

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.03.2018

CORAM:

THE HON'BLE MR.JUSTICE M.DHANDAPANI

Second Appeal No.464 of 1999 and

C.M.P.Nos.5644 and 5645 of 1999

- 1.R.Kannaiyan (Deceased)
- 2.K.Sandhrodhayam
- 3.Shanmugavalli
- 4.Kandasamy
- 5.Kalaivani
- 6.Anitha
- 7.Saravanan

... Appellants/Respondents/Plaintiff

(Appellants 2 to 6 & R2 brought on record
LR's of the deceased sole appellant vide
order of this Court dated 02.02.2018 made
in CMP.No.2203 to 2205/2017 in S.A.No.464/1999)

/Vs/

- 1.P.Rajamanickam
 - 2.Saravanan
- (2nd Respondent Transposed 7th appellant
vide order of Court dated 19.02.2018 made
in CMP.No.3101/2018 in S.A.No.464/1999).

... Respondents/Appellant/Defendant

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and Decree, dated 23.09.1996 made in A.S.No.64 of 1996 on the file of the Additional Subordinate Judge, Mayiladuthurai, in reversing the Judgment and Decree dated 18.06.1996 made in O.S.No.351 of 1990 on the file of the learned Additional District Munsif, Mayiladuthurai.

For Appellants : Mr.A. Muthukumar

For Respondent : Mr.S. Sounthar

* * * * *

J U D G M E N T

The plaintiff, who lost the case before the Lower Appellate Court has filed the Second Appeal before this Court. The plaintiff is the first appellant herein. The defendant is the respondent herein. Appellants 2 to 7 are the legal heirs of the first appellant. For the sake of convenience the parties will be hereinafter referred to as per their rank in the suit.

2. The sum and substance of the plaint averments are as follows.-

(a) The plaintiff is in possession and enjoyment of the suit schedule property for more than twenty years and patta stands in the name of the plaintiff. The Special Tahsildar also under the "Nila Udamai Membattu Thittam" Mayiladuthurai, in recognition of his possession, granted patta in the plaintiff's name on 23.09.1987. Though the suit land is classified as Punja and assessed, the plaintiff has constructed a thatched house and formerly resided there. Thereafter, he has shifted his residence westwards and is running a bucket shop in the suit shop building. He is also paying the house tax to the Panchayat Board. The plaintiff is thus in undisputed possession and enjoyment of the suit property, for more than 12 years as against the prescribed statutory period. Hence, the plaintiff is entitled to enjoy the possession of the suit property.

(b) The defendant's father has got Nanja lands, north of the suit property and he wanted the suit land to be given to him by the plaintiff. He could not purchase the suit property since the plaintiff refused. Hence, the defendant's father one Pazhanivel filed a suit in O.S.No.84 of 1982 on the file of the Additional District Munsiff Court, Mayiladuthurai, against the plaintiff for permanent injunction, as if, he was in possession and enjoyment of the suit property. The said suit was dismissed against the defendant's father. As against the dismissal, he preferred an appeal before the Additional Subordinate Judge, Mayiladuthurai in A.S.No.54 of 1983 and the Additional District Munsiff Court, Mayiladuthurai, also confirmed the decree passed in O.S.No.84 of 1982 and the same was also dismissed.

(c) While being so, the defendant, who is the son of the said Pazhanivel, is now laying a claim over the suit property. The defendant wanted the plaintiff to convey the suit schedule property in favour of him and the same was refused by the plaintiff. Aggrieved over the same, the defendant attempted to enter into the suit property forcibly on 03.06.1990 and the same was prevented by the plaintiff. Hence, the plaintiff filed the suit for permanent injunction restraining the defendant from

interfering with the plaintiff's peaceful possession and enjoyment of the suit property.

3. The sum and substance of the written statement averments are as follows:-

(a) The defendant denied the entire allegations made in the plaint. Initially, the suit schedule property belongs to one Krishna Rao and his brother Raghunatha Rao. The defendant's grand father enjoyed the northern side of the property by way of lease and thereafter, the same was conveyed to the defendant's father and he was enjoying the suit property by way of lease. Accordingly, the defendant purchased 2 1/2 cents of the suit schedule property from Ramachandra Rao's wife Kangubai, by a registered Sale Deed, dated 17.12.1986. Thereafter, the defendant became the owner of the suit schedule property of 2 1/2 cents and enjoyed the suit property without any disturbance. However, suppressing the earlier facts, the plaintiff approached the Revenue Authorities under the "Nila Udamai Membattu Thittam" Mayiladuthurai and obtained patta. Even assuming that the patta stands in his name, the plaintiff challenged the first defendant's right since the defendant purchased the property for valuable consideration from the legal heirs of the first appellant. While being so, the plaintiff encroached a portion of the suit property and running betelnet shop in the suit property and the admission made by the defendant; that the plaintiff enjoyed the suit property for more than 12 years is not at all true at any point of time. Only in order to grab the suit property from the defendant, the plaintiff has filed the vexatious suit.

(b) The defendant admitted that there was a suit filed by the defendant's father in O.S.No.84 of 1982 and the same was also confirmed by the appellant. However, the defendant is entitled to enjoy the suit property, which was purchased for a valuable consideration. However, the defendant's father informed the defendant that there was a liberty granted in the earlier suit for purchasing the property from the owner.

4. After elaborate trial and after framing the issues, the Lower Court decreed the suit in favour of the plaintiff. Aggrieved by the same, the defendant has filed the first appeal before the Lower Appellate Court. The Lower Appellate Court allowed the appeal on the ground that the judgment and decree in O.S.No.84 of 1982 and the judgment and decree in A.S.No.54 of 1983 were not marked as documents by the plaintiff. In the absence of judgment in between the plaintiff and the defendant's father, the Lower Appellate Court dismissed the suit filed by the plaintiff. Against which, the present Second Appeal is filed.

5. At the time of admission, this Court has framed the following Substantial Questions of Law.-

"(i) When the Lower Appellate Court having held that neither the plaintiff nor the defendant proved his title to the suit property and the possession of the plaintiff is admitted, whether the plaintiff is entitled for a decree for injunction on the strength of his possession as per the decision of our High Court reported in 1976 (2) MLJ 363?

(ii) Whether the Lower Appellate Court erred in law in not relying upon Ex.A3 the decree passed in the earlier suit O.S.No.84/82 wherein the plaintiff's possession was upheld against the defendant's father?

(iii) Whether the Lower Appellate Court erred in law in not relying upon the report and plan of the Advocate Commissioner and marked as Ex.C1 & C2, when the defendant failed to file any objections to the same?"

6. The learned counsel appearing for the appellant would submit that though the judgment and decree in O.S.No.84 of 1982 was not marked before the Lower Appellate Court since the said judgment, copy was not available, after obtaining the copy of the judgment in O.S.No.84 of 1982, the appellant/plaintiff filed a petition in C.M.P.No.5645 of 1999 under Order 41 Rule 27 of CPC for marking the above said judgment in O.S.No.84 of 1982 as additional document.

7. The Lower Appellate Court dismissed the suit only on the ground that the judgment in O.S.No.84 of 1982 was not marked before the Lower Appellate Court and in order to decide the issue between the parties it is necessary to mark the document. In view of the above and on perusal of the judgment of the Lower Appellate Court, in order to decide the issue, if necessary, to allow this petition accordingly. This Court allowed the petition in C.M.P.No.5645 of 1999 and the said document is marked as Ex.A7 for the purpose of deciding the second appeal, since a specific question of law was framed by this Court.-

"Whether the Lower Appellate Court erred in law in not relying upon Ex.A3 the decree passed in the earlier suit O.S.No.84/82 wherein the plaintiff's possession was upheld against the defendant's father?"

8. The learned counsel appearing for the appellants would further submit that earlier the defendant's father filed another suit for permanent injunction as against the plaintiff. After elaborate trial, the earlier Court in original suit arrived at a conclusion, the plaintiff is entitled for possession of the property. Accordingly, the suit filed by the defendant's father was dismissed. Aggrieved over the same, he preferred appeal before the earlier Lower Appellate Court and the said Lower Appellate Court also confirmed the order passed by the Lower Court. In view of the above, the earlier judgment rendered in O.S.No.84 of 1982 (Ex.A7) is also binding on the defendant. Accordingly, the respondent is not entitled to succeed in the second appeal.

9. On a perusal of the Ex.A7 judgment in O.S.No.84 of 1982, the earlier Lower Court did not confirm the title in favour of the defendant's father, since the defendant's father did not establish his title over the property and occupation. On that ground the earlier suit was dismissed against the defendant's father. The defendant's father filed the earlier suit only on the capacity of leasehold right from one Krishna Rao and thereafter, the defendant's father purchased the adjacent property from one Ramachandra Rao vagayara. Originally the property belonged to one Krishna Rao and his brother Raghunatha Rao. Having purchased the property, the defendant is entitled to protect his possession. Accordingly, he enjoyed the property. In order to deprive the title the appellant/plaintiff has filed the vexatious suit against the defendant before the Court. The Lower Appellate Court after narrating the entire facts arrived at a conclusion that the plaintiff did not establish possession of the property and dismissed the suit.

10. On perusal of the entire records the Lower Appellate Court has specifically averred in its judgment that the plaintiff did not mark the Judgment rendered in O.S.No.351 of 1990 filed by the defendant's father.

11. In support of his contention the learned counsel for the appellants relied upon the decision of this Court reported in CDJ 1998 MHC 883 [Chellathurai & Ors v. Perumal Nadar].

12. The plaintiff, except for the production of Ex.A1, has not adduced any evidence to show that he is in possession. Exs.A2 to A4 are only documents that came into existence subsequent to the institution of the suit.

13. Merely because the defendant has failed to prove his case, it does not follow that the plaintiff is in possession. As I said earlier, in a suit for injunction the burden is only on the plaintiff to prove that he is in exclusive

possession of the property. In this case plaintiff has miserably failed to prove the same.

12. In the absence of the judgment in O.S.No.84 of 1982 the Lower Appellate Court was not able to arrive at a conclusion in favour of the plaintiff. Accordingly, the entire suit was dismissed. On perusal of Ex.A7 judgment in O.S.No.84 of 1982, the defendant's father Pazhanivel filed the permanent injunction suit against the appellant/plaintiff. After contest and on perusal of the Commissioner Report and other documents, the District Munsiff, Mayiladuthurai, dismissed the suit filed by the defendant's father.

13. Apart from the above, the defendant himself admitted in the written statement that the plaintiff is in possession of 100 sqft., and running the betelnet shop in the suit property. Accordingly, the plaintiff is entitled to the decree for permanent injunction. In view of the above, the judgment and decree of the Lower Appellate Court is unsustainable and on a perusal of Ex.A7 and the written statement, I am of the view, that the plaintiff is entitled to succeed the suit. Accordingly, the Substantial Questions of Law are answered in favour of the appellant.

14. In the result, the second appeal is allowed. The Judgment and decree dated 23.09.1996 in A.S.No.64 of 1996 passed by the learned Additional Subordinate Judge, Mayiladuthurai, is set aside. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

सत्यमेव जयते
Sub Assistant Registrar

To

1. The Additional Subordinate Judge, Mayiladuthurai
2. The Additional District Munsif, Mayiladuthurai.

+1cc to Mr.A.Muthukumar, Advocate sr.no.16362

S.A.No.464 of 1999

ssd(co)
nr 06/06/2018