

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 04.04.2018

PRONOUNCED ON : 16.04.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.695 of 2004

P.K.Palanisamy ... Appellant

Vs.

1.K.C.Kauppannan

2.K.A.Selvaraj

3.K.A.Mehala

... Respondents

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree of the Subordinate Judge, Bhavani in A.S.No.6 of 2003 dated 30.06.2003 reversing the judgment and decree of the Second Additional District Munsif, Bhavani in O.S.No.407 of 2000 dated 28.10.2002.

For Appellant : Mr.A.K.Kumarasamy, SC
for Mr.S.Kaithamalai Kumaran

For RR1 : N.Manokaran

For RR2 and R3 : Mr.R.Prabakaran
for Mr.R.Marudhachalamoorthy

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J U D G M E N T

This second appeal is directed against the judgment and decree dated 30.06.2003 passed in A.S.No.6 of 2003 on the file of the Subordinate Court, Bhavani reversing the judgment and decree dated 28.10.2002 passed in O.S.No.407 of 2000 on the file of the Second Additional District Munsif Court, Bhavani.

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

3. Suit for permanent injunction.

4.The case of the plaintiff in brief is that the plaintiff and the defendants 1 and 2 entered into a sale agreement on 19.08.1994 in respect of the suit property whereunder the defendants 1 and 2 had agreed to sell the suit property to the plaintiff for a sum of Rs.1,30,000/- and the plaintiff accepted the same and the defendants received a sum of Rs.25,000/- as advance from the plaintiff on the date of the agreement and the parties had entered into a written agreement on 19.08.1994 and as per the same, the balance amount of Rs.1,05,000/- should be paid and the defendants 1 and 2 had put the plaintiff in the possession and enjoyment of the suit property pursuant to the sale agreement and since then, it is only the plaintiff, who has been in peaceful possession and enjoyment of the suit property by way of paying house tax etc and the defendants 1 and 2 further received the balance sale consideration of Rs.10,000/- on 28.04.1995, Rs.80,000/-on 25.12.1995 and Rs.15,000/- on 16.01.1998 and also endorsed the receipt of the abovesaid amounts in the agreement of same and thus the defendants received the entire sale consideration of Rs.1,30,000/- from the plaintiff, as per the terms of the sale agreement and accordingly, the plaintiff had requested the defendants 1 and 2 to execute the sale deed in favour of the plaintiff and however, the defendants had been evasive and failed to execute the sale deed with a male fide intention and ulterior motive and also attempted to disturb the plaintiff's possession and enjoyment of the suit property, however, the same had been prevented by the plaintiff and the third defendant, who had instituted the suit in O.S.No.558 of 1995 for the relief of specific performance against the plaintiff has been added in the plaint as a necessary party and accordingly, inasmuch as, the defendants are not entitled to disturb the plaintiff's possession and enjoyment of the suit property, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

5.The case of the defendants 1 and 2 in brief is that the suit laid by the plaintiff is false and not maintainable either in law or on facts and it is true that the defendants 1 and 2 entered into a sale agreement with the plaintiff on 19.08.1994 for a sale consideration of Rs.1,30,000/- and on that date itself, they had received a sum of Rs.25,000/- as advance from the plaintiff. It is true that, the plaintiff has been in peaceful possession and enjoyment of the suit property pursuant to the sale agreement and also in possession and enjoyment of the suit property from said date, and it is also true that, the defendants had received the balance sale consideration on various dates as narrated in the plaint and endorsed the receipt of the payments in the sale agreement and no balance amount is due, towards the sale price as recited in the sale agreement and the defendants 1 and 2 are always ready and willing to execute the sale deed in favour of the plaintiff and there is a case in

O.S.No.189 of 1999 in respect of the suit property filed by one Backiyam and another for the relief of partition and other reliefs and the said suit is still pending and on account of the same, the execution of the sale deed is pending and postponed, and the third defendant, who is the stranger to the sale agreement dated 19.08.1994 and not having any interest in respect of the suit property has no locus standi in respect of the suit sale agreement and it is false to state that the defendants 1 and 2 are disturbing the plaintiff's possession and enjoyment of the suit property and hence the suit liable to be dismissed.

6.The case of the third defendant in brief is that the suit laid by the plaintiffs is not maintainable either in law or on facts and the allegations that the plaintiff and the defendants 1 and 2 entered into a sale agreement on 19.08.1994 in respect of the suit property for a sale price of Rs.1,30,000/- and the plaintiff paid a sum of Rs.25,000/- as advance and the plaintiff being put in possession and enjoyment of the suit property are all false and denied and the further allegations that the plaintiff has paid the balance sale agreement on various dates as narrated in the plaint are also denied and false. The defendants 1 and 2 entered into a sale agreement with third defendant on 27.04.1989 in respect of the suit property for a sum of Rs.1,15,000/- whereunder the defendants 1 and 2 had received a sum of Rs.50,000/- as advance from the third defendant and the time fixed for the specific performance of the said agreement is three months. Subsequently, as the sister of the defendants 1 and 2 laid a partition suit in O.S.No.189 of 1999, the time fixed for specific performance was further extended to another three months and thereafter the defendants 1 and 2 did not come forward to perform their part of the contract and hence the third defendant instituted the suit in O.S.No.58 of 1996 for specific performance and the same is also pending and the third defendant is the first agreement holder, whereas, the plaintiff is the second agreement holder and the present suit has been laid by the plaintiff in collusion with the defendants 1 and 2 and pending the suit for specific performance laid by the third defendant, the defendants 1 and 2 with a malafide intention entered into the sale agreement in respect of the suit property with the plaintiff and on that basis, the present suit has been laid by the plaintiff and the sale agreement relied upon by the plaintiff is not enforceable in law. The plaintiff has no cause of action to institute the suit and hence the suit is liable to to be dismissed.

7.In support of the plaintiff's case, P.W.1 has been examined. Exs.A1 to A8 were marked. On the side of the defendants, D.Ws.1 and 2 were examined. No document has been marked.

8. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial court was pleased to dismiss the suit laid by the plaintiff. On appeal, the first appellate court, on an appreciation of the materials placed, was pleased to set aside the judgment and decree of the trial court and by way of allowing the appeal preferred by the plaintiff, decreed the suit as prayed for. Aggrieved over the same, the present second appeal has been laid.

9. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration.

- i. In the suit for bare injunction without a prayer for specific performance of the agreement of sale maintainable, in view of Section 41(h) of Specific Relief Act?
- ii. When Plaintiff as P.W.1 admitted in his evidence that defendants 1 and 2 did not interfere with his possession of the suit property and when there is no complaint against the appellant is there any cause of action to maintain the suit?

10. The plaintiff claims to be in possession and enjoyment of the suit property on the basis of the sale agreement dated 19.08.1994 which sale agreement, according to the plaintiff, has been entered into between him and the defendants 1 and 2 in respect of the suit property for a sum of Rs.1,30,000/- and the said sale agreement has been marked as Ex.A1. According to the plaintiff, pursuant to the sale agreement entered into between the abovesaid parties, he has paid a sum of Rs.25,000/- as advance and also paid the balance sale consideration of Rs.1,05,000/- on various dates as endorsed in the sale agreement which endorsements have come to be marked as Exs.A2 and A4 and thus, it is the case of the plaintiff that, he had paid the entire sale consideration in respect of the sale agreement Ex.A1 to the defendants 1 and 2 and though he had been always ready and willing to obtain the sale deed from the defendants 1 and 2, according to him, the defendants 1 and 2 and delaying the same and on some pretext or the other attempted to disturb his possession and enjoyment of the suit property and hence according to the plaintiff, the need for the institution of the suit. Further, according to the plaintiff, on the date of the sale agreement itself, he has been put in possession and enjoyment of the suit property and accordingly, it is the case of the plaintiff that it is he who has been in possession and

enjoyment of the suit property by paying the house tax receipts and to evidence the same, the plaintiff has marked the house tax receipts as Exs.A6 to A8.

11.It is found that, inasmuch as, the third defendant had also laid a suit in respect of a sale agreement, in respect of the suit property executed in his favour by the defendants 1 and 2 in O.S.No.58 of 1999, accordingly, it is found that, at the instance of the third defendant, he has come to be implead as a party in the present suit proceedings.

12.The defendants 1 and 2 have, almost in all aspects, admitted the plaintiff's case and the only defence taken by them is that the case of the plaintiff that they had attempted to disturb his possession and enjoyment of the suit property is false and hence on that score, contended that the suit laid by the plaintiff is liable to be dismissed. Thus, from the abovesaid nature of the defence projected by the defendants 1 and 2, it is found that the plaintiff has been inducted into the possession and enjoyment of the suit property pursuant to Ex.A1 sale agreement by the defendants 1 and 2 and accordingly, it is found that it is only the plaintiff, who is in possession and enjoyment of the suit property and as above seen, the same could be evidenced also from the house tax receipts marked as Exs.A6 to A8.

13.In this case, the plaintiff claims the benefits of section 53-A of the Transfer of Property Act for sustaining the reliefs sought for and according to the plaintiff, inasmuch as he has satisfied all the ingredients necessary for obtaining the benefits contemplated u/s.53-A the Transfer of Property Act, he has become entitled to obtain the relief of permanent injunction on the strength of the abovesaid provision of law. According to the plaintiff, though, he had been always ready and willing to obtain the sale deed from the defendants 1 and 2 only on account of the delay tactics adopted by the defendants 1 and 2, the sale deed could not be executed.

14.The third defendant claims that he is the first agreement holder in respect of the suit property and the plaintiff being the second agreement holder, thus according to the third defendant, it is only he, who is in possession and enjoyment of the suit property pursuant to the sale agreement executed in his favour by the defendants 1 and 2 on 27.04.1989 and further according to the third defendant, on the date of the sale agreement as abovestated, he has paid a sum of Rs.50,000/- to the defendants 1 and 2 and the time limit has been fixed as three months for completing the sale transaction and on account of the pendency of the partition suit in O.S.No.189 of 1999, the time limit was further extended for a period of three months and

as the defendants 1 and 2 failed to perform their part of contract in coming forward to execute the sale deed in favour of the third defendant by receiving the balance sale consideration, according to the third defendant, he has been necessitated to lay the suit for specific performance in O.S.No.58 of 1996. The materials placed on record by way of oral evidence go to show that the suit in O.S.No.58 of 1996 has been instituted by the third defendant against the defendants 1 and 2 for specific performance.

15. From the pleadings set out in the written statement filed by the third defendant, it is found that nowhere he has stated that he has been put in possession and enjoyment of the suit property pursuant to the sale agreement dated 27.04.1989. Such being the position, the case of the third defendant in the course of his evidence that, he has been inducted into the possession of the suit property on the date of the sale agreement dated 27.04.1989, as such, cannot be accepted sans plea with reference to the same, in the written statement. As rightly argued, without plea, the party is not entitled to adduce oral evidence and even if any such oral evidence is adduced, the same cannot be taken into consideration. In addition to that, there is no material placed on behalf of the third defendant to establish that he has been put in possession and enjoyment of the suit property on 27.04.1989, the date of sale agreement and that he continues to remain in the possession and enjoyment of the suit property. That apart, the third defendant has not chosen to file the sale agreement dated 27.04.1989 in the present suit nor endeavored to file the copy of the same, atleast to show as to whether any recital is contained in the sale agreement as regards he being put in possession and enjoyment of the suit property on the date of the said agreement. For the reasons best known to the third defendant, neither the sale agreement dated 27.04.1989 is placed for the consideration of the Courts nor any document worth acceptance has been placed to evidence that he has been in possession and enjoyment of the suit property and continue to remain in the possession and enjoyment of the suit property. Thus, it is seen that absolutely there is no material placed on record by the third defendant to hold that he has been in possession and enjoyment of the suit property pursuant to the sale agreement dated 27.04.1989. Merely on the footing that, the third defendant had levied the suit in O.S.No.58 of 1986 for specific performance, it cannot be construed that it is he, who has been in possession and enjoyment of the suit property and equally the same cannot be determined merely from his ipsi dixit testimony particularly, when there is no plea as regards the same and also no proof to establish the same. Such being the position, it is evident, as rightly put forth by the plaintiff's counsel, absolutely, there is no material placed by the third

defendant to sustain his claim of being in possession and enjoyment of the suit property pursuant to the sale agreement dated 27.04.1989.

16.As above seen, the defendants 1 and 2 have admitted the plaintiff's case in pleading that the plaintiff had been in possession and enjoyment of the suit property and it is only the plaintiff, who continue to be in possession and enjoyment of the suit property.

17.As above seen, the plaintiff seeks the benefits of section 53-A of the Transfer of Property Act for claiming the relief of permanent injunction as prayed for. As seen from the provisions contained in 53-A of the Transfer of Property Act, it is found that, if at all the plaintiff is entitled to claim the benefits conferred by way of the same, it is found that, at the best, the plaintiff could seek the relief of permanent injunction, on that basis, only as against the proposed transferrors namely the defendants 1 and 2 and not against the third defendant. Accordingly, it is found that as laid down by the Apex Court in the decision reported in 2004 (8) SCC 614 [Rambhau Namdeo Gajre Vs. Narayan Bapuji Dhotra (Dead) Through Lrs.] it is seen that the right to protection offered u/s 53-A of the Transfer of Property Act could not be claimed by the plaintiff to protect his possession of the suit property against the third party and accordingly, it is seen that the abovesaid provision of law could not be resorted to by the plaintiff for pressing the relief of permanent injunction as against the third party to the agreement namely, the third defendant. It is found that on that basis, the plaintiff would not be entitled to obtain the relief of permanent injunction as prayed for against the third defendant.

18.In so far as the relief sought for by the plaintiff as against the defendants 1 and 2 claiming the benefits by way of Section 53-A of the Transfer of Property Act, as rightly put forth by the plaintiff's counsel, when it is found that the plaintiff has satisfied all the ingredients contemplated under the said provision for seeking the benefits and when it is also seen that the defendants 1 and 2 have also not resisted the plaintiff's case as such to claim the relief sought for based on the sale agreement marked as Ex.A1, accordingly, it is found that the plaintiff, apprehending that the defendants 1 and 2 are attempting to disturb his possession and enjoyment of the suit property, it is seen that as rightly determined by the first appellate court, the plaintiff would be entitled to sustain the relief of permanent injunction as against the defendants 1 and 2 as prayed for.

19.The counsel appearing for the third defendant contended

that the plaintiff cannot be granted the relief of permanent injunction as prayed for, when he has failed to enforce the sale agreement marked as Ex.A1 as against the defendants by seeking appropriate reliefs and thereafter according to him, when equally efficacious relief can be obtained by the plaintiff by levying the suit for specific performance based on the sale agreement Ex.A1, as provided u/s.41(h) of the Specific Relief Act, according to him, the relief of permanent injunction prayed for by the plaintiff cannot be granted. However, countering the same, it is contended by the plaintiff's counsel that, when the defendants attempt to invade or threaten the plaintiff's right of enjoyment of the suit property, which he has been obtained based on the sale agreement Ex.A1, according to him, the plaintiff is entitled to maintain the relief of permanent injunction as against the defendants 1 and 2, by way of invoking section 53-A of the Transfer of Property Act and further according to him as regards the third defendant, when the third defendant is a stranger to the suit property as on date and not acquired any valid title as such by obtaining a decree in his favour, pursuant to the levy of the suit for specific performance in O.S.No.58 of 1996 and further according to him as the third defendant has not established that, he has been put in possession and enjoyment of the suit property by the defendants 1 and 2 pursuant to the sale agreement dated 27.04.1989 and further as there is no material at all placed by the third defendant to establish his possession and enjoyment of the suit property and on the other hand, when the plaintiff has proved his possession and enjoyment of the suit property based on the admission of the defendants 1 and 2 as well as the documents marked as Exs.A6 to A8, it is contended that the third defendant having no better claim of title to the suit property than that of the plaintiff, the third defendant is not entitled to disturb the plaintiff's possession and enjoyment of the suit property and on that basis, it is argued that the plaintiff being in possession and enjoyment of the suit property, he is entitled to protect his possession as against all excepting true owner, and to show that the plaintiff is entitled to sustain the relief of permanent injunction prayed for even as against the third defendant, in this connection, the plaintiff's counsel placed reliance upon the decisions reported in 2004 (3) LW 143 [Rame Gowda (D) by Lrs. Vs. M.Varadappa Naidu (D) by Lrs. & Another], and 2007 (1) MLJ 837. As per the decision reported in 2007 (1) MLJ 827 [A.P.Kuppusamy and Others Vs. P.Kumarapalayam Municipality, rep. by its Commissioner, P. Komarapalayam] It is seen that a person, who is in possession though without title can resist the interference from another, who has no better title than himself and get the relief of injunction prayed for and accordingly, it is found that, when the plaintiff is in possession and enjoyment of the suit property, when the third defendant is attempting to invade or threaten his possession, it

is seen that and the plaintiff having established his possession and enjoyment of the suit property as above pointed out, it is found that the plaintiff is entitled to obtain the relief of permanent injunction as prayed for. The Apex Court in the decision reported in 2004(3)LW 143 [Rame Gowda (D) by Lrs. Vs. M.Varadappa Naidu (D) by Lrs & Another] has detailed the principles of law outlined on the above subject and held that a person in settled possession is entitled to maintain the suit for permanent injunction and elucidated the principles of law on the subject in the following manner.

It has been held that no one, including the true owner, has a right to dispossess the trespasser by force if the trespasser is in settled possession of the land and in such case unless he is evicted in the due course of law, he is entitled to defend his possession even against the rightful owner. But merely stray or even intermittent acts of trespass do not give such a right against the true owner. The possession which a trespasser is entitled to defend against the rightful owner must be settled possession, extending over a sufficiently long period of time and acquiesced to by the true owner. A casual act of possession would not have the effect of interrupting the possession of the rightful owner. The rightful owner may re-enter and re-instate himself provided he does not use more force than is necessary. Such entry will be viewed only as resistance to an intrusion upon his possession which has never been lost. A stray act of trespass, or a possession which has not matured into settled possession, can be obstructed or removed by the true owner even by using necessary force.

It is difficult to lay down any hard and fast rule as to when the possession of a trespasser can mature into settled possession of a trespasser can mature into settled possession. The 'settled possession' must be (i) effective, (ii) undisturbed and (iii) to the knowledge of the owner or without any attempt at concealment by the trespasser. The phrase settled possession does not carry any special charm or magic in it. Nor is it a ritualistic formula which can be confined in a strait-jacket. An occupation of the property by a person as an agent or a servant acting at the instance of the owner will not amount to actual physical possession. The court laid down the following tests which may be adopted as a working

rule for determining the attributes of settled possession.

(i) that the trespasser must be in actual physical possession of the property over a sufficiently long period:

(ii) that the possession must be to the knowledge (either express or implied) of the owner or without any attempt at concealment by the trespasser and which contains an element of animus possidendi. The nature of possession of the trespasser would, however, be a matter to be decided on the facts and circumstances of each case:

(iii) the process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced to by the true owner and

(iv) that one of the usual tests to determine the quality of settled possession, in the case of culturable land, would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner has no right to destroy the crop grown by the trespasser and take forcible possession.

In the present case the Court has found the plaintiff as having failed in proving his title. Nevertheless, he has been found to be in settled possession of the property. Even the defendant failed in proving his title over the disputed land so as to substantiate his entitlement to evict the plaintiff. The Trial Court therefore left the question of title open and proceeded to determine the suit on the basis of possession, protecting the established possession and restraining the attempted interference therewith. The Trial Court and the High Court have rightly decided the suit. It is still open to the defendant-appellant to file a suit based on his title against the plaintiff-respondent and evict the latter on the former establishing his better right to possess the property.

It was submitted that in the absence of declaration of title having been sought for, the suit filed by the plaintiff-respondent was not maintainable, and should have been dismissed solely on this ground. We cannot agree

The High Court has kept the question of title open. Each of the two contending parties would be

at liberty to plead all relevant facts directed towards establishing their titles, as respectively claimed and proving the same in duly constituted legal proceedings

20. In the light of the abovesaid principles of law enunciated by the Apex Court, it is found that the plaintiff having established his settled possession and enjoyment of the suit property, when the real owners of the suit property namely the defendants 1 and 2 have also acquiesced to the claim of the plaintiff's possession and enjoyment of the suit property pursuant to the sale agreement Ex.A1 and when the third defendant has miserably failed to establish that he has been put in possession and enjoyment of the suit property pursuant to his sale agreement dated 27.04.1989 and when no plea at all has been made by the third defendant claiming that he has been in possession and enjoyment of the suit property pursuant to the abovesaid sale agreement in the written statement and also not placed any material to sustain his said case, accordingly, it is found that in the light of the abovesaid position of law, the plaintiff is entitled to sustain the relief of permanent injunction granted in his favour by the first appellate court and in such view of the matter, there is no question of interfering with the judgment and decree of the first appellate court in upholding the plaintiff's case.

21. As regards the contention of the third defendant's counsel that the plaintiff cannot be granted the relief of permanent injunction in view of the bar u/s.41(h) of the Specific Relief Act, considering the principles of law enunciated u/s.41 of the Specific Relief Act read as a whole coupled with the provisions of law enunciated u/s.38 of the Specific Relief Act whereunder the circumstances are detailed under what situations the party would be entitled to obtain the perpetual injunction to protect his possession, accordingly it is found that, when the plaintiff has established his settled possession and enjoyment of the suit property pursuant to Ex.A1 as above discussed, the relief of permanent injunction granted by the first appellate court in favour of the plaintiff even as against the third defendant is found to be unassailable and hence not to be interfered with.

22. The principles of law outlined in the decision relied upon by the third defendant's counsel reported in 2000 II CTC 417 [K.S.Balasubramaniam Vs. S.Munuswamy] are taken into consideration and followed as applicable to the case at hand.

23. In view of the abovesaid reasonings, the contention put forth by the third defendant's counsel that suit laid by the plaintiff for bare injunction without seeking the relief of

specific performance is not maintainable in view of section 41 (h) of the Specific Relief Act as such cannot be made applicable to the case at hand, in the light of the principles of law outlined in the decision of the Supreme Court reported in 2004 (3) LW 143[A.P.Kuppusamy and others Vs. P.Kumarapalayam Municipality rep. by its Commissioner, P.Komarapalayam] as above detailed r/w Section 38 of the Specific Relief Act and accordingly it is found that the suit laid by the plaintiff for bare injunction to protect his possession against the third party, i.e. the third defendant, who is a stranger to the suit property without any better title than that of the plaintiff, is maintainable and as above seen, the plaintiff is entitled to sustain the relief of permanent injunction prayed for as against the true owners by claiming the benefits u/s.53-A of the Transfer of Property Act.

24.Further, when the plaintiff's apprehends that the defendants are attempting to invade or threaten his possession and enjoyment of the suit property and accordingly also tendered evidence on the abovesaid lines and when there is no contra material placed by the defendants with reference to the same, as such, it is found that the plaintiff has a valid cause of action to institute the suit against the defendants and in the light of the abovesaid factors, I do not find any reason to interfere with the judgment and decree of the first appellate court and accordingly, the substantial questions of law formulated in the second appeal are answered against the defendants and in favour of the plaintiff.

25. At the end, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

mfa

To

1. The Subordinate Judge,
Subordinate Court,
Bhavani.

WEB COPY

2.The Second Additional District Munsif,
Second Additional District Munsif Court,
Bhavani.

3.The Section Officer,
VR Section,
High Court. (2 Copies)

+1cc to Mr.A.K.Kumarasamy,, Advocate, S.R.No.28032
+1cc to M/s.N.Manokaran, Advocate, S.R.No.28496

S.A.No.695 of 2004

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