

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:13.02.2017

Pronounced on:23.02.2017

Coram

The Hon'ble Dr.Justice G.Jayachandran

Second Appeal Nos.1411 and 1412 of 1997
and

C.M.P.Nos.14095 and 14096 of 1997

1.A.N.Muthusamy(died) ... Appellant/Respondent/Defendant
2.M.Manoranjitham
3.G.M.Thriuvenkatachalam
4.G.M.Balasubramaniam
5.G.M.Senthilkumar
(appellants 2 to 5 are brought on record
as LRS of the deceased sole appellant
vide order of Court dated 05.09.2003
made in C.M.P.Nos.8990 to 8993 of 2001)

..Appellants in both appeals

/versus/

1.L.Ramesh(deceased) ..Respondent in SA.1411/1997/Appellant/
Plaintiff
2.L.Sairam
3.Lakshmi
4.Ananthan
5.Seetha
(RR3 to 5 brought on record
as LRS of the deceased R1 vide
order of Court dated 14.11.2016
made in C.M.P.Nos.210 to 212/15
in S.A.No.1411 of 1997)

.. Respondents in
S.A.No.1411 of 1997

1.L.Ramesh(deceased)
2.L.Sairam
3.Palanisamy
4.P.N.lakshmanan
(R3 and R4 exparte in the Courts
below and hence given up)

..Respondents 1 & 4/
Respondents 2& 3/Defendants 1& 2

5.Lakshmi
6.Ananthan

7.Seetha

(RR5 to 7 brought on record
as LRS of the deceased R1 vide
order of Court dated 14.11.2016
made in C.M.P.Nos.213 to 215/15
in S.A.No.1412 of 1997)

.. Respondents in
S.A.No.1412 of 1997

Prayer in S.A.No.1411 of 1997: Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree of the learned Principal District Judge Erode of Periyar District at Erode in A.S.No.135 of 1996 dated 29.04.1997 preferred against the judgment and decree of the learned Subordinate Judge, Gobichettipalayam in O.S.No.176 of 1995 dated 08.07.1996.

Prayer in S.A.No.1412 of 1997: Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree of the learned Principal District Judge of Periyar District at Erode in A.S.No.124 of 1996 dated 29.04.1997 preferred against the judgment and decree of the learned Subordinate Judge, Gobichettipalayam in O.S.No.175 of 1995 dated 08.07.1996.

For Appellants :Mr.A.K.Kumaraswamy(both appeals)

For Respondents :Mr.R.Subramaniyan for
Mr.M.Narayanasamy for R2 (both appeals)
R1-died (both appeals)
R3 to R5 not ready in notice
(S.A.No.1411 of 1997)
R5 to R7-not ready in notice
(S.A.No.1412 of 1997)
R3 and R4 -given up
(S.A.No.1412 of 1997)

C O M M O N J U D G M E N T

The appellant A.N.Muthsamy in these two appeals is the purchaser of the suit property through a decree in the suit O.S.No.133 of 1988 filed by him for specific performance. On 24.09.1991, the appellant has also filed a suit for permanent injunction in O.S.No.442/1991 on the file of the District Munsif Court, Gobichettipalayam against one Palanisamy, P.N.Lakshmanan (his vendor) and L.Ramesh and L.Sairam (his vendor's sons). Subsequent to this suit, L.Ramesh and L.Sairam filed a suit for partition in respect of the suit properties in O.S.120/1990 on the file of the Subordinate Court Gobichettipalayam. They have

also filed other suit for injunction on 18.02.1993 in O.S.No.95/1993 on the file of District Munsif Court, Gopichettipalayam against the appellant A.N.Muthusamy. Vide order dated 30.03.1995 in Tr.O.P.No.1/1995, the Principal District Judge of Erode has transferred the suits in O.S.No.442/1991 and O.S.No.95/1993 pending on the file of District Munsif Court, Gopichettipalayam to the Subordinate Court, Gopichettipalayam, to be tried along with O.S.No.120/1990. Accordingly, the Subordinate Court has taken two suits on its file and re-numbered as O.S.No.175/1995 and O.S.No.176/1995 respectively.

2. The trial Court, in its common judgment, dismissed the suit in O.S.No.120 of 1990 for partition holding that the suit property is not the joint family property as claimed by the plaintiffs. It is the absolute property of Lakshmanan which he got from his father through the settlement deed dated 25.11.1968 marked as Ex A-2. Lakshmanan has agreed to sell the suit property to A.N.Muthusamy for valuable consideration vide agreement dated 08.07.1986 but, failed to fulfil his part of contract. Therefore, A.N.Muthusamy has enforced the contract through decree in O.S.133/1988 filed for specific performance. In respect of the rival claim for injunction, the trial Court held that, the appellant herein pursuant to the decree passed for specific performance has taken delivery through Court amine on 19.04.1991 and thereafter, the appellant is in possession of the property. Pending suit, the defendants have dispossessed him through force illegally. Therefore, he is entitled for recovery of possession and injunction. Thus, the suit was decreed directing the defendants to deliver the possession of the suit property within one month, resulting in dismissal of O.S.No.120/1990 (partition suit) and O.S.No.176/1995 (injunction suit) both filed by L.Ramesh and his brother L.Sairam. Decreed the suit in O.S.No.175/1995 moulding the relief by granting recovery of possession in the suit filed by A.M.Muthusamy for injunction.

3. On appeal, the lower appellate Court has dismissed the appeal in A.S.No.136/1996 filed against O.S.No.120/1990 by confirming the finding of the trial Court that the suit property is not the joint family property and the sons of Lakshmanan, who are the appellants have no share in it. As far as the appeal against the injunction relief, the lower appellate Court has taken into consideration Ex.A-18-compromise deed executed by the parties and allowed the appeal in A.S.No.124/1996 and A.S.No.135/1996. The lower appellate Court has held that in Ex.A-18 A.N.Muthusamy (the appellate herein) has admitted that he has not taken delivery of the suit property pursuant to E.P.No.3/1989 in O.S.No.133/1988. Therefore, on the date of filing the suit, he was not in possession. Hence, he should have

sought for recovery of possession. Bare injunction without plea for recovery of possession cannot be granted. The decree of the trial Court moulding the relief is not in accordance to law.

4. Aggreived by the reversal judgments, the present appeals are filed by the purchaser of the property, who is now deprived of enjoying the fruits of his decree, whereas, the respondents, who have filed appeal in S.A.No.833/1998 on the file of this court, have subsequently allowed it to be dismissed without costs. Steps taken to restore were also withdrawn. In the light of the above background of facts, this Court, while admitting these two appeals had formulated the following substantial questions of law separately:-

S.A.No.1411 of 1997

"(1)Whether the lower appellate Court is right in holding that Ex.A18 agreement is not disputed by the defendant overlooking that the defendant D.W.1 had specifically denied the execution of the same?

(2)Whether the lower appellate Court, having found that plaintiffs have no title to suit property and defendant the absolute owner of the same is right in granting a decree for injunction, overlooking the principles of law that a person in possession without any title cannot get any relief against a person who has got a better title?"

S.A.No.1412 of 1997

"(1)Whether the lower appellate Court is right in holding that Ex.A18 agreement is not disputed by the plaintiff overlooking that the plaintiff in his oral evidence had specifically denied the execution of the same and it is the specific case of the plaintiff that Ex.A18 agreement is a forged and fabricated one?

(2)Whether the finding of the lower appellate Court, which are not based on evidence on record and are perverse, are sustained in law?"

5. The learned counsel appearing for the appellants submitted that the learned Judge, having found that the defendants have no title over the suit property and the plaintiff/appellant having taken possession of the suit property in Court in E.P.No.3 of 1989 in O.S.No.133 of 1988 ought not to have dismissed the suit filed by the plaintiff and ought not to have allowed the suit filed by the respondents herein. The lower appellate Court erred in presuming that the appellant has admitted the execution of Ex.A18-agreement and therefore, the recital found in Ex.A18 binds on him while the appellant has

specifically denied the execution of Ex.A18 and even if it is assumable to be executed by the appellant, it could have no force since no right of parties have been adjudicated on the basis of Ex.A18 agreement. The lower appellate Court ought to have noted that even if Ex.18-agreement is true, since the defendants have failed to enforce the same within the period of limitation, any right accrued on them has been lost due to limitation. While the trial Court has rightly considered all these aspects and ignored Ex.A18-agreement since it has no legal enforceability, the lower appellate Court has contrarily relied upon Ex.A18-agreement and assumed, the presumption against the appellants and reversed the well considered judgment of the trial Court. The learned counsel appearing for the appellants concluded that having lost the suit for partition the defendants have no title over the suit property. Therefore, whatever be the possession claimed by the defendants is only an illegal possession and no injunction can be granted to the rank trespasser against the true owner.

6. Per contra, the learned counsel appearing for the respondents submitted that the appellants had never been in possession of the property and the same has been admitted by the appellants in Ex.A18-agreement. Further, the all documents relied by the appellant are subsequent to the decree passed in his favour pending the suit, which cannot be weighed against the respondents herein. Pointing out the portion of the appellate Court judgment, the learned counsel for the respondents submitted that it has been found by the first appellate Court that at the time of filing the suit, the plaintiff was not in possession of the property and therefore, without amending the prayer, the relief of delivery of possession cannot be granted in a suit for bare injunction.

7. In support of his argument, the learned counsel referred to the judgment of the Hon'ble Supreme Court reported in Peria Gounder v. Pariath Naidu [2004 1 SCC page 769] wherein, paragraphs 6 and 9 read as follows:

"6.The law in India, as it has developed, accords with the jurisprudential thought as propounded by Salmond. In Midnapur Zamindary Co. Ltd. Vs. Kumar Naresh Narayan Roy and Ors. 1924 PC 144, Sir John Edge summed up the Indian law by stating that in India persons are not permitted to take forcible possession; they must obtain such possession as they are entitled to through a Court.

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 and Ors. Vs. Delhi Administration (1968) 2 SCR 455, Puran Singh and Ors. Vs. The State of Punjab (1975) 4 SCC 518 and Ram Rattan and Ors. Vs. State of Uttar Pradesh (1977) 1 SCC 188. The authorities need not be multiplied. In Munshi Ram & Ors.'s case (supra), 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. But merely stray or even intermittent acts of trespass do not give such a right against the true owner. The possession which a trespasser is entitled to defend against the rightful owner must be settled possession, extending over a sufficiently long period of time and acquiesced to by the true owner. A casual act of possession would not have the effect of interrupting the possession of the rightful owner. The rightful owner may re-enter and re-instate himself provided he does not use more force than is necessary. Such entry will be viewed only as resistance to an intrusion upon his possession which has never been lost. A stray act of trespass, or a possession which has not matured into settled possession, can be obstructed or removed by the true owner even by using necessary force. In Puran Singh and Ors.'s case (supra), 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 strait-jacket. 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' (SCCp.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 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.

8. Further, the learned counsel appearing for the respondents submitted that the respondents were settled in possession of the property ever since the father's demise and therefore, they cannot be dispossessed even by the true owner. Distinguishing the judgment of this Court reported in D.Gopal vs. The Kilpauk Muslims Welfare...[(1995) 1 MLJ 88], the learned counsel submitted that the above said judgment is applicable only when the defendants have entered into the premises pending the suit and that is not applicable when the defendants were already in possession of the property.

9. It is now admitted by both the parties that the title is with the appellants. Whether the appellants have taken actual possession on 19.04.1991 or it was only a paper delivery as found in Ex.A18-agreement? and Whether Ex.A18-agreement can be construed as an admission of possession. For this reason, this

Court, at the beginning of this judgment, has recorded the date of filing of the suits by the respective parties and the subsequent event happened in this case.

10. In the light of the above dates and events, this Court finds that the appellants herein have preferred the suit for injunction in O.S.No.442 of 1991 before the District Munsif Court, Gobichettipalayam on 24.09.1991 and the same was transferred to the Sub Court, Gobichettipalayam pursuant to order passed in Tr.O.P.No.1 of 1995. Thereafter, it was taken on file and renumbered as O.S.No.175 of 1995. Ex.A18-agreement is dated 18.10.1992 evidently pending suit. It is admitted by the respondents that this panchayat has not come into force. It is not his case that he has paid Rs.50,000/- to the respondents as agreed in this agreement and in spite of that the respondents are pursuing the suit. Even if it is so, he can at the most seek the enforceability of the agreement Ex.A-18 on a whole and can not pick and choose the recitals in isolation and try to take advantage of this document, which has not been honoured by the preponder of the document. Furthermore, this Court finds that the lower appellate Court has wrongly understood that this injunction suit was filed subsequent to Ex.A18-agreement. He has failed to note that O.S.No.175 of 1995 was filed before the District Munsif Court as early as 24.09.1991 and not in the year 1993, as it is recorded by the lower appellate Court.

11. In the facts and circumstances of the case, the judgment of this Court reported in D.Gopal vs. The Kilpauk Muslims Welfare...[(1995)1 MLJ 88] is applicable, in which this Court has held in para 7, which reads as under:-

"7....If really the illegal trespass pending suit is true, then the 1st defendant cannot advance this argument of prejudice. But the question whether there was illegal trespass or not has to be gone into only at the time of the trial of the suit. So, there can be no bar for allowing the above said amendment relating to possession relief alone. Simply on the ground of delay, the amendment relating to possession relief cannot be refused particularly when it is found that as early as 1987 the plaintiff has taken criminal action for the alleged trespass."

12. The decree in O.S.No.433 of 1984 regarding delivery of possession in favour of the appellant goes to show that effective and factual delivery of possession of the suit property has been effected. The respondents only after the decree passed in O.S.No.133 of 1988 and after delivery of possession on 19.04.1991

vide Ex.B6, have filed the present suit in O.S.No.95 of 1995. Therefore, at no stretch of imagination the possession of the respondents can be construed as a settled possession so as to get the relief of injunction against the right owner.

13. For the said reason, the Second Appeals are allowed. The judgment of the lower appellate Court in A.S.Nos.124 and 135 of 1996 are set aside. The judgment of the trial Court in O.S.Nos.175 and 176 of 1995 are restored. No order as to costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Asst.Registrar (CS II)

/true copy/

Sub Asst. Registrar

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To

1.The Principal District Judge of Periyar District at Erode.

2.The Subordinate Judge, Gobichettipalayam.

+2ccs to Mr.M.Narayanasamy,Advocate sr.11588

+1cc to Mr.A.K.Kumarasamy,Advocate sr.11597

gjII(co)
ss(3/4/2017)

S.A.Nos.1411 of 1997 and
1412 of 1997

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