

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 21.12.2018

Judgment Pronounced on : 25.01.2019

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

A.S.No.654 of 2005

and CMP.No.10200 of 2005
and CMP.Nos.3441 & 14884 of 2018

1.S.Ganesan (Died) ... Appellant / Plaintiff

2.D.Sugumar

[2nd appellant brought on record as LR of the
deceased sole appellant Vide order dated 26.08.2015
in CMP.No.80 of 2011 in A.S.No.654 of 2005]

Vs

T.Sarala

... Respondent/Defendant

Prayer :- Appeal Suit filed under Section 96 of CPC, against the
judgment and decree dated 27.10.2003 in O.S.No.10471 of 1996 on
the file of IV Additional City Civil Court, Madras.

For Appellant : Mr.A.Sundaravadhanam

For Respondent : Mr.M.Sriram

JUDGMENT

This appeal is preferred by the plaintiff challenging a decree dismissing his suit for delivery of the property. For the sake of convenience, the parties would be referred to by the rank before the trial court.

2.1 The case of the plaintiff is that on 25.06.1960, he had purchased a plot of land measuring 1 ground 2,085 sq.ft. in R.S.No.3682/2 under Ext.A2 sale deed. The property purchased was plot No.19 in an approved layout. According to the plaintiff, he had put up a house in a portion of the property and this was assigned Door No.22. While so, a certain Lilly, wife of the 1st defendant and a relative of the plaintiff had requested the plaintiff that she might be permitted to put up a structure in the vacant plot available on the rear side of the plaintiff residential building. Plaintiff had agreed to the proposal and

one of the terms of this arrangement / agreement between the plaintiff and Lilly was that in due course the plaintiff would pay the cost of construction of the proposed building to Lilly and till such time it was so paid, Lilly would remain as plaintiff's tenant.

2.2 Accordingly, Lilly put up a structure and it was assigned Door No.22A. However, the plaintiff could never muster enough financial resources to pay the cost of construction to Lilly and consequently she remained a tenant. In the mean time, Lilly asserted that she was a tenant of the building No.22, which the plaintiff himself had put up. She even approached the Rent Controller (Small Cases Court), Chennai in RCOP No.413 of 1968 and this came to be dismissed because the plaintiff contended that the very existence of landlord and tenant relationship between him and Lilly.

2.3 Lilly had since passed away and her son-in-law Mr.Thiagarajan, who had married Lilly's daughter Sarala came to be in possession and they have exchanged notice between the parties. In his reply dated 18.03.1991, Thiagarajan informed the plaintiff that his father-in-law was in possession of the building which Lilly had put up, and therefore, the suit is laid against the first defendant, is the husband of Lilly and father-in-law of Thiagarajan.

2.4. It may be stated, in the mean time, the plaintiff had sold the front portion of the plot with building, to a third parties for a sale consideration of Rs.9,00,000/- and that he now had adequate finance to pay the cost of construction to Lilly. On the said facts, the plaintiff had laid the suit for recovery of property to the title of the rear portion.

3. In the written statement it is admitted that the plot No:19 was allotted to the plaintiff, but that was the only admission made, as the rest of the plaint allegations are denied. It was then pleaded in the written statement, that the plaintiff had committed default in paying his monthly installments to the Co-operative Housing Society which allotted the plot, and that it was in peril of being brought to auction-sale. To avert the said sale, Lilly, a close relative of the plaintiff offered to purchase the rear portion of the plot No.19, and provided the requisite finance following which the proposed auction sale was averted. She was allowed to occupy the rear portion and she had put up a construction there. The rear portion of plot No:19 was orally sold, wherein Lilly had put up a house. Alternatively it was contended that Lilly has prescribed the title by adverse possession to B-schedule property.

4. Before the trial court, the plaintiff had examined himself as PW1 and also examined a certain Anbarasan as PW2 who valued the building constructed by Lilly. On the side of the defendant, 1st defendant himself was examined as DW1 and S.P.Thangarajan was examined as DW2 and Deenadayala Rao was examined as DW3. defendant have also filed Exts.B1 to B21 of which, Exts.B1 and B3 to B21 are of property tax receipts or electricity charge receipts for payment of electricity charges as the case may be. The trial court has dismissed the suit on the ground that the defendant had prescribed title to the property by adverse possession.

5. Point for consideration:

Have the defendant prescribed title by adverse possession?

6. The learned counsel for the appellant/plaintiff argued that :

- It is not the case of the defendant that the plaintiff was not the owner of the entire plot No.19. Therefore, unless the defendant established the title in the manner that law can recognise, their attempt to get title over the rear portion of the plaint A-schedule property (described in the plaint as B-schedule), the defendant have pleaded an oral sale-agreement towards which Lilly had paid part consideration of Rs.5,000/-. In this regard it is not made clear the date when the sale agreement was entered into, and/or, if it was an oral sale above the value of Rs.5,000/- then in the absence of any registered deed, Lilly could acquire no title to B schedule property.
- It is not the case of the defendant that they are the tenants of the building in the rear side, and the plaintiff contends that it was put up by Lilly based on a permission granted by the plaintiff and that she agreed to be a tenant of the building that she would put up. Therefore, from the stand point of the contention of the rival parties, while plaintiff makes a concession that Lilly was a permissible occupant of B-schedule property, it was the defendant who alleged an oral sale in their favour coupled with adverse possession. When the title alleged to have been transferred by an oral sale could not be sustained, the legal character of the defendant could no more than being a permissive occupant since the preponderance of probability of the materials available in the case would only lead to an inference that Lilly could have put up a structure in the plaint b schedule property, only based on the permission of the plaintiff. And, the defendant has not even pleaded acquiescence.

- When acquiescence is not pleaded, adverse interest cannot be shown to have been exhibited and therefore, plea of adverse possession can never be sustained. It is not even made clear the specific date from which such possession has become adverse to the interest of the plaintiff. The documentary evidence which the defendant have filed are essentially tax receipts and it is settled law that tax receipts can never be termed as documents of title.

7. Per contra, the learned counsel for the respondent would argue that:

- There is no clarity on what the suit intends. In paragraph 15 of the plaint, the plaintiff says that the suit is being laid for specific performance whereas the reliefs show that it is one for declaration of title over B-Schedule property and for recovery of possession. He then comes up with an offer to sell the site in 'B' schedule property to the defendant for Rs.9.0 lakhs.
- As to the legal character of Lilly vis a vis the 'B' schedule property, the plaintiff does not have a consistent case: He would first allege that she was permitted to occupy the B schedule property, granted permission to put up a building, and that she had agreed to be a tenant of the building. He would then say that Lilly was paying him the rent for the building till March, 1990. But when his attempt to evict the defendant alleging that that Lily was his tenant under Rent Control proceedings boomeranged, he concedes ownership of the building in B schedule property to Lilly.
- Turning to the plea of adverse possession, Lilly had Vide Ext.B-2 dated 02-02-1968 declared that her possession was hostile to the plaintiff. In his reply in Ext.B-3 dated 05-02-1968, plaintiff has denied the sale agreement. The property tax are being paid by Lily or the defendant, as the case may be. And, the suit is laid only 1996 some 28 years after arising of hostility between the parties. Necessarily ingredients constituting adverse possession are present and proved.
- Presently the suit itself is not maintainable. The plaintiff who has instituted the suit, had passed away and his alleged legatee under a Will said to have been executed by the plaintiff has now come on record to prosecute the suit. It is true that the legatee under the Will had probated it and had obtained Letters of Administration in O.P.No.261 of 2011. But it was obtained without the defendant being put on notice, and hence the same is

appealed against at the instance of the defendant in the suit.

8. The last of the point argued by the counsel for the respondents is considered first. Is the appeal not maintainable because the defendant in the suit were not put on notice about the probate proceedings, and were not heard? This depends on, but for the will, whether the defendant would be entitled to succeed to the suit property, or any share thereof. It is not the case of the defendant that they would succeed to the estate of the plaintiff. Therefore, they cannot raise an objection as to the sustainability of the appeal.

9. The next point is if Lilly or any other claiming under her have prescribed title to B schedule property by adverse possession? Here the case of the plaintiff, after clipping all the frills, is that Lilly was inducted as a permissive occupant of the B schedule property, that she was permitted to put up a building therein. He might have stretched his case that there was an agreement to between him and Lilly whereby he would become the owner of the building that Lilly would put up and that she would a tenant under him. This part of the pleadings have not been proved, which would only mean that the allegation about an oral agreement between the plaintiff and Lilly as alleged in the plaint well could be an exaggeration. However, this portion of the pleading can be compared to an inconsistent pleading could well be separated from the rest, and the other part of the plaint allegation that Lilly was a permissive occupant of B schedule property alone will survive consideration. Accordingly, even going by the case of the plaintiff, the plaintiff was the owner of the site and Lilly was the owner of the building. This an aspect even the defendant admit, but they add a rider to it when they allege that (a) the plaintiff had orally sold the B schedule property to Lilly, and alternatively (b) That Lilly had prescribed title to the said property by adverse possession.

10. First, both these pleadings founded on title and adverse possession cannot be simultaneously sustained, and if the pleading of the Oral sale cannot be legitimately sustained, then what remains is the case of adverse possession.

11. The point is more on title to the site. As indicated above, when adverse possession is pleaded then, it is implied that the defendant conceded the title of the plaintiff. Is there anything, therefore on evidence that Lilly had asserted a title by adverse possession on the site. Ext.B-2 on which the defendant/respondents now rely on does not claim any title over

the site, but on the contrary it concedes that the plaintiff was the owner of the same. All it asserts is that Lilly was in possession in part performance of an agreement of sale that she had entered into with the plaintiff. Having conceded it in 1968, there is no clarity either in her pleading or in evidence the specific time when her occupation of the site had become hostile to the title of the plaintiff, and/or if the plaintiff had notice of it. Turning to the payment of property tax or other charges connected with Lilly's building in the B schedule property is concerned, inasmuch as it is her building, necessarily she has to pay them and therefore that which she had paid for her building will not have the effect of prescribing title adverse possession over the site. In the final analysis, this court holds that the plaintiff's title over the B schedule property has to be declared.

12. What now remains is what to do with the building. It is not the case of the defendant that either Lilly or those who claim right under her that they have been the tenant of the site as well, and that the building was put up by Lilly in the B-Schedule property as a ground-lessee. Therefore, they would not be entitled to any protection under the Tamilnadu City Tenancy Protection Act. Since the defendant are owners of a building merely in a plot of land of which they are permissive occupants, they have only the obligation to demolish the same and to give vacant possession thereof.

13. However, before the trial court, both the sides have taken out a commission to value the building. The Commissioner taken out by the defendant/respondent has valued it at Rs.4,73,000/- , which is higher of the two valuation available before the court. The counsel for the appellant, in the course of his argument had conceded to the value of the Commission taken out by the defendant and made a statement, instead of directing demolition of the said building, the plaintiff might be directed to pay its value. This appears to be fair to this court, since it might mean that the defendant would not lose any value to the building that which belonged to them. This Court however, rounds it to Rs.5.0 lakhs, ignoring the future depreciation of the building. Therefore, instead of directing the defendant to surrender vacant possession of the plaint B schedule property, the plaintiffs are directed to deposit a sum of Rs.5.0 lakhs within a period of four months before the trial court from today.

14. In the end, the appeal is allowed and the decree in O.S.No.10471 of 1996 on the file of IV Additional City Civil Court, Madras is hereby set aside. The appellant/plaintiff is directed to deposit a sum of Rs.5.0 lakhs within four months from today, whereupon the respondent is directed to deliver possession within one month. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

ds/ssn

To:

1. The IV Additional City Civil Court,
Madras.
2. The Section Officer,
High Court, Madras.

+1cc to Mr.D.Naveen Durai Babu, Advocate Sr.6718
+1cc to Mr.A.Sundaravadhanan, Advocate Sr.6377
+1cc to Mr.Sriram, Advocate Sr.6211

AS.No.654 of 2005

sr[col]
srg 28/05/2019

WEB COPY