

IN THE HIGH COURT OF JUDICATURE AT MADRAS**RESERVED ON : 03.11.2016****PRONOUNCED ON : 21.11.2016****CORAM****THE HONOURABLE MR. JUSTICE T.RAVINDRAN****S. A.No.285 of 2011****and****M.P.No.1 of 2011**

Savithri

...

Appellant

Vs.

Kalyani

...

Respondent

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree of Additional Sub Court, Mayiladuthurai, dated 31.03.2010 made in A.S.No.28 of 2009 confirming the judgment and decree of Additional District Munsif Court, Mayiladuthurai dated 03.12.2008 made in O.S.No.322 of 2006.

For Appellant : Mr.S.Sounthar

For Respondent : Mr.N.Srinivasan

JUDGMENT

Challenge in this second appeal is made by the plaintiff against the judgment and decree dated 31.03.2010 made in A.S.No.28 of 2009 on the file of Additional Sub Court, Mayiladuthurai, confirming the judgement and decree dated 03.12.2008 made in O.S.No.322 of 2006 on the file of the Additional District Munsif Court, Mayiladuthurai.

2. The suit has been laid for permanent injunction.

3. The averments contained in the plaint are briefly stated as follows:

The ground site in the suit property bearing R.S.No.60/2 punjai 16 cents wherein the old thatched house and its backyard are situated bearing Old Door No.3/78-C and New Door No.3/171, belongs to A/M Agneeswara Swamy Koil, Nalladai and one Kasinathan was the then Paguthidar of the suit property. The plaintiff got the same transferred in her favour on 22.06.1989 for a proper and valid consideration and after the above said transfer, the plaintiff has put up a thatched house in the suit property and paid house tax. The plaintiff had also obtained an electric connection for the thatched house in her name bearing service connection No.613. The plaintiff is in possession and enjoyment of the suit property. She has already approached the temple authorities to transfer the Paguthidar's name from Kasinathan to her name and it is pending. The defendant is the western neighbour of the suit property and not cordial with the plaintiff. The defendant attempted to annex a portion of the suit property in the year 1997 and to restrain the same, the plaintiff was forced to file the suit for permanent injunction against the defendant in O.S.No.562 of 1997 and pending the above said suit, the villagers intervened and on the

assurance that the defendant will not disturb the possession of the plaintiff in respect of the suit property, the plaintiff allowed the above said suit to go for default and the suit was dismissed for default on 06.02.2001. Presently, the defendant forgetting her assurance, had attempted again to encroach upon the suit property illegally and hence, the necessity for laying the suit.

4.The averments contained in the written statement filed by the defendant are briefly stated as follows:

The suit is not maintainable either in law or on facts. No doubt, the ground site of the suit property belongs to A/M Abineswarar Swamy Devasdhanam, Perambur. The defendant's husband by name Natesan was the original Paguthidar and after his demise, the defendant and her daughters became the owners. As such, the defendant, as the oldest member of the family has got the paguthy rights transferred in her name. The brothers of the plaintiff's husband trespassed into the suit property and hence, the defendant was constrained to file a suit for recovery of possession in O.S.No.116 of 1990 and the said suit was later transferred to the District Munsif Court, Nannilam and the same was decreed in favour of the defendant.

The appeal preferred in A.S.No.32 of 1994 was also dismissed and pursuant to the same, the defendant had executed the decree and taken possession of the suit property and as such, the defendant is in possession and enjoyment of the suit property. The plaintiff's suit in O.S.No.592 of 1997 had been allowed to go for default, for the reasons best known to the plaintiff. Further, at the instigation of the plaintiff, one Kasthuri also filed a suit for permanent injunction, which was also not prosecuted. Only to get over the above hurdles, the plaintiff has, without any cause of action, laid the suit and hence, the suit is liable to be dismissed.

5. In support of the plaintiff's case, PWs 1 & 2 were examined and Exs.A1 to 12 were marked. On the side of the defendant's, DW1 has been examined and Exs.D1 to 8 were marked.

6. On a consideration of the oral and documentary evidence adduced by the respective parties, the trial Court was pleased to dismiss the suit. The first appellate court also confirmed the judgment and decree of the trial Court in the appeal preferred by the plaintiff. Aggrieved over the same, the present second appeal has been laid by the plaintiff.

7. The second appeal has been admitted and the following substantial question of law is formulated for consideration in this second appeal.

Whether the judgment of courts below are liable to be set aside in its refusing to grant injunction when appellant proved his settled possession over suit property ?

8. The main point urged by the learned counsel for the appellant is that the plaintiff/appellant has established beyond any reasonable doubt that she is in possession and enjoyment of the suit property and when the same has been admitted by the trial Court and when no material has been projected by the defendant to differ from that view, before the courts below, according to the appellant, her possession should be protected against all, except the true owner of the suit property and as such, it is argued that the courts below have failed to consider the establishment of the appellant settled possession in respect of the suit property and grant suitable relief to her and hence, according to the appellant, the judgement and decree of the courts below are liable to be set aside.

9. As regards, the possession and enjoyment of the suit property, as rightly argued by the appellant, she has produced the house tax receipts, electricity bills and also, Paguthy receipts in her name, which have been marked as Ex.A1 to 12. The specific case of the appellant is that it is, she, who had put up the thatched house in the suit property and also paying tax for the same and also, secured electricity connection in her name and was paying the electricity charges. Therefore, from the above said documents filed on behalf of the plaintiff including the Paguthy receipts, it is evident that it is only the plaintiff, who is in possession and enjoyment of the suit property. That apart, even the trial Court has clearly found that based upon the documents marked on behalf of the plaintiff, which have not been contested by the respondent, it is only the plaintiff, who is in possession and enjoyment of the suit property. This could be seen from the findings of the trial Court in para 9 of the judgment.

10. Despite the above finding of the possession and enjoyment of the plaintiff over the suit property, the Courts below, however, came to dismiss the suit based on the defence set out by the defendant. According to the defendant, the brother of the plaintiff's husband trespassed into the suit property, when she was enjoying the

suit property as Paguthidar and as a corollary, the defendant was constrained to file a suit against the plaintiff's husband's brother for recovery of possession in O.S.No.116 of 1990 and the same had ended in her favour and the appeal preferred was also dismissed and therefore, according to the trial Court, inasmuch as the defendant had been granted decree in her favour, in the above said proceedings, the plaintiff is not entitled to seek the relief of permanent injunction against the defendant.

11. Countering the same, it is argued by the counsel for the appellant that even assuming for the sake of arguments that the defendant laid the suit and obtained decree in her favour, other than marking the copy of the judgment and decree in the above said suit, the defendant has not established that she had taken possession of suit property by executing the decree granted in her favour in the above said suit proceedings. It is fairly admitted by the defendant's counsel that the defendant has not placed any record to establish that she has taken possession of the suit property by executing the decree obtained by her against the brother of the plaintiff's husband. Therefore, it could be seen that the trial Court has erred in holding that the defendant has taken delivery of possession of the suit

property, pursuant to the decree obtained by her, in respect of the suit proceedings laid by her against the plaintiff's husband's brother. Merely on the footing that the defendant has made a claim that she has instituted execution proceedings in the said suit, we cannot presume that the defendant has taken possession of the suit property in accordance with law. Therefore, it could be seen that the defendant has failed to establish that she has secured possession of the suit property, pursuant to the decree obtained by her in the above said suit proceedings. The delivery account to establish that the defendant had taken possession of the suit property in the above said suit proceedings, has not been marked. That apart, it has also been admitted that the plaintiff is not a party in the suit proceedings. So, it is evident that the decree obtained by the defendant in the above said suit proceedings would not, in any manner by itself non suit the plaintiff.

12. The defendant's counsel would contend that the plaintiff has laid a suit against the defendant in O.S.No.592 of 1997 and later, left the suit to go for dismissal without prosecution and therefore, according to her, the judgment and decree rendered in the above suit would operate as *res judicata* for the present suit. However, the above argument does not merit acceptance. No doubt, the plaintiff has laid a

suit against the defendant in O.S.No.592 of 1997 for permanent Injunction. However, as averred by the plaintiff in the plaint, due to the intervention of the mediators, the plaintiff did not prosecute the suit. Therefore, it could be seen that the above suit had been dismissed for default. Accordingly, it could be seen that the defendant has also not marked the judgment and decree in the above said suit, but, only marked the copy of the plaint and written statement filed in the above suit as Exs.B4 and 5. Therefore, it could be seen that when the above suit has been left to go for dismissal, on account of non prosecution, it does not stand to reason as to how the judgment and decree passed in the above suit would operate as *res judicata* for the present suit. That apart, it is also not pleaded by the defendant in the written statement that the judgment and decree rendered in O.S.No.562 of 1997 would operate as *res judicata* to the present suit. Therefore, it could be seen that the above argument projected by the defendant to reject the plaintiff's suit cannot be countenanced.

13. The defendant has not placed any material to hold that it is, she, who is in possession and enjoyment of the suit property. Therefore, it could be seen that the plaintiff is entitled to protect her possession till she is lawfully evicted from the suit property.

14. In support of the plaintiff's case, the counsel for the plaintiff relied on the decision reported in **(2004) 1 Supreme Court Cases 769 (Rame Gowda (Dead) By LRs. V. M.Varadappa Naidu (Dead) By LRS. And Another)** and from the above said decision, it could be seen that a person, who is found to be in settled possession of law of the property is entitled to protect his/her possession until dispossessed therefrom by due process of law. The relevant portion of the said judgment is extracted as follows:

The Court in (1975) 4 SCC 518 (Puran Singh V. State of Punjab) laid down the following tests which may be adopted as a working rule for determining the attributes of "settled possession" (SCC p.527, para12):

(i) that the trespasser must be in actual physical possession of the property over a sufficiently long period;

(ii) that the possession must be to the knowledge (either express or implied) of the owner of without any

attempt at concealment by the trespasser and which contains an element of animus possidendi. The nature of possession of the trespasser would, however, be a matter to be decided on the facts and circumstances of each case;

(iii) the process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced to by the true owner; and

(iv) that one of the usual tests to determine the quality of settled possession, in the case of culturable land, would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner, has no right to destroy the crop grown by the trespasser and take forcible possession.

" The " settled possession" must be (i) effective, (ii) undisturbed, and (iii) to

the knowledge of the owner or without any attempt at concealment by the trespasser.”

The principles of law enunciated in the above said decision, squarely applies to the facts and circumstances of the present case.

15. As observed supra, the plaintiff has established her possession and enjoyment of the suit property right from 1999 onwards by marking Exs.A1 and 12 and the above said documents not having been disputed by the defendant and furthermore, when the defendant has not even an iota of evidence to establish that she is in possession and enjoyment of the suit property or had taken possession, pursuant to the decree obtained by her in O.S.No.116 of 1990, it could be seen that the plaintiff/appellant has established, as adumbrated by the Hon'ble Apex Court, that she is in the settled possession of the suit property for a sufficiently long period of time.

16. In the light of the above discussion, it could be seen that the courts below have erred in holding that the plaintiff is not entitled to seek the relief of permanent injunction against the defendant, when the plaintiff has established by cogent and convincing evidence that it is she, who is in possession and enjoyment and when it is also found

that the defendant has failed to establish that she is in possession and enjoyment of the suit property. For the reasons aforesaid, the judgment and decree of the courts below are liable to be set aside.

17. In support of his case, the defendant's counsel relied on the decisions reported in **1970(1) Supreme Court Cases 613 (Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B.Jeejeebhoy), (2004) 5 Supreme Court Cases 762 (Thiagarajan And others Vs. Sri Venugopalaswamy B.Koil and others), (2005)10 Supreme Court Cases 38 (Manicka Poosali (Dead) By LRs.And others V. Anjalai Ammal and another), AIR 2011 Supreme Court 1113 (M.Nagabhushana V.State of Karnataka and Ors.), 2016 (2) MWN (Civil) 100 (Damodar Lal V. Sohan Devi and others), 2016 (5) CTC 862 (Syeda Rahimunnisa V. Malan Bi by L.Rs. and ors), 2015 (1) CTC 623 (Kuzhanthaiappa Gounder V. Nachimuth and two others) and (1994) 2 Supreme Court Cases 14 (Sulochana Amma V. Narayanan Nair)**. In the light of the above discussion, it could be seen that the authorities referred to by the defendant's counsel as rightly submitted by the plaintiff's counsel, would not be applicable to the facts and circumstances of the case at hand.

In conclusion, the second appeal is allowed and the judgment and decree dated 31.03.2010 made in A.S.No.28 of 2009 on the file of the Additional Sub Court, Mayiladuthurai, confirming the judgment and decree dated 03.12.2008 made in O.S.No.322 of 2006 on the file of the Additional District Munsif, Mayiladuthurai, are set aside and the plaintiff is granted the relief of permanent injunction against the defendant and that her possession of the suit property should not be disturbed by the defendant except under due process of law. No costs. Consequently, connected miscellaneous petition is closed.

21.11.2016

Index : Yes/No
Internet: Yes/No
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To

1. The Additional Sub Court,
Mayiladuthurai.
2. The Additional District Munsif Court,
Mayiladuthurai.

T.RAVINDRAN,J.

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Pre-delivery order in
S. A.No.285 of 2011
and
M.P.No.1 of 2011

21.11.2016

**Pre -delievery judgment made
in S. A.No.285 of 2011
and
M.P.No.1 of 2011**

To

The Hon'ble Mr.Justice T.Ravindran

**Most respectfully submitted
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(P.A.to the Hon'ble Judges)**