

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.04.2018

PRONOUNCED ON : 04.06.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.858 of 2004

1. Muthulinga Udayar (died)
2. Gnanambal Ammal
3. Mani
4. Chandran
5. Vimala
6. Poongothai
7. Pushpavalli

... Appellants/Sole Plaintiff and his LRS

(Appellant 2 to 7 brought on record as LRS of the deceased sole appellant vide Order dated 29/11/2012 made in CMP.No. 48/2012)

Vs.

1. Chandra Ammal
2. Maharajan
3. Rayar
4. Dhanasekaran
5. Suresh

.... Respondents/Defendants

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 31.10.2003 in A.S.No.33/2003 on the file of the II Additional Sub Court, Villupuram reversing the decree and judgment dated 01.02.2002 in O.S. No.478/99 on the file of the I Additional District Munsif Court, Thirukoilur.

For Appellants : Ms.R.Meenal

For Respondents : D.Rajasekar

JUDGMENT

Challenge in this second appeal is made the judgment and decree dated 31.10.2003 passed in A.S.No.33/2003 on the file of the II Additional Sub ordinate Court, Villupuram reversing the

judgment and decree dated 01.02.2002 passed in O.S. No.478/99 on the file of the I Additional District Munsif Court, Thirukoilur.

2. The second appeal has been admitted on the following substantial questions of law:

"1. Whether in law the lower appellate Court was right in failing to see that the possession of the respondents was not open, continuous and hostile for the statutory period and that it did not have the necessary ingredients for adverse possession?

2. Whether in law the lower appellate Court was not wrong in concluding that the entire possession of the respondents was adverse, when it was interrupted in 1975 by the filing of the suit and subsequently by the pendency of various litigations? and

3. Whether in law the lower appellate Court was right in failing to see that the respondents lacked animus as they claimed title through oral purchase in the prior proceedings"

3. Inasmuch as the issues involved in the matter lies in a narrow compass, I deem it unnecessary to dwell into the facts of the case in detail.

4. Suffice to state that the respondents seeking title to the suit properties based upon an oral sale said to have been effected in the year 1970 by the deceased first appellant, accordingly alleging that the deceased first appellant attempted to interfere with their possession and enjoyment of the suit properties, it is found that the respondents preferred a suit in O.S.No.43/78, against the deceased first appellant and one Mani udaiyar for the reliefs of declaration and permanent injunction. It is found that the respondents were successful in the trial Court and as well as in the first appeal in respect of the above said litigation. However, in the second appeal preferred by the deceased first appellant, challenging the judgment and decree of the Courts below in favour of the respondents, it is seen that the High Court, on an appreciation of the materials placed on record, found that the oral sale pleaded by the respondents in respect of the suit properties is false and not established and accordingly, determined that the respondents cannot claim any valid title to the suit properties on the basis of the alleged oral sale and resultantly, entertained the appeal preferred by the deceased first appellant and consequently by

setting aside the judgment and decree of the Courts below, dismissed the suit laid by the respondents in O.S. No.43/1978. The above said order of the High Court has come to be passed on 30.10.98 and the same could be evidenced from the judgment of the High Court passed in S.A. No.1038/86 marked in Ex.A7 as well as the decree copy marked as Ex.A3. Thus, it is found that the respondents claim of title to the suit properties has been negatived by this Court and as against the judgment and decree of the High Court passed in S.A.No.1038/86, no further appeal has been preferred by the respondents.

5. Following the judgment and decree of the High Court, dated 30.10.98, passed in S.A.No.1038/86, it is found that inasmuch as the respondents had failed to deliver the possession of the suit properties to the deceased first appellant, the deceased first appellant preferred the suit in O.S.No.478/99 against the respondents for the reliefs of declaration, possession and mesne profits. The respondents again set up a claim of title to the suit properties and also took the plea of adverse possession and thus, according to the respondents, they have prescribed title to the suit properties by way of adverse possession, since, they had been in possession and enjoyment of the suit properties right from 1970 onwards and hence, according to them, the deceased first appellant is not entitled to obtain the reliefs sought for in the abovesaid suit. The abovesaid suit ended in a decree in favour of the first appellant. However, the first appellate Court upholding the plea of adverse possession projected by the respondents, thereby set-aside the judgment and decree of the trial Court and challenging the same, the present second appeal has been preferred.

6. In view of the abovesaid position, the only point that has to be determined is whether the respondents have prescribed title to the suit properties by way of adverse possession as projected by them.

7. Now, the respondents claim to be in possession and enjoyment of the suit properties right from 1970 onwards and accordingly, it is their contention that as they had been enjoying the suit properties to the knowledge of the appellants, it is their case that the appellants cannot obtain the reliefs sought for as they had prescribed title to the suit properties by way of adverse possession. By taking the plea of adverse possession, it is found that the respondents have impliedly admitted the title of the appellants in respect of the suit properties. Inasmuch as the respondents seek to hold the suit properties only on the plea of adverse possession, it is for the respondents to establish that they had been enjoying the suit properties right from 1970 onwards openly, continuously and uninterruptedly beyond the statutory period by expressing animus

attitude to one and all, including the appellants and thereby entitled to the claim of adverse title as projected by them.

8. The appellate Court seems to have upheld the plea of adverse possession mainly on the footing that the respondents had been in possession and enjoyment of the suit properties right from 1970 onwards. In this connection, some admission had been taken into consideration tendered by the deceased first appellant in the suit proceedings. No doubt, the materials placed on record go to show that the respondents seem to have been in possession and enjoyment of the suit properties right from 1970 onwards. However, their case that they had been enjoying the suit properties right from 1970 onwards on the basis of the oral sale, as abovenoted, had come to be negatived by the High Court and therefore, it is seen that the respondents cannot again reagitate the said issue in this matter once again. When even according to the respondents case, the appellants or for the matter, the deceased first appellant interfered with their possession and enjoyment of the suit properties, on the footing that he has title to the same and accordingly, it is found that the respondents have preferred O.S. No.43/78. Thus, it is found that by way of the abovesaid case of the respondents in O.S. No.43/78, it is found that the appellants had been asserting their title to the suit properties one way or the other and accordingly, contested the claim of title, valid possession and enjoyment of the suit properties by the respondents. As above found, the case of the respondents had come to be rejected by this Court in S.A.No.1038/86 and when it is seen that, as per the materials placed on record, right from 1978 onwards the parties had been vying with each other seeking the claim of title to the suit properties and when it is also seen that an another litigation had been pending between the parties in O.S.No. 114/75, it is found that right from 1975 onwards, the appellants had been throwing challenge to the claim of title to the suit properties by the respondents and also thrown challenge to their claim of valid possession and enjoyment of the suit properties and finally, it is found that the appellants' title to the suit properties had been upheld by the High Court in S.A.No.1038/86. In the light of the above position, as rightly put forth by the appellants' counsel, when it is seen that the respondents claim of title to the suit properties has come to be rejected in the earlier litigation, the respondents cannot take advantage of the period during which the earlier litigation had been pending between the parties in respect of the suit properties and accordingly, it is found that the pendency of the earlier litigation between the parties in respect of the suit properties would arrest the period of claim of adverse possession projected by the respondents and accordingly, it is found that the respondents cannot claim that right from 1970 onwards till the laying of the present suit by

the appellants, they had been in continuous and uninterrupted possession of the suit properties by expressing animus attitude to one and all including the appellants for prescribing title to the suit properties by way of adverse possession. When the challenge has been made by the appellants to the respondents claim of valid title, possession and enjoyment of the suit properties at the earliest point of time i.e., during 1978 itself and when it is further seen that another litigation is pending in O.S.No. 114/75, accordingly, it is seen that the appellants asserting their title to the suit properties had been challenging the claim of title, possession and enjoyment of the suit properties by the respondents. In such view of the matter, it is found that the period during which the earlier litigation had been pending between the parties in respect of the suit properties commencing from 1978 to 1986 cannot be taken advantage by the respondents for continuing their claim of adverse possession in respect of the suit properties against the appellants and this position of law could be gathered from the decision relied upon by the appellants counsel reported in 1975 (2) MLJ page 482 (N.E.Vedammal Vs. S.R.Krishnamoorthy Iyer), AIR 1979 Orissa 110 (Artabandhu Mohapatra and others Vs. Bisweswar Bhutia and others) and 1997 (II) CTC 245 (Veeramuthu Vs. Puttalayee). The above position of law can also be gathered from the decision relied upon by the respondents' counsel reported in AIR 1976 Madras 283 (N.E.Vedammal Vs. S.R.Krishnamoorthy Iyer) equivalent to 1975 (2) MLJ page 482 (N.E.Vedammal Vs. S.R.Krishnamoorthy Iyer) as well as the decision reported in AIR 1958 CALCUTTA 437 (Achhiman Bibi Vs. Abdur Rahim Naskar and others) and AIR 1973 Madhya Pradesh 72 (Mst. Sultan Jehan Begum and others Vs. Gul Mohd. and others). Thus, it is found that the parties had been indulging in the earlier litigation in respect of the claim of the title, possession and enjoyment of the suit properties even before the adverse title has culminated in favour of the respondents. As in this case, the respondents seek to prescribe title to the suit properties based on the claim of possession of the suit properties right from 1970 onwards and when it is seen that the litigation had started between the parties right from 1978 onwards, as above adverted to, the time during which the earlier litigation had been pending till its final culmination cannot be tagged on to the period of claim of the respondents for claiming title to the suit properties by way of prescription. In such view of the matter, it is found that merely on the footing that the respondents are in possession and enjoyment of the suit properties right from 1970 onwards, that by itself would not be sufficient to hold that they had been enjoying the suit properties adversely to the interest of the appellants and in such view of the matter, it is seen that the first appellate Court has failed to appreciate the principles of law governing the plea of adverse possession in the right perspective and seem

to have upheld the claim of right of prescription projected by the respondents mainly on the footing of their alleged continuous possession and enjoyment of the suit properties from 1970 onwards.

9. As above seen, the appellants claim of title to the suit properties has been upheld by the High Court in S.A. No.1038/86. Now claiming title to the suit properties, the appellants had preferred the present suit for the reliefs of declaration, possession and mesne profits and it is seen that the present suit has been laid by the appellants within 12 months period of time from the date of judgment passed in S.A. No.1038/86. In the light of the above position, the suit having been preferred by the appellants based on title, it is found that unless and until the respondents establish their claim of right of prescription in respect of the suit properties, it is found that as per the Article 65 of the Limitation Act 1963, the appellants would be entitled to recover the possession of the suit properties on the failure of the respondents in establishing their plea of adverse possession and the above position of law could be gathered from the decision reported in AIR 1976 MADRAS 124(1) (Bhagavathy Pillai and another Vs. Savarimuthu and another) in which the principles governing the abovesaid point of law has been elucidated in the following manner.

" (A) Limitation Act (36 of 1963), Art.65 and S.27 - Adverse possession - Suit for possession based on title - Burden of proof is on the defendant who claims the right to property by way of adverse possession.

Art.65 relates to suits for possession based on title. In such a case period of limitation is 12 years when the possession of the defendant became adverse to the plaintiff. If in a suit falling under Art.65, the defendant wants to defeat rights of the plaintiff, he has to establish his adverse possession for a period of 12 years which has the effect of extinguishing the title of the owner by operation of S.27 of the Act. If he fails to do so then the plaintiff cannot be non-suited merely because he was not able to prove possession within 12 years.

In the case of a suit for possession based on title the plaintiff has no longer to prove that he was in possession of the property for a period of 12 years. It is

for the defendant to establish that his possession has been adverse for the requisite period of 12 years. In the instant case as the defendants have not established their case of adverse possession, the plaintiffs having proved title to the property are entitled to the possession thereof, so long as the defence has not established the plea of adverse possession."

In view of the abovesaid principles of law, it is found that the respondents having failed to establish the plea of adverse possession set out by them, it could be seen that the appellants would be entitled to the reliefs sought for in the present suit as determined by the trial Court. The respondents have marked certain kist receipts for upholding their plea of adverse possession and when it is found that some of the kist receipts had emanated during the period of the earlier litigation and some had come into existence after the institution of the present suit and further, when the respondents have failed to establish that the kist receipts projected in the matter relate to the suit properties as such, when it is found that the respondents are owning other extent in the suit survey numbers, in view of the above position, merely on the kist receipts projected and marked as Exs.B8 to B19 and the patta marked as Ex.B7, which document has come to be issued after the institution of the present suit, in my considered opinion, the abovesaid documents cannot be the basis for upholding the plea of adverse possession projected by the respondents.

10. Considering the principles of law enunciated governing the plea and proof of adverse possession as reported in AIR 2007 SC 1753 (P.T.Munichikkanna Reddy and Ors. Vs. Revamma and Ors.), (2008) 7 MLJ 275 (Veerasekaran and another Vs. Devarasu, 1979 (1) MLJ 419 (Karmega kone Vs. Udayar Kone and others) and AIR 1996 SC 869 (Dr.Mahesh Chand Sharma Vs. Smt. Raj kumar Sharma and others), it is found that the party seeking the plea of adverse possession, thereby impliedly admitting the claim of the opponent party, merely on the long possession of the suit properties by itself would not be entitled to contend that he has prescribed title to the properties in dispute by way of prescription. On the other hand, it is found that the parties seeking the plea of adverse possession should establish his possession and enjoyment of the suit properties continuously, publicly, openly and uninterruptedly beyond the statutory period expressing animus possidendi i.e., expressing animus intention to possess and hold to the properties in dispute adversely to the knowledge of the title holder and unless and until all the ingredients are established by the parties seeking the adverse

possession by exhibiting cogent, acceptable and reliable evidence, merely on surmises and conjectures, we cannot uphold the plea of adverse possession. Accordingly, when it is found that the period of the so called adverse possession and enjoyment of the suit properties by the respondents has been suspended or arrested during the period of the pendency of the earlier litigation and accordingly, when it is found that the kist receipts projected by the respondents are not sufficient to uphold their plea of adverse possession and when there is no material placed on record by the respondents to hold that they had been enjoying the suit properties with necessary animus to the knowledge of the title holders by challenging their title, on the other hand, when it is found that the claim of title, valid possession and enjoyment of the suit properties of the respondents from the inception had been challenged by the appellants, as above seen, it is found that the first appellate Court had erred in upholding the plea of adverse possession merely on the long possession and enjoyment of the suit properties by the respondents without taking into consideration the ingredients which are necessary to be proved by the respondents for claiming title to the suit properties by way of adverse possession as enunciated in the abovesaid decisions.

11. Resultantly, the suit having been laid by the appellants based upon title and when the respondents have failed to establish their plea of adverse possession by placing acceptable, reliable and convincing materials, it is found that the first appellate Court has erred in rejecting the appellants suit by erroneously upholding the plea of adverse possession set out by the respondents and in such view of the matter, the judgment and decree of the first appellate Court cannot be allowed to sustain any further. The substantial questions of law formulated in the second appeal are answered against the respondents and in favour of the appellants.

12. In conclusion, the judgment and decree dated 31.10.2003, passed in A.S.No.33/2003, on the file of the II Additional Sub Court, Villupuram are set-aside and the judgment and decree dated 01.02.2002, passed in O.S. No.478/99, on the file of the I Additional District Munsif Court, Thirukoilur are confirmed. Accordingly the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

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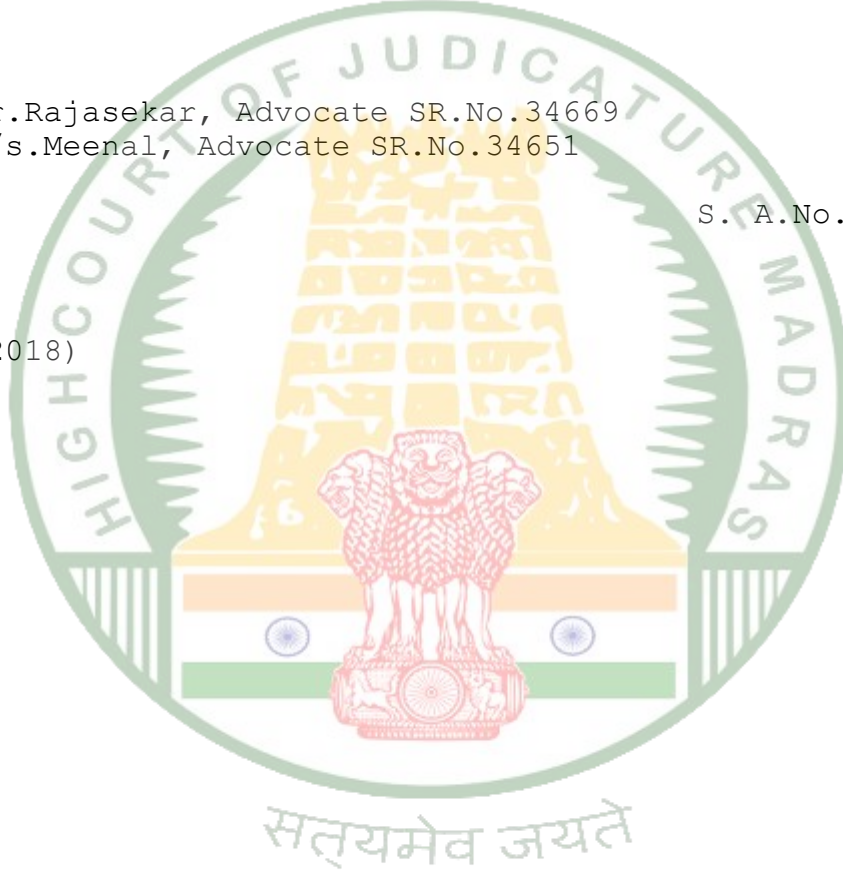
To

1. The II Additional Sub Court,
Villupuram.
2. The I Additional District Munsif Court,
Thirukoilur.
3. The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.Rajasekar, Advocate SR.No.34669
+1cc to M/s.Meenal, Advocate SR.No.34651

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