

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Second Appeal No.340 of 2008 &
M.P.Nos.1 of 2008 & 1 of 2009

1. Mr.S.Arumugam
2. Mrs.A.Anjalai

...Appellants/Plaintiffs

Vs

1. Mr.A.N.Subramaniyan
2. Mr.K.Velumail

... Respondents/Defendants

Prayer:-

Second Appeal has been filed under Section 100 of C.P.C. against the judgment and decree dated 20.12.2007 passed in A.S.No.28 of 2007 on the file of the Principal Subordinate Court, Cuddalore reversing the judgment and decree dated 19.02.2007 in O.S.No.823 of 2004 on the file of the Principal District Munsif Court, Cuddalore.

For Appellants : Mr.R.Sunil Kumar

For Respondents : Mr.T.S.Baskaran

JUDGMENT

Aggrieved over the judgment and decree of the first appellate Court in dismissing the suit, the present Second Appeal has been filed.

2. The parties are arrayed as per their own ranking before the trial Court.

3. The suit property originally belong to one Arumugam and he is in enjoyment of the same beyond the statutory period without any interruption and disturbance. The said Arumugam executed a General Power of Attorney in respect of the 'B' schedule property in favour of the first plaintiff on 27.03.2001. Thereafter, the 'A' schedule property was sold to the first plaintiff by the said Arumugam on 24.09.2003. Thereafter, the plaintiff has executed a sale deed on 25.02.2004

with respect of 'B' schedule property to the second plaintiff. The 'A' and 'B' schedule properties are vacant site. The plaintiffs are enjoying the suit property commonly and stored waste materials in the manure pit and also stored Vaikol in the suit property. The defendants are the strangers to the suit properties. They are having vacant site adjacent to the suit properties. They are no way connected with the suit properties. They have made an attempt to trespass into the suit properties on 05.09.2004. Hence, the suit.

4. It is the contention of the defendants that the suit is not maintainable without declaration. Both the plaintiffs have separate interest in the suit properties and hence, the suit is not maintainable. As far as 'B' Schedule property is concerned, they have no right or interest in the same. The alleged act of trespass is hereby denied. It is the contention of the first defendant that the 'A' schedule property is in possession and enjoyment of the second defendant from the date of purchase from the first defendant on 24.9.2003. The 'A' schedule property was enjoyed for more than 20 years continuously without any interference and prescribed title by adverse possession. The defendants cannot enjoy their property without entering the first item of the suit property. The sale in favour of the first plaintiff in respect of the first item of the property is neither true nor valid. The vendors have no right or interest in the suit property. The document dated 24.09.2003 was created only for the purpose of the suit. It is the further contention of the defendants that in the Power of Attorney dated 27.03.2001 executed in favour of the first plaintiff, one of the boundaries is shown as the second defendant's land. Hence, disputed the suit.

5. It is the further contention of the plaintiff in their reply statement is that the sale in favour of the second defendant by the first defendant is not valid and the above sale has been registered after the sale in favour of the first plaintiff on 24.09.2003. The first plaintiff has purchased properties on the east of suit properties from Kaliyan and Gunasekaran and the plaintiffs alone are in possession of 'A' and 'B' schedule properties.

6. In the additional written statement it is the contention of the defendants that the rough plan filed along with the reply statement is false and misleading.

7. Based on the above pleadings, the trial Court has framed the following issues :

1. Whether the sale deeds dated 24.09.2003 and 25.02.3004 in respect of the A and B schedule properties respectively are true and valid one?

2. Whether the plaintiffs are entitled for issuance of permanent injunction as prayed for?

3. Whether the suit is maintainable for seeking permanent injunction without seeking a decree of declaration?

4. Whether the defendants attempted to trespass in the suit A schedule property on 05.09.2004?

5. Whether the sale deed dated 24.09.2003 in respect of A schedule property in favour of the second defendant is true?

6. Whether the second defendant has acquired title to the suit property A schedule by way of adverse possession?

7. To what other reliefs the plaintiffs are entitled?

8. Additional Issues :

1. Whether the suit is not maintainable?

2. Whether the plaintiffs are in exclusive possession and enjoyment of the suit properties?

3. Whether the plan attached with the reply statement is correct?

9. Before the trial Court, on the side of the plaintiffs P.W.1 to 4 were examined and Ex.A.1 to Ex.A.8 have been marked. On the side of the defendants, D.W.1 to D.W.3 have been examined and Ex.B.1 was marked. And Ex.X.1 was also marked.

10. The trial Court decreed the suit. However, the first appellate Court non suited the plaintiffs on the ground that the possession has not been proved by them and dismissed the suit. Aggrieved over the same, the present Second Appeal came to be filed.

11. The learned counsel appearing for the appellants vehemently contended that the evidence of P.W.1 to P.W.4 not only prove the possession of the plaintiffs in 'A' and 'B' schedule properties but also title of the plaintiffs in respect

of 'A' schedule property. The evidence of P.W.1 to P.W.4 and Ex.X.1 clearly show that the properties were enjoyed from time immemorial by their ancestors. and the plaintiffs have acquired the title of the property from their vendor. Merely because some wrong description is shown in the Power of Attorney executed in the year 2001 in favour of the first plaintiff, the defendants have taken advantage of the same.

12. It is further contended by the learned counsel for the appellants that the plaintiffs are the owners of the property. Infact, after the sale of the 'A' schedule property, they created sale deed in respect of the 'B' schedule property on the next day with the same boundaries. But absolutely, there is no evidence whatsoever available on record to show that the 'B' schedule property was ever in possession of the defendants. It is his further contention that the trial Court has analysed the entire aspects and found that the plaintiffs have proved their title in respect of the 'A' schedule property. The first appellate Court has also found that there is no dispute with regard to the title. However, only on the ground that the possession has not been proved by the plaintiffs, the first appellate Court has allowed the appeal. Hence, submitted that the judgment of the first appellate Court is not based on proper appreciation of evidence.

13. Admittedly the suit property is a vacant site. Once, the title is established, the possession follows the title. Therefore, it is the contention of the learned counsel for the plaintiffs that the plaintiffs are certainly entitled for injunction. In support of the same, he has relied on the judgment in Ananthula Sudhakar Vs. P.Buchi Reddy (Dead) by LRs and others reported in 2008 (4) Supreme Court cases 594.

14. The learned counsel for the respondents would contend that the plaint pleadings itself would indicate that the vendor of the plaintiffs had no title to the suit properties. They claim title only on the basis of continuous possession. Ex.A.1 Power of Attorney executed in the year 2001 itself clearly indicate that one of the boundary is shown as the defendants' property. Therefore, the vendor again selling the suit property under Ex.A.2 does not arise at all. The same clearly indicate that the same is created only for the purpose of case.

15. Further, it is the contention of the learned counsel appearing for the respondents that the first appellate Court also took note of the fact that the plaintiffs themselves

admitted that the suit property has been used as a pathway by the defendant, the first appellate Court has rightly come to the conclusion that the possession is not with the plaintiff. Similarly, Ex.B.1 is the document relating to the sale deed. When there is a cloud over the title, the suit ought to have filed only for declaration of title and not for bare injunction. Hence, prayed for dismissal of the suit.

16. The following substantial questions of law have been framed.

1. Whether the learned Subordinate Judge did not err in failing to examine the title between the parties, when admittedly the suit property was a vacant site in grama natham and the claim to possession in respect of vacant land could only follow title?

2. Whether the subordinate Judge was not in err in rejecting out of reckoning all the relevant documents immediately adjoining the suit property for considering the nature of user and the tracing of the title to the family of the plaintiff of vendor?

17. The suit properties are vacant lands. This fact is not in dispute. Originally, the suit has been laid for permanent injunction in respect of 'A' and 'B' suit schedule properties. As far as 'B' schedule property is concerned, there is no dispute between the parties. The defendants have admitted in the written statement that they have no dispute between the parties in respect of 'B' schedule property. Now the appeal is confined with 'A' schedule property, which is a vacant site measuring about 720 sq.ft.

18. It is the case of the plaintiff that the suit properties and other properties originally belong to the vendor and they have been in possession and enjoyment of the properties for many years in pursuant to the power given in respect of the 'A' schedule property under Ex.A.1. Thereafter, sale deed has been executed in respect of the 'A' schedule property under Ex.A.2. P.W.1 to 4 were examined on the side of the plaintiffs. In fact, the vendor under Ex.A.2, one Arumugam was examined as P.W.3 and another witness was examined as P.W.4 and they are related to each other. The trial Court has analysed the entire evidence of P.W.1 to P.W.4 and D.W.1 to D.W.3 and found that the vendor of the plaintiff was originally in possession of the property and sold the property under Ex.A.2 to the first

plaintiff. P.W.3 in his evidence has clearly spoken about the mistake crept in the boundaries while executing the Power of Attorney under Ex.A.1. According to him, East to West 36 ft and South to West 20 ft. i.e., Item No.1 of the suit property was in his enjoyment and he has sold the property under Ex.A.2 on 24.09.2003. The trial Court has also relied upon Ex.X.1 Exchange Deed between some of the occupants. Ex.A.7 and Ex.A.8 have been filed to show that the suit properties and other properties were in possession of the vendor and others, namely the parties under Ex.X.1.

19. D.W.1 in his evidence has also admitted that the second defendant has a house on the south side of the 'A' schedule property. The first defendant never resided in the above place and he has also admitted that the second defendant has access from the southern portion. Whereas, the second defendant in his pleadings and written statement stated that except the suit property, there is no path and access to his house. But this fact has been falsified by the evidence of D.W.1, who is said to have sold the property to the second defendant. It is further to be noted that P.W.1 also admitted in his evidence that to east of 'A' schedule property, they have no vacant site.

20. It is curious to note that under Ex.A.2, 'A' schedule property was registered in favour of the first plaintiff on 24.09.2003 with specific boundaries. The very next day, the first defendant has registered the same property in favour of the second defendant. According to the first defendant, the suit property was in his possession for more than the statutory property. But no evidence, whatsoever is available on record to show that he was in continuous possession of the property. Further, D.W.2 in his evidence also admitted that one Palaniammal was originally residing in East of 'A' schedule property and she obtained patta. But no such patta has been produced. Similarly no other evidence, whatsoever, is available on record to show that the second defendant in fact had any property in the south side of 'A' schedule property. Merely because some mistake has been crept in the boundaries in Ex.A.1, it cannot be said that the defendant had properties very next to 'B' schedule property. In fact, it appears that confusion had occurred due to improper description of the property in Ex.A.1. Whereas the evidence of P.W.1 to 4 and Ex.X.1 clearly indicate that vendors under Ex.A.2 were in possession of the property. They have continued their possession and the revenue records also have been changed in their name. P.W.4, who is also a party in the Exchange Deed supported the version of P.W.3 and asserted that the suit 'A' schedule property originally belonged to one Arumugam and he has

sold the property in favour of the first plaintiff.

21. The trial Court analysed the entire evidence and found that the plaintiff is entitled to injunction and title has been proved by him in respect of the 'A' schedule property. The first appellate Court relying upon the evidence of P.W.1 and P.W.2 held that the title of the plaintiff in respect of the suit property is not in dispute and what has to be decided is the possession of the suit property in respect of the plaintiffs. Having found that the title of the plaintiffs is not in dispute, the first appellate Court has held that the trial court has discussed in detail in respect of question of title. However, the trial Court failed to consider the admission on the part of P.W.1 to find out whether there is any proof of possession of the property and allowed the appeal. Similarly, the appellate Court has held that since the defendants had relied upon Ex.B.1, the plaintiffs ought to have filed a suit for declaration of title and not for injunction.

22. In the entire judgment of the first appellate Court, the first appellate Court has not found fault with the finding of the trial Court with regard to the title and the appellants were non suited only on the ground that they have not established possession and it cannot be said that it create cloud on the title. Infact, the plaintiffs are better title holders. Therefore, the first appellate Court allowing the appeal is not correct.

23. In this regard it is useful to refer the judgment of the Honourable Supreme Court in Anathula Sudhakar Vs. P.Buchi Reddy (Dead) by LRs and others reported in 2008 (4) Supreme Court Cases 594, wherein the Honourable Supreme Court has held that

"We may however clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to plaintiff's title raises a cloud on the title of plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the

plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. Where the plaintiff, believing that defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised only the issue of possession and not any issue of title.

But what if the property is a vacant site, which is not physically possessed, used or enjoyed? In such cases the principle is that possession follows title. If two persons claim to be in possession of a vacant site, one who is able to establish title thereto will be considered to be in possession, as against the person who is not able to establish title. This means that even though a suit relating to a vacant site is for a mere injunction and the issue is one of possession, it will be necessary to examine and determine the title as a prelude for deciding the de jure possession. In such a situation, where the title is clear and simple, the court may venture a decision on the issue of title, so as to decide the question of de jure possession even though the suit is for a mere injunction. But where the issue of title involves complicated or complex questions of fact and law, or where court feels that parties had not proceeded on the basis that title was at issue, the court should not decide the issue of title in a suit for injunction. The proper course is to relegate the plaintiff to the remedy of a full-fledged suit for declaration and consequential reliefs."

24. Admittedly, the suit properties are vacant lands. The first appellate Court has given undue advantage to the fact that the second defendant is walking through the vacant land and therefore, the plaintiffs are not in possession of the property.

Such an assumption of the first appellate Court is not based on the proper appreciation of evidence. Merely because the second defendant has walked on the vacant land to go to his house, it cannot be construed that he is having control over the entire vacant land. D.W.1 evidence also clearly indicate that the defendants have access from the other side also. The same makes it clear that the suit property is not only pathway, which has access to the defendants' property. Therefore, the finding of the first appellate Court that the plaintiff has not established possession is not proper. Admittedly, the first plaintiff is a title holder and his title is also proved and the suit property is a vacant land. Only possession follows title. In view of the same, the plaintiffs are certainly entitled for permanent injunction and the substantial questions of law are answered in favour of the appellants.

25. Accordingly, this Second Appeal is allowed and the judgment and decree of the first appellate Court is set aside and the judgment and decree of the trial Court is confirmed. Consequently, the connected miscellaneous petition is closed. No cost.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

vrc

To

1. The Subordinate Judge,
Cuddalore.
2. The Principal District Munsif,
Cuddalore.

+1cc to Mr.R.Sunil Kumar, Advocate, S.R.No.24123
+1cc to Mr.T.S.Baskaran, Advocate, S.R.No.23809

Second Appeal.No.340 of 2008

RT (CO)
CS/16/12/2019