

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.06.2016

CORAM :

THE HONOURABLE MR.JUSTICE T.MATHIVANAN

S.A.No.205 of 2003

1.Parvathi

2.Boopathy

... Appellants/ Respondents/ Plaintiffs

Vs.

1.Muruhiyalu Ammal

2.Beeman @ Pethu Naicker(died)

3.P.Ellammal

4.P.Rajendran

5.P.Chandran

6.P.Venkatan

7.P.Jayaraman

... Respondents/ Appellants/ Defendants

(RR3 to 7 brought on record as LRs

of the deceased R2 vide order of

court dated 05.06.2013 made in

CMP.No.12911 of 2005 in S.A.No.205 of 2003).

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 31.01.2002 and made in the appeal in A.S.No.124 of 2001 on the file of the learned first Additional District Judge cum Judicial Magistrate, Salem, modifying the judgment and decree dated 30.04.2001 and made in the suit in O.S.No.351 of 1997 on the file of the learned second Additional District Munsif, Salem.

For Appellants : Mr.S.Subbiah

For Respondents : Mr.Sivakumaran

J U D G M E N T

The judgment and decree dated 31.01.2002 and made in the appeal in A.S.No.124 of 2001 on the file of the learned first Additional District Judge/Chief Judicial Magistrate, Salem are impugned in this Second Appeal.

2. The appellants are the plaintiffs in the suit in O.S.No.351 of 1997, whereas the 1st respondent herein is the first defendant in the suit. The 2nd respondent being the second defendant had passed away. The respondents 3 to 7 have been brought on record as the legal heirs of the deceased R2, vide order dated 05.06.2013 and made in the petition in C.M.P.No.12911 of 2005.

3. For easy reference and for the sake of convenience, the appellants herein may herein after be referred to as the plaintiffs and the respondents be referred to as the defendants, where ever the context so require.

4. The first plaintiff is the mother of the second plaintiff. One Ramasamy is the husband of the first plaintiff and the father of the second plaintiff. The said Ramasamy is the son of the first defendant. The deceased second respondent/D2, is none other than the another son of the first defendant. 15 years prior to the filing of the suit, the suit property and other properties were divided among the family members of Perumal Naicker, who is the husband of Muthialu Ammal(D1) and their children. In the said family arrangement, the suit property was allotted to the first plaintiff's husband Ramasamy, for which the first defendant had received a sum of Rs.10,000/- on 30.03.1993. After getting the suit property from the above said arrangement, Ramasamy had constructed a tiled house and resided therein along with the plaintiffs. Ramasamy had died on 29.11.1991, leaving the plaintiffs as his legal representatives to succeed the suit property.

5. After the life time of Ramasamy, the plaintiffs have been in possession and enjoyment of the suit property for more than a statutory period by paying the house tax, electricity tariff etc due to the Government. That on 17.03.1997, the first defendant had issued a notice to the plaintiffs, claiming that the suit property was allotted to her in the family arrangement and therefore, she had claimed exclusive right over the suit property.

6. The plaintiffs had also issued a suitable reply. According to the plaintiffs, they have been in possession and enjoyment of the suit property and therefore, the defendants have got no right to interfere with their possession. Hence, they were constrained to file the above suit.

7. On the other hand, the defendants have contended that the suit site is belonged to the first defendant. The first defendant's son Ramasamy, who is none other than the husband of the first plaintiff and father of the second defendant had died in the year 1991 and till his life time, the plaintiffs and the said Ramasamy were living jointly with the first defendant in the house bearing Door No.148-C, Krishnan Pudur, Amma Pet, Salem-3, which is the permanent residence of the defendants.

8. Taking undue advantage of the loneliness as well as the old age of the first defendant, the plaintiffs had trespassed into the suit property and put up a building bearing Door No.2/18-A. The first defendant had also paid a sum of Rs.8000/- towards the consideration to the plaintiffs for the construction. Hence, the first defendant is also a co-owner of undivided half share

alongwith the plaintiffs. Since the defendants are denying the title of the plaintiffs, the suit for permanent injunction without seeking the prayer for declaration is not maintainable.

9. That on 05.08.1994, a family arrangement was made, wherein, the plot which was already allotted to the first defendant was recognized and the same is described as 'B' schedule in the said family arrangement. The suit building is constructed at this Plot only. The plaintiffs are aware of this fact.

10. The first defendant had executed a Settlement Deed dated 14.03.1997 in favour of the second defendant. On the basis of the said Settlement Deed, the second defendant has become the absolute owner of the suit property. The Settlement Deed dated 05.08.1994 is true, valid, accepted and acted upon and therefore, it would definitely bind upon the plaintiffs. As per the provisions of the Specific Relief Act, the plaintiffs possession cannot be protected in the eye of law.

11. The trial Court, based on the pleadings of the parties to the suit had formulated the following two issues:

(i) Whether the plaintiffs are entitled to permanent injunction as prayed for?

(ii) To what relief, the plaintiffs are entitled?

12. In order to find answer for the above formulated issues, the parties to the suit were directed to face the trial. The first plaintiff had examined herself as PW1 and two more witnesses were also examined on her behalf as PW2 & 3 respectively. The second defendant was examined as DW1. Seven documents were exhibited (A1 to 7) on behalf of the plaintiffs and 9 documents (Ex.B1 to 9) were exhibited on behalf of the defendants.

13. The learned trial Judge on scrutinisation of the evidences both oral and documentary had found that the super structure was belonged to the first plaintiff's husband as it was constructed by him with his own funds and after his demise, the plaintiffs were entitled to remain therein. Though the land upon which, the tiled house is constructed, it does not belong to them. The possession of the plaintiffs in respect of vacant land was only permissive in nature and that had spent money for constructing the tiled house and since their possession was legal, they were entitled to the equitable relief of permanent injunction. They could not be evicted from the vacant land belonging to the defendants, upon which they had constructed the tiled house without compensating them.

14. With the above said finding, the learned trial Judge had proceeded to decree the suit as prayed for with cost.

15. Having been aggrieved by the judgment of the trial Court, the defendants had preferred an appeal in A.S.No.124 of 2001 on

the file of the learned first Additional District Judge/Chief Judicial magistrate, Salem.

16. After hearing both sides, the learned first Appellate judge had found that the plaintiffs were the owners of the super structure only. So they could claim injunction as against the defendants only with regard to the super structure, and hence they were not entitled to get the relief of permanent injunction as prayed for but they were entitled only for a qualified injunction.

17. Accordingly, the appeal preferred by the defendants was partly allowed by modifying the judgment and decree of the trial Court. The finding of the first Appellate Court is extracted as under:

"the respondents / plaintiffs are entitled to a decree of qualified injunction against the appellants/defendants and their men restraining them from in any way interfering with, disturbing, trespassing into the peaceful possession and enjoyment of the plaintiffs in respect of the suit property except under due process of law and without giving compensation for the super structure according to law".

18. Having been aggrieved by the judgment of the first Appellate Court, the plaintiffs stand before this court with this second appeal.

19. This second appeal came to be admitted based on the following three substantial questions of law:

(i) Whether in a suit for permanent injunction, when the possession of the plaintiff is admitted, can the Court go into the capacity or right in which the plaintiff is in possession?

(ii) Without framing any issue with regard to the title to the super structure or the land, can the Court in a suit for permanent injunction grant a limited right to the plaintiff subject to the payment of compensation to the super structure put up by the plaintiff in the suit land?

(iii) Whether Ex.B1, an alleged family Kurchit Will, by itself confirm the alleged partition said to have been taken place in the year 1981?

20. Heard Mr.S.Subbiah, learned counsel appearing for the appellants and Mr.Sivakumaran, learned counsel appearing for the respondents.

21. It is significant to note here that the suit in O.S.No.351 of 1997 seems to have been filed by the plaintiffs on 26.05.1997. The plaintiffs case is that 15 years prior to the filing of the suit, a family arrangement was made between Perumal Naickar, Muthialu Ammal and their children.

22. For reference, it may be better to place on record that one Ramasamy, who is the husband of the first plaintiff and the father of the second plaintiff as well as the second defendant in the suit viz., Beeman @ Pethu Naicker are the sons of the first defendant Muthiyalu Ammal and Perumal Naicker. In the above said family arrangement, the suit property was given to Ramasamy(husband of first plaintiff) for which the first defendant being the mother had received a sum of Rs.10,000/-.

23. Secondly, the plaintiffs have contended that after the allotment of the suit property, Ramasamy had constructed a tiled house and resided therein alongwith the plaintiffs. Admittedly, the said Ramasamy had died on 29.11.1991. Since the plaintiffs have been in possession and enjoyment of the suit property by putting up a tiled house therein for more than the statutory period, they have filed this suit seeking the relier of permanent injunction.

24. In paragraph No.5 of their written statement, the defendants have stated that till the death of Ramasamy, who is also the son of the first defendant, the plaintiffs and Ramasamy were living jointly alongwith the first defendant in the house bearing Door No.148-C, Krishnan Pudur, Amma Pet, Salem-3 and taking advantage of the old age of the first defendant, the plaintiffs had trespassed into the suit property and constructed a building bearing Door No.2/18A, for which the first defendant had also paid a sum of Rs.8,000/- to the plaintiff and as such the first defendant claims that she is also a co-owner of undivided half share along with the plaintiffs. Since the first defendant had also claimed as one of the co-owners recognising the co-ownership of the plaintiffs, it is not open to the defendants to deny the possession of the plaintiffs.

25. Entirely contrary to their own pleadings, admitting the co-ownership of the plaintiffs in respect of the suit property, in paragraph No.6 of their written statement, the defendants have contended that the suit as framed without seeking the relief of declaration is not at all maintainable. When the title of the plaintiffs has been admitted by the defendants alongwith the co-ownership of the first defendant, they cannot take a conflictual stand and deny their title.

26. However, the defendants have admitted the possession of the plaintiffs in respect of the suit property. No satisfactory evidence was forthcoming on the part of the defendants to substantiate the fact that the first defendant had also paid a sum of Rs.8000/- towards the consideration as well as the construction of the house put up by the plaintiffs. The Courts below have found that the plaintiffs are the owners of the super structure alone and the house site is belonged to the first defendant but the Courts below have not given proper reasoning for coming to the conclusion, because their conclusion is absolutely in confliction

with the written statement of the defendants. The defendants have admitted the co-ownership of the plaintiffs in respect of the suit property.

27. The first defendant also claimed half share in the suit property. It is pertinent to note here that the defendants in paragraph No.5 of their written statement particularly in the last three lines have stated as under:

'hence the first defendant is also a co-owner of undivided $\frac{1}{2}$ share alongwith the plaintiffs. As such the plaintiffs are the co-owners''.

28. To shed more light, upon the case of the parties to the suit, a reference to the evidences given by PW2 is absolutely necessary. The first defendant is PW2's elder sister. The second defendant is his sister's son. He says that some 12 years back, he had effected a partition in respect of their ancestral property and given shares to his seven sisters including the first defendant. At one point of time, the second defendant approached him and asked to identify the place which was allotted to his mother i.e., the first defendant. He had also identified that place. When he asked the first defendant as to why she had given a house site for her second son Ramasamy, who is none other than the husband of the first plaintiff, the first defendant, according to PW2, had replied that since he was a T.B. Patient, let him survive by putting up a shop in the said place. After two years, the first defendant's second son Ramasamy, who is the husband of the first plaintiff had died in the same place.

29. When the first defendant had approached him to get back the said land from the plaintiffs, he had persuaded them and convened a Panchayat and in the said Panchayat the first plaintiff had agreed to pay a sum of Rs.10,000/- to the first defendant and subsequently she had given a sum of Rs.7,000/- only. Therefore, PW2 has ratified the fact that the plaintiffs have been in possession and enjoyment of the suit property and they had also paid a sum of Rs.7000/- to the first defendant. When such being the case, the question of granting qualified injunction modifying the decree of the trial Court does not arise and the finding given by the first Appellate Court seems to be perverse in nature and liable to be set aside.

30. Further, the learned counsel Mr.S.Subbiah, while advancing his argument has placed reliance upon the decision of the Apex Court in Rame Gowda(dead) by Legal Representatives Vs. Varadappa Naidu (dead) By Legal Representatives and another (2004) 1 Supreme Court Cases 769, wherein the Apex Court in paragraph No.8, with regard to the entitlement of a person to retain possession, has observed that:

(8) "It is thus clear that so far as the as the Indian law is concerned, the person in peaceful

possession is entitled to retain his possession and in order to protect such possession he may even use reasonable force to keep out a trespasser. A rightful owner who has been wrongfully dispossessed of land may retake possession if he can do so peacefully and without the use of unreasonable force. If the trespasser is in settled possession of the property belonging to the rightful owner, the rightful owner shall have to take recourse to law, he cannot take the law in his own hands and evict the trespasser or interfere with his possession. The law will come to the aid of a person in peaceful and settled possession by injunction even a rightful owner from using force or taking the law in his own hands, and also by restoring him in possession even from the rightful owner (of course subject to the law of limitation), if the latter has dispossessed the prior possessor by use of force. In the absence of proof of better title, possession or prior peaceful settled possession is itself evidence of title. Law presumes the possession to go with the title unless rebutted. The owner of any property may prevent even by using reasonable force a trespasser from an attempted trespass, when it is in the process of being committed, or is of a flimsy character, or recurring, intermittent, stray or casual in nature, or has just been committed, while the rightful owner did not have enough time to have recourse to law. In the last of the cases, the possession of the trespasser, just entered into would not be called as one acquiesced to by the true owner.

31. In paragraph No.9, the Apex Court has also observed that:

(9) "It is the settled possession or effective possession of a person without title which would entitle him to protect his possession even as against the true owner. The concept of settled possession and the right of the possessor to protect his possession against the owner has come to be settled by a catena of decisions. Illustratively, we may refer to *Munshi Ram Vs. Delhi Admn* AIR 1968 SC 702: (1968) 2 SCR 455: 1968 Cri LJ 806, *Puran Singh Vs. State of Punjab* (1975) 4 SCC 518 : 1975 SCC (Cri) 608 and *Ram Rattan Vs. State of U.P.* (1977) 1 SCC 188: 1977 SCC (Cri) 85. The authorities need not be multiplied. In *Munshi Ram* case AIR 1968 SC 702: (1968) 2 SCR 455: 1968 Cri LJ 806, it was held that no one, including the true owner, has a right to

dispossess the trespasser by force if the trespasser is in settled possession of the land and in such a case unless he is evicted in the due course of law, he is entitled to defend his possession even against the rightful owner.

In the very same paragraph, the Apex Court has made reference to the decision in Puran Singh Vs. State of Punjab (1975) 4 SCC 518: 1975 SCC (Cri)608. In this connection, the Apex Court has held that :

..... 'In Puran Singh case (1975) 4 SCC 518: 1975 SCC (Cri)608, the Court clarified that it is difficult to lay down any hard-and-fast rule as to when the possession of a trespasser can mature into settled 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 phrase 'settled possession' does not carry any special charm or magic in it, nor is it a ritualistic formula which can be confined in a straitjacket. An occupation of the property by a person as an agent or a servant acting at the instance of the owner will not amount to actual physical possession. The Court laid down the following tests which may be adopted as a working rule for determining the attributes of 'settled possession' (SCC p.527, para 12).

(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 or 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.

32. In paragraph No.10, the Apex Court has also observed as under:

'In the cases of Munshi Ram AIR 1968 SC 702: (1968) 2 SCR 455: 1968 Cri LJ 806 and Puran Singh (1975) 4 SCC 518: 1975 SCC (Cri)608, the Court has approved the statement of law made in Horam Vs. R. AIR 1949 All 564: 50 Cri LJ 868, wherein a distinction was drawn between the trespasser in the process of acquiring possession and the trespasser who had already accomplished or completed his possession wherein the true owner may be treated to have acquiesced in, while the former can be obstructed and turned out by the true owner even by using reasonable force, the latter may be dispossessed by the true owner only by having recourse to the due process of law for reacquiring possession over his property.

33. This Court has carefully gone through the above cited decision made in Rame Gowda(dead) by Legal Representatives Vs. Varadappa Naidu (dead) By Legal Representatives and another (2004) 1 Supreme Court Cases 769 and find that having been admitted the possession of the plaintiffs in respect of the suit property, the Courts below cannot proceed to question the capacity or right of the plaintiffs' possession.

34. As argued by Mr.S.Subbiah, learned counsel, though the defendants have disputed the title of the plaintiffs in respect of the suit property no issue has been formulated by the trial Court. Further, in the suit for permanent injunction, no limited right could be granted to the plaintiffs subject to the payment of compensation to the super structure put up by them in the suit site.

35. Further, Ex.B1, is an unregistered document with the caption of a family Kurchit is not sufficient as well as inadmissible to confirm the partition, which is said to have been taken place in the year 1981. Equally, it cannot either be treated as a Deed of Partition or as a family Kurchit, as the genuineness of the document has been questioned by the appellants contending that the signatures found in Ex.B1 are forged one. As afore stated, Ex.B1, cannot be taken as a conclusive evidence as to what could have been done in the year 1981.

36. Based on the above discussion, it is to be noted that the the learned first Additional District Judge had gone on the wrong side in adjudicating the rights of the parties over the disputed property as the suit is filed for the relief of permanent injunction. Such a finding seems to be without jurisdiction and out of the scope of the suit for permanent injunction, as contemplated under Section 34 of the Specific Relief Act. Therefore, the first Appellate Court ought not to have granted a qualified relief of permanent injunction at this stage.

37. Based on the discussions made above, the substantial questions of law Nos.1 to 3 are answered in favour of the appellants/plaintiffs.

38. Keeping in view of the above fact, this Court finds that the judgment and decree of the first Appellate Court are liable to be set aside. Accordingly, the second appeal is allowed and the judgment and decree of the first Appellate Court dated 31.01.2002 and made in the appeal in A.S.No.124 of 2001 are set aside. The judgment and decree of the trial Court are restored and the parties to the appeal are at liberty to work out their rights in a properly framed suit. However, there shall be no order as to costs.

Sd/-
Asst.Registrar (CS VII)

/true copy/

Sub Asst. Registrar

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To

- 1.The learned first Additional District Judge
cum Judicial Magistrate, Salem.
- 2.The learned second Additional District Munsif,
Salem
3. The Section Officer
VR Section,
High Court, Madras

1 cc to Mr.D. Shivakumaran, Advocate, Sr. 29414
1 cc to Mr.S. Subbiah, Advocate, Sr. 29323

S.A.No.205 of 2003

PVR (CO)
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