

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.02.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.1699 of 2002

Kumar

... Appellant/Plaintiff

Vs.

Jayapal

...Respondent/Defendants

PRAYER: The Second Appeal has been filed under Section 100 of C.P.C. to set aside the Judgment and Decree dated 09.04.2002 made in A.S.No.141/2000 on the file of Principal District Judge, Villupuram confirming the Judgment and Decree made in O.S.No.465/1994 on the file of Principal District Munsif, Thirukoilur dated 30.08.2000.

For Appellants : Mr.P. Ravi Shankar
for M/s.V.J.Latha

For Respondent : Mr.S.Parthasarathy
Senior Counsel
for M/s.Sarvabhauman Associates

J U D G M E N T

The appellant/plaintiff filed the suit for declaration and title of permanent injunction, who lost the case before the lower courts, filed a second appeal before this court.

2. The sum and substance of the plaint is as follows:

The suit property originally belongs to Marimuthu Udaiyar and others from whom the plaintiff purchased the same on 12.03.1975. After purchase of the property, he put up a house within east-west 19-1/2 feet and 40 feet north-south as well as superstructure in front of a premises with measurement of 16 feet and north-south 30 feet and left 3x30 feet on the east of the house as pathway. Since the plaintiff has been enjoying the suit property for over 20 years, he has prescribed the title by adverse possession. The vacant site is situated on the eastern side of the suit property belongs to the defendant in which the defendant does not lay any claim. Due to previous enmity, the defendant attempted to trespass into the suit property on 06.06.1994, which was thwarted by the plaintiff. Hence, the plaintiff filed the suit for declaration and consequential permanent injunction with regard to suit property.

3. The sum and substance of the written statement as follows:

The suit is not maintainable. In fact, the east-west 19-1/2 feet and north-south 70 feet originally belonged to one Marimuthu Udaiyar and others. The said Marimuthu Udaiyar and others sold the property to the plaintiff on 12.03.1975. In fact, the suit property and other properties originally belonged to Manicka Udaiyar S/o. Poongovil Udaiyar. The said Marimuthu Udaiyar executed a registered settlement deed on 05.03.1952, in which, one Ponnammal was allotted with 'C' schedule property through settlement deed. She is entitled to enjoy till her life time without the power to alienation. Thereafter, her grand sons Govindasamy and Ragothaman is in possession of the absolute enjoyment and title over the property. In the said settlement deed, the western boundary, which is a property belonged to Manicka Asari is still existing. The eastern owner, Krishnasamy Udaiyar's son Marimuthu sold the property to Kannammal on 14.10.1958 from whom Gopal Gounder who settled the property in favour of this defendant. The aforesaid settlement deed dated 05.03.1952 east-west northern measurement was referred as 12 feet alone. The plaintiff's father had dealt with the properties found in the said settlement deed and accordingly, the settlement deed would bind upon this plaintiff. If the plaintiff's vendor Marimuthu and others had saleable rights, they should have obtained the rights from Govindasamy and Ragothaman. Hence, the purchase of East-west 19-1/2 feet by the plaintiff is not correct. Marimuthu and others has right to sell east- west 19-1/2 feet and consequently in the suit property the plaintiff had not derived any title. On the east of suit property, Gopal Gounder's vacant site lies and on its further east situated vacant site of one Sundaramoorthy which remains with east-west measurement 36 feet which was purchased by the Gopal Gounder 03.03.1961 and subsequently, it was allotted to the share of his younger brother Ramachandran Gounder. On the west of that property lies the property of Marimuthu, which remains with 35 feet East West. The said property was sold by Marimuthu to Kannammal on 14.10.1958. The said Kannammal sold the same on 21.12.1968 to Gopal Gounder and he settled the property in favour of the defendant on 05.06.1980. Marimuthu and Sundaramurthy sold to Kannamal and Gopal respectively east-west 36 feet a piece. Hence, the total East-West measurement is 72 feet. If actual measurement is effected, the suit property, namely east -west 3 feet would be available within east - west 36 feet, belonging to this defendant. Hence, the suit is not sustainable. This defendant purchased the property for valuable sale consideration from one Gopal Gounder.

4. At the time of admission, this court has framed the following substantial questions of law as follows:

(i) Whether the courts below are correct in not even framing and deciding the issue with regard to adverse possession when it has been specifically pleaded?

(ii) Whether the courts below are correct in holding that the plaintiff is not entitled to the suit property when he has got easementary right over the suit property in order to reach the building put up by him on the southern side of the suit property?

(iii) Whether the settlement deed under Ex.B1 will bind the plaintiff when it has not been acted upon as correctly found by the learned Trial Judge?

5. Learned counsel appearing for the appellant submitted that admittedly the property was purchased by the appellant/plaintiff from one Marimuthu Udaiyar by sale deed dated 12.03.1975. The said sale deed was marked as Ex.A1. The measurement of the property is east-west 19-1/2 feet and 40 feet north-south as well as superstructure in front of a premises with measurement of 16 feet and north-south 30 feet and left 3x30 feet on the east of the house as pathway.

6. In order to reach the back side of the property, the appellant/plaintiff left 3x30 feet as vacant site and the vacant site pathway is to reach the back side of the property, which was clearly established through Ex.A1. Even though the appellant/plaintiff enjoyed the property for more than 20 years and used the suit schedule property as pathway to reach the backward of house property which was constructed after the purchase, the appellant is prescribed the title by way of adverse possession. In order to deprive his rights, the respondent/defendant interfered with the peaceful possession of the property. Hence, the appellant/plaintiff filed the suit for declaration of title and permanent injunction against the defendant. However, the lower courts had concurrently held in favour of the respondent/defendant which is not sustainable in law and the lower court has not considered either adverse possession or the easementary rights.

7. Learned Senior Counsel for the respondent/defendant would submit that the respondent/defendant established his title by way of exhibits marked as Exs.B4 - B6. He further submitted that prior to Ex.A2 sale Marimuthu Udaiyar sold east-west 36 feet on 14.10.1968 in favour of Kannammal. The defendant has produced a copy of sale deed Ex.B5 in favour of Kannammal. The said Kannammal sold the said property to Gopal Gounder on 21.12.1968. Thereafter Gopal Gounder executed the settlement deed in favour of the defendant. The copy of the sale deed is Ex.B5. The said Gopal Gounder settled the said property in favour of this defendant on 05.06.1980 by means of Ex.B6 settlement deed, by means of which the defendant derived title

to a property measuring east -west 36 feet and north-south 36 feet. Ex.B1 is the settlement deed executed by Manikka Udayar and Ex.B5 is the sale deed in favour of Gopal Gounder.

8. Though the appellant/plaintiff filed a suit for declaration, by way of alternative plea, he claimed adverse possession and easementary rights. For claiming easementary rights and adverse possession, the plaintiff has to necessarily establish his continuous and un-interrupted possession for the statutory period as law required. In this aspect, the Learned Senior Counsel for the respondent/defendant has also relied upon the following decisions:

(i) K. Krishnamoorthy Vs. Nagammal & Others reported in 2015-1-L.W 570. The relevant paragraph Nos.15 & 16 are extracted as follows:

"15. Further, the learned counsel for the respondent relied on the following decisions:-

(i) (2000) 9 SCC 524 (Madai Lakshmi alias M.Rajalakshmi .v. P.M.Partha Kumar) and the relevant portion reads as follows:-

"Easements Act, 1882 Ss.13(f) and 15 Trial Court and lower appellate court finding that easement of necessity pleaded in respect of the pathway over appellant's land had extinguished and that respondent also failed to prove user by him of the said pathway for the statutory period of 20 years so as to enable him to claim easementary right High Court while upholding the concurrent finding that easement of necessity no longer existed, held, erred in coming to conclusion that the respondent had perfected his right of quasi-easement under S.13(f); the respondent having failed to establish his continued and uninterrupted user of the pathway for a period of 20 years."

(ii) AIR 1956 Madras 584 (Mariyayi Ammal and others .v Arunachala Pandaram). In the said decision, it was held that to claim right of way as an easement of necessity, it must be proved that there was no other access to his property by the defendant. Convenience was not the test, but test was of absolute necessity.

(iii) (2005) 2 MLJ 208 (Sarasu .v. Karuppa Gounder and others) and the relevant portions are as under:-

"Easement Act (V of 1882), Secs. 13 and 15 Evidence Act (1 of 1872), Secs.101 to 103 Suit for declaration and injunction Dispute regarding a pathway Exclusive right claimed by the plaintiffs No

evidence to prove that the plaintiffs exclusive easementary right over the pathway On the contrary defendant disproving the case of the plaintiffs First Appellate Court is not justified in granting decree Impugned judgment set aside."

(iv) (2006) 1 MLJ 240 (Ponnan alias Palaniappan and another.v. Chinna Gounder (died) and others) and the relevant paragraphs are as follows:-

"12. In fact, there is a factual finding that there is no cart track. In Exs.B-1 and B-2, nowhere the existence of pathway is mentioned. The lower appellate Court clearly found in paragraph 11 that the defendants failed to prove the existence of pathway. The said finding is a factual finding based on evidence and therefore the same cannot be treated as perverse finding. Since the appellants/defendants have failed to prove easementary right and easement by necessity as pleaded by them, and as there is an alternative pathway available for them. The claim of the appellants/defendants is not sustainable as Section 13 of the Indian Easements Act, 1882, contemplates the proof of necessity, without which the land cannot be enjoyed. The said section reads thus,

"Section 13 - Easements of necessity and quasi easements.- Where one person transfers or bequeaths immovable property to another -

(a) if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or

(b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or lessee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement;

(c) if an easement in the subject of the transfer or bequest is necessary for enjoying other immovable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement; or

(d) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative

of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement. Where a partition is made of the joint property of several persons,--

(e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entried to such easement; or

(f) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless the different intention is expressed or necessarily implied, be entitled to such easement.

The easements mentioned in this section clauses (a), (c) and (e) are called easements of necessity.

Where immovable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee."

Further according to section 15 of the Act, a person claiming the right must establish the same and prove that it is enjoyed peacefully, openly and without interruption for the prescribed period prior to two years of filing of the suit. The said aspects are not proved by the appellants/defendants as held by the Courts below. Therefore, there is no legal right for the appellants to sustain the Second Appeal. "

(v) (2008) 17 SCC 491 (Bachhaj Nahar .v. Nilima Mandal and another) and the relevant portions are extracted hereunder:-

18. A perusal of the plaint clearly shows that entire case of the plaintiffs was that they were the owners of the suit property and that the first defendant had encroached upon it. The plaintiffs had not pleaded, even as an alternative case, that they were entitled to an easementary right of passage over the schedule property. The facts to be pleaded and proved for establishing title are different from the facts that are to be pleaded and proved for making out an easementary right. A suit for declaration of title and possession relates to the existence and establishment of natural rights which inhere in a person by virtue of his ownership of a property. On the other hand, a suit for enforcement of an easementary right, relates to a right possessed by a dominant owner/occupier over a property not his own, having the effect of

restricting the natural rights of the owner/occupier of such property.

19. Easements may relate to a right of way, a right to light and air, right to draw water, right to support, right to have overhanging eaves, right of drainage, right to a water course etc. Easements can be acquired by different ways and are of different kinds, that is, easement by grant, easement of necessity, easement by prescription, etc. A dominant owner seeking any declaratory or injunctive relief relating to an easementary right shall have plead and prove the nature of easement, manner of acquisition of the easementary right, and the manner of disturbance or obstruction to the easementary right.

20. The pleadings necessary to establish an easement by prescription, are different from the pleadings and proof necessary for easement of necessity or easement by grant. In regard to an easement by prescription, the plaintiff is required to plead and prove that he was in peaceful, open and uninterrupted enjoyment of the right for a period of twenty years (ending within two years next before the institution of the suit). He should also plead and prove that the right claimed was enjoyed independent of any agreement with the owner of the property over which the right is claimed, as any user with the express permission of the owner will be a licence and not an easement. For claiming an easement of necessity, the plaintiff has to plead that his dominant tenement and defendant's servient tenement originally constituted a single tenement and the ownership thereof vested in the same person and that there has been a severance of such ownership and that without the easementary right claimed, the dominant tenement cannot be used. We may also note that the pleadings necessary for establishing a right of passage is different from a right of drainage or right to support of a roof or right to water course. We have referred to these aspects only to show that a court cannot assume or infer a case of easementary right, by referring to a stray sentence here and a stray sentence there in the pleading or evidence.

16. On perusal of the materials available on record, it is found that plaintiff has not come out with a single plea of easement of necessity, instead, he has pleaded long user and ownership also. Therefore, in three modes, he claims the right to use the 'B'

schedule property which is not maintainable in law as rightly pointed out by the learned counsel for the respondents, after referring the decisions cited supra. Therefore, the finding of the courts below rejecting the claim of the plaintiff cannot be found fault with and they do not warrant any interference. The substantial question of law is answered against the plaintiff/appellant herein."

(ii) 2014 (1)SCC 669 in the case of Gurdwara Sahib Vs. Gram Panchayat Village Sirthala & Another. The relevant paragraph Nos.7 & 8 are extracted hereunder as follows:

"7. In the second appeal, the relief of ownership by adverse possession is again denied holding that such a suit is not maintainable.

8. There cannot be any quarrel to this extent that the judgements of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can use this adverse possession as a shield/defence."

9. The total property was purchased by the respondent/defendant by way of two deeds i.e., one is by way of sale deed and the other one is by way of settlement deed. The total property purchased by the defendant is 36x36 feet and the same was marked as Exs.B4 & B5. After consideration, the lower court as well as the lower appellate court had arrived at a conclusion that the appellant/plaintiff did not establish his rights either through sale deed or by way of oral and documentary evidence.

10. Heard the learned counsel for the appellant as well as learned counsel for the respondent.

11. Admittedly, both the courts have concurrently held that the appellant/plaintiff did not establish the case with regard to the title over the property. Contrary to the findings of the lower court as well as the lower appellate court, the appellant/plaintiff did not establish any of the rights or title towards the suit schedule property before this court.

12. On perusal of the above decisions, it is clearly held that with regard to the adverse possession, the appellant/plaintiff cannot seek for declaration of ownership of land on the basis of adverse possession unless he admits the defendant's title. If he wants to claim adverse possession as against the particular person, he has to plead and establish Adverse Possession against the person. On one hand, claiming

title over the property by way of declaration and on the other hand, seeking adverse possession, is not permissible.

13. It is for the plaintiff to prove the adverse possession which has been matured into ownership and not by way of declaration of title. If the appellant/plaintiff claims easementary rights, it must be proved by him by way of evidence. When the plaintiff admitted the claim of ownership and not easementary rights and if he fails to prove the ownership, he claims to be alleged to prove the easementary rights and ownership. The easementary rights are mutually exclusive to ownership.

14. In the present case, the appellant/plaintiff filed the suit for declaration declaring the title over the property. The adverse possession and easementary rights cannot be granted since both the courts have concurrently held that the appellant/plaintiff did not prove his title and there is no pleadings available with regard to the adverse possession and easementary rights. When the plaintiff claims that he has title and right over the property, in view of exclusive title and rights against the defendant, he cannot be alleged to claim adverse possession. With regard to adverse possession, the appellant/plaintiff has to prove for long standing possession and uninterrupted enjoyment of the suit schedule property. In the absence of any pleadings or documents to show that the appellant possessing the property for a long time, the court cannot grant any relief based on the assumption.

15. In view of the above aspects, I do not find any error in the orders passed by the courts below. Accordingly, the substantial questions of law are answered against the appellant.

In the result, the second appeal is dismissed and the Judgment and Decree dated 09.04.2002 made in A.S.No.141/2000 on the file of Principal District Judge, Villupuram, confirming the Judgment and Decree made in O.S.No.465/1994 on the file of Principal District Munsif, Thirukoilur dated 30.08.2000, is confirmed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

gv

To

1. The Principal District Judge,
Villupuram.

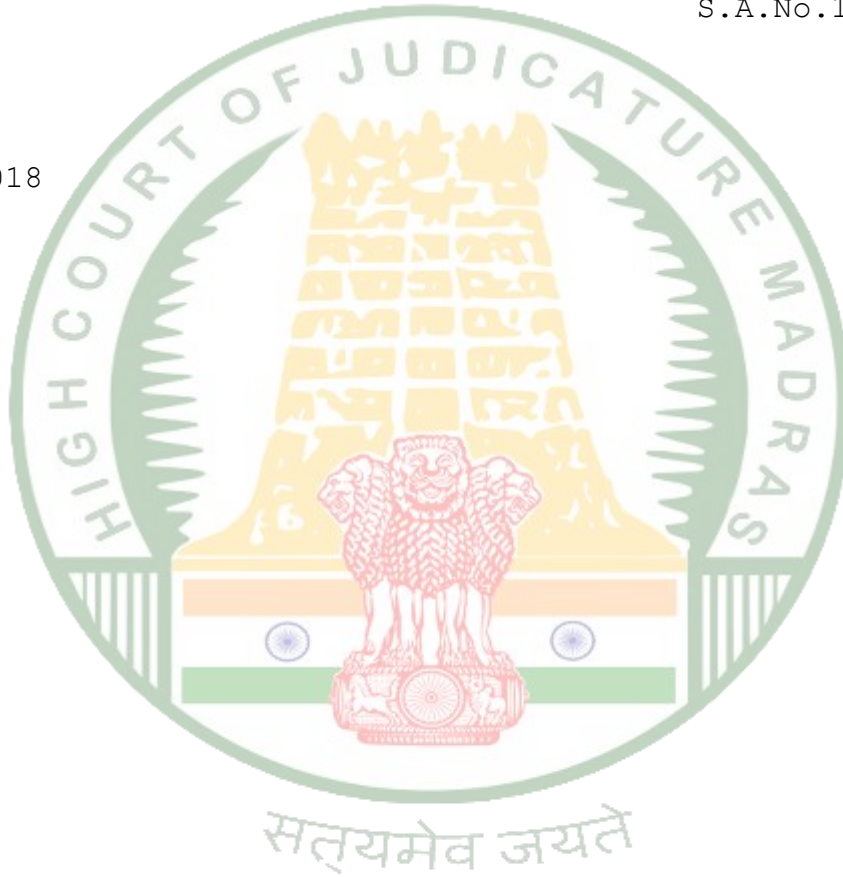
2.The Principal District Munsif,
Thirukoilur

+1 cc to Mr.Sarvabhauman Advocate sr 8904

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