

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :29.01.2019

Pronounced on :06.02.2019

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

S.A.No.92 of 1994

1.Saravana Thevar(died)

2.Thangavel

... Appellants

Vs

1.Rathanasabapathy

2.Murugadas

3.Ganapathy Thevar

4.Kalianna Thevar

5.Kulandeval

6.Kumaravel

7.Arukkani

8.Kaalimuthu

9.Kamalammal

10.Maheswari

11.Kanchana

12.Saraswathy

13.Royakkal

14.Velumani

15.Manimekalai

16.Poonkodi

17.Karupayee Ammal

18.Manickam

19.Karthikeyan

20.Vijayalakshmi

21.Susila

22.Shanmugasundaram

23.Manoranjitham

24.Baby Kousalya

... Respondents

RR17 to 24 brought on record as
LRs of the deceased 1st appellant
vide order of court dated

12.09.2013 made in CMP.No.1597 of 2007 in S.A.No.92 of 1994.

PRAYER: The Second Appeal filed under Section 100 of CPC, against the judgment and decree of the learned II Additional District Judge, Coimbatore, in A.S.No.272 of 1981 dated 14.10.1993 modifying the judgment and decree of the learned Subordinate Judge, Coimbatore, in O.S.No.650 of 1975 dated 20.11.1980.

For Appellants : Mr.J.Ramakrishnan

For R1 : Mr.S.V.Jayaraman, Senior Advocate
For S. Kadarkarai, V.Sanjeevi

For RR2 to 24 : Memo filed by counsel for appellants dispensing the respondents.

JUDGMENT

The third and seventh defendants in O.S.No.650 of 1975 on the file of the Sub Court, Coimbatore, are the appellants herein.

2.O.S.No.650 of 1975 had been filed by the plaintiff Rathanasabapathy against ten defendants. The first to eighth defendants were also either directly or indirectly related to him. The ninth and tenth defendants were purchasers of a portion of the property. The plaintiff sought a judgment and decree to declare his absolute title to the suit property and for consequential permanent injunction to restrain the defendants from interfering with his peaceful possession and for mandatory injunction directing the third and seventh defendants to remove the shed put up in the property and for consequential reliefs. By judgment and decree dated 20.11.1980, the suit was decreed.

3.Thereafter, the third and seventh defendants filed A.S.No.272 of 1981. By judgment dated 14.10.1993, the learned II Additional District Judge, Coimbatore, modified the judgment of the Trial Court, but however, granted the decree for mandatory injunction and also declaration of title and permanent injunction.

4.Challenging the judgment in A.S.No.272 of 1981, the third and seventh defendants filed the present Second Appeal. The Second Appeal had been admitted on the following substantial question of law:

"Whether on the facts and circumstances of the case the courts below are correct in proceeding on the footing that Article 65 of the Limitation Act alone is attracted overlooking the fact that the plaintiff/respondent seeks in effect to enforce the covenant contained in the partition of the year 1941 and therefore the appropriate Articles is Article 54 of the Limitation Act?"

5. However, during arguments, learned counsel for the Appellants did not press the said substantial question of law and urged the Court to examine the following substantial question of law:

"Whether the Lower Appellate Court is correct in law in coming to the conclusion that the plaintiff is entitled to relief of possession of the shed as shown in the plan of the Advocate Commissioner alleged to have encroached upon by the appellants especially when there is absolutely no plea or prayer seeking possession?"

A memo to this effect filed by the learned counsel for the appellants and the said substantial question was also framed after hearing the learned senior counsel for the first respondents and arguments were advance on the same.

O.S.No.650 of 1975 (Sub Court, Coimbatore):

6. The plaintiff Rathanasabapathy claimed that the suit property was allotted to the plaintiff by a partition deed dated 01.03.1993. It was part of a larger extent of land which originally belonged to two brothers Subbia Thevar and Murugaya Thevar. The son of Subbia Thevar through his first wife was Velusamy Thevar. The first defendant was the son of Velusamy Thevar. The second defendant Murugadass was the son of Subbia Thevar through his second wife. The plaintiff was the grandson of Subbia Thevar through his another son Shanmuga Thevar born through his second wife. The third to sixth defendants were the sons of Murugaya Thevar. The seventh defendant was the son of the third defendant. The eighth defendant was the son of the sixth defendant. Ninth and tenth defendants were the purchasers of a portion of the property from the second defendant. There were partitions among the family on 04.07.1941 and again on 14.06.1967. There was also an earlier suit between the parties in O.S.No.1042 of 1952 on the file of the District Munsif Court, Coimbatore. It was claimed by the plaintiff that the third and seventh defendants have no manner or right title over the suit

property, but taking advantage of absence of fixed boundaries had put up a new shed in the portion belonging to the plaintiff. He had protested. He had given a police complaint on 10.06.1975. He had given a complaint to the Commissioner of Singanallur Municipality on 14.06.1975. The temporary shed measured 24*15 feet. It was the construction of his shed which was the cause of action for instituting the suit seeking declaration of title and permanent injunction to protect possession and for mandatory injunction to remove the shed.

7.The third and seventh defendants contested the suit and filed written statement along with the defendants 4-6. They admitted that there was a partition in the year 1941 between the Subbia Thevar and Murugaya Thevar by metes and bounds. A separate arrangement had also entered between them, whereby Murugaya Thevar was given a small extent of land. It was denied that the third and seventh defendants had encroached upon the partition of the plaintiff. It was claimed that this portion was allotted to Murugaya Thevar by exchange arrangement. It was stated that the seventh defendant had purchased the portion from the fourth defendant and had put up shed at a cost of Rs.2,000/-. It was stated that the defendants had perfected title by adverse possession.

8.The ninth and tenth defendants had also filed written statement claiming that they had also purchased a portion of the property and that the plaintiff had encroached into the same.

9.Based on the above pleadings, the following issues were framed:

- 1.Whether the suit properties were divided by metes and bounds under the partition deed dated 04.07.1941?
- 2.Whether the defendants 3 and 5 to 7 have not encroached into the plaintiff's land?
- 3.Whether the defendants 3 and 5 to 7 have perfected their title by adverse possession?
- 4.Whether the plaintiff has encroached into the lands purchased by the defendants 9 and 10?
- 5.Whether the plaintiff is entitled to the reliefs prayed for?
- 6.To what relief is the plaintiff entitled?

O.S.No.650 of 1975 was tried along with another suit in

O.S.No.594 of 1977 which had been filed by the ninth and tenth defendants namely, M.Ramasamy and Arukkani against the plaintiff Rathnasabapathy and first defendant V.Vellingiri, for a direction to put the first plaintiff in possession of the portion encroached by the said two defendants.

10.As stated above, both the suits were tried together and during trial, the plaintiff in O.S.No.650 of 1975 was examined as PW1. The third defendant Saravana Thevar was examined as DW1. The ninth defendant M.Ramasamy was examined as DW2 and A.Sadayappan was examined as DW3. The plaintiff marked Exs.A1 to A8. Ex.A1 was the partition deed dated 04.07.1941 and Ex.A2 was the another partition deed dated 14.06.1967 and Ex.A3 was yet another partition deed dated 01.03.1973. Exs.A7 and A8 were extracts from Exs.A1 and A2. The defendants marked Exs.B1 to B8. Ex.B1 was the sale deed in favour of the seventh defendant dated 11.02.1971. Ex.B2 was another sale deed in favour of the seventh defendant dated 10.6.1975. Exs.B3 and B4 were the sale deeds in favour of the ninth and tenth defendants dated 26.07.1973 and 28.11.1973 respectively. Ex.B5 was the copy of Advocate notice issued by the ninth and tenth defendants dated 31.07.1975 and Ex.B8 was the reply dated 14.09.1975. The Commissioners report and plan were marked as Exs.C1 to C5.

11.On the basis of oral and documentary evidence, it was held that the arrangement agreed upon the parties and the Commissioner's reports and plans in Ex.C3-C5 were equitable and fair and that the suit properties had been divided by metes and bounds under the partition deed dated 04.03.1941. It was also found that the defendants 3 and 5-7 have encroached upon the plaintiff's land and have not perfected title by adverse possession. It was also found that the plaintiff had not encroached upon any of the portions purchased by the defendants 9 & 10. Consequently, O.S.No.650 of 1975 was decreed by the learned Sub Judge, Coimbatore.

A.S.No.272 of 1981(II Additional District Court, Coimbatore):

12.Challenging that Judgment, as stated above, the third and seventh defendants filed A.S.No.272 of 1981. This came up for consideration before the II Additional District Court, Coimbatore. By judgment dated 14.10.1993, the learned II Additional District Judge framed points for consideration and also found that the plaintiff was entitled for the relief of declaration of title and permanent injunction and also for mandatory injunction for removal of the shed. The findings was modified slightly with respect to the Commissioner's sketch Ex.C5. In all other respects, the judgment of the Trial was

upheld.

S.A.No.92 of 1994:

13.Challenging the judgment in A.S.No.272 of 1981, the third and seventh defendants had filed the present Second Appeal. The Second Appeal had been admitted on the following substantial question of law:

"Whether on the facts and circumstances of the case the courts below are correct in proceeding on the footing that Article 65 of the Limitation Act alone is attracted overlooking the fact that the plaintiff/respondent seeks in effect to enforce the covenant contained in the partition of the year 1941 and therefore the appropriate Articles is Article 54 of the Limitation Act?"

14.During the Course of arguments, the learned counsel for the appellant stated that he was giving up the said substantial question of law. On the other hand, he stated that the following substantial question of law alone would arise for consideration:

"Whether the Lower Appellate Court is correct in law in coming to the conclusion that the plaintiff is entitled to relief of possession of the shed as shown in the plan of the Advocate Commissioner alleged to have encroached upon by the appellants especially when there is absolutely no plea or prayer seeking possession?"

15.For the sake of convenience, the parties would be referred as plaintiff and defendants.

16.The only substantial question of law which now arises for consideration is whether the Lower Appellate Court was correct in coming to the conclusion that the plaintiff was entitled to relief of possession of the shed, though there no relief was sought seeking possession. In other words, the learned counsel of the appellants argued that the suit was filed for declaration of title and for mandatory injunction to remove the shed. Mandatory injunction to remove the shed was granted. However, since the plaintiff had not sought the relief of recovery of possession, the plaintiff has to be non-suited.

17. In this connection, learned counsel for the appellant relied on the observation of this Court in the judgment reported in (1970) 2 MLJ 577, Bodi Reddy Vs. Appu Goundan, wherein M.M. Ismail, J. had observed as follows:

6. The case of the respondents in both these second appeals is that the grant of mandatory injunction is in the discretion of the Court and taking into consideration the facts and circumstances of a particular case and more specifically any delay or laches on the part of the appellants and the extent of injury or inconvenience caused to the appellants by the conduct of the respondents and the extent of injury or hardship that will be caused to the respondents by the grant of the mandatory injunction, it is always open to the Court to award damages instead of granting a mandatory injunction. The question for consideration is, whether the proposition for which the respondents contend applies to cases of this nature, whether on principle or of any authority.

7. Let me examine the position purely as a legal principle. If a plaintiff comes to the Court with a prayer for declaration of his title to and recovery of possession of a property in the possession of the defendant, he is entitled to a decree in his favour, once he establishes his title and also the fact that he has been in possession of the property within 12 years prior to the date of the suit. The fact that the property involved is of small value or is of no practical use to the plaintiff is wholly irrelevant to the grant of the relief to the plaintiff. Equally irrelevant is any consideration as to whether the defendant would be inconvenienced or subjected to any hardship by the grant of a decree in ejectment against him. It is a simple case of trespass or encroachment on the plaintiff's property and the defendant is entitled to no consideration, while granting relief to the plaintiff with reference to the wrong committed by the defendant. In such a case, if the defendant instead of simply

occupying the land after his encroachment and trespass puts upon a construction, can his position be in any way better if it is to be held that simply because the defendant, in addition to committing trespass or encroachment, has put up a construction on the land and because of such construction, there is a discretion left in the Court either to grant a decree for possession after directing the defendant to demolish the construction or to award damages instead of directing such demolition, that will be placing such a person in a better position for having aggravated his wrong by putting up a construction. In such a situation there can be no equitable consideration in favour of the defendant and as a matter of fact all notions of equity and justice will be opposed to any such contention. But the position may be different, if the plaintiff in such a situation comes to the Court and does not ask for possession but only asks for a mandatory injunction directing the defendant to demolish the construction. In that case, the Court may very well take into account the factor that so long as the plaintiff does not ask for possession of his property; it will make no difference to him whether the defendant continued in occupation of the plaintiff's property without putting up a construction or after putting up a construction and the question of demolition of the construction will arise only, when the plaintiff asks for possession and therefore damages may be awarded instead of a mandatory injunction directing the defendant to demolish the superstructure put up by him. As a matter of fact, in such a case, it may equally be argued that the suit itself for a bare mandatory injunction is not maintainable without the plaintiff having asked for possession." [Emphasis Applied]

Relying on the passage emphasised above, the learned counsel states that the suit for bare mandatory injunction is not maintainable when the plaintiff had not asked for possession.

18. The learned senior counsel for the first

respondent/plaintiff, however, relied on the judgment in 1991 (1) L.W. 371, Palaniammal V. Pechimuthu & 3 others, wherein M.Srinivasan, J. had held as follows:

"In a suit for grant of an injunction restraining the defendant from interfering with plaintiffs possession and for a mandatory injunction for removal of the construction already made by the defendant and marked as A.B. In the plain attached to the plaint, the plaintiffs, alleged that the defendant had started construction on 25.05.1977 and in fact has already encroached on the portion marked A.B. In the plan by putting up a construction and is continuing in her nefarious act in spite of plaintiffs' protest. In this Second Appeal it was contented on behalf of the defendant-appellant. (i) That the plaintiffs have to fail as they have not prayed for declaration of title or recovery of possession as, according to learned counsel for the appellant, it is admitted in the plaint that the defendant had already encroached on the suit property. It was submitted that the aforesaid averment would constitute an admission on the part of the plaintiffs that the defendant has trespassed upon the suit property and without a prayer for declaration of title and recovery of possession, the suit for bare injunction and mandatory injunction is not maintainable. (ii) It was further contented that the disputed property is situated in between the property of the plaintiffs and the property of the defendant, and there is a presumption in law that the space which is between the two properties is common property belonging to both the parties.

If the entire plaint is read, it is clear that the plaintiffs have rushed to the court as soon as the defendant started construction. It is not as if the defendant encroached upon the property and squatted on the same for some time, and thereafter began to construct thereon. The encroachment itself was by commencement of the construction on the disputed property. Hence, there is no necessity for the

plaintiffs to seek a declaration of their title or recovery of possession. If the impugned construction is removed, the plaintiffs will be certainly in possession as the property is adjacent to their admitted property and it is really part of the same. The courts below have taken the correct view on a reading of the plaint and held that there is no necessity to pray for any declaration or recovery of possession. Hence this contention of learned counsel for the appellant fails."

19. Reliance was also placed on 2013 (6) CTC 530, Kandhathal Vs. Muthammal and others, wherein it had been held by M.Sathyannarayanan, J., as follows:

"18.....the prayer for permanent injunction and mandatory injunction should be read along with other averments made in the plaint as there is allegation of encroachment made in the Suit property as mentioned in the description of the property and hence, there is no necessity for the Plaintiff to seek declaration of title or possession of the Suit property. When the offending obstruction is removed, the Plaintiff will be certainly in possession of his property."

20. A careful reading of the judgment reported in (1970) 2 MLJ 577 reveals that an observation alone had been made by M.M.Ismail, J. That was a case, where it was also urged that damages may be granted instead of granting mandatory injunction. In the present case, the plaintiff had also sought the relief of declaration of title. The title had been upheld by both the Courts below in favour of the plaintiff. Naturally when the relief of mandatory injunction was also granted then automatically the plaintiff has to be put in possession of the portion for which title had been granted.

21. Consequently, I hold that the First Appellate Court was correct in granting the relief of mandatory injunction, even though, relief of possession was not sought. This is because of the plaintiff had also sought the relief of declaration of title and title had been upheld.

22. In view of the above facts, the Second Appeal stands

dismissed, with costs. The judgment and decree of both the courts below are confirmed.

Sd/-
Assistant Registrar (CS-III)

//True copy//

Sub Assistant Registrar

smv

To

1.The II Additional District Court, Coimbatore.

2.The Subordinate Court, Coimbatore.

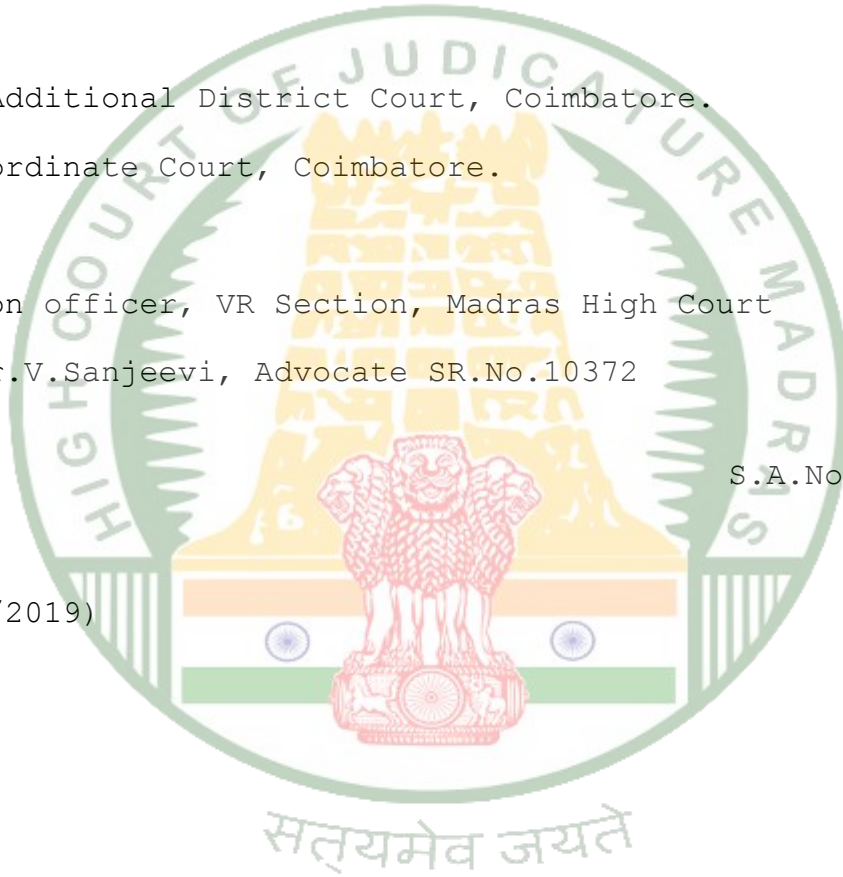
Copy To

The Section officer, VR Section, Madras High Court

+1cc to Mr.V.Sanjeevi, Advocate SR.No.10372

S.A.No.92 of 1994

RSV (CO)
GMY (03/04/2019)



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