

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on: 20.12.2017

Judgment pronounced on : 28.04.2018

CORAM

THE HONOURABLE MR.JUSTICE P. RAJAMANICKAM

S.A.No.1461 of 2000
and CMP.No.13742 of 2000

1.Manonmani
2.S. Samuelraj
3.Santhamani
4.William Jayaraj
5.Kannimari
6.W.Mohansingh

... Appellants/Defendants

Vs.

D.Selvaraj

...Respondent/Plaintiff

Prayer : Second Appeal is filed under Section 100 of the Civil Procedure Code, against the Judgment and Decree dated 06.08.1999 in A.S.Nos.41 of 1999 (1st Additional District Judge cum Chief Judicial Magistrate, Coimbatore) reversing the Judgment and Decree passed in O.S.No.2186/1994 dated 10.12.1998 on the file of the III Additional District Munsif, Coimbatore.

For Appellants : M/s.A.S.Vijayaraghavan &
Mr.D.Shivakumaran

For Respondent : No appearance

JUDGMENT

This second appeal has been filed by the defendants against the Judgment and Decree passed by the 1st Additional District Judge cum Chief Judicial Magistrate, Coimbatore in A.S.No.41 of 1999 dated 06.08.1999 reversing the Judgment and Decree passed by the III Additional District Munsif, Coimbatore in O.S.No.2186 of 1994 dated 10.12.1998.

2. The respondent herein has filed a suit in O.S.No.2186 of 1994 on the file of the III Additional District Munsif, Coimbatore, for permanent injunction to restrain the defendants, their men, agents, etc., from interfering with his peaceful possession and enjoyment of the suit property. The learned District Munsif has dismissed the said suit with cost by the Judgment dated 10.12.1998. Aggrieved by the same, the plaintiff

has filed an appeal in A.S.No.41 of 1999 on the file of the 1st Additional District Judge -cum- Chief Judicial Magistrate, Coimbatore. The learned 1st Additional District Judge-cum-Chief Judicial Magistrate, Coimbatore, by his Judgment dated 06.08.1999, has allowed the said appeal with cost and set aside the Judgment and Decree passed by the Trial Court and decreed the suit as prayed for with cost. As against the same, the defendants have preferred the present second appeal. For the sake of convenience, the parties are referred to as described before the trial court.

3. The averments made in the plaint, are in brief, as follows:

The plaintiff is the owner of the suit property. He purchased the suit property on 07.01.1965 from one Tmt.Selvam and her son, Gurusamy. Subsequently on 30.04.1993, a proper registered sale deed was executed in favour of the plaintiff. The plaintiff is in possession and enjoyment of the suit property right from 07.01.1965. Before the plaintiff, his predecessors in title were in possession and enjoyment of the suit property as absolute owners thereof. Originally the suit property was the vacant site. Subsequently, the plaintiff has put up a thatched shed in a portion of the suit property facing North. The shed is in existence for more than 15 years. The plaintiff is using the thatched shed for cooking purposes and also for residential purposes. The remaining extent is used as a vacant site which is serving as front yard to the residential house of the plaintiff and to the thatched shed. The plaintiff wanted to put up a pucca construction in the suit property and in that view in mind, he has stored bolder stones and black stones in the vacant space within the suit property. But due to some financial problems, the plaintiff could not put up the construction. The plaintiff is residing with his family members in the residential house just abutting the suit property on the north-western side. The plaintiff's house is bearing Door.No.1/42 -A. The plaintiff is the owner of the suit property by virtue of sale deed. Even otherwise, he has perfected title by adverse possession. The plea of adverse possession is taken as an alternative plea without prejudice to the other contentions of the plaintiff. The defendants are the neighbours of the plaintiff. They are not in talking terms with the plaintiff for the past two years. The defendants are having an eye over the suit property and therefore, they are attempting to encroach the suit property. Hence, the plaintiff was constrained to file a suit for permanent injunction.

4. The averments made in the written statement filed by the fourth defendant and adopted by other defendants, are in brief, as follows:

It is false to state that the plaintiff is the owner of the suit property. It is also false to state that he purchased the

same on 07.01.1965 from one Selvam and her son Gurusamy and subsequently the same was confirmed by a registered sale deed dated 30.04.1993. It is also false to state that the plaintiff is in possession and enjoyment of the suit property from 07.01.1965. There is a vacant space situated immediately on the east of the defendants' building. The fourth defendant is the owner of the property bearing D.No.42 comprising of two portions and the same is facing east from the main road which is situated on the south. The plaintiff has to necessarily pass through the vacant space situated on the east and then reach the residential portion. Out of the suit property mentioned, about an extent of 30 feet North - South and 15 feet East - West is in possession and enjoyment of the fourth defendant. The fourth defendant has planted two coconut trees and he has been enjoying the fruits of the said trees. The plaintiff is none other than the fourth defendant's paternal uncle. The fourth defendant has obtained water tap connection and the same is located in the front yard where now the plaintiff is surreptitiously and hurriedly put up a temporary thatched shed. The plaintiff was working as a casual labourer in Electricity Department at Kundah. The plaintiff came to Thirumalapalayam only in the year 1967. At that time, the fourth defendant's mother permitted the plaintiff to put up a construction on the northern side of the building bearing D.No.42. The fourth defendant is working in the Revenue Department at Pollachi and he is residing at Anaimalai for the past 7 years. The defendants 2 and 3 are residing at Palladam. The first defendant who is the mother of the fourth defendant alone was in occupation of Door No.42. She became sick during June, 1994 and hence, she went to her daughter's house at Kurichi. Taking advantage of the absence of the defendants, the plaintiff has cleverly and with ulterior motive put up temporary shed to show that he is in occupation of the same. It is false to state that the plaintiff has perfected title by adverse possession. It is false to state that the defendants attempted to encroach the suit property. On the other hand, the plaintiff alone has placed granite stones in the property of the defendants. Therefore, the defendants prayed to dismiss the above suit.

5. Based on the aforesaid pleadings, the learned District Munsif has framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1 and also examined one Gurusamy as PW2. He has marked Exs.A1 to A9 as exhibits. On the side of the defendants, the fourth defendant was examined as DW1 and also examined two more witnesses as DW2 and DW3. They have marked Ex.B1 to Ex.B17 as exhibits. The Advocate Commissioner was examined as CW1 and his report and rough plan were marked as Ex.C1 and Ex.C2 respectively.

6. The learned District Munsif after considering the materials placed before her, found that the plaintiff failed to establish that he is the owner of the suit property and also failed to establish that he is in possession and enjoyment of the suit property and accordingly, dismissed the suit with cost. Aggrieved by the same, the plaintiff has filed an appeal in A.S.No.41 of 1999 on the file of the I Additional District Judge-cum-Chief Judicial Magistrate, Coimbatore. The learned First Appellate Judge, has allowed the said appeal and set aside the Judgment and decree passed by the trial court and consequently, decreed the suit as prayed for with cost. As against the same, the defendants have preferred the present second appeal.

7. At the time of admitting the second appeal, this court has formulated the following substantial questions of law :

"1. Whether the Judgment and Decree of the lower appellate Court is not vitiated for non-consideration of material evidence before it?

2. Whether the Judgment and decree of the Courts below is right in that it does not draw an adverse inference as to the title of the respondent for non-production of the parent documents in the face of the admitted evidence by PW2 that his family and defendant's family encroached the place called parayar natham wherein the suit property is situate and when the respondent has not denied the title of the appellants to the door No.42?"

8. Though notice was served on the respondent/plaintiff on 03.04.2002 itself, the respondent neither appeared in person nor through counsel. Hence, the respondent was set ex parte. After hearing the learned counsel, Mr.A.S.Vijayaraghavan, appearing for the appellants and perusing the Judgments and decrees passed by the courts below and other materials, judgment is being passed.

9. The learned counsel for the appellants submitted that in the description of the property given in the plaint, it is mentioned as a vacant site, whereas in the body of the plaint, the plaintiff has stated that he is using the suit property by putting up a thatched shed for cooking purposes. He further submitted that Ex.A1 is dated 07.01.1965 and the same is an unregistered sale deed through which, the plaintiff cannot claim any right over the suit property. He further submitted that though on 03.04.1993, the plaintiff has got registered sale deed, the plaintiff has not produced any parent document to show that his vendors got title over the suit property. He further submitted that house tax receipts produced by the

plaintiff are relating to the plaintiff's residential house and not relating to the suit property. He further submitted that the plaintiff has claimed ownership over the suit property through Ex.A1 and Ex.A2, but at the same time, he has taken a plea of adverse possession also. He further submitted that the plaintiff cannot take inconsistent plea and on that ground alone, the suit has to be dismissed. He further submitted that since there was a serious dispute with regard to the title over the suit property, the plaintiff ought to have filed a suit for declaration of his title, but he has filed a bare injunction suit and the suit is liable to be dismissed. He further submitted that as per the Commissioner's Report and rough plan, the suit property is situated in front of the defendants' house and hence, the same is being used by the defendants as front yard and also as pathway. He further submitted that taking into consideration of the aforesaid facts, the trial court has rightly dismissed the suit, but the first appellate court, without considering the aforesaid facts, has allowed the first appeal and decreed the suit and hence, he prayed to allow the second appeal and set aside the decree and judgment passed by the first appellate court. In support of his contention, he relied upon the decision in Venkatachalam and another Vs.Nallathambi reported in 2013 (4) CTC 45.

10. It is seen from the Advocate Commissioner's report (Ex.C1) and rough plan (Ex.C2) that the house of the defendants is situated on the north of Oomaithurai street, and further north, the plaintiff's house is situated. The suit property is also situated on the north of Oomaithurai street and east of the houses of both parties. The evidence of both parties would show that the houses of both the parties are facing north. Therefore, it is clear that the suit property is situated in front of the houses of both parties.

11. According to the plaintiff, he has purchased the suit property from one Tmt. Selvam and her son Gurusamy (PW2) on 07.01.1965 through Ex.A1 sale deed. Ex.A1 sale deed is an unregistered one and hence, the plaintiff has got registered sale deed on 30.04.1993 from the same vendors and the said sale deed has been marked as Ex.A2. In Ex.A2, it is clearly stated that the said Tmt. Selvam and her son Gurusamy have already entered a sale agreement on 07.01.1965 with regard to the suit property for Rs.100/- and also received the said amount and possession was handed over and from the date of execution of Ex.A2, they have sold the property to him. It is also mentioned that since there is no parent document, the sale agreement which was executed in the year 1965 itself may be treated as parent document. Therefore, it is clear that even if it is assumed that the plaintiff has not acquired title to the suit property through Ex.A1, in view of Ex.A2, he would have

acquired title to the suit property atleast from the date of execution of Ex.A2 i.e., 30.04.1993.

12. According to the plaintiff, he has put up a thatched shed in the suit property and the shed is in existence for more than 15 years. He has not produced any documentary evidence to show that the said thatched shed was in existence for more than 15 years. As per Ex.A2, the plaintiff has purchased the suit property only as a vacant site. The Advocate Commissioner's report and plan would show that there is a shed in the suit property. The defendants also admitted in their written statement that there is a thatched shed in the suit property. According to the defendants, except the first defendant, all other defendants were residing away from the suit property and the first defendant fell in sick in the month of June, 1994 and went to her daughter's house at Kurichi and taking advantage of the absence of the defendants, the plaintiff has put up the said thatched shed in the suit property. So, it is clear that the defendants have admitted that the existing thatched shed has been put up by the plaintiff in the suit property. As per Ex.A2, the plaintiff has purchased the suit property, as vacant site on 30.04.1993. So, the principle that "possession follows title" will apply. Since the sale deed (EX.A2) stands in the name of the plaintiff, it has to be presumed that the plaintiff is in possession of the suit property from the date of purchase. Further as already pointed out that the defendants themselves have admitted in their written statement that the plaintiff has put up the existing thatched shed in the suit property.

13. As per Section 58 of the Indian Evidence Act, admitted facts need not be proved. For proper appreciation, Section 58 of the Indian Evidence Act is extracted hereunder:

"58. Facts admitted need not be proved- No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

14. In this case, as already pointed out that the defendants have admitted in their written statement that the plaintiff has put up the existing thatched shed in the suit property. Therefore, it is clear that on the date of filing of the suit, the plaintiff was in possession of the suit property. It is also to be pointed out that the defendants have not

produced any documentary evidence to show that the suit property is in their possession. The trial court came to the conclusion that since a portion of the suit property is situated in front of the defendants' house, it has to be presumed that the said portion was in their possession. The said finding is not correct in view of the sale deed (Ex.A2) which stands in the name of the plaintiff and also categorical admission of the defendants.

15. It is also to be pointed out that the trial court has found that the suit property is a poramboke land. The said finding is also not correct. The suit property is situated in SR.No.14/1. As per Ex.B12, SR.No.14/1 is a Natham land. In Ex.A2, also it is specifically stated that the suit property is a Natham land. Therefore, the finding of the trial court that the suit property is the Government Poramboke land is an erroneous one.

16. In Venkatachalam and another Vs.Nallathambi (supra), the property involved was a house. The plaintiff has not produced any documentary evidence to show that he was in possession on the date of filing of the suit. The defendants have denied the title of the plaintiffs. Under the said circumstances, this court has held that since the suit property is the house property, the presumption that possession follows title will not attract. Further, it was held that the plaintiff has not produced any documentary evidence to prove his possession and hence, when the defendants seriously disputing the title, the plaintiff should have filed a suit for declaration. But in the case on hand, the plaintiff has produced a title deed (Ex.A2) in which it is clearly stated that he purchased only a vacant site. So, the principle that "possession follows title" will apply. Even as per the case of the defendants, the plaintiff has put up the existing thatched shed in the suit property. Therefore, the aforesaid decision will not apply to the facts of this case.

17. In the plaint, the plaintiff has claimed right over the suit property through Ex.A1 and A2 sale deeds. It is also specifically stated in the plaint that the plea of adverse possession is taken as an alternative plea without prejudice to the other contentions of the plaintiff. So, it is clear that only as an alternative plea, the plaintiff has taken the plea of adverse possession. The plaintiff has established his title over the suit property through Ex.A2. The defendants have not produced any contra evidence to show that the said property belongs to them or they are in possession of the suit property. Further this is the suit for bare injunction. As already pointed out that the defendants themselves admitted in their written statement that the plaintiff has put up existing thatched shed in the suit property prior to filing of the suit. Under the said

circumstances, merely because the plaintiff has pleaded in his plaint that as an alternative plea that he perfected title by adverse possession, it cannot be said that the suit is not maintainable.

18. In the plaint schedule, the plaintiff has given the entire extent of the property which was purchased by him through Ex.A2, where as in para-5 of the plaint, the plaintiff has stated that due to personal relationship, the plaintiff permitted the defendants to use a smaller portion on the western side in the suit property roughly about 2 feet and now, he is not claiming the said portion in this suit. Taking into consideration the topography and location of properties of both parties, this court is of the view that the defendants have used the aforesaid portion of the suit property as a pathway for reaching their house. So, the plaintiff is entitled to get injunction excluding the aforesaid portion. Accordingly, the substantial questions of law are answered.

19. In the result, this second appeal is partly allowed. The Judgment and Decree passed in A.S.No.41 of 1999 dated 06.08.1999 on the file of the First Additional District Judge-cum-Chief Judicial Magistrate, Coimbatore are modified as follows:-

(1) That the defendants, their men, etc., are restrained by means of permanent injunction from interfering with the plaintiff's possession and enjoyment of the suit property excluding the pathway on the western side in the suit property as admitted by the plaintiff in paragraph No.5 of the plaint and ;

(2) that considering the facts and circumstances of the case and also the relationship between the parties, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

gv

To

1. The 1st Additional District Judge cum Chief Judicial Magistrate,
Coimbatore.

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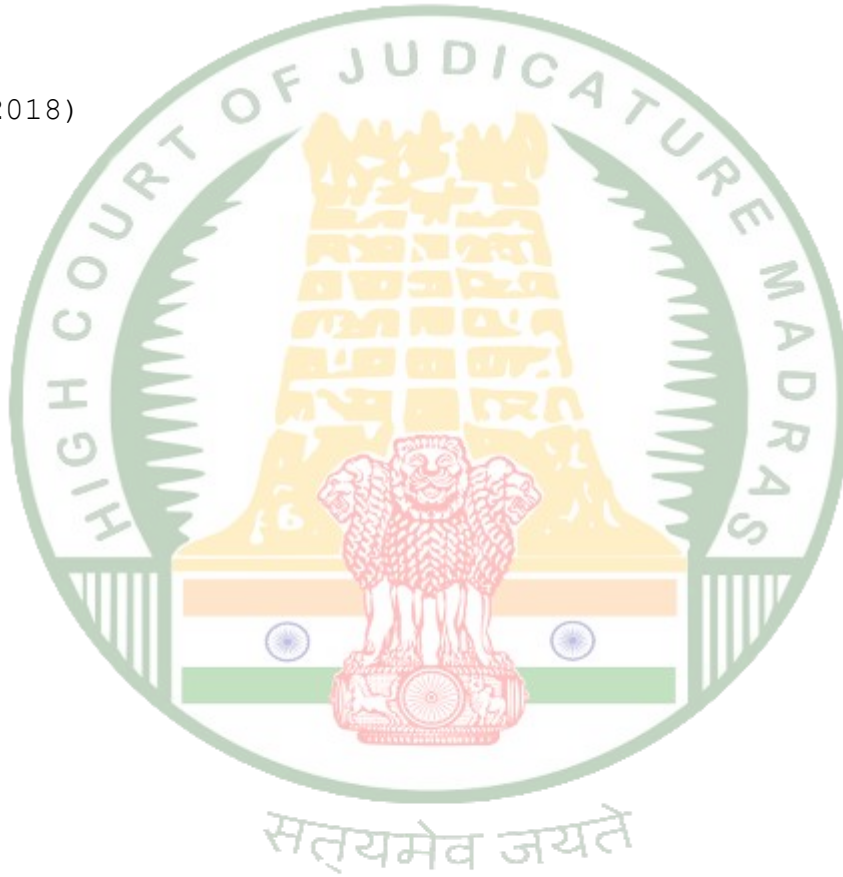
2.The III Additional District Munsif,
Coimbatore.

3. The Section Officer,
V.R.Section,
High Court, Madras.

+1 CC to Mr.A.S. Vijayaraghavan, advocate sr 32454.

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