

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON : 25.01.2017
PRONOUNCED ON : 31.01.2017
CORAM
THE HONOURABLE MR. JUSTICE T.RAVINDRAN
S. A.No.742 of 2011
and
M.P.No.1 of 2011

1. Chakravarthy

2. Elangovan

... Appellants/Appellants/
Defendants 1 & 2

Vs.

Arasayee

... Respondent/Respondent/Plaintiff

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 08.09.2010 in A.S.No.3 of 2008 on the file of the Additional District Judge (Fast Track Court No.3), Vriddhachalam, confirming the judgment and decree dated 20.07.2007 in O.S.No.303 of 2003 on the file of the I Additional District Munsif, Vriddhachalam.

For Appellants : Mr.D.Shivakumaran

For Respondent : No appearance.

JUDGMENT

Challenge in this second appeal is made by the defendants 1 & 2 against the judgment and decree dated 08.09.2010 made in A.S.No.3 of 2008 on the file of the Additional District Court, FTC No.3, Virddhachalam, confirming the judgment and decree dated 20.07.2007 made in O.S.No.303/2003 on the file of the First Additional District Munsif Court, Virddhachalam.

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

"Are not the judgment and decree of the courts below liable to be set aside for non consideration of the material evidence available on record?

3. The suit has been laid by the plaintiff for permanent Injunction.

4. The plaintiff claims title to the suit properties under the sale deed dated 02.05.2002 marked as Ex.A1. Briefly stated, according to the plaintiff, the suit properties fell to the share of Gopalasamy and after his death, the suit properties were succeeded and enjoyed by his legal heirs and the plaintiff had purchased the suit properties from the legal heirs of Gopalasamy by virtue of Ex.A1 and seeking loans from the Co-operative Housing Society, it is the case of the plaintiff that she had put up construction in the suit property and inasmuch as the defendants, without any authority, attempted to interfere with her possession and enjoyment of the suit properties by putting up rain water harvesting pit etc, the suit has been laid.

5. Per contra, the defendants 1 & 2 claim right to an extent of East-West 50' and North-South 38' in the suit survey No.171/1 on the footing that the same belonged to Sadaiya Konar and the same had been purchased by one Chinnasamy Konar under two sale deeds and thereafter, the said property was succeeded by his only son Vasudevan and after Vasudevan, the said property was inherited and enjoyed by his three sons Viz., Alavandar, the first defendant and the plaintiff's husband Manavalan and subsequently, it is only the first defendant, who had put up superstructure over the said property and enjoying the same. It is also the case of the defendants 1 & 2 that they have prescribed title to the above said extent of the property in the suit survey number by adverse possession.

6. The Courts below, on a consideration of the oral and documentary evidence adduced by the respective parties, have held that the plaintiff has established her title to the suit properties under the sale deed marked as Ex.A1 and also, the possession and enjoyment of the same. As regards the claim of the particular extent in the suit property as belonging to the defendants 1 & 2, it is found by the courts below that the defendants have not established the said plea by marking any title deed and further, they have also held that the defendants have failed to establish that they have perfected their title to the above said extent of the suit property by adverse possession.

7. The Courts below have also found that the first defendant examined as DW1 has clearly admitted during the course of evidence that the suit properties originally belonged to Gopalasamy and were succeeded by his sons Palanivel and Shanmugam and Palanivel and Shanmugam enjoyed the suit properties and alienated the same in favour of the plaintiff under the sale deed dated 02.05.2002. Though DW1 would at the first instance plead ignorance about the sale deed marked as Ex.A1, subsequently, during the course of cross examination, has admitted that the extent of the suit properties which had been

enjoyed by Gopalasamy Pillai are being enjoyed by the plaintiff. Similarly, DW2 also, during the course of cross examination, has admitted that the sons of Gopalasamy had enjoyed the properties belonging to him and subsequently, they sold the same to the plaintiff. Therefore, it could be seen that both DWs1 and 2 have clearly admitted that pursuant to Ex.A1, it is only the plaintiff, who had been in possession and enjoyment of the properties covered under the said deed.

8. As adverted to earlier, the Courts below have negatived the plea of title and also the plea of adverse possession put forth by the defendants 1 & 2 with reference to a particular extent of the property in the said survey number. During the course of this appeal, the counsel for the appellants did not put forth any argument as regards the above said pleas raised by the defendants 1 & 2 for claiming title to the particular extent in the suit survey number.

9. The counsel for the defendants contended that from the report and plan of the commissioner marked as Exs.C3 & 4, it has been observed by the trial Court that the defendants have formed rain water harvesting pit in the suit property and further, the first appellate court has also observed that Exs.C3 & 4 point out that the defendants would have put up sunshade, rain water harvesting pit etc., in the suit property prior to the institution of the suit and in such view of the matter, according to him, the courts below have erred in granting the relief of permanent injunction sought for by the plaintiff. According to him, when it has been observed by the Courts below that with reference to a portion of the suit property, the defendants have put up sunshade, rain water harvesting pit etc., the relief of permanent injunction for the entire suit properties should not have been granted by the courts below.

10. However, the above contention of the counsel for the appellants does not merit acceptance. No doubt, there is an observation by the courts below that the defendants have put up sunshade, rain water harvesting pit, etc., in a portion of the suit property. However, it is found that without any material whatsoever the first appellate court has observed that the same would have been put up by the defendants prior to the institution of the suit. For coming to a such conclusion, the first appellate court has not placed reliance upon any acceptable material other than Exs.C3 & 4. However, when Exs.C3 & 4 do not point out or establish that the said intrusion into the suit property by the defendants 1 & 2 have been made prior to the institution of the suit, it could be seen that on the basis of the same, it cannot be held that the plaintiff had not been in possession and enjoyment of the suit properties on the date of the filing of the suit. The defendants have not established by placing the acceptable material that even prior

to the filing of the suit, they have put up the above said superstructure in a portion of the suit property thereby denying the right of the plaintiff in respect of the said portion. As seen earlier, the defendants claim of title/right over a portion of the suit property and also, their plea of the adverse possession in respect of the same, have been negated by the Courts below. The documents marked on the part of the defendants as Exs.B1 to 4 which are house tax, water tax and EB receipts do not point out that the defendants have put up sunshade, rain water harvesting pit, etc., in the suit property prior to the institution of the suit. Therefore, the contention of the defendants counsel that the courts below have erred in accepting the case of the plaintiff in its entirety, therefore the same warrants interference cannot be accepted. As seen earlier, the observation of the first appellate court that the above said intrusion of the defendants into the suit property would have been made prior to the institution of the suit, is not based on any acceptable and reliable material. Therefore, the above observation cannot be accepted as such to disturb the judgments and decrees of the Courts below. Though the first appellate court has observed on the above said line as regards the intrusion of the suit property by the defendants, still, had proceeded to confirm the judgment and decree of the trial Court.

11. In the light of the above position, the substantial question of law formulated in this second appeal is answered against the defendants/appellants and in favour of the plaintiff. The facts being above, the decision relied upon by the defendants' counsel reported in 2014 (5) CTC 801 (N.Kaliamoorthy and others Vs. Vairavan Chettiar) would not be applicable to the facts and circumstances of the case at hand.

In conclusion, the second appeal fails and the same is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

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-s/d-

Assistant Registrar(CCC)

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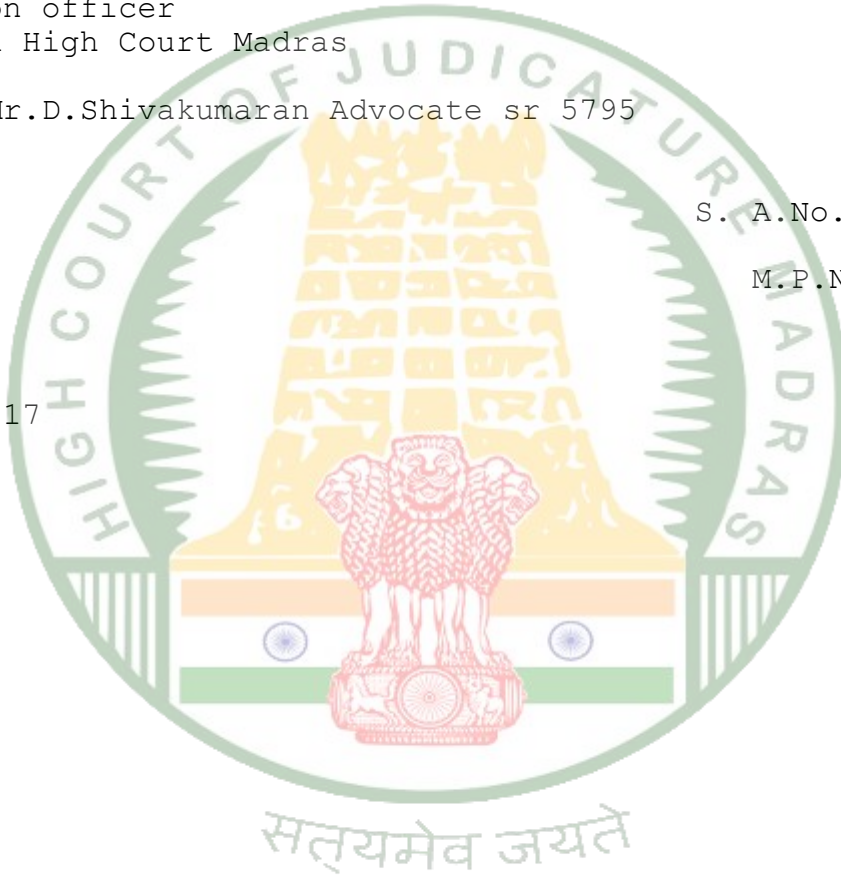
1. The Additional District Court,
(Fast Track Court No.3),
Vriddhachalam.
2. The I Additional District Munsif Court,
Vriddhachalam.

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The Section officer
VR Section High Court Madras

+1 cc to Mr.D.Shivakumaran Advocate sr 5795

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