

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.04.2015

CORAM

THE HONOURABLE MS. JUSTICE R. MALA

S.A.Nos.2192 and 2193 of 2004

S.A.No.2192 of 2004:

1.P.M.Palanisamy (died)
2.R.Palanisamy
3.Pappayammal @ Pappathi
4.M.P.Thangarasu ...Appellants/Plaintiffs
(Appellants 3 and 4 brought on record
as legal heirs of the 1st appellant vide
order of Court dated 12.03.2012 made
in C.M.P.Nos.3590 to 3592/2007
in S.A.No.2193 of 2004)

Vs

1.Krishnan alias Kittamooppan
2.Sellappan ...Respondents/Defendants

S.A.No.2193 of 2004:

1.P.M.Palanisamy (died)
2.R.Palanisamy
3.Pappayammal @ Pappathi
4.M.P.Thangarasu ...Appellants/Defendants
(Appellants 3 and 4 brought on record
as legal heirs of the 1st appellant vide
order of Court dated 12.03.2012 made
in C.M.P.Nos.74 to 76 of 2012
in S.A.No.2192 of 2004)

Vs

Krishnan alias Kittamooppan ... Respondent/Plaintiff

Prayer: Second appeals filed under Section 100 of CPC against the judgment and decree dated 30.01.2004 made in A.S.Nos.28 and 29 of 2003 on the file of the Principal Sub-Court, Erode, confirming the judgment and decree dated 28.02.2002 made in O.S.Nos.209 of 1998 and 401 of 1995 on the file of the learned District Munsif cum Judicial Magistrate, Perundurai.

For Appellants : Mr.A.K.Kumaraswamy
For R1 in both : Mr.N.Manokaran
the appeals

For R2 in SA.2192/04: No appearance

COMMON JUDGMENT

The second appeals arise out of the judgment and decree dated 30.01.2004 made in A.S.Nos.28 and 29 of 2003 on the file of the Principal Sub-Court, Erode, confirming the judgment and decree dated 28.02.2002 made in O.S.Nos.209 of 1998 and 401 of 1995 on the file of the learned District Munsif cum Judicial Magistrate, Perundurai.

2.The plaintiffs 1 and 2 in O.S.No.209 of 1998 are the defendants in O.S.No.401 of 1995 and the appellants herein. The first defendant in O.S.No.209 of 1998 is the plaintiff in O.S.No.401 of 1995 and the first respondent herein. The second defendant in O.S.No.209 of 1998 is the 2nd respondent herein.

O.S.No.209 of 1998:

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

(i)The 1st defendant was the owner of the suit properties. In the year 1967, the plaintiffs had encroached upon the suit properties and are in possession and enjoyment openly, continuously and uninterruptedly with the knowledge of the 1st defendant for more than the statutory period. The plaintiffs had acquired title to the suit properties by way of adverse possession. The plaintiffs by spending huge amount raised crops and made improvements in the suit properties. The plaintiffs had also paid Kists due to the Government.

(ii)During Mariamman Temple festival, there was a misunderstanding between the 2nd defendant and the plaintiffs. Taking advantage of the said enmity, the 2nd defendant instigated the 1st defendant to give trouble to the plaintiffs and they trespassed into the suit properties on 02.06.1994. Hence, the plaintiff constrained to file a suit for the following reliefs:

(a) granting a declaration that the plaintiffs are the absolute owners of the suit properties;

(b) restraining the defendants, their men and agents from in any manner either trespassing or interfering with the plaintiffs' peaceful possession and enjoyment over the suit properties by means of a permanent injunction;

(c)direct the defendants to pay the costs of the suit to the plaintiffs;

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

(i)The 1st defendant is the owner of the suit properties and he is in possession and enjoyment of the same. There is no cause of action for the suit arose. The plaintiffs have not come to the Court with clean hands. The suit as framed itself is not maintainable and hence the suit is liable to be dismissed in limine.

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

(i)The plaintiffs admit that defendants are the owners, but the plaintiffs claim title by adverse possession. The defendants purchased the suit property from the brother of plaintiffs and the Government has also granted patta to the defendants, since they have been in possession and enjoyment of the suit properties. They had also paid Kists. Therefore, he prayed for dismissal of the suit.

O.S.No.401 of 1995:

6.The plaintiff is the owner of the suit properties. Due to some inconvenience, the defendants paid Kists to the Government on behalf of the plaintiff. The defendants approached the plaintiff to purchase the suit properties, but the plaintiff refused to do so. Therefore, there was misunderstanding between the plaintiff and the defendants. Due to the said impact, on 07.11.1994, the defendants tried to trespass into the suit properties. So the plaintiff constrained to file the suit.

7.The gist and essence of written statement filed by the defendants are as follows:

(i) The suit is not maintainable. The address given by the plaintiff in the plaint is wrong and he was residing in Pollachi Taluk for the past 35 years. Once upon a time, the plaintiff was the owner of the suit properties. Since the plaintiff has been residing out of the suit properties for the past 35 years, the defendants have been in possession and enjoyment of the suit properties from 1967. So the plaintiff has lost his right and the defendants are in possession and enjoyment openly, continuously and uninterruptedly with the knowledge of the 1st defendant for more than the statutory period. The plaintiffs had acquired title to the suit properties by way of adverse possession. Due to the dispute regarding Mariamman Temple festival, the plaintiff tried to trespass into the suit properties. So the defendants filed the suit in O.S.No.900/1994 (later transferred and renumbered as O.S.No.209 of 1998). So the plaintiff

has filed the suit in O.S.No.401 of 1995 as case and counter. Therefore, they prayed for dismissal of the suit.

8.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 to D.W.3 and Exs.A1 to A18 and Exs.B1 to B18, passed the common order and decreed the suit in O.S.No.401 of 1995 as prayed for in the plaint and dismissed the suit in O.S.No.209 of 1998. Aggrieved against the judgment and decree of the trial court, the appellants herein preferred appeals in A.S.Nos.28 and 29 of 2003 on the file of the Principal Sub-Court, Erode.

9.The learned First Appellate Court has considered the argument advanced on either side and framed necessary point for consideration and confirmed the Judgment and Decree passed by the Trial Court and dismissed the appeals. Against the Decree and Judgment passed by the first Appellate Court, the present second appeals have been preferred by the appellants.

10.At the time of admission, the following substantial question of law has been framed:

"(i) When title to immovable property is based on possessory title, whether the absence of document of title to sustain such claim would disable the plaintiff from getting the relief?"

11.For the sake of convenience, the parties herein are referred to as the 'appellants' and 'first and second respondent'.

12.During arguments, learned counsel for the appellants submits that the second appeals against the second appellant namely, R.Palanisamy is not pressed stating that the second appellant is not willing to proceed the appeals and he has also made an endorsement to that effect.

13.Challenging the concurrent findings of both the Courts below, learned counsel for the first appellant submits that the appellants herein had filed a suit in O.S.No.209 of 1998 for declaration of title and injunction stating that the suit properties are belonging to the first respondent and the appellants herein are in possession and enjoyment of the same openly, continuously and uninterruptedly with the knowledge of the first respondent for more than the statutory period. It is further submitted that the appellants acquired title to the suit properties by way of adverse possession and to prove the same, Exs.A1 to A18 Kists receipts are marked. But the Courts below have failed to consider the same. Therefore, he prayed for allowing the second appeals.

14. Resisting the same, learned counsel for the first respondent submits that Exs.A1 to A18 are only Kists receipts and since the first respondent was residing in Pollachi, the first appellant has paid that amount. But Adangal was not filed to show that the first appellant is in possession of the suit properties. Other document viz., Chitta also stands in the name of the first respondent. Both the Courts below have rightly held that the first appellant has not proved that he has prescribed the title by way of adverse possession. To substantiate his arguments, he relied upon the decision of the Apex Court reported in (2014) 1 SCC 669 (Gurdwara Sahib v. Gram Panchayat Village Sirthala and another) and submits that suit itself is not maintainable and the appellants cannot claim declaration of title and injunction on the basis of the adverse possession. Therefore, he prayed for dismissal of the appeals.

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

16. Now this Court has to decide whether the suit in O.S.No.209 of 1998 filed by the appellants is maintainable? It is true, a person who claims adverse possession, has to prove that he prescribed title by way of adverse possession. Admittedly, the appellants had filed a suit in O.S.No.209 of 1998 for declaration of title and injunction stating that the suit properties are belonging to the first respondent and the appellants herein are in possession and enjoyment of the same openly, continuously and uninterruptedly with the knowledge of the first respondent for more than the statutory period. The first respondent resisting the suit in O.S.No.209 of 1998, filed a suit in O.S.No.401 of 1995 for declaration of title and injunction stating that the first respondent is the owner of the suit properties and he is in possession of the same. A common judgment and decree was ordered and the suit filed by the appellants in O.S.No.209 of 1998 was dismissed and the suit filed by the first respondent in O.S.No.401 of 1995 was allowed, against which, the appellants herein had preferred appeals in A.S.No.28 of 2003 in O.S.No.209 of 1998 and A.S.No.29 of 2003 in O.S.No.401 of 1995. The said appeals are also dismissed, against which, the present second appeals have been preferred by the appellants.

17. At this juncture, it is appropriate to consider the decision of the Apex Court relied upon by the learned counsel for the first respondent reported in (2014) 1 SCC 669 (Gurdwara Sahib v. Gram Panchayat Village Sirthala and another), wherein it was held that claim of adverse possession can be used as a shield not as a sword and no person can file a suit for declaration of title on the basis of the adverse possession. Para-7 and 8 are extracted hereunder:

"7. In the second appeal, the relief of ownership by adverse possession is again denied holding that such a suit is not maintainable.

8. There cannot be any quarrel to this extent that the judgments of the Courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can use this adverse possession as a shield/defence."

18. Considering the above decision along with the facts of the present case, I am of the view, the suit filed by the appellants in O.S.No.209 of 1998 itself is not maintainable. But the first appellant is entitled to take the plea of adverse possession in the suit in O.S.No.401 of 1995 as defence, which was filed by the first respondent. It is well settled dictum of the Apex Court that the person who pleaded adverse possession must prove that he is in possession and enjoyment of the suit property openly, continuously and uninterruptedly for more than the statutory period (i.e.) 12 years with the knowledge of the true owner, on the basis of which, he can prescribe title by adverse possession.

19. On perusal of the documents under Exs.A1 to A18 filed by the appellants would reveal that the suit is filed in the year 1994 (i.e.) O.S.No.900/1994 (later transferred and renumbered as O.S.No.209 of 1998) and Exs.A1 to A11 are Kists receipts from 27.03.1974 to 05.02.1994. Ex.A12 is the chitta dated 16.06.1995; Ex.A13 is the order dated 15.04.1995 passed by the Deputy Tahsildar, Perundurai; Ex.A14 is the proceedings dated 07.04.1998 by the Revenue Divisional Officer; Exs.A15 to A18 are Kists receipts from 18.02.1992 to 19.02.1997; It is to be noted that Exs.A12 to A14 and A16 to A18 came into existence after the suit in O.S.No.209 of 1998 has been filed. So no reliance can be placed on Exs.A12 to A14 and A16 to A18.

20. On perusal of documents under Exs.B1 to B18 would reveal that Ex.B1 patta alone came into existence before filing of the suit and other documents under Exs.B2 to B18 came into existence after filing of the suit. But the first appellant has not filed any documents to show that he is in possession and enjoyment of the suit properties more than the statutory period with the knowledge of the first respondent. Mere filing of the Kists receipts is not sufficient to come to the conclusion that the first appellant has prescribed title by adverse possession.

21.It is seen from the records that Ex.A12/Chitta was issued on 14.06.1995 for the fasli No.1404; Patta number has been given as 136; Name of the Pattadhar is M.Palanisamy, s/o Marappa Gounder and R.Palanisamy, S/o.Rangasamy Gounder. The suit survey number has also been given. But Ex.A12 came into existence after filing of the suit. The appellants had filed a petition sought for change of patta and in pursuance of the same, the Deputy Tahildar, Perundurai had passed the proceedings dated 15.04.1995 under Ex.A13. Ex.A14 is the Proceedings dated 07.04.1998 passed by the Revenue Divisional Officer, Erode stating that since the suit is pending, patta will not be changed. Furthermore, Ex.B1 is the patta book issued much prior to the litigation, which stands in the name of the first respondent namely, Krishnan @ Kittamooppan, s/o.Karuppa Mooppan stating that the properties were inherited by him. The first respondent has also filed Kists receipts, wherein patta number has been mentioned as 136, 1734, 1554, 1424, 1825. Some of the Adangal documents filed by the first respondent stand in the name of Palanisamy and some of them stand in the name of the first respondent.

22.As already stated that the burden is heavily shifted upon the first appellant to prove that he is in possession and enjoyment of the suit properties for more than 12 years and prescribed title by adverse possession. The trial Court has correctly held that the first appellant has not proved that he is in possession and enjoyment of the suit properties with the knowledge of the true owner openly, continuously and uninterruptedly for more than the statutory period. Further the trial Court has correctly held that the first appellant has not prescribed title by adverse possession. Moreover, the judgment and decree passed by the trial Court have been correctly appreciated by the first Appellate Court. In such circumstances, I am of the considered opinion, the first appellant has not proved that he has prescribed title by adverse possession in O.S.No.401 of 1995, even though he has raised the same as defence. So the substantial question of law is answered accordingly.

23.For the foregoing reasons, both the Courts below have rightly held that the appellant has not prescribed title by adverse possession. So the decree and judgment passed by both courts below does not warrant any interference and the same are hereby confirmed. The second appeals are liable to be dismissed and they are hereby dismissed.

24. In fine,

- Second Appeals are dismissed in respect of first appellant. The Second Appeals are dismissed as not pressed in respect of the second appellant.

- The decree and judgment passed by both Courts below are hereby confirmed.
- There is no order as to costs.
- Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Deputy Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The District Munsif cum Judicial Magistrate, Perundurai.

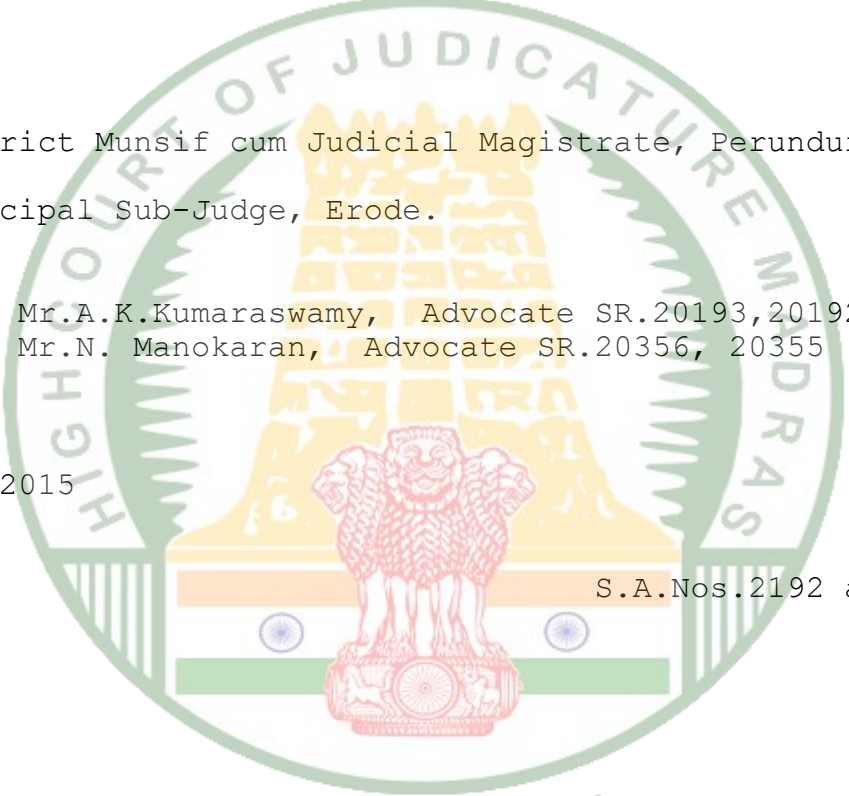
2.The Principal Sub-Judge, Erode.

+ 2 ccs to Mr.A.K.Kumaraswamy, Advocate SR.20193,20192

+ 2 ccs to Mr.N. Manokaran, Advocate SR.20356, 20355

RSY (CO)
EU 04.06.2015

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