

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :27.02.2018

PRONOUNCED ON:14.03.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.Nos.1650 and 1651 of 2003

S.A.No.1650 of 2003

Kalliappan Appellant/Defendant
in both appeals

Vs.

1.Marappa gounder (deceased)

2.Ramayee Ammal ... Respondents 1 & 2 /Plaintiffs 1 & 2
(in both appeals)

3.Jayamani

4.Senthil Kumar

5.Satish

6.Ponnu Samy

7.M.Lakshmi

[RR2 recorded as legal
representative of the deceased
first respondent and RR3 to R7
are brought on record as legal
representatives of the deceased
first respondent vide order of the
Court dated 18.08.2006 made in
C.M.P.Nos.8499 to 8504 of 2006]

... Respondents 3 to 7
in both appeals

Prayer in S.A.No.1650 of 2003:

Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree dated 25.11.2002 made in A.S.No.92 of 2003 on the file of Additional District and Sessions Court, Namakkal reversing the judgment and decree dated 24.12.1996 made in O.S.No.834 of 1994 on the file of Additional District Munsif Court, Namakkal.

Prayer in S.A.No.1651 of 2003:

Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree dated 18.11.2002 made in A.S.No.93 of 2002 on the file of Additional District and Sessions Court, Namakkal reversing the judgment and decree dated 24.12.1996 made in O.S.No.834 of 1994 on the file of Additional District Munsif Court, Namakkal.

For Appellant : Mr.Tranquebar Durai Vasu
in both appeals for M/s.S.Muthukumar

For RR2 to R7 : Mrs.Mythili Suresh
in both appeals for M/s.Sarvabhauman Associates

R1 :Died

C O M M O N J U D G M E N T

The second appeal Nos. 1650 and 1651 of 2003 are directed against the judgment and decree dated 25.11.2002 passed in A.S.Nos.92 and 93 of 2002 respectively on the file of the Additional District and Sessions Court, Namakkal, reversing/confirming the judgment and decree dated 24.12.1996 passed in O.S.No.834 of 1994 on the file of the Additional District Munsif Court, Namakkal.

2. The parties are referred to as per the rankings in the trial court.

3. Suit for declaration and permanent injunction.

4.The case of the plaintiffs in brief is that the the first plaintiff purchased a portion of the suit properties from the defendant's father Ammaya Gounder, by way of a sale deed dated 09.05.1958 and the second plaintiff purchased the other portion of the suit properties from Karuppaiya and others, by way of a registered sale deed dated 17.11.1957 and since then, it is only the plaintiffs, who are the husband and wife, enjoying the suit properties including the "ABCD" pathway, as depicted in the plaint plan and accordingly, the properties acquired by the plaintiffs are shown as " P1P2" in the plaint plan and the properties belonging to the defendants are shown as D1 and D2 and in recognition of the plaintiffs' possession and enjoyment of the suit properties, they had been granted patta by the Revenue authorities and the plaintiffs are using the "ABCD" pathway for having access to their suit properties from the village on the northern side and using the suit pathway right

from the days of their predecessors in interest and their predecessors in interest namely Karuppaiya and others had also been using the pathway "ABCD" for gaining access to the suit properties and the other properties and Karuppaiya and others thereafter had sold their other lands to the third parties and accordingly not used the suit pathway and thereby it is only the plaintiffs, who had been using the suit pathway "ABCD" as of right, without any objection from any quarters for more than the statutory period, openly and continuously and thereby, the plaintiffs have acquired absolute right over the suit pathway and the lands situated to the south of the suit properties known as Vellaikkal Punjai belonged to Karuppaiya and others and the lands situated to the east of the same belonged to the defendant and the said lands also are known as Vellaikal Punjai and the defendants are having access to reach the lands from the house directly and the defendant has no right, interest or necessity to use the suit pathway and accordingly, not entitled to obstruct the plaintiffs' use and enjoyment of the suit pathway and on account of the non-use of the suit pathway by the plaintiffs' predecessors in interest and the defendant for several years, their right, if any, over the same had abated and the BGP firm, who had acquired lands from the defendant had also fenced the pathway on the southern side to prevent others from using the pathway, while so, the defendant laying a false claim of right over the suit pathway, thereby interfered with the plaintiffs possession and enjoyment of the same and hence, according to the plaintiffs they had been necessitated to lay the suit for appropriate reliefs.

5.The case of the defendant in brief is that the suit laid by the plaintiffs is not maintainable either in law or on facts. The purchase of the suit properties excluding the suit pathway by the plaintiffs as narrated in the plaint, by way of the sale deeds dated 09.05.1958 and 17.11.1957 are true and it is false to state that the suit pathway "ABCD" belonged to Karuppaiya and others, they had granted the pathway right to the plaintiffs and thereafter, on account the of alienation of the other lands, they had stopped using the suit pathway and thereby, it is only the plaintiffs, who had been using the suit pathway as of their own for more than the statutory period openly and continuously and thereby acquired right and it is further false to state that the plaintiffs had been granted patta for the properties as described in the plaint schedule. The suit pathway has been used only as a pathway by the owners of lands called 'Vellaikal Punjai' and the owners of lands called 'Palamara Punjai' are not entitled to use the suit pathway and it is only the owners of the land 'Vellaikal Punjai', who had been using the suit pathway for more than 100 years for taking their men, sheep, cattle, cart etc., and enjoying the same, the defendant's father had also alienated the 'Vellaikal Punjai' lands belonging to him to other parties and in the said sale transactions as well as in

the other allied sale transactions, the reference about the suit pathway is mentioned and the plaintiffs have no right, possession and enjoyment of the suit pathway at any point of time and the same is also reflected in the plaintiffs' sale deeds and hence, the claim of the plaintiffs, they have prescribed title to the said pathway, on account of long, continuous enjoyment of the pathway, by way of adverse possession is false. The plaintiffs have obtained patta for more extent of lands than what they are entitled to and the same is not binding upon the defendant. It is only the owners and the subsequent purchasers of the 'Vellaikal Punjai' lands, who are entitled to use the suit pathway and hence the plaintiffs cannot be allowed to any claim of right over the suit pathway. Hence, the suit is liable to be dismissed.

6. In support of the plaintiffs' case, P.W.1 was examined. Exs.A1 to A4 were marked. On the side of the defendant, D.Ws.1 to 3 were examined. Exs.B1 to B7 were marked. Exs.C1 and C2 were also marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial court was pleased to decline the relief of declaration prayed for by the plaintiffs, as regards the suit pathway and granted the relief of declaration sought for by the plaintiffs as regards the other suit properties and holding that plaintiffs are using the suit pathway as well as the defendant is also using the suit pathway and accordingly granted the relief of permanent injunction sought for by the plaintiffs in respect of the suit properties. Aggrieved over the judgment and decree of the trial court, it is found that both the plaintiffs as well as the defendant preferred A.S.No.92 of 2002 and A.S.No.93 of 2002 respectively. The first appellate court, on an appreciation of the materials placed on record, was pleased to set aside the judgment and decree of the trial court as regards the declinement of the reliefs sought for by the plaintiffs and the conferment of the right of the defendant and thereby allowed the first appeal preferred by the plaintiffs and dismissed the first appeal preferred by the defendant and resultantly decreed the suit as prayed for in entirety in favour of the plaintiffs as prayed for. Aggrieved over the same, the present second appeals have been laid.

8. At the time of admission of the second appeals the following substantial questions of law were formulated for consideration.

"i. Whether the findings of the lower appellate court in respect of suit pathway based on Ex.A2 is correct without considering the documents Ex.B2 to B7?

ii. Whether the findings of the lower appellate court is correct in respect of suit pathway is concerned by just referring to the boundaries of Ex.A2 and B2?

iii. Whether the judgment of the lower appellate court is correct while holding that the plaintiffs have right of adverse possession when it reversed the judgment of the trial court?

iv. Whether the lower appellate court was right in decreeing the suit in toto when such right of adverse possession of plaintiffs could not have been acquired prior to execution of Ex.B5 and B7?

9. The plaintiffs are the husband and wife respectively. It is not in dispute that the first plaintiff had acquired a portion of the suit properties measuring one acre from the defendant's father, by way of a sale deed dated 09.05.1958 and it is also not in dispute that the second plaintiff had purchased an extent of 1.37 acres of land from Karuppaiya and others, by way of a sale deed dated 17.11.1957 and it is found that the lands acquired by the plaintiffs, as above stated are depicted as P1 and P2 in the plaint plan. The properties belonging to the defendant are depicted as D1 and D2 in the plaint plan. Materials placed on record would go to show that the above said lands of the plaintiffs and the defendant as shown in the plaint plan are known as 'Palamara punjai' lands and it is further found that the properties situated to the south eastern side are known as "Alinjimarai punjai" lands and it is further found that the lands situated to the south of the plaintiffs and defendant's properties as well as the lands situated to the west of the same are known as "Vellaikal punjai" lands and as regards the above position, there is no dispute. Now, according to the plaintiffs in recognition of the possession and enjoyment of the properties acquired by them, by way of the above said sale deeds marked as Exs.A1 and A2, they had been granted pattas, which have come to be marked as Exs.A3 and A4. However, as rightly argued by the defendant's counsel, Exs.A4 patta is found to have been granted for a larger extent than what had been acquired, by the second plaintiff by way of Ex.A2. It is thus found that the patta marked as Ex.A4, it is not corresponding to the property acquired by the second plaintiff by way of Ex.A2 and in such view of the matter, it is thus found that when the plaintiffs seek the reliefs in the plaint based upon the measurements in the patta documents particularly Ex.A4 and not by way of the extent actually purchased by them under Exs.A1 and A2, the plaintiffs cannot be

held to be having title to the plaint schedule properties as such based upon the patta documents. Patta documents cannot be considered as equivalent to the documents of title.

10.The issue between the parties is only regards the "ABCD" pathway as depicted in the plaint plan, in fact, the dispute is more concerning BCD pathway. According to the plaintiffs, their vendors namely Karuppaiya and others had been using the suit path way and after the sale of the plaint schedule properties and the sale of the other properties belonging to them, Karuppaiya and others stopped using the suit pathway or did not have the necessity to use the suit pathway thereafter and thus, according to the plaintiffs, it is only they, who had been using the pathway as of right over a long period of time, openly and continuously beyond the statutory period and thereby acquired title to the suit pathway as such, by way of adverse possession. The plaintiffs are thus claiming the relief of declaration as regards the suit pathway only by way of adverse possession. The plaintiffs have not claimed right or title over the suit pathway, by way of Exs.A1 and A2 and the plaintiffs cannot also lay any claim of right or title over the suit pathway by way of Exs.A1 and A2, inasmuch as, no such right had been conferred on them, in respect of the suit path way under the said documents. On the other hand, it is found that as per the recitals found in Ex.A1, the first plaintiff had acquired property only to the west and south of the above said suit pathway and it is thus found that by way of Ex.A1, no right had been granted to the first plaintiff, in respect of the suit pathway. No doubt, there is a reference about the mamool pathway for the use of the property acquired by the first plaintiff, by way of Ex.A1. But, the reference about the manual pathway is found to be not related to the suit pathway as such, when in particular, the suit pathway has been shown as the eastern and northern boundaries of the property acquired by the first plaintiff under the said document. Similarly, in Ex.A2, the second plaintiff had acquired property only located to the east and south of the suit pathway and it is thus found that under the said document, she had been not conferred any right over the suit pathway and the reference about the mamool pathway in the sale deed is found to be not relating to the suit pathway, particularly, when the lands conveyed thereunder is shown to be located only lying to the east and south of the suit pathway. It is found that the plaintiffs have not been granted any right as such, over the suit pathway, by way of Exs.A1 and A2, the same has also fairly admitted by plaintiffs' counsel.

11.Accordingly, it is seen that the plaintiffs in the plaint has claimed right over the suit pathway only by way of adverse title contending that the same has been in their possession and enjoyment, openly and continuously beyond the statutory period and thereby they had prescribed title to the same, by way of

adverse possession. The plaintiffs having taken the plea of adverse possession and seeking the relief of declaration, impliedly thereby, they had accepted, the title of the defendant, in respect of the suit pathway. It is only as against the defendant, the plaintiffs had laid the suit and the plaintiffs had laid the claim over the suit pathway only on the plea of adverse possession.

12.The defendant has contested the claim of the plaintiffs' title as pleaded in the plaint and according to the defendant, the plaintiffs have no right or title over the said pathway in any manner and never been in possession and enjoyment of the same and the plaintiffs have other access to their properties and according to the defendant, it is only the land owners of 'Vellaikal punjai' lands, who are entitled to use the suit pathway and no others and hence it is contended that the suit laid by the plaintiffs seeking the relief of declaration as regards the suit pathway and the other incidental reliefs are not maintainable and liable to be dismissed.

13.In the light of the above defence version, the plaintiffs having laid the declarative suit based on the plea of adverse possession, in respect of the suit pathway, should establish that they have prescribed title to the suit path way, by way of adverse title, by placing acceptable and reliable evidence. On the other hand, other than two patta documents marked as Exs.A3 and A4 and the sale deeds marked as Exs.A1 and A2, nothing has been placed on record by the plaintiffs to establish that they have acquired right over the suit pathway, on account of long and continuous enjoyment beyond the statutory period and thereby, by way of prescription. As above seen, the plaintiffs have not been granted any right over the suit pathway, by way of Exs.A1 and A2. As further seen, the patta document marked as Ex.A4 does not correlate to the property acquired by the plaintiffs, by way of Ex.A2. Ex.A4 patta reflects that the second plaintiff is owning more extent of lands than what she had acquired by way of Ex.A2. It is thus found that Ex.A4 is not reflecting the true state of affairs and particularly when the same is being challenged by the defendant, it is for the plaintiffs to establish that Ex.A4 patta has come to be issued in favour of the plaintiffs only based on the proper appreciation of the title deeds of the plaintiffs, their possession and enjoyment of the subject matter involved in the suit. However, to buttress their above said claim, other than the first plaintiff, no independent witness has been examined. No one from the revenue department has been examined. In such view of the matter, merely from Ex.A4 not being a document of title, we cannot safely conclude that the plaintiff owns lands in the suit survey number 119/3 measuring an extent of 0.58.5 hectares of land. It is thus resultantly found that the description of the suit properties has not been correctly given

in the plaint, as regards the property comprised in suit survey number 119/3. The boundaries of the suit properties are not mentioned. The burden of proof is resting on the plaintiff to establish that they have prescribed title to the suit pathway, by way of adverse possession and when the patta documents marked as Exs.A3 and A4 do not in any manner advance their case, no independent witness has been examined by the plaintiffs, it is thus found that merely from the ipse dixit evidence of P.W.1 and the documents marked as Exs.A1 to A4 as above discussed, we cannot conclude that the plaintiffs have prescribed title to the suit pathway in particular, by way of adverse possession. It is thus found that the plaintiffs have miserably failed to establish their use and enjoyment of the suit pathway openly, continuously, beyond the statutory period to the knowledge of others, including the defendant by exercising animus attitude and thereby prescribed title to the same, by way of adverse possession. It is thus found that the first appellate court has erred in upholding the claim of the plaintiffs as regards the suit pathway. Similarly, the determination of the first appellate court that the plaintiffs had acquired right over the suit pathway based on Exs.A1 and A2 is found to be erroneous as no such right had been conferred on the plaintiffs by way of Exs.A1 and A2 and the plaintiffs have also failed to establish that they had prescribed title to the suit pathway, by way of adverse possession.

14.Only on the sole basis of the plea of adverse possession, the plaintiffs have sought the relief of declaration as regards the suit pathway. In such circumstances, it has not been explained as to how the suit laid by the plaintiffs is maintainable legally. In the decision reported in 2014 (1) SCC 669 [Gurdwara Sahib Vs. Gram Panchayat Village Sirthala and another], the apex court had held that even assuming for the sake of arguments that the plaintiffs are found to be in or established their adverse possession of the subject matter, they cannot seek a declaration to that effect that such adverse possession has matured into ownership and further held that only if, proceedings are filed against the plaintiffs, by arraying them as defendants, they can use their plea of adverse possession as a shield/defence. In other words, it is found that the plea of adverse possession can only to be used as shield not as a sword. Accordingly, the apex court has held that the suit laid by the party claiming the relief of declaration, on the basis of adverse possession is not maintainable. The principles of law enunciated by the apex court in the above decisions squarely applies to the present case and accordingly, it is seen that the plaintiffs suit seeking the relief of declaration, as regards the suit pathway, on the plea of adverse possession is found to be not maintainable.

15. However, it is contended by the plaintiffs' counsel that this Court in the decision reported in 2017 (4) MLJ 230 [Arulmighu Sadayappasamy Temple rep by its Hereditary Trustee Sadayappa Gounder (deceased), Thandampalayam Kollankkoil village, Erode Taluk and others Vs. State of Tamilnadu rep by the District Collector, Erode District] has expressed an opinion that the above said decision of the apex court reported in 2014 (1) SCC 669 [Gurdwara Sahib Vs. Gram Panchayat Village Sirthala and another] has been rendered only by a two Judges Bench of the Supreme Court and the three Judges Bench of the Supreme Court in decision reported in 1967 (1) MLJ 154 [Sarangadeva Periya Matam and another Vs Ramaswami Gounder (dead) by legal representatives] has taken a different drift qua adverse possession pleaded by the plaintiff. Accordingly, further opined that the above said decision of the Supreme Court rendered in 1967 (1) MLJ 154 [Sarangadeva Periya Matam and another Vs Ramaswami Gounder (dead) by legal representatives] was not brought to the notice of the Supreme Court, while disposing of the case concerned in the decision reported in 2014 (1) SCC 669 [Gurdwara Sahib Vs. Gram Panchat Village Sirthala and another]. Based on the above said opinion of the learned judge in the above said decision and relying upon the decision of the apex court reported in 1967 (1) MLJ P.No.154 [Sarangadeva Periya Matam and another Vs Ramaswami Gounder (dead) by legal representatives], she contended that in the decision, the apex court had upheld the relief of declaration of title sought for by the plaintiff, based on the plea of adverse possession and thereby contended that the decision rendered by the three Judges Bench of the Supreme Court should prevail.

16. On a perusal of the authority relied upon by the plaintiffs' counsel reported in 1967 (1) MLJ 154 [Sarangadeva Periya Matam and another Vs Ramaswami Gounder (dead) by legal representatives] it is found that the maintainability of the declarative suit at the instance of the plaintiff therein on the plea of adverse possession was not raised in specific and accordingly the Supreme Court had no occasion to consider the maintainability of the suit in the said decision and in the said decision, the Supreme Court, on affirming the decision of High Court, Madras confirming the judgment and decree of the trial court, upheld the relief of declaration and possession sought for by the plaintiff. No doubt, in the said case, the plaintiffs had raised the plea of adverse possession for seeking the reliefs claimed. However, in specific, as the maintainability of such a suit has not been raised, it is found that the Supreme Court was not necessitated to go into the question of the maintainability of the suit on that footing and accordingly, in my humble opinion, it is found that the said decision cannot be held as the authority for holding that the

plaintiff could maintain the suit for declaration of title to a property on the sole plea of adverse possession. As rightly argued, it is found that there are some judgments of the Supreme Court wherein it has affirmed the declaratory relief granted to the plaintiff/squatter by the Courts below or not doubted the maintainability of a declarative suit by a squatter as plaintiff as in the decision reported in 1967 (1) MLJ 154 [Sarangadeva Periya Matam and another Vs Ramaswami Gounder (dead) by legal representatives] and in such view of the matter, it cannot be said that by way of the above said decision, the Supreme Court had upheld the position of law that the suit laid by a squatter for declaration of title on the plea of adverse possession is maintainable. Per contra, in the decision reported in 2014 (1) SCC 669 [Gurdwara Sahib Vs. Gram Panchayat Village Sirthala and another], the specific question was put in issue in the said case as to the maintainability of the suit for declaration on the basis of adverse possession and accordingly in the said decision, the apex court had held that such suits based on the plea of adverse possession is not maintainable as the plea of adverse possession could only to be raised as a shield/defence and not as a sword. In such view of the matter, it is found that in the light of the decision of the Apex court reported in 2014 (1) SCC 669 [Gurdwara Sahib Vs. Gram Panchayat Village Sirthala and another], the present suit laid by the plaintiffs seeking declaration of title in respect of the suit pathway solely based on the adverse possession is found to be not legally sustainable. In any event, as above discussed, the plaintiffs have also miserably failed to establish their plea of adverse possession as regards the suit pathway and on that score also, it is seen that the plaintiffs are not entitled to obtain the relief of declaration and other consequential reliefs as regards the suit pathway.

17. Materials placed on record would go to show that it is only the land owners of "Vellaikal punjai" lands, who had been using the suit pathway and the same could be inferred or noted from the documents projected by the defendant marked as Exs.B1 to B7 and on perusal of the above said documents coupled with the evidence tendered by D.Ws.1 to 3 in the correct perceptive, it is found that there is a clear mention about the conferment of the right of usage over the suit pathway under the above said sale transactions and it is found that it is only the defendant and the other owners of Vellaikal punjai lands and the subsequent purchasers of the same, who would be entitled to use the suit pathway and not the other land owners, such as the plaintiffs.

18. In the light of the above position, the determination of the trial court that the plaintiffs are also using the suit pathway and entitled to 0.58.5 hectares of land

in S.No.199/3 is found to be not sustainable. Similarly, the determination of the first appellate court that the plaintiffs have acquired title to the suit pathway, on account of their long and continuous enjoyment, by way of adverse possession and thereby entitled to the relief of declaration and other reliefs pertaining thereto are found to be not sustainable. It is found that the findings of the first appellate court in respect of the suit pathway ignoring the documents marked as Exs.B2 to B7 and basing only upon Ex.A2 in the wrong perceptive and failing to appreciate the boundary recitals found in Exs.A1 and A2 as well as the documents projected by the defendant, it is found that the first appellate court has erred in holding that the plaintiffs have prescribed title to the suit pathway by way of adverse possession and thereby erred in decreeing the suit as prayed for by the plaintiffs in toto. The substantial questions of law formulated in the second appeal are accordingly answered.

19.In conclusion, the judgment and decrees dated 25.11.2002 passed in A.S.No.92 and 93 of 2002 on the file of the Additional District and Sessions Court, Namakkal are set-aside and the judgment and decree dated 24.12.1996 made in O.S.No.834 of 1994 on the file of Additional District Munsif Court, Namakkal are confirmed, only as regards the actual extent of the properties acquired by the plaintiffs by way of Exs.A1 and A2 i.e., 1 acre in S.No.119/2 and 1.37 ½ acres in S.No.119/3 excluding the suit pathway. The plaintiffs' suit in respect of the suit pathway "ABCD" as depicted in the plaint plan is dismissed in toto. Accordingly, the second appeals are allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

s/d-

Assistant Registrar(CS-V)

True Copy

Sub-Assistant Registrar

mfa

To

1. The Additional District and Sessions Judge,
Namakkal.

2.The Additional District Munsif,
Namakkal.

+1 CC to M/s. Sarva Bhuman Associates sr 19390.

+2 CC to Mr.S. Muthukumar, Advocate sr 18988,18989.

S.A.Nos.1650 and 1651 of 2003

VD(CO)

SP(27/09/2018)