

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.02.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.1679 of 2002

1.K.S.Meikappa Devar (Deceased)

... Appellant/Respondent/Plaintiff

2.Baby
3.Pushpa
4.Kalyani
5.Sekhar
6.Banu
7.Pushparaj
8.Jeeva
9.Chandra

(Appellants 2 to 9 brought on record
as LRs of the deceased sole appellant
vide order of Court dated 3.6.14
made in CMP.114/14 in SA.1679/02)

... Appellants

Vs.

1.M.K.Narayanan (Deceased)

... Respondent/Appellant/Defendant

2.N.Manoharan
3.N.Karunakaran
4.N.Mohan
5.N.Raman
6.Mohana
7.N.Damayandhi
8.N.Indira
9.N.Bindhu
10.N.Susma

(Respondents 2 to 10 brought on
record as LRs of the deceased R1
vide order of court dated 7/12/16
made in CMP 7664 & 7665/16
in SA 1679/02)

... Respondents

Prayer:

Second Appeal filed under Section 100 of C.P.C. against the
judgment and decree dated 16.02.2001 in A.S.No.156 of 1999 on

the file of IV Additional City Civil Court, Madras, reversing the judgment and decree dated 28.04.1999 in O.S.No.11084 of 1992 on the file of I Assistant City Civil Court at Madras.

For Appellants : Mr.P.Sunil
for Mr.T.Viswanatha Rao

For Respondents: No Appearance

J U D G M E N T

The un-successful plaintiff who lost his case before the lower Appellate Court has come forward with this second appeal.

2.The sum and substance of the plaint averments are as follows: The plaintiff is the absolute owner of the property, a portion of the premises bearing Door No.118/4, Adam Sahib Street (facing cemetery Road), Royapuram, Madras, comprised two shops measuring 113 sq.ft. and 110 sq.ft. marked as 'D' and 'E' respectively, in the plan appended with the plaint. The plaintiff purchased the same under two sale deeds vide Document Nos.1266/85 and 1267/85, dated 15.07.1985 from one V.T.Somasundaram and Neelothpalammal, Executors, appointed by this Court in O.P.No.212 of 1983.

3.The plaintiff further avers that the suit property forms part, being land and superstructure bearing Municipal Door No.118/4, Adam Sahib Street (facing cemetery Road), Royapuram, Madras, consists of number of shops, originally belonged to one V.S.Thiagaraja Mudaliar. When the said V.S.Thiagaraja Mudaliar was a minor, his adopted mother Janaki Ammal purchased the property for his benefit and after attaining majority, in a partition under a deed of partition dated 28.07.1958, this property along with other properties fell to his share. The said V.S.Thiagaraja Mudaliar, executed the Will appointing two Executors namely, V.T.Somasundaram and Neelothpalammal, his son and widow respectively, giving them power to sell or otherwise deal with the property.

4.The plaintiff further avers that the said Will was probated by the Executors in O.P.No.212 of 1983 on the file of this Court and on obtaining probate the said Executors conveyed the shop portions as mentioned above under registered sale deeds dated 15.07.1985 in favour of the plaintiff. After purchase, the plaintiff became absolute owner of the property and has taken over physical possession of the shop portion marked as 'E' in the plan measuring 110 sq.ft. and he has been carrying on business under a valid licence therein.

5.The plaintiff further avers that the defendant who was carrying on business in the adjoining shop No.'C' has been in occupation of the suit shop bearing No.'D' measuring 113 sq.ft. in the plan belonging to the plaintiff under his leave and licence. He was running a provision store in both the shop portions originally with a dividing masonry wall separating the shop portion marked 'D' from shop portion 'E' belonging to the third party. After purchase of the property, the plaintiff allowed the continued occupation of the defendant of the suit shop portion under his leave and licence for sometime on the promise that he will vacate and handover the said suit shop portion to the plaintiff as and when he requires.

6.The plaintiff further avers that subsequently he repeatedly requested the defendant to vacate and deliver vacant possession of the suit shop portion marked 'D' in the plan measuring 113 sq.ft. belonging to him as he needs the portion for his own occupation. Though the defendant originally agreed to do so, subsequently he started evading to comply with the demand and has been postponing to do so on one pretext or the other. Thereafter, the defendant had removed the masonry demarcation wall between the suit shop portion marked 'D' belonging to the plaintiff and the adjoining shop portion marked 'C' in the plan belonging to third party. Suspecting foul play, the plaintiff confronted the defendant and when his replies were not convincing he had issued notice through his counsel dated 01.04.1992 to the defendant calling upon him to vacate and deliver vacant possession of the suit shop portion marked 'D' in the suit plan to him forthwith.

7.The plaintiff further avers that the suit shop portion marked 'D' in the plan measures 113 sq.ft. and because of its locational advantages it easily fetches a monthly income of not less than Rs.300/- in the open market. While being so, the defendant in his reply notice through his counsel dated 20.04.1982 sent to the plaintiff's counsel has falsely repudiated his liability to deliver possession of the suit shop portion to the plaintiff and interalia contended falsely that he was allegedly put into possession of the two shop portions by one S.Krishnan under a thandal agreement under one P.G.Thiagaraja Mudaliar who was allegedly receiving the rents from him on behalf of the said S.Krishnan.

8.The plaintiff further avers that the defendant claimed that he is the tenant of one P.G.Thiagaraja Mudaliar in respect of the shop portions marked 'C' and 'D' and the said P.G.Thiagaraja Mudaliar was allegedly offering to sell the shops to him. A due rejoinder dated 30.06.1992 repudiating the false allegations in the reply notice was sent on behalf of the plaintiff and the defendant was called upon to comply with his

lawful demand forthwith under threat of legal action being taken against him. However, the defendant did not give any further reply nor complied with the lawful request made by the plaintiff.

9.Hence, the plaintiff filed a suit for declaration, declaring that the suit shop portions marked 'D' in the plan annexed measuring 113 sq.ft. in No.118/4, Adam Sahib Street, facing Cemetery Road, Royapuram, Madras, absolutely belongs to the plaintiff; directing the defendant to vacate and deliver vacant possession of the suit shop portion marked 'D' in the plan annexed measuring 113 sq.ft. part of Door No.118/4, Adam Sahib Street, Royapuram, Madras, to the plaintiff; and directing the defendant to pay mesne profits to the plaintiff for his illegal occupation of the suit shop portion at Rs.300/- per month from the date of plaint till the date of realization.

10.The sum and substance of the written statement filed by the defendant is as follows: The defendant denied the averments made in the plaint. The defendant contended that the very suit filed by the plaintiff for declaration, possession and mesne profits is un-sustainable in law and on facts since the defendant became the owner of the suit property in his own rights and by possession of the same right from July, 1977.

11.The defendant further contended that he is not aware of the averments made regarding the ownership and possession as alleged by the plaintiff with reference to the suit property. The defendant is the owner of the suit property in his own rights and as such the defendant neither became a licence under the plaintiff or the person under permissive occupation of the plaintiff. Further, the plaintiff did not put the defendant in notice with reference to the purchase of the suit property, but long after sent the notice dated 01.04.1992 with the allegation that he purchased the property on 15.07.1985. Thereafter, the defendant sent reply dated 20.04.1992 asserting his right and title to the suit property.

12.The defendant further contended that for the allegation that the demarcation of the suit property in the plaint as 'D' is not in existence, the fact remains that the defendant is in possession of his own property measuring about 226 sq.ft. Under such circumstances, any purchase of the portion owned and possessed by the defendant is not valid and such sale cannot be acted upon and consequently the plaintiff cannot make any valid claim in respect of the suit schedule property.

13.The defendant further contended that he is in possession right from 1961 and thereafter by virtue of the possession and enjoyment in the capacity of the lessee and by virtue of purchase from the rightful owner in the year 1977 has prescribed

his title by virtue of adverse possession. The plaintiff in order to knock away the valuable property has sent notice in the year 1992 alleging his right to the property and requiring the delivery of possession of the same. Infact the plaintiff is not the owner of the property and the defendant is the owner and he is not the licensee under the plaintiff. Therefore, the question of mesne profit does not arise and the defendant is not liable to pay the same as claimed by the plaintiff.

14. After framing issues and after perusal of the entire records, the lower Court decreed the suit in favour of the plaintiff. Aggrieved by the same, the defendant preferred appeal before the lower Appellate Court. The lower Appellate Court reversed the findings of the lower Court and allowed the appeal. Aggrieved by the same, the plaintiff has filed the present second appeal.

15. At the time of admission of the second appeal, this Court framed the following substantial questions of law:

"1. When the suit is based on title and in fact the relief claimed being for declaration and recovery of possession and when the title is not questioned, whether the defendant can successfully resist the suit?

2. Is not the defendant who claims right to be in possession of the suit property as an alleged original sub-tenant and subsequently direct tenant under the admitted real owner and having failed to prove the claim is he still entitles to set up a claim of adverse possession in respect of the suit property?"

16. The learned counsel appearing for the appellants would submit that the plaintiff purchased two properties from the lawful owner appointed by this Court in O.P.No.212 of 1983. The said sale deed is marked as Ex.A1. The said sale deed contains the description of property and Annexure - I-A was annexed along with the sale deed. Such annexed plan specifically shows the shop portion and measurement and the same was coloured and described as 'D'. After perusing the entire records, the lower Court arrived at a conclusion that the plaintiff is the lawful owner and he proved title by way of marking the document and decreed the suit. However, the lower Appellate Court erroneously arrived at a conclusion that Ex.A1 did not disclose the measurement and the portion of the property and arrived at a conclusion that the plaintiff has not purchased the property under Ex.A1 and Ex.A1 property was not enjoyed by him.

17. The learned counsel appearing for the appellants would

further submit that the prayer in the suit itself is for declaration, recovery of possession and for mesne profits. The plaintiff proved his title by way of sale deed under Ex.A1 and the same was purchased through lawful owner. In the absence of any valid title, the defendant is not entitled to occupy the portion of the property. Hence, the lower Appellate Court arrived at an erroneous conclusion that the plaintiff did not establish his title contrary to the findings of the lower Court as well as Ex.A1. So in view of the above, the appellant is entitled to succeed as the appellant proved his title by marking Ex.A1. Accordingly, he prayed for allowing the second appeal.

18. Heard the learned counsel appearing for the appellants. No one appeared on behalf of the respondents.

19. At the time of admitting the second appeal, this Court also ordered notice and the respondent entered appearance through a counsel by name Mr.A.Palaniappan. Thereafter, the respondent passed away. Accordingly, the appellant filed petition under Order 22 Rule 4 of C.P.C., for bringing the legal representatives of the deceased respondent on record. This Court ordered notice in the said petition. The said notice returned with endorsement 'no such person'. Thereafter, the learned counsel for the appellants filed petition praying to order fresh summons by substituted service. On 31.01.2018, this Court permitted the petitioners to issue paper publication and paper publication was effected on 06.02.2018 in one issue of 'Dhinakaran'. However, the legal representatives of the deceased respondent neither came forward to conduct the case in person nor they represented through a counsel. Hence, on 16.02.2018, this Court directed the Registry to list the matter on 23.02.2018 by printing the name of the parties. Today, the names of the legal representatives of the deceased respondent are also printed in the cause list. Even today, there is no representation for the respondents. Hence, this Court decides to proceed with the case with the materials available on record.

20. A perusal of exhibit Ex.B1 marked by the defendant discloses that they obtained an agreement dated 22.03.1961 from one S.Krishnan and the said Krishnan executed agreement in favour of the defendant as if the property was enjoyed by him and the same was given to the defendant for running the provisional store. The said Krishnan has executed the agreement on the capacity of Managing lessee, however, the said agreement did not disclose any description of the property and it simply stated that the shops are situated in Cemetery Road. Except this description, no other description is available in Ex.B1.

21. Apart from the above, perusal of Ex.B2 discloses that one Krishnan has given a hand written letter dated 26.09.1976.

On perusal of the above letter it is known that one Krishnan sublet the shop and that lessee was not able to run the shop and recover the possession in the year 1973. The said letter also did not contain any description of the property, in order to prove the enjoyment of the defendant and the other documents marked also did not disclose any description of the suit schedule property. However, the defendant is claiming lease from the lawful owner and he is not able to establish adverse possession in the same property.

22.However, on a perusal of Ex.A1, it clearly disclose and tally with the suit schedule property. However, the lower Appellate Court without considering the description of Ex.A1 erroneously dismissed the suit. Since the adverse possession claimed by the defendant was already rejected by the lower Court and the lower Appellate Court also confirmed that the defendant did not prescribe any adverse possession and as against the findings he did not prefer appeal before this Court, the necessity of dealing with adverse possession does not arise.

23.In view of the above and on perusal of the Exhibits, I am convinced that the plaintiff established title over the suit schedule property. Accordingly, the substantial questions of law are answered in favour of the appellant.

24.In the result, the second appeal is allowed. The judgment and decree dated 16.02.2001 made in A.S.No.156 of 1999 on the file of the IV Additional City Civil Court, Madras, reversing the judgment and decree dated 28.04.1999 made in O.S.No.11084 of 1992 on the file of the I Assistant City Civil Court, Madras, is set aside. No costs.

Sd/-

Assistant Registrar(CS IV)

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Sub Assistant Registrar

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To

1.The IV Additional Judge,
City Civil Court,
Madras.

2.The I Assistant Judge,
City Civil Court,
Madras.

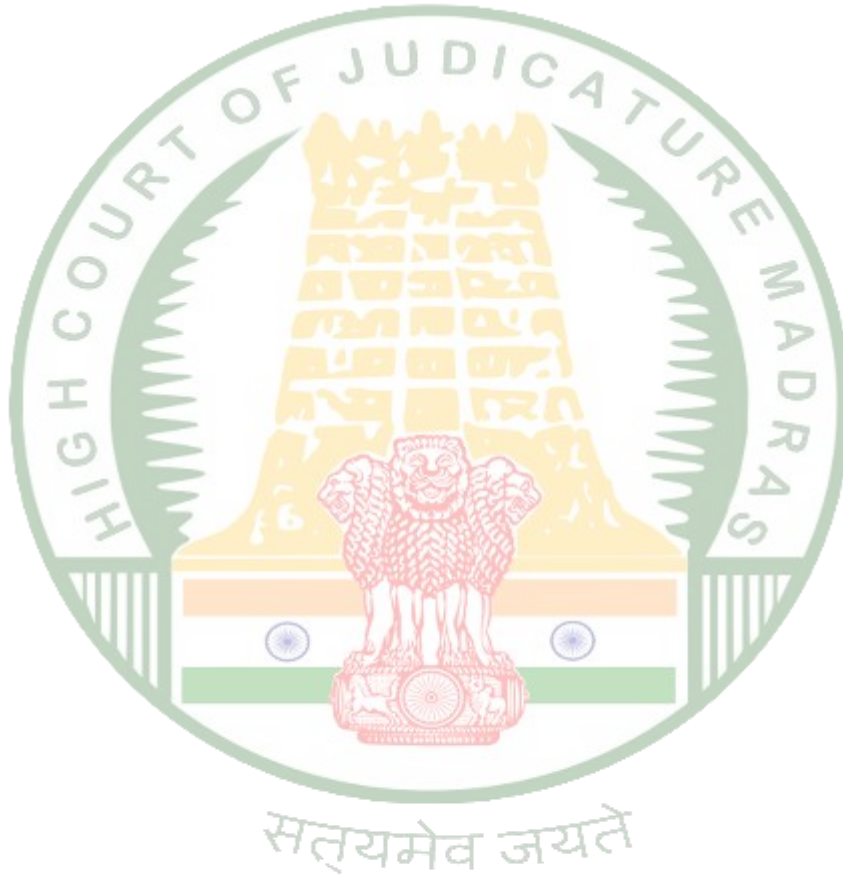
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3.The Section Officer,
V.R.Section,
High Court of Madras,
Chennai 600 104.

+1cc to Mr.T.Viswanatha Rao, Advocate SR.No.14284

S.A.No.1679 of 2002

GJII(CO)
GN(14/03/2018)



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