

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.03.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

S.A.No.565 of 2011

1. Sellamuthu
2. Raja alias Sekar
3. Chellammal

... Appellants/Respondents/Defendants

Vs.

Vadivel Gounder ... Respondent/Appellant/Plaintiff

Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 15.12.2009 made in A.S.No.23 of 2009 passed by the Subordinate Judge, Thiruchengode, reversing the judgment and decree dated 31.10.2008 dismissing the suit in O.S.No.163 of 2001 passed by the District Munsif, Thiruchengode.

For Appellants : Mr.M.Balasubramanian

For Respondent : Mr.N.Manokaran

J U D G M E N T

Aggrieved by the judgment and decree dated 15.12.2009 passed by the Subordinate Judge, Thiruchengode in A.S.No.23 of 2009, reversing the judgment and decree dated 31.10.2008 passed by the District Munsif, Thiruchengode, dismissing the suit in O.S.No.163 of 2001, the defendants are before this Court by way of the present Second Appeal.

2. Initially, the plaintiff, who is the respondent herein, filed a suit for permanent injunction against the defendants, who are the appellants herein. It is the case of the respondent/plaintiff before the Trial Court that originally, the suit property and yet other properties belonged to him and his brother Palanivel Gounder and pursuant to the partition between them on 17.04.1970, 'B' schedule property of the Partition Deed was partitioned to him and thus, he became the absolute owner of the suit property situated in S.No.75/5, Andrampatti Village, Tiruchengode Taluk.

3. It is the further case of the respondent/plaintiff that the property in S.No.81/2 belongs to the appellants/defendants and that they have no right or interest over the suit property in S.No.75/5. Since the appellants/defendants attempted to enter into the suit property of the respondent/plaintiff on 07.06.2001 and construct a building therein, the respondent/plaintiff lodged a complaint before the Tiruchengode Rural Police Station. Since no action was taken on the said complaint, the respondent/plaintiff filed a suit in O.S.No.163 of 2001 before the District Munsif Court, Tiruchengode against the appellants/defendants, seeking permanent injunction.

4. Refuting the averments of the respondent/plaintiff that he is in absolute possession of the suit property, the appellants/defendants have stated that the respondent/plaintiff and his predecessors are in possession of only 2 acres and 7 cents of land in S.No.75/5 till date and that the appellants/defendants are in possession and enjoyment of the remaining 13 to 15 cents of land in S.No.75/5.

5. The Trial Court, on a consideration of the entire oral and documentary evidence dismissed the suit holding that the relief of permanent injunction sought by the respondent/plaintiff cannot be granted, as there is a common pathway and a public Well in S.No.75/5 binding on the defendants and others. Aggrieved by the same, the plaintiff filed an appeal before the Sub Court, Tiruchengode in A.S.No.23 of 2009 and the First Appellate Court, by a judgment and decree dated 15.12.2009 allowed the appeal on the ground that the plaintiff has proved his possession of the suit property by producing relevant revenue records, viz. Patta, Chitta, Adangal and other receipts. Challenging the reversal of the Trial Court judgment, the defendants are before this Court by way of the present Second Appeal.

6. For better understanding, relevant portion of the judgment passed by the First Appellate Court in A.S.No.23 of 2009, is extracted hereunder:

“25, வழக்கிடைச் சொத்தின் கீழ்ப்பறம் உள்ள 15 சென்ட் நிலம் எதிர்மேல்முறையிட்டாளருக்கு எதிரிடை அனுபவம் மூலம் பாத்தியப்பட்டது என்பதை எதிர்மேல்முறையிட்டாளர் நிரூபிக்க கடமைப்பட்டுள்ளார் என்றபோதிலும், எந்த ஒரு ஆவணமும் தாக்கல் செய்து நிரூபிக்கத் தவறியுள்ள நிலையிலும், ச.எண்.75.5 ஆன வழக்கிடைச் சொத்து மேல்முறையிட்டாளருக்கு வா.சா.ஆ1 மூலம் பாத்தியப்பட்டு, பட்டா, சிட்டா அடங்கல், கந்தாய ரசீதுகள் தாக்கல் செய்து அனுபவம் நிரூபிக்கப்பட்டு உள்ள நிலையில், மேல்முறையிட்டாளர் கோரியுள்ள நிரந்தர உறுத்துக்கட்டளைப் பரிகாரம் மேல்முறையிட்டாளர்.வாதிக்கு கிடைக்கக் கூடியது என்றே இம்மன்றம் தீர்மானிக்கிறது.”

7. Learned counsel for the appellants contended that the First Appellate Court ought to have considered the vital legal

aspect that 15 cents of land out of 2.22 acres comprised in S.No.75/5 of Andrampatti Village has been in joint possession and enjoyment of the appellants/defendants and their predecessors-in-title for well over 200 years and that had not been disputed either in the form of oral or documentary evidence. It is his further contention that the First Appellate Court ought to have considered the Reports of the Advocate Commissioner, marked as Exs.C1 and C2, and relied on the same to determine the area of separation of S.No.75/5 and S.No.81/2 prepared with the help of a Surveyor, as the same would clearly establish that the respondent/plaintiff is not sure about the enjoyment of the area of 2.22 acres of land in S.No.75/5, even according to his alleged claim.

8. In support of his case, learned counsel for the appellants have relied on the following:

(i) a decision of this Court in the case of S.Ponnuthai vs. P.Muthusamy reported in (2004) 2 MLJ 530

"19. The non-joinder of his wife is another circumstance which casts a doubt on the case of the respondent. If the respondent was really in possession of the property pursuant to the above documents, then his wife, to whom possession is allegedly given under Exs.A-1 and A-2, should have been made a party or she should at least have given evidence. The decisions on Section 53-A of the Transfer of Property Act cannot protect the respondent since the sine qua non for taking shelter under Sec.53-A is proof of possession, which is absent."

(ii) another decision of this Court in the case of Lalitha and another vs. Selvaraj reported in (2006) 1 MLJ 313

"13. ... That apart, the plaintiffs have not chosen to produce any record like patta, etc. before the Court to show that the second plaintiff is in actual possession of the suit property. On the other hand, I find various receipts produced on the side of the defendant marked as Exs.B-13 to B-21, even though the same were subsequent to the filing of the suit, to show that he is in possession. In any event, the law is well settled that the person, who comes to the Court especially in a suit for injunction, has to prove that he is in actual possession, which is lawful. In the circumstance, when it is admitted that the suit site belongs to the defendant, the burden is heavily on the second plaintiff to prove

that he is in possession of the superstructure and the same was constructed by the Corporation in his favour. In the absence of any such evidence, I am of the view that the finding of the first appellate Court that the plaintiffs have not proved their possession is perfectly in order. That apart, even under Ex.B-1, which is stated to be a letter written in the Police Station, there is no specific admission either by the defendant or by anyone that the second plaintiff is in possession of the suit property. On the other hand, what is stated therein is that on payment of Rs.25,000 by the defendant, the second plaintiff has to execute a sale deed. That cannot be a piece of evidence for the purpose of safely arriving at a conclusion that the second plaintiff has been in possession of the suit property."

(iii) yet another decision of this Court in the case of M.Subramani vs. P.Shanmugam and others reported in 2007 (4) CTC 125

"8. In a suit for injunction what is to be considered in respect of possession of the plaintiff, of course lawfully and the minor discrepancies in the document cannot be considered for throwing out the claim of the plaintiff simply based on the documents on the other side which has not been proved in respect of boundaries as admissible evidence as stated above. In view of the above said decision, it is clear that the learned First Appellate Judge has not considered the issue in its proper perspective and rejected the claim of the plaintiff simply based on Ex.B-10 and B-11 in which the plaintiff is not a party. The very fact that the defendants themselves have not proved the documents which they rely upon in a manner known to law shows the case in favour of the plaintiff. The judgment and decree of the First Appellate Court made in A.S.No.21 of 1993, dated 31.08.1994 are set aside and the Appeal stands allowed. ..."

9. According to the learned counsel for the respondent/plaintiff, the respondent/plaintiff is in absolute possession of the suit property and he has produced relevant revenue records in his name before the Trial Court to prove his possession and enjoyment of the same. It is his further

submission that though the Trial Court dismissed the suit that the plaintiff is not entitled for permanent injunction, the First Appellate Court has rightly allowed the appeal, thereby granting the relief sought by the plaintiff.

10. To substantiate his stand, learned counsel appearing for the respondent has relied on the following:

(i) an Apex Court decision in the case of Anathula Sudhakar vs. P.Buchi Reddy (dead) by LR's reported in (2008) 4 SCC 594

"14. We may, however, clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to the plaintiff's title raises a cloud on the title of the plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. Where the plaintiff, believing that the defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raise a serious dispute or cloud over the plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised only the issue of possession and not any issue of title."

(ii) yet another Apex Court decision in the case of State of Haryana v. Mukesh Kumar and others reported in AIR 2012 SC 559

"35. A person pleading adverse possession has no equities in his favour since he is trying to defeat the rights of the true owner. It is for him to clearly plead and establish all facts necessary to establish adverse possession. Though we got this law of adverse possession from the British, it is important to note that these days the English courts are taking a very negative view towards the law of adverse possession. The English law was amended and changed substantially to reflect these changes, particularly in light of the view that property is a human right adopted by the European Commission. This Court in Revamma observed that to understand the true nature of adverse possession, Fairweather v. St. Marylebone Property Co. Ltd. can be considered where the House of Lords referring to Taylor v. Twinberrow termed adverse possession as a negative and consequential right effected only because somebody else's positive right to access the court is barred by operation of law. As against the rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property."

(iii) a decision of this Court in the case of K.M.A.Wahab and 5 others vs. Eswaran and another reported in 2008 (3) CTC 597

"6. ... It is evident from the abovesaid provision of law that a Court may appoint a Commissioner in any Suit where it deems a local investigation to be requisite for the purpose of elucidating any matter in dispute. It is necessary to point out in the affidavit filed in support of I.a.No.697 of 2006, it is stated by the respondent therein that he alone is in possession by cultivating the suit property and only to seek to find out the factum of possession, he sought for appointment of the Advocate-Commissioner under the pretext of taking of the physical features indirectly. Such reasons ought to have been rejected by the Trial

Court as untenable. As far as the factum of possession is concerned, the Court alone can gather evidence through the parties and it cannot entrust the said matter to the Advocate-Commissioner to collect the evidence. As held in the judgment reported in Jabeen Taj vs. M.Parveen Banu, 2005 (3) MLJ 24, inasmuch as there is no dispute with regard to the identity of the property, the Trial Court has no reason to appoint the Advocate Commissioner. Similarly, in the other judgment reported in Chandrasekaran and 6 others vs. Doss Naidu, 2006 (2) L.W. 159, it is held that though remuneration is paid by the party, who sought for appointment of the Advocate-Commissioner, as such no prejudice will be caused to the other side, is not at all relevant factor for appointment of the Advocate Commissioner."

11. Heard the learned counsel on either side, gave careful consideration to their submissions and perused the material documents available on record.

12. Substantial questions of law that arise for consideration in this appeal are as under:

(i) Whether the First Appellate Court is right in granting the relief of bare injunction in favour of the respondent/plaintiff, when the title, right and possession over 15 cents of land in S.No.75/5 are specifically disputed by the appellants/defendants, to claim the relief of injunction by the respondent/plaintiff?

(ii) Whether the First Appellate Court is right in law in brushing aside the Advocate Commissioner's Report and Plan, marked as Exs.C1 and C2, which have been prepared with the help of a Surveyor, that too at the instance of the respondent/plaintiff, and when the said Court documents clearly demonstrate that 15 cents in the possession of these appellants in S.No.75/5 is 6 feet high in level than the remaining part of 2 Ac. 07 cents in the occupation and enjoyment of the respondent/plaintiff herein?

13. The ownership of the lands to an extent of 2 acres and 22 cents in S.No.75/5 is not in dispute. The case of the appellants/defendants is that they are in continuous possession and enjoyment of the property in question in S.No.75/5 to an extent of 13 to 15 cents and that though the District Munsif,

Tiruchengode accepted their contention as regards the possession of the suit property based on the Advocate Commissioner's Reports marked vide Exs.C1 and C2, unfortunately, the First Appellate Court has completely reversed the finding of the Trial Court.

14. Admittedly, the respondent/plaintiff has established his case before the Trial Court that he is in possession of the property in question including the disputed extent of land, i.e. 13 to 15 cents in S.No.75/5, by marking ten documents including revenue records viz. Patta, Chitta, Adangal, etc. On the other hand, not even a single document has been produced by the defendants in support of their case to establish their possession. Even though the appellants/defendants have taken a plea in the Written Statement that they and their predecessors-in-title were in possession of the suit property for over 200 years, there is no iota of evidence to establish that they are in adverse possession of the suit property to the extent of 13 to 15 cents of land in S.No.75/5.

15. Further, as rightly pointed out by the First Appellate Court, the defendants are bound to prove that they are in possession of the disputed portion of the suit property by means of adverse possession. A perusal of the Advocate Commissioner's Reports and Sketch shows that the disputed portion of land in S.No.75/5 is being used as a Cow Shed, which fact cannot be assumed that the defendants have proved their adverse possession. Even though the Trial Court has stated that the plaintiff's role is to file a suit for declaration, the question of declaration arises only when there is a serious dispute with regard to ownership.

16. From the aforesaid discussion, it is clear that there is no need for the respondent/plaintiff to have filed a suit for declaration, as the ownership of the disputed extent of land i.e. 13 to 15 cents in S.No.75/5 is proved by means of documentary evidence. Further, it is a settled law that when a person comes to the Court seeking a suit for injunction, the burden is on him to establish that he is in actual possession. Accordingly, the respondent/plaintiff has proved his possession of the suit property by producing requisite revenue records. On the contrary, the appellants/defendants have failed to prove their possession of the disputed extent of the suit property.

17. As there is substantial evidence let in by the respondent/plaintiff, I am of the view that the finding of the Trial Court has been rightly interfered with by the First Appellate Court that the respondent/plaintiff is the absolute owner of the suit property including the disputed extent of 13 to 15 cents of land in S.No.75/5 and that the judgment of the

First Appellate Court is perfectly in order and the same is confirmed. The substantial questions of law are answered accordingly.

In fine, the Second Appeal stands dismissed. No costs. Consequently, connected M.P.No.1 of 2011 is closed.

Sd/-
Assistant Registrar(CS V)

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Sub Assistant Registrar

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To :

1. The Subordinate Judge, Thiruchengode.
2. The District Munsif, Thiruchengode.
3. The Section Officer,
V.R. Section, High Court, Madras.

+1cc to Mr.N.Manoharan, Advocate SR.No.16674/2017

+1cc to M.Balasubramanian, Advocate SR.No.16459

S.A.No.565 of 2011

VGI (CO)
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