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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 29.06.2018

PRONOUNCED ON : 06.08.2018

CORAM

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM

S.A.No.421 of 2000

and

CMP.No.7435 of 2000

1.R. Sundaram (died)

2.Padma

3.Rajkumar

4.Varadarajan

(Appellants 2 to 4 are brought on record as LR's of the deceased sole appellant vide order of court dated 12.10.2006 made in CMP.No.14230/2002)

... Appellants/plaintiffs

Vs.

1.Malli Chettiar (died)

2.M.Saroja (deceased)

3.Maheswari

4.M.Jagadeesan

RR3 and RR4 are brought on record as LR's of the deceased, first respondent vide order of Court dt 27.02.2009 made in CMP.No.1538/2008 in S.A.No.421/2000.

R3 & R4 are recorded as LR's of the deceased R2 vide order of Court dated 29.6.2018 made in SA.421/2000

... Respondents/defendants

PRAYER:Second Appeal filed under Section 100 of C.P.C, against the judgment and decree of the Principal District Court of Salem dated 29.04.1999 in A.S.No.70 of 1999 confirming the judgment and decree of the Subordinate Judge's Court of Namakkal dated 24.12.1998 in O.S.No.515 of 1994.

For Appellants : Mr.M.S.Krishnan,
Senior Counsel
for M/s.Sarvabhauman Associates

For Respondent Nos.3 & 4 : Mr. D. Shivakumaran



JUDGMENT

This Second Appeal has been filed by the plaintiff against the Judgment and Decree passed by the Principal District Judge, Salem in A.S.No.70 of 1999 dated 29.04.1999 confirming the judgment and decree passed by the Sub-Judge, Namakkal, in O.S.No.515 of 1994 dated 24.12.1998.

2. The first appellant herein has filed a suit in O.S.No.515 of 1994 on the file of the Sub-Judge, Namakkal as indigent person to declare that he is the absolute owner of the suit 'A' Schedule property and for mandatory injunction directing the defendants to remove the superstructures put up in the suit 'A' schedule property and for delivery of possession of the suit 'A' schedule property. The learned Sub-Judge, Namakkal, by the judgment and decree dated 24.12.1998 has dismissed the said suit with costs and also directed the plaintiff to pay the court fees to the Government.

3. Aggrieved by the same, the plaintiff has filed an appeal in A.S.No.70 of 1999 on the file of the Principal District Judge, Salem as indigent person. The learned Principal District Judge, Salem, by the judgment and decree dated 29.04.1999 has dismissed the said appeal with costs confirming the judgment and decree passed by the trial court. He also directed the plaintiff to pay the court fees to the Government. Feeling aggrieved, the plaintiff has preferred the present second appeal.

4. This second appeal also has been filed by the first appellant as indigent person. For the sake of convenience, the parties are referred to as described before the trial court.

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

The suit 'A' schedule property along with some other property was purchased by late Ramasamy Naidu S/o. Govindasamy Naidu under a registered sale deed dated 26.06.1935. The said Ramasamy Naidu sold certain portions of the property covered under the said sale deed retaining the suit 'A' schedule property. The plaintiff is the only son of the said Ramasamy Naidu and as such, he is entitled to the suit 'A' schedule property absolutely. The plaintiff's father Ramasamy Naidu had purchased 76 cents in S.Nos.477/1B and 442/B. But in Survey records, it is shown as only 55 cents of land and 21 cents of land have been left out. Even prior to the survey proceedings, adjacent to the suit 'A' schedule property, there existed a Cinema Theatre by name Saraswathy Theatre, later on changed to the name of New Palace Theatre. It seems that within the compound wall of the Cinema Theatre, the suit 'A' schedule property was included. The said portion seems to have been brought under as part of S.Nos.442/4 and 477/10, both surveyed in the name of the land



owner who leased out the land for construction of the Cinema Theatre. Survey Nos.477/1B and 442/B which were in the name of the plaintiff's father, later on brought under different survey fields viz., 477/1B as 477/9 and 442/B as 442/3. The extent of S.No.477/1B was 36 cents and S.No.442/B was 19 cents. So, it is clear that the lessee of the land over which the Cinema Theatre was constructed had encroached 21 cents of the land of the plaintiff's father and constructed a compound wall. The plaintiff's father finding long after that there has been shortfall in his land and that the shortage in extent was due to the encroachment by the lessee of the Theatre appears to have contemplated legal action. Later, he postponed it on the ground that the lessee being in possession for more than 12 years could not be dispossessed and he has to wait till the lessee is dispossessed. So no legal action has been initiated for recovery of possession by the plaintiff's father. Now the plaintiff's father died. In July 1993, the defendants through their Power of Attorney Agent, has taken possession of the Theater premises. The defendants cannot claim any right to the land tacked on by the lessee from the holding of the plaintiff's father. They are liable to surrender the suit 'A' schedule property. Hence, the plaintiff has sent a lawyer's notice dated 02.08.1993 to the defendants Power of Attorney agent. Though he has received the said notice on 03.08.1993, so far, he has not chosen to surrender the suit 'A' schedule property nor replied. Hence, the plaintiff was constrained to file the above suit for the aforesaid reliefs.

6. The averments made in the written statement and additional written statement are, in brief, as follows:

The allegation that the plaintiff's father Ramasamy Naidu had purchased the suit 'A' schedule property along with other properties are all false. It is also false to state that after the death of the said Ramasamy Naidu, the plaintiff became the absolute owner of the suit 'A' schedule property. If patta was not granted for 21 cents, the said Ramasamy Naidu should have taken steps for obtaining patta. The allegation that the said 21 cents have been encroached by the lessee of the defendants and put up a compound wall are all false. The said Ramasamy Naidu was aware of the construction of the compound wall. For more than 50 years, the defendants have been in possession and enjoyment of the suit 'A' schedule property as of their own and hence they have perfected the title to the suit property by adverse possession. The plaintiff and his father had partitioned their properties and in the said partition, the property situated on the west of the Cinema Theatre fallen to the share of the plaintiff's father and on further west, the plaintiff's share was allotted. The plaintiff's father had sold his property to one Rajagopal and others and in the said sale deed, it is specifically stated that the property which is situated on the west of the Cinema Theatre compound has been sold. Contrary to the same, the plaintiff's cannot claim any property on the east of the compound wall. Moreover, in the said partition, the subject matter of the present suit was not



included. If the suit 'A' schedule property belongs to their family, plaintiff and his father would have shown this property also in the partition suit. The present vexatious suit has been filed with a view to extract money from the defendants. Therefore, the defendants prayed to dismiss the above suit.

7. Based on the aforesaid pleadings, the learned Sub-Judge has framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1 and he has examined two more witnesses as PW2 and PW3. He has marked Exs.A1 to A20 as exhibits. On the side of the defendants, the Power of Attorney agent of the defendants was examined as DW1 and Exs.B1 to B10 were marked as exhibits. The reports and the plans filed by the Advocate Commissioner have been marked as Exs.C1 to C4.

8. The learned Sub-Judge, after considering the materials placed before him found that the plaintiff failed to prove that he is the absolute owner of the suit 'A' schedule property. Accordingly, he dismissed the suit with costs. He also directed the plaintiff to pay court fees to the Government. Aggrieved by the same, the plaintiff has filed an appeal in A.S.No.70 of 1999 on the file of the Principal District Judge, Salem. The learned Principal District Judge has dismissed the said appeal with costs. He also directed the plaintiff to pay the court fees to the Government. As against the same, the plaintiff has filed the present second appeal.

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

"(i) Whether the lower Appellate Court is correct in law in misreading Ex.A-1, the Title Deed of the appellant of the year 1935 and in discarding the Survey & Settlement Register and Revenue Records, marked as Exs.A-15 to A-17 which would clearly confirm the title of the appellant?

(ii) Whether the Lower Appellate Court is correct in law in holding that Ex.B-4 Lease Deed which did not contain the suit survey number and to which the appellant is not a party, would confer title upon the respondents?

(iii) Whether the Lower Appellate Court is correct in law in holding that the boundary recital in Ex.B-2 would take away the title of the appellant as per Ex.A-1 Sale Deed of the year 1935?

(iv) Whether the Lower Appellate Court, being the final court of fact, is justified in discarding the material evidence marked as Exs.A-2, A-4 to A-20?



(v) Whether the Courts below are correct in not drawing an adverse inference against the respondents' for their failure to send a reply to Ex.A-2 Suit Notice?"

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10. During pendency of the second appeal, the sole appellant died and hence his legal representatives have been impleaded as appellants 2 to 4. The respondents 1 and 2 also died and their legal representatives have been impleaded as respondents 3 and 4.

11. Heard Mr.M.S.Krishnan, learned Senior Counsel for the appellants appearing for M/s.Sarvabhauman Associates and Mr.D.Sivakumaran, learned counsel for the respondents 3 and 4.

12. Question Nos.1 to 5:

Learned Senior counsel for the appellants has contended that the learned Principal District Judge having rightly rejected the case of the defendants that they prescribed title by adverse possession to the disputed 21 cents, erred in law holding that the plaintiff failed to establish his title. He further contended that the first appellate court has failed to consider that the plaintiff's father had purchased 0.86 cents under Ex.A1 sale deed in S.Nos.477/1, 477/2, 442 corresponding to new SR.No.442/4 and 444/10. He further contended that the courts below failed to draw adverse inference for not sending reply to Ex.A2 notice. He further contended that the courts below failed to consider that the plaintiff had established his title to the suit 'A' schedule property by producing Ex.A1 sale deed and also through the Commissioner's report and plan. He further contended that the courts below failed to consider that the defendants have not produced any documentary evidence to show that they got right over the suit 'A' schedule property. He further contended that the courts below erred in not drawing adverse inference against the defendants for their failure to send a reply to Ex.A2 suit notice. He further contended that the courts below have failed to consider that Ex.B4 Lease Deed would not confer any right to the defendants and therefore, he prayed to allow the second appeal and decree the suit as prayed for.

13. Learned counsel for the respondents 3 and 4, on the contrary, contended that as per the final decree passed in I.A.No.590 of 1979 in O.S.No.827 of 1979 on the file of the Sub-Judge, Namakkal dated 01.08.1980, the property situated on the west of the Cinema Theatre compound wall was allotted to the share of the plaintiff's father and the property situated on further west allotted to the share of the plaintiff. He further submitted that after passing of the said final decree, the plaintiff's father had sold his share to one Ranganayaki Ammal and Rajagopal under a registered sale deed dated 29.09.1980 and in the said sale deed, it is clearly stated that the property situated on the west of the Cinema Theatre



compound wall has been sold and as such, the plaintiff cannot claim any right over the property situated within the Cinema Theatre compound wall. He further contended that if the plaintiff's family had owned the suit 'A' schedule property, they would have shown the same in the partition suit itself. He further contended that PW1 himself has admitted in his chief-examination itself that the Cinema Theatre was constructed in the year 1945 and he admitted in his cross-examination that the suit property was in possession of his father till the year 1945 and thereafter, it was encroached by one Perianna Pillai and the said Perianna Pillai was the lessee of the defendants and hence, it has to be presumed that the defendants have perfected title to the suit property by adverse possession. He further contended that the trial court after considering the materials placed before it found that the plaintiff failed to prove his title over the suit property and the same has been confirmed by the first appellate court and in the said concurrent findings, this court cannot interfere and therefore, he prayed to dismiss the second appeal.

14. The case of the plaintiff is that the father Ramasamy Naidu had purchased the suit 'A' schedule property and other properties under a registered sale deed dated 26.06.1935. He has produced the said sale deed and marked as Ex.A1. A perusal of the said sale deed would show that the said Ramasamy Nadu had purchased properties in SR.Nos.442/4 and 477/10 as three items. The first item is situated on the eastern side, the second and third items are situated on the west of the Item No.1. On the east of the Item No.1, the defendants' property is situated. According to the plaintiff, the defendants have leased out their lands to one Periyanna Pillai and the said Periyanna Pillai had constructed a Cinema Theatre in the year 1945 and also constructed a compound wall encroaching his land measuring about 21 cents. In Ex.A1, the extent of each items not mentioned either in cents or in square feet. Measurements were given in feet for all four sides of each item. If it is converted into cents, the Item No.1 alone will have more than 21 cents. So if at all any encroachment was made by the said Periyanna Pillai on behalf of the defendants, that could be only on the Item No.1 of the property mentioned in Ex.A1 sale deed. But the plaintiff, instead of mentioning the Item No.1 alone, he has mentioned Item Nos.2 and 3 also in the plaint schedule. After describing all the three Items, he has stated that out of three Items, the defendants have encroached 21 cents. The plaintiff has not described the suit property properly. The description of the property given in the plaint is a misleading one.

15. The plaintiff while examining himself as PW1 has deposed that the defendants have leased out their property to one Periyanna Pillai and the said Periyanna Pillai had constructed a Cinema Theatre in the year 1945. He further stated in his cross examination that the suit property was in



possession of his father till 1945 and thereafter the lessee of the defendants viz., Periyanna Pillai had encroached the suit property. So, it appears that the plaintiff had admitted in his evidence that he had knowledge that the suit property was encroached by the lessee of the defendants even in the year 1945 and constructed a compound wall. The evidence of PW1 also shows that his father died in the year 1983. But, his father has not taken any steps through court to remove the encroachment till his life time. The plaintiff also has not filed any suit for recovery of possession till 1993. Only in the year 1993, he has filed the above suit for declaration and delivery of possession. So it appears that only after 58 years, the plaintiff has filed the above suit. Since the defendants have been in possession and enjoyment of the property which is under dispute for about 58 years openly, continuously and with the knowledge of the plaintiff and his father, it has to be presumed that the defendants have perfected title over the suit property.

16. The plaintiff has stated in his plaint as to why he has not taken any legal action for recovery of possession. According to him, since there was a dispute between the defendants and their lessee, neither his father nor himself have not taken any legal action for recovery of possession. The said reason has not been accepted by the courts below. The existence of the dispute between the defendants and their lessee would not prevent the plaintiff or his father for filing suit for recovery of possession. Therefore, the reason stated by the plaintiff for not taking steps immediately for recovery of possession cannot be accepted.

17. It is seen from Ex.B1 that the plaintiff had filed a suit in O.S.No.141 of 1978 on the file of the Sub-Judge, Salem, against his father and others for partition and the said suit has been transferred to Sub-court Namakkal and numbered as O.S.No.827 of 1979 and in that suit, a preliminary decree was passed on 08.02.1979. Thereafter, the plaintiff had filed an application in I.A.No.590 of 1979 to pass a final decree in terms of the preliminary decree and during pendency of the said application, the plaintiff and his father compromised the matter and filed a joint compromise memo. In pursuance of the said compromise memo, a final decree was passed in respect of 30 cents only. In the said final decree, western portion was allotted to the plaintiff and eastern portion was allotted to the plaintiff's father. In the said suit, the plaintiff had not included the subject matter of the present suit. If really plaintiff's family had any right over the suit property, the plaintiff would have included these properties also in O.S.No.827 of 1979 on the file of the Sub-Court, Namakkal.

18. It is seen from Ex.B2 (registration copy of the sale deed dated 29.09.1980) that the plaintiff's father, Ramasamy Naidu had sold his share which was allotted to him under Ex.B1



final decree to one Ranaganayaki Ammal and Rajagopal. In the said sale deed, it is clearly stated that he had sold the property which is situated on the west of the Cinema Theatre compound. If really the said Ramasamy Naidu had any property on the east of the property which was sold under Ex.B2, he would have shown the eastern boundary as his remaining property. The mentioning of the Cinema Theatre compound as the boundaries on the east itself would show that there was no property belonging to the plaintiff's family on the east of the property which was sold under Ex.B2.

19. The oral evidence of the PW1 coupled with Exs.B1 and B2 would show that even from the year 1945, the defendants have encroached the suit property and enjoyed it as their own property. The plaintiff and his father never bothered about the said property till the issuance of the Ex.A2 notice dated 02.08.1993. After 58 years for the first time, only through Ex.A2 notice, the plaintiff claimed right over the suit property. As per Article 64 of the Limitation Act, the suit for possession of immovable property based on title should have been filed within twelve years from the date when the possession of the defendant become adverse to the plaintiff. In this case, as already pointed out that from the year 1945, the defendants have been in possession of the suit property openly and continuously and adverse to the plaintiff.

20. At this juncture, it would be relevant to refer Section 27 of the Limitation Act, 1963 which reads thus:

"27. Extinguishment of right to property:- At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."

21. A plain reading of the aforesaid provision would show that after expiry of the period prescribed in the Limitation Act to any person, for instituting a suit for possession of any property, his right to the said property shall be extinguished. In this case, even as per the own admission of the plaintiff, the defendants are in possession of the suit property from the year 1945 openly and continuously and with the knowledge of the plaintiff and his father and hence, the plaintiff has lost the right over the suit property.

22. In so far as the contention of the learned Senior Counsel that the courts below erred in not drawing adverse inference against the defendants for not sending reply to Ex.A2 notice is concerned, it would be relevant to refer the decision in C.T.Devaraja in re, 1955 MWN 485 wherein this court observed as follows:

"The contention, that no reply was given by Adityan to the lawyer's notice and that this would prove admission of the fact of instruction and defamation is too absurd to be discussed.



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Supposing an unconnected woman claims to be the wife of a man and sends him a notice claiming maintenance, or an unconnected man claims to be a son and sends him a notice claiming partition, the law in the Republic of India will not oblige the man who receives such an absurd and vexatious notice to reply to it, and will not conclude from the mere fact of non-reply that the person sending the notice is the wife or the son."

From the aforesaid decision, it is clear that merely because no reply was sent to the Advocate's notice, it cannot be presumed that the facts mentioned in the said notice were admitted by the opposite party.

23. In Kamma Otukunta Ram Naidu Vs. Chereddy Pedda Subba Reddy and others, AIR 2003 SC 3342, the Hon'ble Supreme Court held that all the pros and cons must be examined before drawing an adverse inference against a party. In that case, the issue had been, as to whether two persons had been travelling together in the vehicle and presumption had been drawn only on the basis that the bus tickets of both the persons were not produced. The Hon'ble Apex Court held that presumption could not have been drawn if other larger evidence was shown to the contrary (See also: Mohinder Kaun Vs. Kusam Anand, (2004) 4 sec 214; and The Takhaji Hiraji Vs. Thakore Kubersing Chamansing & Others, AIR 2001 SC 2328)

24. In this case, as already stated that the plaintiff himself has admitted in his evidence that the defendants have been in possession of the suit property from the year 1945. Moreover, in the partition suit filed by the plaintiff, he has not included the subject matter of this suit. Under the said circumstances, the contention of the learned Senior Counsel for the appellants that the courts below erred in not drawing adverse inference against the defendants for not sending reply to Ex.A2 notice cannot be accepted.

25. The learned Senior counsel for the appellant has also contended that apart from the lease deed, the plaintiffs have not produced any other documents to establish their title over the suit property. In the written statement, the defendants have pleaded that they have perfected title over the suit property by adverse possession. Under the said circumstances, the court cannot expect that the defendants would have any title deeds. As already pointed out that the plaintiff himself has admitted in his evidence that the defendants have encroached the suit property even in the year 1945 and till date, they are in possession of the same. It is well settled that admission made by the opposite party is the best evidence and therefore, this court is of the view that the courts below have rightly come to the conclusion that the plaintiff has failed to prove his case and in the said factual concurrent findings, this court cannot interfere. Accordingly,



the substantial questions of law are answered against the appellants/plaintiffs.

26. In the result, the second appeal is dismissed with costs. Consequently, connected miscellaneous petition is closed. Since this second appeal has been filed by the first appellant as indigent person, the appellants are directed to pay the court fees to the Government.

gv

Sd/-/-

Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

To

1. The Principal District Judge,
Salem.

2.The Subordinate Judge,
Namakkal.

+2cc to M/s.Sarvabhauman Associates, SR.NO.54191

+1cc to Mr.D.Sivakumar, Advocate SR.NO.54411

GSII(CO)

sm:20.11.2018

S.A.No.421 of 2000
and
CMP.No.7435 of 2000