

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.03.2017

CORAM:

THE HONOURABLE MR. JUSTICE M.SATHYANARAYANAN

Second Appeal No.931 of 2015

1. V.Chidambaram

2. V.Pannerselvam ..Appellants/Respondents/
Defendants

Vs

V.Thanigachalam ..Respondent/Appellant/Plaintiff

Prayer:- Second Appeal filed under Section 100 of C.P.C. against the judgment and decree made in A.S.No.174 of 2014 dated 23.04.2015 on the file of the learned Subordinate Judge, Arakkonam reversing the judgment and decree made in O.S.No.313 of 2007 dated 18.07.2014 on the file of learned District Munsif, Arakkonam.

For Appellants : Mr.G.Jeremiah
For Respondent : Mr.R.Kumaravel

J U D G M E N T

The defendants in O.S.No.313 of 2007 on the file of Court of District Munsif, Arakonam, are the appellants. The respondent/plaintiff had filed the above said suit praying for judgment and decree for permanent injunction restraining the defendants, their men, agent and servants in any way interfering with his peaceful possession and enjoyment of the vacant site in Natham Survey No.760/1, measuring East to West 22 feet, North to South 160 feet and a terraced house therein in S.C.No.2989 situated at Thakkolam, Arakonam Taluk, Vellore District and also for the cost of the suit. The trial Court, vide judgement and decree dated 18.07.2014, had dismissed the said suit and aggrieved by the same, the plaintiff filed an appeal in A.S.No.174/2014 on the file of the Court of Subordinate Judge at Arakonam and vide judgment and decree dated 23.04.2015, the lower Appellate Court, has allowed the appeal, thereby, decreeing the suit as prayed for with costs and challenging the legality of the said judgment, the present second appeal is filed by the defendants.

2. The facts briefly narrated, necessary for disposal of this Second Appeal, are as follows:

The respondent/plaintiff would aver that the schedule mentioned property is a self acquired property and he purchased the same through a registered sale deed dated 14.02.2001 (Ex.A1) from Sababathy S/o Jalanatha Mudaliar for a valid consideration and it is a self acquired property. The plaintiff would however, aver that ever since the date of purchase, he is in peaceful possession and enjoyment of the same and would also claim that he and his predecessors in title had prescribed title over the property by way of adverse possession and also to the knowledge of the defendants. As such, the defendants are estopped from questioning the same. The plaintiff would further state that in the year 2002, he had put up a terraced house and starting residing there and he has also applied for loan and to prove his possession, he also filed tax receipt, electricity meter card, family card. It is the specific case of the plaintiff that the defendants who are the third parties and also the adjacent owners of the southern side of the suit property and who had no right whatsoever over the suit property, attempted to interfere with the possession from 30.11.2007 onwards. Therefore, he was constrained to file the above said suit.

3. The 1st defendant has filed the written statement which was adopted by the 2nd defendant and apart from denying the averments made in the plaint, he would contend that the suit is bad for misjoinder of parties and the 2nd defendant is no way connected with the suit property and further state that neither the plaintiff nor the vendor was enjoying the property as alleged by the plaintiff. The 1st defendant further averred that he and the 2nd defendant /wife, namely, Jayalakshmi, had purchased the suit property from one Subramani, S/o Thaiyumana Mudaliar under registered sale deeds dated 19.04.2007 in Exs.B1 and B2 and the 1st defendant had purchased the property comprised in Natham S.No.760/1 as per land revenue Survey No.1315/5 situated Thakkolam village, measuring East west 125 feet, North to south 16 feet and his wife, the 2nd defendant had purchased the property in the very same survey number as per the land revenue Survey No.1315/5 East- West 125 feet and North-South 16 feet. Ever since the date of purchase, they are in possession and enjoyment of the same and except them nobody is having right in respect of the properties purchased by them. The 1st defendant has also traced title to the said property by making necessary averments and took a specific stand that the plaintiff is enjoying North to South only 128 sq.ft. and likewise, his brother namely, Ravi, is owning the property on the eastern side of the suit schedule property and enjoying North south only to an extent of 128 sq.ft. Therefore, the claim of he plaintiff that he is enjoying 160 feet of land in north

south is false. It is further contended by the 1st defendant that the sale deed dated 14.02.2001 - Ex.A1, in and by, which the plaintiff claims right, title & possession is not valid in respect of the extent of land and the same is not binding the defendants and taking advantage of the sale deed, it is only the plaintiff, who is making attempts to encroach upon the property of the defendants on the northern side and therefore, would further contend that the plaintiff is not having a prima face case and also the balance of convenience is in favour of the defendants and prays for dismissal of the suit.

4. The trial Court on consideration of the pleadings has framed the following issues.

- i) Whether the plaintiff is entitled to the decree for permanent injunction?
- ii) To what other relief the plaintiff is entitled to?

5. During the course of trial, the plaintiff examined himself as P.W.1 and examined one Somasundaram as P.W.2 and marked Exs.A1 to A9. The 1st defendant examined himself as D.W.1 and marked Exs. B1 to B8. The trial Court, on consideration of the pleadings, oral and documentary evidence found that the burden is on the plaintiff to prove that he is in possession of 160 feet - North to South and as such, he is bound to prove that his predecessor in title was having such right to convey the title in respect of the suit property.

6. The trial Court, on perusal of Ex.A1 found that the plaintiff did not put anterior title deed/parent title deed in respect of the said property and would further found that though the plaintiff has recorded Ex.B8 it was based upon Ex.A1. The trial Court has also considered the case of the defendant and found that the anterior title deeds/ parent title deeds under Ex.B3 dated 24.11.1939 and Ex.B4 dated 16.05.1943 have been filed which indicate the extent of the property also and since the plaintiff disputes that extent of the property held by the defendant, he would have taken steps to file necessary application for appointment of Advocate Commissioner along with the surveyor to measure the property but he did not take such steps and ultimately, the trial Court found that the plaintiff has failed to prove his case and therefore, dismissed the suit by judgment and decree dated 18.07.2014.

7. The plaintiff, aggrieved by the dismissal of the suit, filed A.S.No.174/2014 on the file of the Court of Subordinate Judge, Arakonam, Vellore District and the lower appellate Court, on consideration of the materials, framed the following points for consideration.

i) Whether the judgment and decree passed by the trial Court are sustainable?

ii) To what relief the appellant is entitled to?

8. The lower appellate Court found that the parent title deed under Ex.B3 dated 24.11.1939 did not contain the extent of the property and though such description is found in Ex.B4, sale deed dated 16.05.1943, in the absence of description of the property in Ex.B3, the measurement stated in Ex.B4, cannot be taken into consideration. The lower appellate Court further found that since the sale deeds in favour of the defendant and his wife came into the existence on 19.04.2007 i.e., nearly after six years from the date of Ex.A1 dated 14.02.2001 which came to be executed in favour of the plaintiff, has held that burden is on the defendants to prove that the plaintiff is not in possession of 168 feet of land and therefore, the defendant ought to have taken steps to appoint an advocate commissioner to measure the property to discharge that burden, but they have failed to do so.

9. The lower appellate Court further found that the plaintiff is in possession of 31 feet East West and 160 feet North to South and though the lower appellate Court held that under Ex.A2 to A9, the measurement has not been indicated, has held that since the plaintiff is having registered documents in the form of sale deed dated 14.02.2001, possession follows title and as such, he is entitled to the decree for permanent injunction. The lower appellate Court further held that the defendant has failed to adduce any evidence to the effect that the plaintiff is entitled to the extent of land as claimed by him and therefore, by the impugned judgment and decree dated 23.4.2015, the lower Appellate Court has set aside the judgment and decree passed by the trial Court and allowed the appeal and thereby, granted the decree for permanent injunction as prayed for with costs.

10. The defendants, aggrieved by the reversal of the judgment and decree passed by the trial Court and allowing of the appeal, had filed this Second Appeal.

11. This Court, while admitting the Second Appeal on 06.10.2015 has formulated the following substantial questions of law.

i) Whether the Lower Appellate Court's failure to formulate necessary points for determining while deciding the appeal is sustainable in law?

ii) Whether the Lower Appellate Court was correct in law in shifting the burden of proof on the defendant?

iii) Whether it was legally permissible for the plaintiff to base his claim on title as well as adverse possession?

iv) Whether the Lower Appellate Court was correct in law in accepting the recitals and measurements contained in Ex.A1 in the absence of any parent document to substantiate the contents of Ex.A1?

12. Learned counsel appearing for the appellants/ defendants has drawn the attention of this Court to the typed set of documents and would submit that the lower appellate Court has wrongly shifted the burden of proof on the defendants to sustain the case over looking that it is for the plaintiff to prove his case on his pleadings and evidence. He further submitted that admittedly, the respondent/plaintiff has produced only Ex.A1, document of title, and even the contents of Ex.A1 would clearly reveal that the prior title has not been traced, whereas the title under which, the defendant had purchased the property is also supported by the parent title deeds in the form of Ex.B3 dated 24.11.1939 and Ex.B4 dated 16.05.1943 and though the lower appellate Court has observed that except the production of Ex.A1, the other documents marked on behalf of the plaintiff did not support his case, has held that it is for the defendant to sustain their claim that the plaintiff did not own such an extent of land and such finding is also against the well settled position of law.

13. It is also contended by the learned counsel for the appellant that insofar as the pleading of adverse possession putforth by the respondent/plaintiff is concerned, except stating in few lines that he and his predecessors in title have proved the prescriptive right to the suit property by way of adverse possession, nothing has been stated and the respondent/plaintiff has also failed to sustainable his case on that plea. The lower appellate Court, without properly advertng to the facts and also against the well settled canons of law, had chosen to reverse the well considered findings rendered by the trial Court and therefore, prays for interference.

14. Per contra, learned counsel appearing for the respondent/plaintiff would submit that though the appellants/defendants would claim that their document Exs.B1 and B2 are supported by parent title deeds, admittedly, Es.B3 the registered sale deed dated 24.11.1939 the description of the property has not been given and in the subsequent document dated 16.05.1943 marked as Ex.B4, such description was given. He

further submitted that based on the title deed of the plaintiff marked as Ex.A1 he has also paid property tax and also got the sanction plan under Ex.A8 and put up construction and the lower appellate Court, taking into consideration, the said evidence, has rightly reached a conclusion and reversed the findings rendered by the trial Court and correctly allowed the appeal, thereby, decreed the suit and thus, prays for dismissal of the appeal.

15.This Court heard the submissions of either side and also perused the materials placed on record.

16. Substantial Question of law No.1:

No doubt the lower appellate Court has formulated the following points for consideration.

i) Whether the judgment and decree passed by the trial Court are sustainable?

ii) To what relief the appellants are entitled to?

In the considered opinion of the Court, the points for determination as framed by the lower Appellate Court, cannot be termed as correct but it is to be pointed out that the parties to the said appeal had understood the scope of appeal and made their submission, based on which, the lower appellate Court has rendered its findings and therefore, nothing formulated for necessary points for determination. Therefore, the substantial question of Law No.1 is answered in the negative and as against the appellant.

17. Substantial Question of law No.2

Whether the Lower Appellate Court was correct in law in shifting the burden of proof on the defendant?

i) A perusal of the impugned judgment passed by the lower Appellate Court would clearly reveal that it has shifted the burden of proof on the defendant. The respondent/plaintiff has approached the Court seeking for a judgment and decree for permanent injunction and as the plaintiff, he has to stand on his own pleadings, the respondent/plaintiff except marking Ex.A1, registered sale deed dated 14.02.2001, have not filed any other documents of credence to substantiate the fact that he is entitled to 160 feet in North South of his property. This Court has also perused Ex.A1 and its contents would reveal that the title to the said property has not been traced at all and it

merely says that the property in possession of the seller, namely, J.Sabapathy, has been conveyed in favour of the plaintiff herein. The lower Appellate Court itself has arrived at a finding that the documents in Exs.A1 to A9, did not come to the aid of the plaintiff but chose to aver that since the respondent / plaintiff is having a registered sale deed dated 14.02.2001 (Ex.A1), he is entitled to the possession of the property for the reason that possession follows title. The lower Appellate Court, that apart, has called upon the appellants/ defendants to take up necessary application for appointment of Advocate Commissioner and to measure the property with the help of the surveyor forgetting the fact that it is for the respondent/ plaintiff to take out such an application to sustain his case as to the ownership of the above said extent of land in question.

ii) A perusal of Ex.B4 dated 16.05.1943 would disclose that the extent of land given also tallies with Exs.B1 and B2 dated 19.04.2007. The presumption under Section 90 of the Indian Evidence Act 1872 stands attracted to Ex.B4 dated 16.05.1943. As already pointed out, in the absence of recital as to the tracing of title in respect of the property purchased by the respondent / plaintiff under Ex.A1 coupled with the fact that the prior title of the appellants/ defendants has been traced through Exs.B3 and B4, this Court is of the considered opinion that the lower appellate court has committed an error in law in shifting the burden of proof on the defendants. Therefore, the substantial question of law No.2 is answered in the affirmative and in favour of the appellants/defendants.

18. Substantial Question of law No.3.

i) It is well settled position of law that the possession must be over the statutory period and it must be clear to the knowledge of the owner against whom adverse possession is pleaded.

ii) In Rame Gowda (Dead) by Lrs. v. M.Varadappa Naidu (Dead) by L.Rs. And another (2004(1) (SCC 769, the Honourable Supreme Court has held as follows:

" 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 "settlement 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 test which may be adopted as a working Rule for determining the attributes of "settled possession".

(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."

iii) The respondent/plaintiff in paragraph No.4 of the plaint pleads as follows:

The plaintiff and his predecessor in title have perfected the suit property by way of adverse possession also to the knowledge of the defendants. Hence, they are estopped from questioning the same.

iv) Neither the trial Court nor the Appellate Court has formulated an issue or points for determination with regard to the plea of adverse possession and even otherwise, the necessary averment and ingredients so as to the plea of adverse possession put forth by the plaintiff.

v) The Honourable Supreme Court in the judgment reported in 2014(1) SCC 669 (Gurdwara Sahib v. Gram Panchayat Village Sirthala & another) has held as follows:

Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession had matured into ownership. Only if proceedings are filed against the plaintiff and the plaintiff is arrayed as defendant that it can use the adverse possession as a shield/defence.

vi) In the light of the settled legal position coupled with the factual aspect, the substantial question of law No.3 is answered in the affirmative and in favour of the appellants/defendants.

19.Substantial Question of Law No.4:

This Court, while answering substantial question of law No.2 had observed that in the absence of any recitals as to the tracing of title in existence prior to Ex.A1, the said registered document would not come to the aid of the respondent/plaintiff. The judgment of the lower Appellate Court which is in favour of the respondent/plaintiff, observation has been made that the possession of 31 feet of land in East West and 160 feet of land in North South claimed by the plaintiff, is not supported by Ex.A1 to Ex.A9. The building plan of the plaintiff marked as Ex.A8 is based upon Ex.A1 registered sale deed dated 14.02.2001. As such the said document is not coming to the aid of the respondent/plaintiff. Hence, substantial question of law No.4 is answered in affirmative and in favour of the appellant/defendants.

20. In the light of the reasons assigned above, this Court is of the considered view that the impugned judgment and decree passed by the lower appellate Court warrants interference. Hence, the Second Appeal is allowed and the judgement and decree passed by the lower Appellate Court in A.S.No.174 of 2017 on the file of the learned Subordinate Judge, Arakkonam, dated 23.04.2015, reversing the judgment of the trial Court in O.S.No.313 of 2007 on the file of the learned District Munsif, Arakkonam, dated 18.07.2014, are set aside. Consequently, the suit in O.S.No.3013 of 2007 on the file of the learned District Munsif, Arakkonam, is dismissed. However, in the circumstances of the case there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS VII)

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Sub Assistant Registrar

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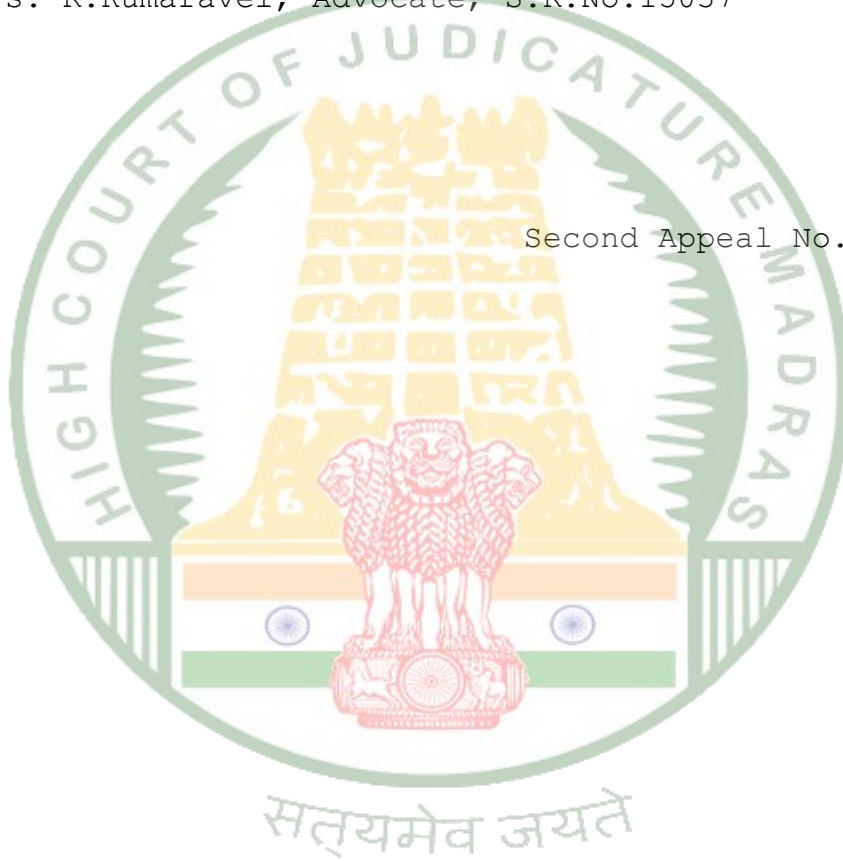
To

1. The Subordinate Judge,
Arakkonam,
2. The District Munsif ,
Arakkonam,

+1cc to M/s. G. Jeremiah, Advocate, S.R.No.15061
+1cc to M/s. R.Kumaravel, Advocate, S.R.No.15037

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