



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 22.09.2017

CORAM

THE HONOURABLE MRS. JUSTICE PUSHPA SATHYANARAYANA

SECOND APPEAL (MD) Nos.644 and 645 of 2015

and

M.P.(MD).No.2 of 2015 in S.A.(MD).No.645 of 2015

WEB COPY

S.A.(MD).No.644 of 2015

J.Ajith Moses ... Appellant /Appellant / Plaintiff

Vs.

1.Thaya

2.C.Xavier

3.Jothi Subramoniam ... Respondents / Respondents / Defendants

S.A.(MD).No.645 of 2015

J.Ajith Moses ... Appellant /Appellant / 2nd defendant

Vs.

1.Thaya ... 1st respondent/1strespondent /Plaintiff

2.Jothi Subramoniam ... 2ndrespondent/2ndrespondent/1st defendant

COMMON PRAYER: Appeals filed under Section 100 of C.P.C., against the judgment and decree, dated 15.03.2014, made in A.S.Nos.38 and 39 of 2013 by the learned Subordinate Judge, Padmanabhapuram, confirming the judgment and decree, dated 18.07.2013 made in O.S.Nos.182 and 167 of 2010 by the learned Additional District Munsif, Eraniel.

For appellant in both
the appeals

... Mr.P.Thirumahil Maran

For respondent Nos.1 & 2
in S.A.(MD).644 of 2015 &
1st respondent in

S.A.(MD).No.645 of 2015 ... Mr.A.Rajkumar Sen

For 3rd respondent in
S.A.(MD).No.644 of 2015

and 2nd respondent in

S.A.(MD).No.645 of 2015 ... Mrs.P.Christina Arputha Mary

**COMMON JUDGMENT**

The above second appeals are directed against the common judgment and decree passed in the suits for permanent injunction filed by one Thaya, the plaintiff in O.S.No.167 of 2010 and Ajith Moses, the plaintiff in O.S.No.182 of 2010.

2. The case of the plaintiff in O.S.No.167 of 2010 and the first defendant in O.S.No.182 of 2010 / Thaya is that the suit property belonged to her. As she had to borrow a sum of Rs.1 lakh from the first defendant - Jothi Subramoniam, as a security for the same, the suit property was sold in favour of the said Jothi Subramoniam. It was agreed that as soon as the plaintiff repaid the amount with interest, the property would be reconveyed to the plaintiff, fixing the time limit as 10 years. Accordingly, the sale deed was executed by the plaintiff in favour of Jothi Subramoniam on 23.05.2002 as per Ex.A2. Even after the sale deed, the plaintiff continued to be in possession and he was paying the interest to the first defendant - Jothi Subramoniam upto June 2010. When the plaintiff approached the first defendant for reconveyance of the property, the first defendant asked him to come to the Sub-Registrar Office on 11.10.2010. However, the first defendant - Jothi Subramoniam never came as promised and did not execute the reconveyance. While so, the first defendant had executed a sale deed in favour of the second defendant viz., Ajith Moses on 13.06.2010. After the said sale, the first and second defendants colluded together and tried to interfere with the plaintiff's peaceful possession. Hence, the suit for injunction was filed by her against the defendants. She had also prayed for dismissal of the suit in O.S.No.182 of 2010, based on the very same averments.

3. The case of the plaintiff in O.S.No.182 of 2010 and the second defendant in O.S.No.167 of 2010 / Ajith Moses is that he admitted the title of Thaya and the sale in favour of the third defendant therein viz., - Jothi Subramaniam. The said Ajith Moses purchased the suit property on 13.08.2010 from Jothi Subramoniam for a valid sale consideration. It is further stated by the said Ajith Moses that on the date of sale deed, the plaint schedule property was delivered to him and the same was under his exclusive possession and enjoyment. It is also stated that the vendor had delivered the title deeds and all other connected records to him. The plaintiff - Ajith Moses claimed to have effected mutation, obtained patta and has been paying the kisth to the revenue authorities. According to the plaintiff - Ajith Moses, as the defendants 1 and 2 viz., Thaya and her husband, who have no manner of right or title, attempted to trespass into the plaint schedule properties, the suit was filed for permanent injunction, restraining them from causing any disturbance to his peaceful possession and enjoyment of the suit property. He had also prayed for dismissal of the suit in O.S.No.167 of 2010 based on the very same averments.



4. Jothi Subramoniam, who is the first defendant in O.S.No.167 of 2010 and the third defendant in O.S.No.182 of 2010 had filed written statements contending that though the suit property originally belonged to Thaya, the same was purchased by him on 23.05.2002 for a valid sale consideration. He also claimed to be in possession of the suit property having taken the same on the date of registration itself. He denied the borrowal of one lakh by the said Thaya and the registration of sale deed with the condition that it will be reconveyed on repayment of the sum borrowed. Jothi Subramoniam also sold the property to the second defendant viz., Ajith Moses on 13.8.2010 and delivered possession to him.

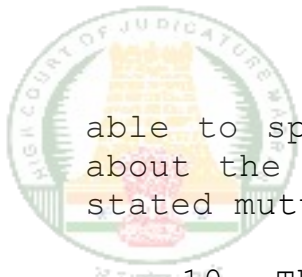
5. Before the trial Court, the plaintiff - Ajith Moses was examined as PW1 and on his side, Exs.A1 to A7 were marked. The plaintiff - Thaya was examined as DW1 and two other witnesses were examined as DW2 & DW3 and on her side, Exs.B1 to B7 were marked. On the side of the Court, Exs.C1 and C2 were marked.

6. On the above pleadings and the documents, both the Courts below have concurrently decreed the suit in O.S.No.167 of 2010 and dismissed the suit in O.S.No.182 of 2010. Aggrieved by the same, the said Ajith Moses has preferred the above second appeals.

7. At the time of admission, only notice was ordered in both the appeals.

8. Heard the learned counsel for the appellant and the learned counsel for the respondents.

9. The plaintiff in both the suits have only sought for the relief of permanent injunction. The appellant, as plaintiff in O.S.No.182 of 2010, had pleaded that he has been in possession of the suit property having purchased the property from Jothi Subramoniam on 13.08.2010 for a valid sale consideration. For the purpose of ascertaining the possession of the said Ajith Moses, his evidence as PW1 can be usefully considered. In the chief examination, he had stated that he has purchased the property from Jothi Subramoniam and took possession on the same date and has been in continuous enjoyment from the date of purchase. However, in the cross examination, he has stated that he knew the said Jothi Subramoniam only two weeks prior to the date of sale and there were only two palm trees and one tamarind tree on the suit property. So far as the description of the suit property or measurements are concerned, PW1 had given contradictory statements as he had stated that the suit property is facing west, later he had stated that it is facing east. About the description of the house in the suit property also he had not answered cogently. He has stated that there are no rooms or windows in the house. A person, who is stated to be in possession, was not even



able to speak about the physical features of the property. Even about the construction of the house on the suit property, he had stated mutually contradictory statements.

10. The Courts below had disbelieved the evidence of PW1 - Ajith Moses, as he had stated that the foundation was completed in one day and the building was constructed in two days, when admittedly the area of the land is 175 sq. meter. Even with respect to the building permission from the Panchayat, PW1 has deposed that he got the permit within a week from the date of his application and thereafter, within two days, he had completed the construction of the house. Further, the appellant / Ajith Moses had not produced any documents with respect to his wherewithal to purchase the property and to construct the house, though he had stated that they are available and the same would be produced before the Court. The further reading of PW1's cross examination would go to show that he was not speaking the truth.

11. In this regard, the evidence of DW2 is also relevant. DW2 is the President of Kurunthencode Panchayat. DW2 has stated that he had visited the suit property, which was constructed with cement blocks and the person by name Thaya was living in the suit property. The said Thaya is the plaintiff in O.S.No.167 of 2010. The said Thaya was also examined as DW1. She had deposed that the suit property was purchased by her from one Charles and she had been living in the suit property by putting up a hut. As she was in need of money for the purpose of her sister's marriage, a sum of Rs.1 lakh was borrowed from Jothi Subramoniam. For the sake of security, the suit property was sold in favour of the said Jothi Subramoniam on the understanding that the same would be reconveyed to DW1 on discharge of debt. It is stated by DW1 that when the reconveyance was demanded, the said Jothi Subramoniam had ransacked the suit property with the help of rowdy elements by pulling down the thatched shed house. Thereafter, she (Thaya) had build a house with cement blocks. The evidence of DW1 is corroborated by the evidence of DW2, who is the President of Kurunthancode Panchayat. DW2, who is the only an official, is not related to none of the parties and he is a neutral person. Therefore, there is no reason to disbelieve his evidence and the Courts below also rightly placed reliance on the evidence of DW2.

12. The question that arises for consideration is whether the plaintiff in O.S.No.167 of 2010 can be given a decree for permanent injunction, when, admittedly, she had sold the suit property on 23.05.2002?. Even assuming that Thaya has no right to continue in possession of the suit property, she cannot be forcibly dispossessed from the suit property, unless by due process of law. When the remedy of injunction is an equitable one, like the one in the instant case, the question to be answered is as to whether a person, who is in settled possession, though he may not have right to continue in possession, can be



forcibly dispossessed?. The said question has to be answered in the context of the decisions of the Hon'ble Supreme Court.

13. It is well settled that the possession of a trespasser is good against every one but not the true owner. However, the question as to whether a person in settled possession can be forcibly dispossessed has to be considered. The very same issue has already been dealt with by the Hon'ble Supreme Court in the judgment reported in (2004) 1 SCC 769 (Rame Gowda Vs. M.Varadappa Naidu and another) wherein at paragraph No.9, it has been held as follows;

"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

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' :

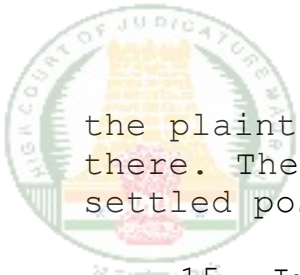
i) that the trespasser must be in actual physical possession of the property over a sufficiently long period;

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.

14. Considering what is settled possession, in this case, Thaya was a original owner and even after the sale of the suit property in favour of Jothi Subramoniam on 23.05.2002, she has been continued to be in possession of the suit property. It is also alleged that the said Jothi Subramoniam had disturbed the possession of Thaya by damaging his thatched house. Thereafter, the said Thaya had put up the superstructure with cement blocks which fact is also corroborated by DW2. Considering the above aspects, it can be easily concluded that the possession of Thaya was peaceful and her possession was not precarious at the time of filing the suit. Till the dispute arose between the plaintiff - Thaya and the defendants viz., Jothi Subramoniam and Ajith Moses,



the plaintiff had settled in the suit property and had been living there. Therefore, her possession can be conveniently said to be a settled possession.

15. In the light of the above discussions, the plaintiff in O.S.No.182 of 2010 had miserably failed to prove his possession, whereas the plaintiff in O.S.No.167 of 2010 has been found to be in settled possession and the said possession cannot be disturbed unless by due process of law. There is also no question of law arising for consideration. Hence, the concurrent judgment passed by the Courts below are liable to be confirmed.

16. In the result, both the second appeals are dismissed, confirming the judgment and decree passed by the Courts below. No costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-
Assistant Registrar(CO)

/True Copy/

Sub Assistant Registrar

To

- 1.The Subordinate Judge, Padmanabhapuram.
- 2.The Additional District Munsif, Eraniel.
- 3.The Record Keeper,
V.R. Section, Madurai Bench of Madras High Court,
Madurai.

+2cc to M/S.P.THIRUMAHIL MARAN, Advocate SR.No.80800&808001
+1cc to M/S.A.RAJKUMAR SEN, Advocate SR.No.80591

gcg
MAS/JC/SAR2:11.10.2017:7P-7C

S.A. (MD) Nos.644 and 645 of 2015
22.09.2017