

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.06.2016

CORAM

THE HONOURABLE MR. JUSTICE P.KALAIYARASAN

S.A. No.1041 of 2008
and M.P.No.1 of 2008

1. The Government of Tamil Nadu
Rep. by its District Collector
Dharmapuri.
2. The Assistant Circle Engineer
Highways and Rural Works Department,
Harur. Appellants / Defendants

vs.
Kamala Respondent / Plaintiff

Second Appeal is preferred under Section 100 of the Code of Civil Procedure against the Judgment and Decree, dated 29.12.2005 made in A.S.No.34 of 2004 on the file of the Sub-Court, Dharmapuri, confirming the Judgment and Decree, dated 27.03.2001 made in O.S.No.458 of 1995 on the file of the District Munsif Court, Harur.

For Appellants : Mr.T.Jayaramaraj
Government Advocate (CS)

For Respondent : Mr.R.Asokan

J U D G M E N T

This Second Appeal is preferred against the concurrent findings of the Courts below, decreeing the plaintiff's suit for permanent injunction.

2. The unsuccessful defendants are the appellants. For convenience, the parties are to be referred to in their original rank in the suit.

3. The suit land is Natham poramboke land. The predecessor of the plaintiff encroached the suit poramboke land 35 years back. The plaintiff purchased the suit land from her predecessor about 10 years back and put up construction after obtaining approval from the panchayat. The second defendant has no right over the property. The second defendant, while removing encroachers from the Highways property, attempted to remove the superstructure in the suit land. However, the attempt was thwarted by the plaintiff with the help of

others. Therefore, he has filed the suit with leave to dispense with Section 80 notice to file the suit.

4. D2 in its written statement admits that the suit land is a poromboke land. He contends that the averments made in the plaint has to be established by the plaintiff. The second defendant never removed any encroachment in the suit land. It was also never attempted to and only due to the apprehension, suit has been filed and therefore, the suit has to be dismissed.

5. Based on the above pleadings, the trial Court framed 5 issues. On the side of the plaintiff, plaintiff and two other witnesses were examined and Exs.A.1 to A.6 were marked. On the side of the defendants, one witness was examined and no document was marked. The Commissioner's Report and Plan were marked as Ex.C.1 and Ex.C.2.

6. Upon consideration of oral and documentary evidence of both sides, the trial Court held that the plaintiff was in possession of the suit property on the date of suit and therefore, he is entitled to permanent injunction as prayed for with costs.

7. Being aggrieved by the Judgment of the trial Court, defendants preferred appeal in A.S.No.34 of 2004 on the file of the Sub-Court, Dharmapuri. The lower Appellate Court, reappraised the entire evidence and came to the conclusion that the plaintiff was in possession and enjoyment of the suit property and dismissed the appeal, confirming the Judgment of the trial Court. Being aggrieved by the concurrent findings of Courts below, the defendants have preferred this Second Appeal.

8. At the time of admission of the Second Appeal, the following Substantial Question of Laws were framed :

"a) Whether the Courts below are correct in granting the relief of permanent injunction against defendants on presumption that the structures put up in the suit property was removed only subsequent to the filing of suit ?

b) Whether the Courts below are correct in shifting the burden of proving vesting of possession on the defendants after the structures was removed from the suit property ignoring the principle that "one who pleads the existence of certain facts has to prove the same ?

c) Whether the Courts below are correct in decreeing the suit in the absence of proof of possession for 30 years by the plaintiff ?

d) Whether the Courts below are correct in decreeing the suit when the relief sought for incapable of being granted ?

e) Whether the Courts below are correct in

decreeing the suit on the basis of averments made in the written statement about the factum of possession without deciding the question of possession on the basis of materials on record ?"

9. Heard, Mr. T.Jayaramaraj, learned Government Advocate (CS) appearing for the appellants as well as Mr.R.Asokan, learned counsel appearing for the respondent.

10. The learned counsel appearing for the appellants submitted that when the plaintiff herself admitted in her evidence that the superstructures put up in the suit land was already removed, the relief of injunction claimed is ceased to exist and that the Courts below are not correct in shifting the burden of proof of possession on the defendants and therefore, the relief of permanent injunction ought not to have been granted.

11. The learned counsel appearing for the respondent strenuously contends that the superstructure was removed pending litigation. The plaintiff continued to be in possession and more particularly when the plaintiff was in possession on the date of the suit, she is entitled to the relief as prayed for.

12. There is no dispute that the suit land is a poramboke land. Admittedly, the plaintiff, after getting approval from the panchayat raised the superstructure. The second defendant, i.e., Highways Department does not claim any right over the suit property, as the suit property being poramboke land. It is also not the case of the defendants that the first defendant, being District Collector initiated any action to evict the plaintiff, as per the provisions under the Tamil Nadu Land Encroachment Act, 1905.

13. The suit was filed in the year 1995. The Advocate-Commissioner inspected the suit property and filed his report with plan, which are marked as Ex.C.1 and Ex.C.2. The Advocate-Commissioner, inspected the suit property on 22.09.1995 and found the superstructure, i.e., 5 shops in the suit property. The Town Panchayat approval and plan are marked as Ex.A.2 and Ex.A.3. The plaintiff also filed receipt for payment of penalty kist towards the suit land; house tax receipts and Electricity receipts as Ex.A.4 to Ex.A.6. Therefore, it is clear that the plaintiff was in possession on the date of the suit.

14. No doubt, the plaintiff admits during cross-examination that during the pendency of the litigation, the superstructure was removed. When the second defendant took a definite stand in his written statement that the Department never attempted to remove the superstructure in the suit property, they cannot contend now, taking advantage of the above evidence of the plaintiff that the relief sought for ceased to exist.

15. It is also pertinent to note that the second defendant tries to improve his case during evidence saying that the superstructure was already removed from the suit land.

16. It is settled law that when a claim has been never made in the defence presented, no amount of evidence can be looked into upon a plea, which was never put forward and relief should not be granted on a new plea and on a new point not taken in the pleadings nor any issue raised but merely upon the admission of the parties. Therefore, the plea of the appellants that the relief of permanent injunction ceased to exist cannot be accepted, as it is contrary to the pleadings of the defendants and further, the plaintiff has established the existence of the superstructure in the suit site, on the date of the suit.

17. The second defendant does not claim title to the suit property. The plaintiff has been in possession of the suit property, by raising superstructure. The Tahsildar also gave a certificate, Ex.A.1 to the effect that the suit property is a poramboke land. Though there is oral evidence that superstructure has been removed during the pendency of the suit, there is no evidence to depict that the superstructure was removed under due process of law. As far as vacant site is concerned, when the plaintiff is in possession on the date of the suit and the defendants has no title to the suit property, the general principle is that a person in peaceful possession is entitled to be maintained in possession against all but the true owner. Even a trespasser cannot be evicted by a owner, except under due process of law.

18. In this case, the second defendant being Highways Department does not claim any right over the suit property. The first defendant, being District Collector has authority over the suit land, being poramboke land. But it is not the case of the defendants that the eviction process was initiated under the Tamil Nadu Land Encroachment Act. Therefore, the plaintiff having been in possession of the property on the date of the suit is entitled to get the relief as prayed for.

19. For the aforesaid reasons, both the Courts below rightly granted the relief and accordingly, I answer all the Substantial Questions of Law as against the appellants and in favour of the respondent.

20. In fine, the Second Appeal is dismissed with costs,

confirming the Judgment and Decree of the Lower Appellate Court.
Consequently, connected miscellaneous petition is also dismissed.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

To

1. The Sub-Court
Dharmapuri.

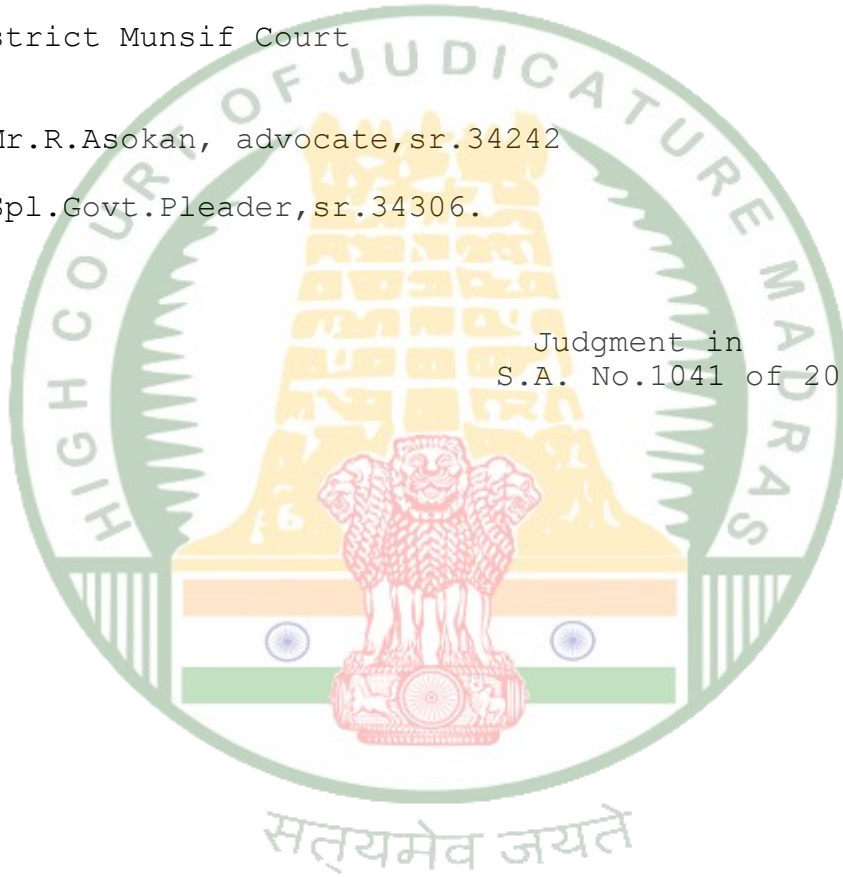
2. The District Munsif Court
Harur.

+1 cc to Mr.R.Asokan, advocate,sr.34242

+1 cc to Spl.Govt.Pleader,sr.34306.

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krd 17/8

Judgment in
S.A. No.1041 of 2008



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