara Sahib v. Gram Panchayat Village Sirthala and another). Therefore, he prayed for allowing the second appeal.

9. Resisting the same, learned counsel for the respondent/plaintiff submits that the suit is maintainable because he is in possession of the suit property from 1967 onwards and his possession has been disturbed by the defendant, so there is no necessity for seeking the relief of declaration of title. To substantiate his arguments, he relied upon the decision of the Apex Court reported in 2009-2-LW 546 (Anathula Sudhakar v. P. Buchi Reddy (Dead) by legal heirs and others). He further submits that if there is no cloud over the suit property, merely because the defendant/appellant denied the title to the suit property, the plaintiff shall not be forced to approach the Court for seeking the relief of declaration of title. Further, the respondent/plaintiff has proved that the defendant/appellant attempted to interfere with the suit property by filing Ex.A1/rough sketch to show that the defendant has made construction and put the slab which is protruding into the suit property. Hence, the respondent/plaintiff is entitled to mandatory injunction and both the Courts below have rightly considered the same and decreed the suit. Therefore, he prayed for dismissal of the second appeal.

10. Considered the rival submissions made on both sides and perused the materials available on record.

11. The case of the respondent/plaintiff is that the suit property is the portion of his garden and he is in possession of the same from the year 1967 onwards. During the absence of respondent/plaintiff from the village, the appellant/defendant put up windows and place 1 ½ feet slab which is protruding into the suit property.

12. The appellant/defendant raised a defence that the plaintiff/respondent is not the owner of the suit property and the suit property is not in his possession. One Varadarajan, who is the Panchayat President has allotted the plots measuring 30 feet from the north to south to the plaintiff and others and separate pattas were given to each of them. One Rasu, who is the Barber, was allotted to the site in between the sites of the plaintiff and defendant and he left the place. At that time, the plaintiff has encroached upon his land ad measuring 14 feet from north to south and made construction. Since the respondent/plaintiff is working in Court, the said Rasu who is unable to evict him, sold the balance land with an extent of 16 ½ feet from the north to south to the defendant on 29.06.1991 orally by receiving Rs.6,000/-. So the appellant/defendant has stated that the plaintiff/respondent ought to have sought for the relief of declaration of title, which is mandatory.

13. It is pertinent to note that the respondent/plaintiff has filed Exs.A1 to A28 on his side. Ex.A1 is the plan; Ex.A2 is the patta, in which, it was mentioned as 216 sq.ft. and the patta number is 784; Exs.A3 to A11 and A22 to A28 are house tax receipts; Ex.A12 to A21 are land tax receipts; As per Ex.A2, the respondent/plaintiff

was allotted to the property only with an extent of 216 sq.ft., but as per his contention, he is in possession of the property more than 216 sq.ft. Admittedly, Advocate Commissioner was appointed and he measured the property and filed the report, in which, it was stated that the appellant/defendant is in possession of the land measuring 28 feet from East to West and 40 feet from North to South and the entire property namely, the property in possession of both the appellant and respondent is measuring 90 feet from North to South.

14. One Rasu was examined as D.W.2, who deposed that he was allotted the site and given patta in his name, since he left the place, he sold his site to the appellant/defendant and to prove the same, appellant/defendant has marked Ex.B1- notice intimating the increase of house tax, Ex.B2 - house tax receipt paid by Rasu, Ex.B3 - land tax receipt paid by Rasu, Ex.B4 - house tax receipt paid by the defendant, Ex.B5 - blue print and Ex.B6 - plan.

15. Admittedly, the suit property is not a patta property and it is a poramboke land and patta was given to the plaintiff/respondent only for 216 sq.ft. At this juncture, it is the duty of the respondent/plaintiff to prove that he is in possession of the same that too a legal possession. His house was constructed in 30 feet. It is to be noted that the suit property is only the property of the said Rasu. It is true, in para-4 of the written statement, the appellant/defendant stated that the suit property was allotted to Rasu and denied the title to the respondent/plaintiff, even then the respondent/plaintiff has not taken any steps to amend the plaint for declaration of title to the suit property.

16. At this juncture, it is appropriate to consider the decision of the Apex Court relied upon by both the Counsel reported in 2009-2-LW 546 (Anathula Sudhakar v. P.Buchi Reddy (Dead) by legal heirs and others), wherein it was held that 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. Para-17 is extracted hereunder:

"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.Learned counsel for the respondent/plaintiff has mainly focused upon clause-(d) of the above para, wherein it was specifically held that the 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.

18.In the case on hand, in the plaint it was stated that the suit property is the northern side of the garden and the suit property is the portion of the garden. The plaintiff/respondent is in possession of the same from 1967 onwards. Whereas in para-4 of the written statement, it was stated that each persons were allotted to the land measuring 30 feet from North to South. One Rasu was allotted to the site which is in between the sites of the plaintiff and defendant and the same has been substantiated by the evidence of D.W.2/Rasu and the documents under Exs.B1 to B4.

19.According to the appellant/defendant, the respondent/plaintiff has to file the suit for declaration of title and hence, the suit for injunction without the prayer for declaration of title is not maintainable. To substantiate his arguments, he relied upon the decision of this Court reported in (2011) 5 MLJ 413 (T.R.Thangappan v. Chitra), wherein it was held as follows:

"Ratio Decidendi

When there is dispute between the parties relating to title over a specific extent of property, then the prayer for declaration is a must."

Since the appellant/defendant is disputing the title of the respondent/plaintiff, the respondent/plaintiff ought to have amended the prayer for declaration of title and also for injunction. On considering the decision of the Apex Court reported in 2009-2-LW 546 (Anathula Sudhakar v. P.Buchi Reddy (Dead) by legal heirs and others), the suit for bare injunction is not maintainable without prayer for declaration of title, since the plaintiff is not having title to the suit property.

20.Now this Court has to decide whether the description of the suit property has been properly given by the respondent/plaintiff? So it is appropriate to extract the description of the suit property, which runs as follows:

"Ariyalur Taluk, Ariyalur Kaspas, Rajaji nagar, 3rd ward, North of 3rd cross street, plaintiff's house No.38E5 and garden, South of Defendant's house, East of Vembu ammal vacant land, West of cross

street from north to south, measuring east to west - 28 feet, south to north - 3 ½ feet, in the plan, the property was shown as "ABCD" ."

21. In the above description of the property, it was mentioned as 3 ½ feet land, but in the prayer, the plaintiff sought for mandatory injunction for removal of 1 ½ feet slab. At this juncture, it is appropriate to consider the following decisions relied upon by the learned counsel for the appellant/defendant:

(i) In 2012 (1) CTC 708 (Arulmighu Kothandaramasamy Koil, Thirupuvanam, rep. by its Managing Trustee Jayaprakash), in para-16 and 17, it was held as follows:

"16. From the conjoint reading of the said provisions of law, it is made clear that if a suit has been instituted in respect of an immovable property, concerned plaintiff should contain proper description of the suit property so as to identify the same and further relief of mandatory injunction can be granted in respect of a property, in case the same can be enforced through Court of law."

17. The present suit has been instituted for the relief of mandatory injunction so as to remove the construction alleged to have been put up by the Defendants 1 to 4. It has already been animadverted to that except three Survey Numbers and its extent, the plaintiff does not contain the breadth and length of the alleged construction or survey numbers, in which the alleged construction is situate. Therefore, the Plaintiff is completely lacking proper description of the suit properties so as to identify the same. "

(ii) In (2007) 5 MLJ 1228 (V.Ranga Durai and others v. S. Jayalakshmi and another), wherein it was held as follows:

"Plaintiff claiming he the exclusive owner, plaintiff's title disputed, suit for bare injunction and mandatory injunction without having title declared, not maintainable."

Ratio Decidendi

"Order 7, Rule 8, Code of Civil Procedure, specifically states that if relief is sought on various claims, such claims must be on distinct grounds. Thus, in a suit for mandatory injunction, alleging encroachment by defendants, the specific extent of encroachment must be distinctly stated in the plaintiff. Otherwise, if the suit is decreed, execution of the decree would itself become impossible."

(iii) In (2005) 3 MLJ 495 (Kandasamy and others v. Savithri (died) and another), it was held that relief of mandatory injunction for removal of construction will be refused, if the plaintiff is guilty of laches and acquiescence.

Considering the above decisions, I am of the view, in the suit for mandatory injunction, description of property has to be furnished. But in the case on hand, no specific description of property has been mentioned for removal of 1 ½ feet slab protruding into the suit property which is sought for in the prayer. Under such circumstances, the above decisions are not applicable to the facts of the present case.

22. Learned counsel for the appellant/defendant has also relied upon the decision of the Apex Court reported in (2014) 1 SCC 669 (Gurdwara Sahib v. Gram Panchayat Village Sirthala and another), wherein it was held as follows:

"Declaration of ownership of land on basis of adverse possession cannot be sought by plaintiff. But claim of ownership by adverse possession can be made by way of defence when arrayed as defendant in proceedings against him.

No declaration can be sought on the basis of adverse possession inasmuch as adverse possession can be used as a shield and not as a sword.

The issue whether adverse possession of the appellant-plaintiff had matured into his ownership is purely a question of law and it is a settled position that no declaration of title can be sought on the basis of adverse possession. The learned trial Court has rightly relied upon the case titled Gurdwara Sahib Sannauli v. State of Punjab (2009) 154 PLR 756 wherein it is held that no declaration can be sought by the plaintiff with regard to adverse possession because such a plea is available only to the defendant. "

In the case on hand, in para-4 of the plaint, it was stated that the plaintiff is in possession of the property openly, continuously and uninterruptedly from 1967 onwards, so he has prescribed title by adverse possession. Even though he is not claiming declaration of title, he is claiming injunction without prayer for declaration of title.

23. Considering the afore said decisions along with the facts of the present case, I am of the view, the suit itself is not maintainable without seeking the relief for declaration of title. The appellant/defendant in para-5 of the written statement itself raised a specific plea that suit itself is not maintainable without prayer

for declaration of title. Both the Courts below have failed to consider the above aspect. Therefore, the decree and judgment passed by both the Courts below are unsustainable and they are liable to be set aside and they are hereby set aside.

24.In fine,

- The Second Appeal is allowed.
- The decree and judgment passed by both the Courts below are hereby set aside.
- Consequently, O.S.No.361 of 1994 on the file of the Principal District Munsif Court, Ariyalur, is dismissed.
- No costs.
- Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

True Copy

Sub Assistant Registrar

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To

- 1.The Additional District Court-cum-Fast Track Court, Ariyalur.
 - 2.The Principal District Munsif Court, Ariyalur.
 - 3.The Record Keeper, V.R.Section, High Court, Chennai.
- 1 cc to M/s.Usha Ramman, Advocate Sr.No.37236

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