



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 10.10.2017

CORAM

WEB COPY

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

S.A.(MD)No.549 of 2014

and

M.P. (MD)Nos.1 and 2 of 2014

Tharmaraj

... Appellant/Appellant/
Defendant

vs.

Ibrahim Nadar

... Respondent/Respondent/
Plaintiff

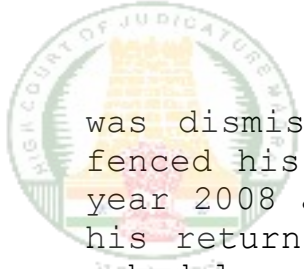
Second Appeal filed under Section 100 C.P.C. against the Judgment and decree dated 10.02.2014 in A.S.No.50 of 2013 on the file of the Additional Subordinate Judge, Tirunelveli confirming the judgment and decree dated 21.03.2013 in O.S.No.307 of 2010 on the file of the Principal District Munsif Court, Tirunelveli.

For Appellant : Mr.H.Lakshmi Shankar
For Respondent : Mr.M.S.Jawaharlal

JUDGMENT

The unsuccessful defendant in the suit filed for recovery of possession of the II schedule property and mandatory injunction to remove the superstructure has preferred this Second Appeal.

2. The case of the Plaintiff is that the suit I Schedule property belongs to him by virtue of the Sale Deed dated 22.10.1981, having purchased the same from one Paul Nadar and Ebenezer Nadar. The said Vendors of the Plaintiff had got the property from their father who had purchased the same in the year 1918. The east of the I Schedule property belong to one Packianatha Nadar and Simpson Nadar. It is stated that immediately after the purchase of the suit I schedule property by the Plaintiff, the above said Packianatha Nadar and Simpson Nadar disputed the possession of the Plaintiff. Hence, the Plaintiff
<https://hcservices.courts.gov.in/HCServices/CaseDetails.aspx?CaseNo=1683> of 1981 on the file of District Munsif, Tiruvannamalai for declaration and injunction. The said suit was decreed and an appeal in A.S.No.59 of 1985 was filed and the same



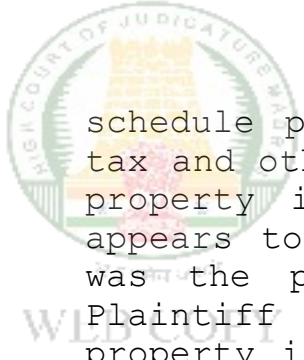
was dismissed. Thereafter, it is stated that the Plaintiff had fenced his property. The Plaintiff had to leave the place in the year 2008 and go to Mumbai and he returned only on 08.05.2010. On his return, he found that a portion of the eastern side of the I schedule property was encroached by the defendant, by putting up a house facing the west. The defendant is the son of Packianatha Nadar, who was the defendant in the earlier suit in O.S.No.1683 of 1981. Hence, the Judgment in the earlier suit are binding on the defendant and he cannot put up any construction. Therefore, the suit has been filed by the Plaintiffs for the above said reliefs.

3. Denying the facts leading to the cause of action in the suit, the defendant had contended that even when the suit in O.S.No.1683 of 1981 was filed, this defendant was in possession of the property along with Kovilpitchai, Simpson, Selvanayagam and Packianatha Nadar. However, without adding them as defendants, the Plaintiff had obtained decree in the earlier suit. The defendant also subsequently denied that the Plaintiff was away in Mumbai from 2008 till 2010. The defendant had been in possession of the suit property and he has been issued patta by the Government. It is his further case that during the year 1998, he had mortgaged the said property, obtained the loan from Co-operative housing society and put up construction in the same year. He has also been paying house tax and electricity charges from the year 1989. As the defendant has been in continuous possession from 1988, the plaintiff cannot have any claim over the same. Thus, according to the defendant, the suit is not maintainable, without seeking the relief of declaration of title.

4. Before the Trial Court, on the side of the Plaintiff, the Plaintiff himself was examined as P.W.1 and another witness was examined as P.W.2 and Exhibits A1 to A4 were marked. On the side of the defendant, the defendant himself was examined as D.W.1 and other two witnesses were examined as D.W.2 and D.W.3. Exhibits B1 to B9 were marked. The Trial Court had decreed the suit and an appeal was filed by the defendant before the First appellate Court and the same was dismissed. The Courts below had concurrently held that the plaintiff was entitled to the decree as prayed for and decreed the suit. Aggrieved by the same, the defendant had filed this appeal.

5. Heard the learned counsel for the appellant as well as learned counsel appearing for the defendant.

6. The Plaintiff has laid the suit based on the Judgment and decree of the previous suit in O.S.No.1683 of 1981, wherein he has obtained decree for permanent injunction against father of the defendant. The said decree was confirmed in the first appeal. The defendant had stated that he had been in possession of the property, even during the time when the earlier suit was filed. The defendant also claims to have constructed the second



schedule property in the year 1988 and has been paying property tax and other statutory dues. On perusal of the records, the suit property in O.S.No.1683 of 1981 and the present suit property appears to be the same. Admittedly, the father of the defendant was the party in the earlier suit as the defendant. The Plaintiff also had admitted that on the eastern side of the property is the defendant's house. However, the defendant claims right to the suit property by virtue of Ex.B1- Patta. Subsequent to the patta, the defendant seems to have obtained loan from Co-operative Housing Society as per Ex.B2 and executed a mortgage deed. Ex.B1 is the joint patta in the name of Packianatha Nadar and his children Kovilpitchai, Simpson and Selvanayagam. But the land document viz., mortgage deed which was marked as Ex.B2 is in the name of the defendant.

7. From the perusal of Ex.B2 also it is clear that the defendant's property is situated on the east of the Plaintiff's property. The Plaintiff's property is on the west of the defendant's property. The question that has to be seen is that whether the defendant has put up the construction encroaching into the Plaintiff's property. If so, when was the said construction put up and when was the encroachment made. The defendant who was examined as D.W.1 admits that there was a construction of 1/2 of the suit property on the east of the Plaintiff's property and entrance of the house was kept on the western side. The complaint of the plaintiff is that the defendant has deliberately put up construction keeping the entrance on the western direction. However, the case of the defendant is that the construction was put up as early as in the year 1988 and the plaintiff cannot maintain the relief of mandatory injunction beyond the period of limitation. The trial Court had based its conclusion on O.S.No.1683 of 1981. No doubt, the father of the defendant was a party to the above suit. However, the appeal proceedings ended in the year 1985. Thereafter, the defendant seems to have obtained patta, based on which he has taken a loan and put up construction in the year 1988 itself. The defendant has also produced the mortgage deed marked as Ex.B2., House Tax receipts marked as Ex.B3, Electricity receipts, marked as Ex.B4 and the family card is marked as Ex.B5. D.W.1 has also stated that even in the year 1988 his house was assessed to tax and Door No.100 was allotted. The Plaintiff has come up with the specific case that the construction by the defendant was put up in the year 2008 when he was away in Mumbai and on his return in the month of May 2010, he could find the construction made by the defendant. Thereafter, he has filed a suit in the year 2010. The defendant had stated that Door No.100 was damaged in fire during 1997. But, there was no document produced by him to prove the same. Now, the Plaintiff who has come to the Court for recovery of possession and for <https://hcmca2003.gov.in/services> injunction has to prove his case. Excepting the Judgments in the previous suit, the Plaintiff has not produced any other documents to establish his right and title of the suit



property and also for the alleged construction put up by the defendant. The Courts below have only analysed the case of the defendant by misreading the evidence and did not see whether the Plaintiff has established his case especially when Exs.B1 to B5 were not challenged by the Plaintiff. It is also admitted that on the eastern side of the Plaintiff's property was the construction of the defendant. As stated earlier, other than the Judgment in the previous proceedings, excepting A1-Sale deed, the Plaintiff has not produced any other documents for continuous possession in the suit property or for the alleged encroachment by the defendant during his absence.

8. It is contended that when the Plaintiff has asked for relief of mandatory injunction without seeking relief for declaration of title, he cannot maintain the suit.

9. Even assuming for a moment that Judgment in the earlier suit is binding on the defendant, from the available pleading, it can be seen that cause of action have arisen even in the year 1988 when the defendant had put up construction. If the construction was put up by the defendant in the year 1988, the suit filed for mandatory injunction for removing the encroachment in the year 2010 is hopelessly barred by limitation. The Plaintiff had remained silent for 22 years, and the suit was filed in the year 2010. Though, the trial Court given a finding that the defendant can be an encroacher from the year 1985, in the cause of action paragraph, the Plaintiff stated that the cause of action arose on the date on which the suit in O.S.No.1683 of 1981 was decreed i.e., on 30.10.1984 and after December 2008 the Defendant had encroached the suit property. When, in the written statement, the defendant has specifically stated that he has put up construction in the year 1988, after obtaining loan, the Courts below ought to have seen whether the Plaintiff has proved the cause of action in the suit. For the purpose of deciding whether facts averred by the Plaintiff would or would not constitute a part of cause of action, one has to consider whether such facts constitute material, essential or integral part of the cause of action. If it does not form cause of action, the suit cannot be entertained. As the defendant has established that he had obtained loan in the year 1988, after obtaining patta and put up construction, the cause of action in the suit arose in the year 1988 itself and the suit for mandatory injunction ought to have been filed, within a period of limitation, the cause of action implies right to sue. The defendant has maintained throughout that his house was constructed in the year 1988 which is different from that of his father's who had three other houses. The Plaintiff has filed a suit, without identifying the property. Therefore, it may be safely concluded that the averments made in the Plaint, if not proved, the suit cannot be decreed. However, the Courts below had



been misdirected by the Judgment in O.S.No.1683 of 1981 and decreed the suit.

10. In the light of the above discussions, it would be appropriate to set aside the finding of the Appellate Court and remit the matter back to the Appellate Court to consider the appeal, afresh and decide the matter. Accordingly, this Second Appeal is allowed and the Judgment of the First Appellate Court, in 10.02.2014, is set aside and the matter is remanded back to the Appellate Court to consider the appeal afresh however, within a period of three months from the date of receipt of the copy of this Judgment. It is open to the parties to let in additional evidence by filing documents available prior to suit. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar(CSII)

/True Copy/

Sub-Assistant Registrar

To

1.The Additional Subordinate Judge, Tirunelveli

2.The Principal District Munsif , Tirunelveli.

+One cc to Mr.H.Lakshmi Shankar, Advocate, SR.No.82078

+One cc to Mr.M.S.Jawaharlal, Advocate, SR.No.82275

arr

RL/5C/5P/KP/SAR1/14/11/2017

Judgment made in

S.A.(MD)No.549 of 2014

10/10/2017