

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.10.2019
PRONOUNCED ON : 25.11.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

A.S.No.214 of 2008

1. Rani
2. Murugan
3. Parimala
4. Rathy
5. Lally

... Appellants/Defendants 1 to 5

Vs.

1. Padmavathy
2. Balaji
3. Udhayakumar
4. Savithri
5. Thilothamma
6. Vijayalakshmi
7. Malaini

(Respondents 1 to 7 are through
their power of attorney
Rama Ravindra Kumar)

8. M.Malliga
9. Devi

(Respondents 8 & 9 are not
necessary party hence notice need
not be sent hence they are given
up for notice)

... Respondents/Plaintiffs 1 to 7 and
Defendants 8 and 9

Prayer: Appeal Suit filed under Section 96 of Civil Procedure Code as against the judgment and decree passed in O.S. No.628/2004 dated 31.10.2006 on the file of the Fast Track Court No.IV, cum Additional District and Sessions Court, Poonamallee.

For Appellants : Mr.N.Manokaran

For Respondents : Mr.N.R.Anantharamakrishnan
for M/s. L.K.Manjunath

JUDGMENT

Aggrieved over the judgment and decree dated 31.10.2006, passed in O.S. No.628/2004, on the file of the Additional District and Sessions Court/Fast Track Court No.IV, Poonamallee, the defendants 1 to 5 have preferred the first appeal.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

3. Suit for declaration, possession, past and future damages.

4. The case of the plaintiffs, in brief, is that the property described in the plaint A schedule belonged to the first plaintiff's mother Rajammal and she had purchased the same from Sankaranarayana Iyer, by way of a registered sale deed dated 26.03.1959 and since then, it is only Rajammal who is in the possession and enjoyment of the plaint A schedule property and she is no more and the first plaintiff is her only daughter. After the demise of Rajammal, the first plaintiff became entitled to the plaint A schedule property and enjoying the same and during 1992, one Devan and Manickkam approached the first plaintiff and requested her to permit them to put up temporary huts in the plaint A schedule property and live therein informing that they are working in the adjacent brick chambers and inasmuch as the first plaintiff has been residing far away from the suit property and in order to prevent any trespass into the suit property, accordingly, on the assurance given by Devan and Manickkam that they will look after the suit property and also report to the first plaintiff now and then, accordingly, the plaintiff had permitted them to reside in the suit property for some time as requested by them. However, taking advantage of the same and also the inability of the first plaintiff to visit the suit property now and then, they had allowed others to enter into the plaint A schedule property without any authority and on coming to know about the developments, the first plaintiff called upon them and demanded to remove all the persons and it is represented that the third parties who are all occupying the plaint A schedule property were also employed in the adjacent brick chambers and promised to vacate the same at the end of the rainy season and accordingly they were occupying the plaint A schedule property during the summer season and vacating the same and the same continued upto 1996. However, during 1997, they did not leave the suit property even during rainy season and on coming to know the same, the first plaintiff had directed them to vacate the property and Devan and Manickkam alleged that they did not have any property and represented that they want to purchase the property from the plaintiff and accordingly, started demanding the first plaintiff to sell the

plaint A schedule property. In the abovesaid circumstances, the plaintiff caused a legal notice dated 23.07.98 to the occupants and to the same, the occupants sent a reply containing false allegations. Though they have not specifically denied the title of the plaintiff, on the other hand, they have gone one step further and put forth the claim of adverse title qua the property in their occupation. However, the claim of adverse possession put forth by them is incorrect and they had occupied the property only on the permission given by the first plaintiff and not otherwise and the plaintiff has also terminated the permission granted to them by laying the suit in O.S.No.515/1998 against them for the relief of permanent injunction restraining them from putting up any further construction in the property and despite the same, they had failed to hand over the vacant possession of the property now described in the plaint B schedule and accordingly, the defendants are liable to pay the past and future damages qua their unlawful possession of the suit property to the plaintiff as claimed in the plaint and hence, the need for the suit for appropriate reliefs.

5. The defendants resisted the plaintiff's suit contending that the suit laid by the plaintiff for the relief of declaration qua the plaint B schedule property is not maintainable in law without seeking the relief of declaration qua the plaint A schedule property. The plaintiff has not valued the suit correctly. The claim of the plaintiff that Padmavathy is the absolute owner of the plaint A schedule property is denied and also denied that Thiru.Rama Ravindran is the power of attorney agent of Padmavathy and on that score alone, the plaintiff's suit is liable to be dismissed. The defendants further denied that the plaintiff's mother Rajammal had purchased the suit property by way of a registered sale deed dated 26.03.1959 and enjoying the same and after her demise, the same had been enjoyed by the first plaintiff. The defendants further disputed the case of the plaintiff that Devan and Manickam had been occupying the suit property on the permission granted by the first plaintiff and assured that they would protect the property from any trespass as claimed by the plaintiff and further disputed the case of the plaintiff that Devan and Manickam had allowed third parties to enter into the plaint A schedule property and taking advantage of the plaintiff's helpless situation, demanded the sale of the said property from the first plaintiff and also further denied the case of the plaintiff that they had assured the plaintiff that they would leave the plaint A schedule property during rainy season and accordingly, following the abovesaid pattern till 1996 and from 1997, they had refused to vacate the suit property and demanded the plaintiff to sell the same to them and also put up unlawful construction and the plaintiff without any cause of action has laid the suit in O.S.No.515/1998 for the relief of

permanent injunction restraining the defendants from putting up construction in the plaint A schedule property. The claim of damages as put forth in the plaint on the part of the plaintiff is false and according to the defendants, they had never approached and requested the plaintiff to occupy the suit property and on the other hand, it is put forth that for more than two decades, the property had been occupied by various persons including the defendants independently and they had put up pucca construction like terrace building and also pucca brick built super structure with cement and tiles and the above said construction were properly assessed to tax by the local bodies and also obtained the electricity service connection. No one had objected their enjoyment and accordingly, they were in the possession and enjoyment of the suit property for more than 40 years and the suit property was in their long, continuous and uninterrupted enjoyment beyond the statutory period and they had prescribed title to the suit property by way of adverse possession. Even assuming that the suit property belonged to Padmavathy, the plaintiffs had failed to implead all the occupants of the suit property and therefore, the suit is bad for non joinder of necessary parties. The suit property had not been properly described and therefore, the suit is liable to be dismissed.

6. On the basis of the abovesaid pleas set out by the respective parties, the following issues were framed for consideration by the trial Court:

1. Whether the plaintiff proves that she is the absolute owner of the suit properties?
2. Whether the plaintiff proves that the defendants are the unauthorised occupants in the B schedule property?
3. Whether the defendants have perfected their title to the suit properties by adverse possession?
4. Whether the plaintiff is entitled to damages from the defendants?
5. Whether the plaintiff is entitled to declaration and recovery of possession after removing the super structure in the suit properties?
6. Whether the suit is to be decreed?
7. To what relief the parties are entitled to?

7. In support of the plaintiffs' case, PW1 was examined, Exs.A1 to A14 were marked. On the side of the defendants, DW1 was examined, Exs.B1 to B4 were 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 declare that the plaintiffs are the absolute owners of the plaint B schedule property and directed the defendants to deliver the vacant possession of the same to the plaintiffs and also directed the defendants to pay Rs.10,800/- towards past damages and future damages at Rs.3600/- per year from the date of the plaint with interest at 6% and accordingly, disposed of the plaintiff's suit with costs. Impugning the judgment and decree of the trial Court, the first appeal has been preferred by the defendants 1 to 5.

9. The following points arise for determination in this first appeal:

1. Whether the plaintiffs have title to the suit property?

2. Whether the plaintiffs are entitled to the relief of declaration in respect of the suit property as prayed?

3. Whether the plaintiffs are entitled to recover the possession of the suit property from the defendants?

4. Whether the plaintiffs are entitled to recover the damages from the defendants as claimed in the plaint?

5. Whether the defendants have prescribed title to the suit property by way of adverse possession as put forth in the written statement?

6. To what relief the plaintiffs are entitled to?

7. To what relief the defendants/appellants are entitled to?

Point Nos.1 to 5:

10. The plaintiffs had put forth the case that the suit property described in the plaint belonged to Rajammal by way of a sale deed dated 26.03.1959. The abovesaid sale deed has been marked as Ex.A1. Though during the course of arguments in the appeal, the defendants' counsel would contend that the plaintiffs had not marked the original sale deed by which Rajammal had acquired the title to the suit property, however, on a perusal of the records placed for consideration, it is found that the plaintiff has marked the original sale deed to evidence that it is only Rajammal who had acquired the suit property. From the pleas put forth by the respective parties, it is found that the defendants are in the occupation of the

suit property. Now, according to the plaintiffs, only on the earlier permission granted by them, the defendants are in the occupation of the suit property and thereafter, as the defendants had failed to surrender the possession of the suit property to the plaintiffs and on the other hand, continued to occupy the same by raising construction unlawfully, according to the plaintiffs, they had been necessitated to institute the suit against the defendants for appropriate reliefs. Per contra, it is the main case put forth by the defendants that they had been in the occupation of the suit property for several years continuously and uninterruptedly without any permission granted by the plaintiffs as claimed in the plaint and accordingly, they had contended that as they had been in the possession of the suit property beyond the statutory period in their own right, they had prescribed title to the suit property by way of adverse possession and therefore, put forth the case that even assuming that Rajammal had title to the suit property, the same had been lost on account of the adverse title prescribed by the defendants qua the suit property.

11. From the pleas put forth by the defendants in the written statement as well as the evidence adduced by them through DW1, it is found that as rightly held by the trial Court, the defendants have not seriously challenged the title of the plaintiffs to the suit property by way of Ex.A1 sale deed. As above pointed out, the defendants have only pleaded that they had prescribed title to the suit property by way of adverse possession and on account of the same, the plaintiffs have lost their title. Therefore, the arguments put forth by the defendants' counsel that the plaintiffs had not established their title to the suit property, as such, cannot be countenanced and similarly, the authority projected by the defendants' counsel reported in (1996) 8 SCC 357 (Lakhi Baruah and others Vs. Padma Kanta Kalita and others) that the presumption under Section 90 of the Evidence Act cannot be taken with reference to the certified copy, considering the fact that the plaintiff has marked the original sale deed as Ex.A1, in such view of the matter, the abovesaid authority is found to be not applicable to the facts and circumstances of the case at hand.

12. From the materials available on record, both oral and documentary, it has to be held that the permission said to have been granted by the plaintiffs to the defendants to occupy the suit property, as such, has not been established. However, even though the abovesaid aspect of the plaintiff's case has not been established, still the plaintiffs having established their claim of title to the suit property and the defendants having not put forth any rival claim of title to the suit property other than raising the plea of adverse possession and thereby, impliedly

the defendants having admitted the claim of title to the suit property in favour of the plaintiffs, in such view of the matter, the main question that has to be determined in this case is whether the defendants have prescribed title to the suit property by way of adverse possession.

13. According to the defendants, they are in the occupation of the suit property in their own right for several decades. To sustain their claim of adverse possession, the defendants would only rely upon the voters list of the years 1984, 1988, 1993 and 1995 marked as Exs.B1 to B4. Other than the voters list, the defendants have not placed any other material to sustain the plea of adverse possession. Though the defendants would put forth the case in the written statement that they had put up pucca constructions in the suit property and the constructions put up by them had been assessed for tax by the local bodies and they had also obtained service connection as the absolute owners thereof, however, with reference to their claim of enjoying the suit property in the abovesaid modes, absolutely there is no proof put forth on the part of the defendants. As above noted, other than the voters list marked as Exs.B1 to B4, there is no other material on the part of the defendants evidencing the claim of enjoying the suit property in their own right, as claimed by them in the written statement.

14. The defendants have put forth the plea of adverse title for sustaining their claim of possession of the suit property and as above noted, when the plaintiffs have established their title to the suit property by projecting their title deed Ex.A1 and the same has not been disputed seriously by the defendants as such and by taking the plea of adverse possession, the defendants impliedly thereby having admitted the title of the plaintiff qua the suit property, in such view of the matter, the defendants having taken the plea of adverse possession, it is only for the defendants to establish the plea of adverse possession by acceptable evidence. However, on a perusal of the evidence of DW1, examined on behalf of the defendants, it is found that they had miserably failed to establish the case of adverse possession as claimed by them. DW1, during the course of cross examination, has admitted that she does not know the survey number of the property with reference to which the lis is pending between the parties and further admitted that she does not know whether the suit property is a patta land and they had not purchased the suit property and no patta had been issued in their favour and they had not paid any land tax and paid tax for the alleged constructions put up in the suit property and further admitted that she does not know from whom the voters list had been acquired and she had not taken the xerox copy of

the voters list and does not know anything about the voters list projected in the suit and doest not know the contents of the voter list and other than the voters list, there is no other document to evidence their occupation of the suit property and further admitted that her husband had acquired the suit property on the premise that the same is a poramboke land and neither the plaintiff nor the agent Rama ravindran had directed them to vacate the suit property and claimed that they had spent amount for raising the construction in the suit property and further admitted that if they had known about the title of the plaintiff, they would not have put up the construction and also further admitted that she does not know as to from when they had occupied the suit property and from which year they had been enjoying the same and also admitted that as others had occupied the suit property on the premise that the same is a poramboke land, she had also occupied the same and further also stated that if any amount is paid to them, they would vacate the suit property and also further admitted that if any one had objected to their occupation, they would not have occupied the suit property. The above is the evidence adduced by DW1 regarding the claim of adverse possession and DW1 is the only witness examined on behalf of the defendants. When DW1 is unable to explain as to the nature of the suit properties and from which year or period she has been in the occupation of the suit property and when she is unable to throw any light as regards the voters list projected by her in the matter and unable to say as to the source of the acquisition of the same and the contents of the same in any manner and when there is no material on the part of the defendants to evidence that they had put up any construction in the suit property and enjoying the same as claimed in the written statement and when there is no material on their part pointing to the same and DW1 further having admitted they had occupied the suit property only on the premise that it is a poramboke land and if they had known about the nature of the suit property as a patta land, they would not have occupied the same and further admitted that no patta had been issued in their favour and no tax had been paid by them in any manner qua the suit property, therefore, considering the abovesaid evidence of DW1, for sustaining the plea of adverse possession, when the defendants are required to state as to when from they had started prescribed the adverse title and whether they had been continuously and openly enjoying the property to the knowledge of the lawful owner by asserting their title independently with animus possidendi and also by denying the title of the lawful owner and with reference to the abovesaid aspects, absolutely no material having been projected on the part of the defendants and when DW1 has not thrown any light on the same as above pointed out, in such view of the matter, the claim of the defendants that they had prescribed the title to the suit property by way of adverse possession, as such, cannot

be believed and accepted and it is thus found that the trial Court has rightly rejected the claim of adverse possession put forth by them.

15. In this connection, the defendants' counsel would mainly rely upon the decisions reported in (2000) 3 M.L.J. 785 (Sadasiva Gounder and another Vs. Purushothaman), (2000) 3 M.L.J.589 (Thangamani Vs. Santhiagu) and 2004-3-L.W.273 (K.Krishnan, K.Varadan Vs. S.Mari Naicker, Kannammal) for contending that the defendants are entitled to raise the plea of adverse possession even without knowing the owner of the property, particularly, when they had established that they are in the possession of the suit property with animus possidendi by asserting title on themselves openly, continuously and uninterruptedly beyond the statutory period. However, the plaintiff's counsel would rely upon the decisions reported in (2006) 7 SCC 570 (T.Anjanappa and others Vs.Somalingappa and another), (2007) 6 SCC 59 (P.T.Munichikkanna Reddy and Others Vs. Revamma and others) and (2010) 14 SCC 316 (Chatti konati rao and others Vs. Palle venkata subba rao) and contended that the possession must be hostile and in denial of title of the real owner. For that, it is essential that the possessor must clearly know the actual owner of the property and only then can be said to be in hostile possession and question of denying the title of true owner would arise and possession must be peaceful, continuous and open, capable of being known to parties interested and in this case, there cannot be any claim of adverse possession since possessor was not sure whether the plaintiff or the Government was the true owner of the property concerned and hence, the claim of adverse possession projected would not be maintainable. The above position of law has been outlined with reference to the same in the decision reported in (2006) 7 SCC 570 (T.Anjanappa and others Vs. Somalingappa and another) in the following manner:

Adverse possession - Concept - Possession must be hostile, in denial, either express or implied, of title of the real owner - For that it is essential that possessor must clearly know the actual owner of the property - Only then can be situation of being in hostile possession and question of denying title of true owner would arise - Possession must be peaceful, continuous and open, capable of being known by parties interested - In this case, since possessor was not sure whether plaintiff or the Govt. was true owner of the property, held, claim of adverse possession is not maintainable - Limitation Act, 1963, Art.65 - Words and Phrases - "Adverse Possession"

The plaintiff-appellant filed a suit for declaration of title in respect of a house property, which the plaintiff had purchased from N two days after filing of the suit. According to the plaintiff, N had mortgaged the property in plaintiff's favour. The defendants had encroached upon a portion of the property, put a hutment about two years prior to the suit and therefore, on the strength of the title, the plaintiff sought relief of declaration of title and possession and also sought for injunction against the defendant not to repair or put up any permanent structure on the site. The defendants in their written statement denied the title of the plaintiff contending that the defendants were in possession of the premises since 1969 by putting up hutments and paying municipal tax. The defendants also contended that the property belonged to the Govt. and they were in adverse possession thereof. A defence was also taken that the area had been declared as a slum area. Hence, they prayed for dismissal of the suit. The trial Court dismissed the suit. In appeal the appellate Court set aside the judgment and decree of the trial Court. The High Court, in second appeal, accepted their plea of their adverse possession of the property. According to the High Court though the defendants were in possession from the standpoint of the real owner. It was held that the suit for possession to that extent was not filed within 12 years of dispossession and therefore grant of decree for declaration of the title and possession to that extent in favour of the plaintiffs (the appellants herein) is bad in law and liable to be set aside.

Allowing the appeal, the Supreme Court Held:

The High Court has erred in holding that even if the defendants claim adverse possession, they do not have to prove who is the true owner and even if they had believed that the Government was the true owner and not the plaintiffs, the same was inconsequential. Obviously, the requirements of proving adverse possession have not been established. If the defendants are not sure

who is the true owner the question of their being in hostile possession and the question of denying title of the true owner do not arise. Above being the position the High Court's judgment is clearly unsustainable.

The concept of adverse possession contemplates a hostile possession i.e. a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's right but denies them. A person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of his title to the property claimed. For deciding whether the alleged acts of a person constituted adverse possession, the animus of the person doing those acts is the most crucial factor. Adverse possession is commenced in wrong and is aimed against right. A person is said to hold the property adversely to the real owner when that person in denial of the owner's right excluded him from the enjoyment of his property. Adverse possession is that form of possession or occupancy of land which is inconsistent with the title of the rightful owner and tends to extinguish that person's title. Possession is not held to be adverse if it can be referred to a lawful title. An occupation of reality is inconsistent with the right of the true owner. Where a person possesses property in a manner in which he is not entitled to possess it, and without anything to show that he possesses it otherwise than as an owner (that is, with the intention of excluding all persons from it, including the rightful owner), he is in adverse possession of it. It is the basic principle of law of adverse possession that (a) it is the temporary and abnormal separation of the property from the title of it when a man holds property innocently against all the world but wrongfully against the true owner; (b) it is possession inconsistent with the title of the true owner.

In order to constitute adverse possession the possession proved must be

adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action.

16. The same had also been reiterated in the decision reported in (2007) 6 SCC 59 (P.T.Munichikkanna Reddy and Others Vs. Revamma and others) as follows:

A. Adverse possession - Concept - Ingredients - Tests to determine - Possession must be open, continuous and hostile to constitute adverse possession - Openness and hostility - Meaning - There must be positive intention to dispossess the owner - Intention to dispossess distinguished from intention to possess - Date of dispossession of the owner i.e. starting point of adverse possession is also important - On facts held, ingredients of adverse possession not established - Even an unduly long undisturbed possession did not prove the intention of the adverse possessor - Limitation Act, 1963, Arts.64 and 65

B. Adverse Possession - Burden of proof - Initial burden lies on landowner to prove his title and possession - Onus then shifts on the other party to prove title by adverse possession - Limitation Act, 1963, Arts.64 and 65 - Limitation Act, 1908, Arts 142 & 144.

C. Adverse possession - Human rights - Right to property is a human right - Adverse possession should be considered in that context - Fact that courts around the world are taking an unkind view to the concept of adverse possession should be kept in mind - Constitution of India - Pt. III - Human Rights.

17. In the decision reported in (2010) 14 SCC 316 (Chatti konati rao and others Vs. Palle venkata subba rao), the position with reference to the plea of adverse possession and the requirements of proof with reference to the same has been outlined in the following manner:

A. Property Law - Adverse possession - Pleading, proof and onus Requirements of - Compliance with - Equity - Inapplicability - Appellants pleading that they came into possession by purchasing property but not producing sale deed nor proving adverse possession - No issue of adverse possession having been framed - Appellants, held, have not perfected their title by adverse possession - In a claim of adverse possession there are no equities in favour of claimant - Claimant must clearly plead and establish all facts necessary to establish adverse possession - Limitation Act, 1963 - Arts.64 and 65 - Civil Suit - Pleading and proof - Civil Procedure code, 1908, Ors. 14 R.1 (Para 7, 13, 15, 6 and 18)

B. Property Law - Adverse possession - Relevant facts and evidence - Orders in settlement proceedings - When not relevant.

C. Property Law - Adverse possession - Relevant fact and evidence - Relinquishment of possession by tenant - Said relinquishment, no facts, held, cannot enure to benefit to appellants against the true owner so as to accept appellants' claim for adverse possession

D. Property Law- Adverse possession - Onus and necessary ingredients required to be proved, restated - Limitation Act, 1963, Arts.64 and 65

E. Property Law - Adverse possession - Issue of - Nature - Adverse possession, held, is both an issue of fact and law.

18. Considering the principles of law outlined in the abovesaid decisions of the Apex Court, applying the same to the facts and circumstances of the case at hand, when it is found that the defendants have not placed any reliable and acceptable material to sustain their defence version other than placing the

voters list and DW1 has pleaded ignorance and unable to say about the voters list and hence, the claim of adverse possession put forth by the defendants is found to be without knowing as to who is the true owner of the suit property and in such view of the matter, the claim of adverse title put forth by the defendants even without knowing the owner of the suit property, as such, cannot be equated to adverse possession as determined by the Apex Court in the abovesaid decisions and accordingly, in toto, when it is found that the defendants have miserably failed to establish their claim of adverse title by placing acceptable materials, particularly, specifying the various ingredients of adverse possession as outlined and adumbrated in the abovesaid decisions of the Apex Court, in such view of the matter, the case of the defendants that they had prescribed title to the suit property by way of adverse possession and therefore, the plaintiffs had lost title to the suit property, as such, cannot be accepted in any manner.

19. In the light of the principles of law adumbrated by the Apex Court qua the plea of adverse possession and the proof that are required to be placed to sustain the same by the party who had taken the said plea, in such view of the matter, as rightly contended by the plaintiffs' counsel, the authorities relied upon by the defendants' counsel, in support of the plea of adverse possession, as above referred to, in my considered opinion, cannot be followed and resultantly, following the decision of the Apex Court holding that the defendants have failed to establish the various ingredients of the plea of adverse possession as outlined by the Apex Court, in all, I hold that the defendants have miserably failed to establish their claim of adverse possession for sustaining their occupation of the suit property.

20. The defendants' counsel while putting forth the arguments stated that the power of attorney who had adduced evidence is not competent to give evidence in respect of the facts exclusively known to the plaintiffs. In this connection, he would rely upon the decisions reported in 2005 (3) CTC 128 (Janki Vashdeo Bhojwani and another Vs. Indusind Bank Ltd. and others), (2010) 10 SCC 512 (Man Kaur (dead) by Lrs. Vs. Hartar Singh Sangha), 2009 (5) CTC 620 (S.Natarajan Vs. V.Thirumavalavan). Per contra, with reference to the abovesaid contentions raised by the defendants' counsel, according to the plaintiff's counsel, the power of attorney is competent to adduce evidence regarding the matter within his knowledge and accordingly, the evidence of PW1 is sufficient for upholding the plaintiff's case and granting the reliefs prayed for by the plaintiffs and in this connection, he would rely upon the decisions reported in AIR 2014 SC (630) (A.C.Narayanan Vs. State of Maharashtra & Anr), 2008 (3) LW (840) (John Kennady @ Murugan

Vs. V.Bhagavathi), the order passed by this High Court dated 23.02.2010 in C.R.P.(NPD) No.2441 of 2009 and M.p.No.1 of 2009 (Standard Literature Company (P) Ltd., Vs. Padma and two others), the order passed by this Court dated 19.09.2014 in C.R.P. No.3436 and 3437 of 2014 and M.P.Nos.1,1 of 2014 and the decision reported in 2004 (1) ALD 241 (Podelly Chinna Chinnanna Vs. Bandari Pedda Bhumanna and ors.). Applying the principles of law outlined in the abovesaid decisions as regards the competency of the power of attorney to tender evidence on behalf of the principal, when it is seen that the power of attorney agent is competent to adduce evidence which are within the purview of his knowledge and accordingly, when PW1 has tendered evidence as regards the claim of title of the plaintiff qua the suit property by marking the sale deed as Ex.A1 and though PW1 may not have direct knowledge about the permission granted to the defendants to occupy the suit property as alleged in the plaint, however, as above pointed out, the abovesaid case of the plaintiff having not been established, still the suit property being found to be only belonging to the plaintiffs and the defendants would only sustain their occupation of the suit property by raising adverse possession and the abovesaid plea of adverse possession is required to be established by the defendants, in the abovesaid scenario, considering the evidence of PW1, in toto, it is found that the same is sufficient and acceptable as regards the claim of title of the plaintiff to the suit property and the entitlement of the reliefs claimed by the plaintiffs against the defendants in the suit. In such view of the matter, the arguments of the defendants' counsel that PW1 is not competent to tender evidence on behalf of the plaintiffs, as such, cannot be accepted.

21. The defendants' counsel put forth the arguments that the suit laid by the plaintiff is hit by Order 2 Rule 2 C.P.C. in view of the earlier suit laid by them in O.S.No.515/1998. In this connection, he would rely upon the decisions reported in 1964 AIR (SC) 1810 (Gurbux Singh Vs. Bhooralal) and 2014 (3) CTC 376 (Gowri (died) and others Vs. T.Lakshmiammal and others). Per contra, according to the plaintiffs, the abovesaid arguments of the defendants' counsel cannot be sustained. In this connection, put forth that the defendants have not specifically put forth the plea of bar of the plaintiff's suit under Order 2 Rule 2 C.P.C. in the defence statement, and on that score alone, the plaintiff's suit cannot be rejected as barred under Order 2 Rule 2 C.P.C. However, according to the defendants' counsel, considering the copy of the plaint filed by the plaintiffs in O.S.No.515/1998 as a document on their side, the same is sufficient for deciding the question with reference to the bar of the plaintiff's suit under Order 2 Rule 2 C.P.C. The plaintiff's counsel in support of his contentions that when the plea of bar of the suit under Order 2 Rule 2 C.P.C., has not

been raised, the same cannot be gone into and in this connection, placed reliance upon the decisions reported in 2010 (11) SCC (141) (Alka Gupta Vs. Narender Kumar Gupta) and the judgment of this Court dated 25.04.2014 in A.S.Nos.184 and 185 of 1991 (P.Swaminathan and 3 others Vs. M.Chidambaram and 16 others). Considering the position of law laid down by the Apex Court in the decision reported in 2010 (11) SCC (141) (Alka Gupta Vs. Narender Kumar Gupta), when it is found that without any plea of bar of the suit under Order 2 Rule 2 of C.P.C. raised in the written statement, there is no question of any issue formulated with reference to the same and the Court cannot examine or reject a suit on that ground without pleadings in the written statement with reference to the same and accordingly, it has to be held that the plaintiff's suit cannot be held to be barred or hit under Order 2 Rule 2 C.P.C. The position of law has been outlined in the abovesaid decision as follows:

I. A suit cannot be dismissed as barred by Order 2 Rule 2 of the Code in the absence of a plea by the defendant to that effect and in the absence of an issue thereon.

Unless the defendant pleads the bar under Order 2 Rule 2 of the Code and an issue is framed focusing the parties on that bar to the suit, obviously the court can not examine or reject a suit on that ground. The pleadings in the earlier suit should be exhibited or marked by consent or at least admitted by both parties. The plaintiff should have an opportunity to explain or demonstrate that the second suit was based on a different cause of action. In this case, the respondent did not contend that the suit was barred by Order 2 Rule 2 of the Code. No issue was framed as to whether the suit was barred by Order 2 Rule 2 of the Code. But the High Court (both the trial bench and appellate bench) have erroneously assumed that a plea of res judicata would include a plea of bar under Order 2 Rule 2 of the Code. Res judicata relates to the plaintiff's duty to put forth all the grounds of attack in support of his claim, whereas Order 2 Rule 2 of the Code requires the plaintiff to claim all reliefs flowing from the same cause of action in a single suit. The two pleas are different and one will not include the other. The dismissal of the suit by the High Court under Order 2 Rule 2 of the Code, in the absence of any plea by the defendant and in the absence of an issue in that behalf, is

unsustainable.

II. The cause of action for the second suit being completely different from the cause of action for the first suit, the bar under order 2 Rule 2 of the Code was not attracted.

The abovesaid position of law has been outlined by the Apex Court following the earlier decision of the Apex Court.

22. In the light of the abovesaid position, in this case, no specific plea of bar of the plaintiff's suit under Order 2 Rule 2 C.P.C. has been raised by the defendants in the defence statement. In such view of the matter, accordingly, when it is noted that no specific issue had also been raised by the trial Court with reference to the same, the arguments put forth by the defendants' counsel that the plaintiff's suit is barred under Order 2 Rule 2 C.P.C. in view of the earlier suit laid by them in O.S.No.515/1998, as such, cannot be accepted, particularly, in the absence of the plea with reference to the same as well as when there is no evidence adduced by the defendants in the matter with reference to the same. In all, following the decision of the Apex Court above cited, I hold that the plea of bar of the plaintiff's suit under Order 2 Rule 2 C.P.C. raised by the defendants during the course of arguments cannot be sustained in the absence of plea and acceptable evidence pointing to the same.

23. The counsel for the defendants would also put forth the arguments that considering the occupation of the defendants qua the suit property and when the defendants have established their settled possession of the suit property and accordingly, the contention has been projected that the defendants possession should be projected and in this connection, relied upon the decision reported in 2004-3-L.W.273 (K.Krishnan, K.Varadan Vs. S.Mari Naicker, Kannammal). However, as rightly put forth, the abovesaid decision would not apply to the case at hand.

24. The suit has been laid by the plaintiff for declaration and recovery of possession. As above pointed out, the defendants have not seriously disputed the claim of the title of the plaintiffs qua the suit property. As above held, the defendants have miserably failed to establish their claim of adverse possession of the suit property. In such view of the matter, when the plaintiffs as the lawful owners of the same have sought the relief of the possession of the suit property, the defendants having failed to establish the plea of adverse title putforth by them, the defendants' occupation of the suit property can only be held as unlawful and in such view of the

matter, the claim of the defendants that they have established their settled position of the suit property and thereby, the plaintiffs should be non suited, as such, cannot be accepted, particularly, when the plaintiffs are entitled to seek the relief of possession of the suit property from the defendants as the lawful owners of the same and their suit is not barred in any manner as above pointed out.

25. In the light of the abovesaid discussions, I hold that the plaintiffs have title to the suit property. I therefore hold that the plaintiffs are entitled to seek the reliefs of declaration and recovery of the possession of the suit property from the defendants. As regards the quantum of damages claimed by the plaintiffs and the consideration of the same by the trial Court, the same being proper and just, I do not find any reason to interfere with the quantum determined by the trial Court to which the plaintiffs are entitled to and also the claim of damages from the defendants as determined by the trial Court and I further hold that the defendants have failed to establish their claim of adverse possession and accordingly, the point Nos.1 to 5 are answered. Point Nos.6 to 7:

26. In the light of the abovesaid discussions, the judgment and decree dated 31.10.2006, passed in O.S. No.628/2004, on the file of the Additional District and Sessions Court/Fast Track Court, No.IV, Poonamallee are confirmed and resultantly, the first appeal is dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

सत्यमेव जयते
Sub Assistant Registrar

sli

To:

The Additional District and Sessions Court,
Fast Track Court No.IV, Poonamallee.

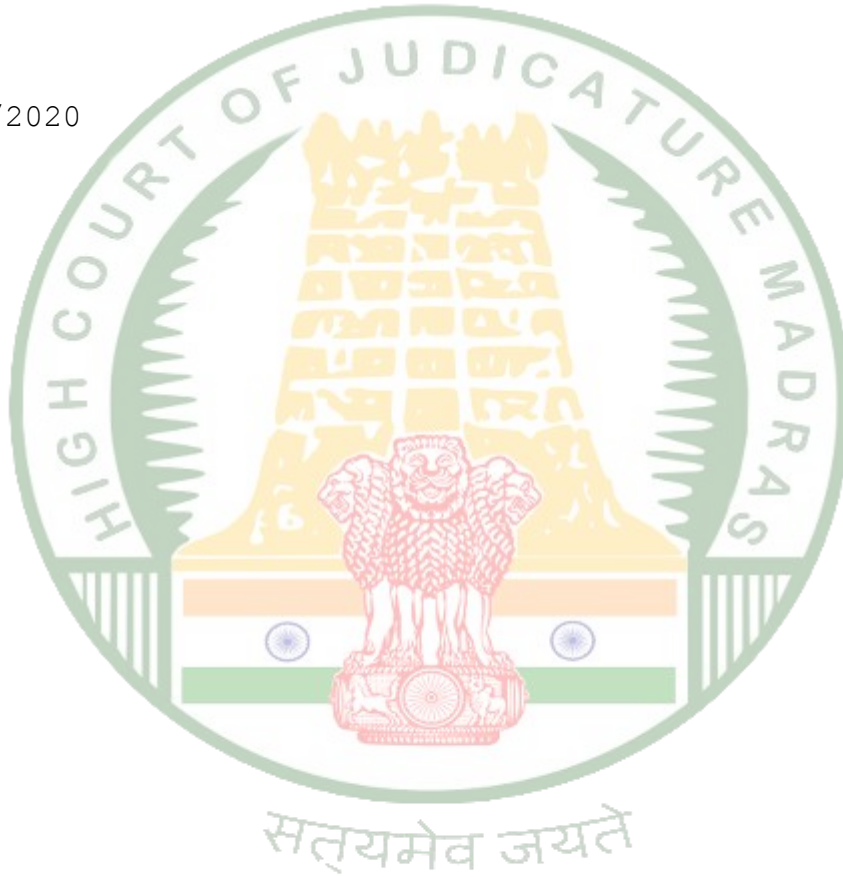
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V.R.Section,
High Court, Madras.

+1cc to Mr.N.Manokaran, Advocate Sr.98213
+1cc to Mr.L.K.Manjunath, Advocate Sr.98246

A.S.No.214 of 2008

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srg 09/06/2020



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