

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 25.07.2017

Judgment Pronounced on : 25.06.2018

CORAM:

THE HONOURABLE MR. JUSTICE S.BASKARAN

S.A.No.566 of 2006  
and CMP.No. 7036 of 2006

1.A.S.Rajendran  
2.Latha

... Appellants/Respondents/Plaintiffs

Vs.

M.Suseela

... Respondent/Appellant/Defendant

This second appeal has been filed under Section 100 of CPC, against the judgment and decree dated 10.01.2006 made in A.S.No.64 of 2005 passed by the Additional Subordinate Judge, Mayiladuthurai, reversing the Judgment and decree dated 10.01.2005 passed by the District Munsif, Mayiladuthurai in O.S.No.413 of 2003.

For Appellants : M/s.Kalaimani  
For Respondent : Mr.S.Soundar

JUDGMENT

This second appeal arises out of the judgment and decree dated 10.01.2006 made in A.S.No.64 of 2005 passed by the learned Additional Subordinate Judge, Mayiladuthurai, reversing the Judgment and decree dated 10.01.2005 passed by the learned District Munsif, Mayiladuthurai in O.S.No.413 of 2003.

2. Brief facts of the case is as follows:-

The plaintiffs are husband and wife. The defendant is the owner of the property situated to the east of the suit property. The property of the plaintiffs and the defendant originally belonged to one Radhakrishnan. He sold the portion of the property to the plaintiff on 13.12.1998, which is the suit property. The said Radhakrishnan sold the adjacent portion to the suit property on 15.11.2002 to the defendant. The plaintiff has purchased 16-1/2 cents, but, actually, he is in possession and enjoyment of the property to the extent of 15-1/2 cents

only. The defendant herein purchased 3 cents as per Ex.B1. But, he is in possession and enjoyment of 4 cents. According to the plaintiff the wall belongs to him exclusively and east of the wall, the plaintiff is having 5 feet space to reach the backyard. The defendant has arrived his thatched superstructure and put up new and projecting the roof over the plaintiff's wall. Even after the plaintiff issued legal notice to the defendant to remove the encroachment, the defendant neither reply nor complied with the request of the plaintiff. Hence, the plaintiff came forward with the suit for recovery of possession after removing superstructure in the suit property.

3. On the other hand, opposing the claim of the plaintiffs, the defendant contended that the description of the property in the plaint schedule and the rough sketch filed along with the plaint is not correct. The portion shown as ABCD in the plaint sketch is not available as vacant land. The total extent of suit survey number of the property is 31 cents. The suit property was in possession of Ramalingam, husband of the defendant on lease from one Ranganatha Iyer and later his son-in-law Radhakrishnan. In the said land, the husband of the defendant put up house during 1960 and ever since the defendant and her husband were living in that house only. After the demise of her husband Ramalingam in 1991, the defendant continuous to reside in the same house. The suit property fully belongs to Ranganatha Iyer and after him to his son Venketraman Iyer and thereafter to one Radhakrishnan. The said Radhakrishnan executed a sale deed on 15.11.2002 for 12-1/2 Kuzhi and while writing the sale deed, the extent was given as 3 cents and boundaries was also mentioned. However, the defendant is in possession and enjoyment of the 12-1/2 Kuzhis. During, 1998, the plaintiff purchased the abetting portion and put up a thatched house. The defendant states that in between the plaintiffs and defendant wall, there is a vacant space of 3 to 4 feet. The defendant denies the allegation that she put up new construction in 2003 and the roof of the building extents in the plaintiff land. The suit filed by the plaintiffs seeking declaration is not maintainable and the defendant seeks to dismissal of the suit.

4. After contest, the trial Court decreed the suit in favour of the plaintiffs as prayed for. Aggrieved upon that the defendant preferred the first appeal before the lower appellate Court and after contest, the lower appellate Court partly allowed the appeal by modifying the decree of the trial Court that the plaintiff is entitled to recovery of possession only to the extent of vacant space abutting the defendants western wall and dismissed the suit with respect to the relief of future profits and other relief. Aggrieved upon that the plaintiff preferred the second appeal.

5.At the time of admission, the following substantial question of law is framed by this Court in this appeal:-

1) In the absence of any claim of adverse possession by the respondent, whether it is proper on the part of the lower appellate Court in granting the relief on that aspect?

6.The learned counsel appearing for the plaintiffs/appellants would submit that the only defence put forth by the defendant/respondent is that originally his father was in possession and enjoyment of the property and after that he is in possession and enjoyment of the property and he never altered the construction and used to change the thatched roof periodically. Thus, the defendant contended that there is no cause action for this suit. Further more, it is pointed out by the defendant that the boundary will prevail over the measurement. It is contended by the appellants/plaintiffs that these are the defence put forth by the defendant in her written statement., but, the lower appellate Court went to the extent of saying that the defendant is found in possession and enjoyment of the defendant's house for more than the statutory period and by law of prescription acquires the prescriptive title though the western wall of the defendant's house is found within the disputed area. However, except the defendant's western wall of the house, plaintiffs are entitled to recovery of possession. The above said findings of the lower appellate Court is unwarranted, since the defendant herself neither pleaded nor claimed. Hence, the second appeal has to be allowed.

7.Per contra, the learned counsel appearing for the defendant/respondent would submit that the findings of the lower appellate Court has no infirmity and based on the available evidence. Thus, the second appeal is devoid of merits and the same has to be dismissed.

8.I have heard the rival submissions and also perused the materials available on record.

9.On perusal of records, it is clear that the plaintiff's properties and the defendant's properties originally belonged to one Radhakrishnan. He sold 16-1/2 cents to the plaintiff on 13.12.1998 through Ex.A3 and three(3) cents through Ex.B1 to the defendant on 05.11.2002. Thus, the plaintiffs purchased the property. These facts are not disputed by both sides. The title of both parties is not disputed. The real dispute between the parties relating only to boundaries. After coming to know that he is in possession of lessee extract then what he

purchased, the plaintiff came forward with the suit for recovery of possession and mandatory injunction. The Trial Court appointed an Advocate Commissioner to survey the suit property with the help of surveyor and the suit properties were measured with the help of surveyor and Ex.C1 Advocate Commissioner report was filed stating that the defendant has encroached upon the portion of the plaintiff's property. The Surveyor report is filed as Ex.C3, the sketch is produced as Ex.C2 and Ex.C4. Hence, the trial Court decreed the suit as prayed for on the basis of the Advocate Commissioner's report and also annexed Ex.C.3 and Ex.C4 plan as part and parcel of the decree. However, the lower appellate Court accepted the oral evidence of the defendant and granted the relief to the defendant on the basis of his long possession. Finding out with the same, the learned counsel for the appellants/plaintiffs contended that the conclusion of the lower appellate Court is not correct and submitted the Apex Court verdict reported in 2012 (6) SCC 430 in A.SHANMUGAM Vs. ARIYA KSHATRIYA RAJAKULA VAMSATHU MADALAYA NANDHAVANA PARIPALANAI SANGAM, REP. BY ITS PRESIDENT AND OTHERS, wherein it is held as follows:-

"In this case, the property is admittedly owned by the respondent Society and the appellant, after his father's death, continued to serve the respondent as a watchman and was allowed to live in the premises. The appellant has also failed to prove adverse possession of the suit property. Only by obtaining the ration card and the house tax receipt, the appellant cannot strengthen his claim of adverse possession."

Thus the plaintiffs contended that in the absence of any pleadings either in the written statement or in the evidence of D.W.1 regarding the claim of Adverse Possession, the lower Court ought not to have granted any relief to the defendant.

10. In the above said case, the appellants claimed adverse possession against the Sangam, but the Apex Court does not recognize the possession of the appellant as adverse to the original owner, because, the watchman, caretaker, agent or servant hold the property of the principal only on behalf of the principal. The watchman, caretaker or servant who are employed to look after the property can never acquire any interests in the property, irrespective of his long possession. Thus, the plea of the appellants/plaintiffs in the above said case was negatived. It is contended that the above said case is applicable to the facts of this case, because in this case also, the defendant claimed as "1991-க்கு முன்னர் பகுதிதாரர் என்ற முறையிலும், அதன் பின்னர் 12-½ குழி நிலத்தைப் பொறுத்து உரிமையாளர் என்ற முறையிலும் அனுபவித்து வந்து அதனை உறுதி செய்யும் வகையில் 15.11.2002-ல் அன்று

ராதாகிருஸ்ணனிமிருந்து கிரையமும் பெற்று அனுபவித்து வருகிறார். Thus, it is clear that from the date of purchase, the defendant claiming possession as a purchaser and before that he was claiming as a "பகுதிதாரர்"; (lessee) The possession of the defendant and his father as a "பகுதிதாரர்;" only and the same is to be towards on possession on behalf of the land owner only as laid down by the Apex Court in the above said verdict. Thus, the earlier possession of the property by the defendant and his father will not cloth that with any right of adverse possession or prescriptive title. Hence, as per the above Apex Court verdict, the finding of the lower appellate Court is not sustainable, as it is not based upon any pleading or any oral and documentary evidence. The plaintiff claim title to the suit property on the basis of title deed and the purchaser of property by the plaintiff is not disputed. Thus, the trial Court considering the oral and documentary evidences on record decreed the suit as prayed for, which is just and proper. For the reasons stated above, the modification of the finding of the trial Court by the lower appellate Court is against settled position of law and the same is unsustainable. In view of the above discussions, the substantial question of law raised by the appellant is sustainable and the same is answered in favour of the plaintiffs/appellant. Therefore, this Court comes to the conclusion that the interference of this Court is warranted against the findings of the lower appellate Court. The point is answered accordingly.

11. In the result, the second appeal is allowed and the decree and judgment dated 10.01.2006 made in A.S.No.64 of 2005 passed by the learned Additional Subordinate Judge, Mayiladuthurai is set aside and the decree and judgment dated 10.01.2005 made in O.S.No.413 of 2013 passed by the learned District Munsif, Mayiladuthurai is hereby restored and confirmed. There is no order as to costs. Connected CMP is closed.

सत्यमेव जयते

Sd/-

Assistant Registrar (CS-VI)

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Sub Assistant Registrar

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To

1.The Subordinate Judge,  
Mayiladuthurai.

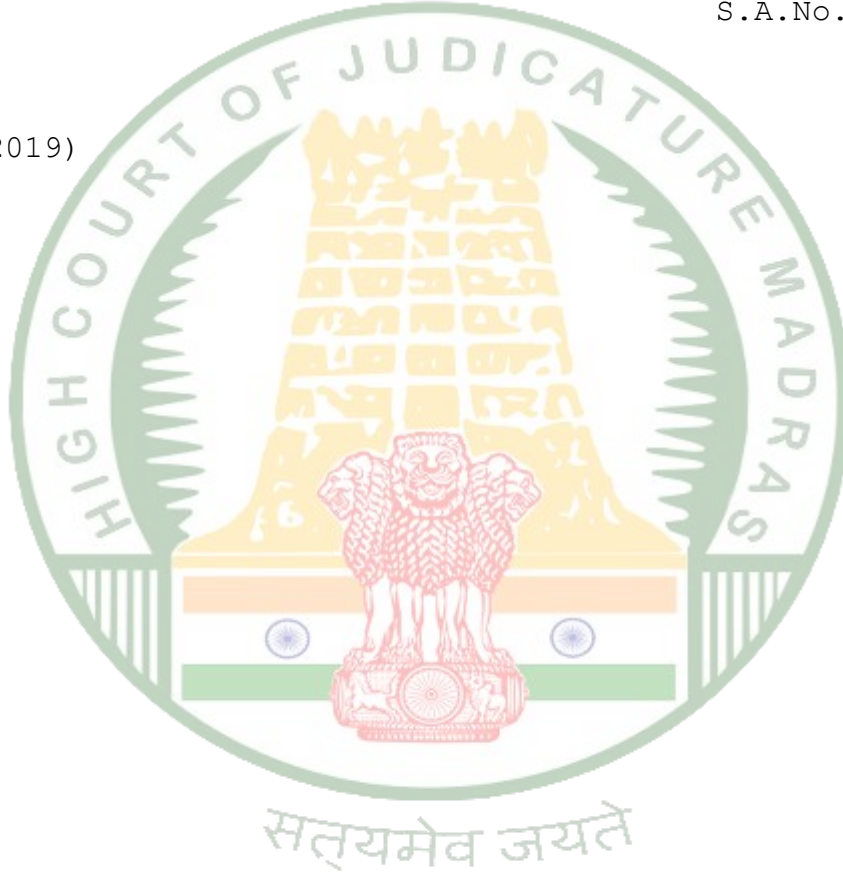
2.The District Munsif Court,  
Mayiladuthurai.

+lcc to Mr.S.Sounthar, Advocate, S.R.No.39869

+lcc to Mr.T.Kalaimani, Advocate, S.R.No. 40086

S.A.No.566 of 2006

GP (CO)  
GN(15/03/2019)



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