

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.12.2018

PRONOUNCED ON : 02.01.2019

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.2201 of 2004 and
C.M.P.No.19380 of 2004

M.Rathinasamy

...Appellant

Vs

G.Vaithyanathan

... Respondent

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree made in A.S.No.39 of 2002 dated 18.08.2004, on the file of the learned Principal Subordinate Judge, Mayiladuthurai reversing the judgment and decree made in O.S.No.2 of 1999 dated 15.03.2002 on the file of the learned District Munsif, Sirkali.

For Appellant : Mr.D.Rajagopal

For Respondent : Mr.S.Sounthar

JUDGMENT

The Defendant in the suit in O.S.No.2 of 1999 is the appellant. The suit is for recovery of property shown as "ABCD" in the suit sketch from the defendant and to hand over the possession to the plaintiff. The consequential prayer sought for is the past profit from the date of suit till the date of delivery of vacant possession with costs.

2.Gist of the plaint averment:

The suit mentioned property is 'inam punjai' land. It belongs to 'Sri Thala Pureeswaraswami Devasthanam'. East of the suit property is a natham land which the plaintiff got through the partition deed dated 12/07/1966. A larger extent of 'inam punjai' land inclusive of this suit property is in enjoyment and possession of the plaintiff. Prior to the year 1966, his predecessors were enjoying the 'inam punjai'. The 'inam punjai' was made over to the plaintiff by one Ramachandran Mudaliar on 13/09/1985 and the possession was handed over to the plaintiff. Since the year 1985, the plaintiff paying the 'paguthi rent' to the devasthanam regularly. On the North of the suit property, the property of the defendant is located.

(a) Earlier, the plaintiff filed a suit against the defendant for permanent injunction in respect of 5 cents of land which includes the 2 cents which is the present suit property. In the suit in O.S.No.23 of 1986, except the plaint schedule extent, decree was granted in favour of the plaintiff. In that suit, the trial Court held that the extent of the present suit property was not proved to be in the possession and enjoyment of the plaintiff. Contrarily, the defendant has proved his possession and enjoyment therefore, injunction restraining them was denied. The appeal preferred by the plaintiff was dismissed confirming the decree of the trial court.

(b) Contending that the defendant have encroached the suit property, the plaintiff has preferred the present suit for recovery of possession and mesne profit. It was also specifically pleaded in the plaint that the suit is not barred by limitation since, the suit for recovery of possession is filed within 12 years from the date of judgement in O.S.No.23 of 1986 on the file of the District Munsif Court, Sirkali and in A.S.No.48 of 1995 on the file of the Subordinate Court, Mayiladurai.

3.Gist of the written statement:

In the written statement, the defendant has contended that the document dated 13/09/1985 alleged to have been executed by one Ramachandran Mudaliar is a false document. The said, Ramachandran Mudaliar was never in possession and enjoyment of the suit property. In a partition deed dated 12/07/1966, the property of the defendant shown as the East and South boundaries. In the earlier suit in O.S.No.23 of 1986, the trial Court as well as the First Appellate Court have held that through the made over document executed by Ramachandran Mudaliar on 13/09/1985, though the plaintiff has proved the 'paguthi right' of Ramachandra Mudaliar was transferred, he has not proved that the possession of the suit extent land was in enjoyment by Ramachandra Mudaliar and from him, the plaintiff continue to possess and enjoy the suit land. The matter has been already heard and decided by the trial Court and the First Appellate Court. The judgement of the earlier suit act as *res judicata*. Therefore, the suit is liable to be dismissed.

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

"1. Is the plaintiff entitled for recovery of possession?;

2. Is the plaintiff entitled to mesne profit?;

3. Is the suit barred by principle of *res judicata*?

5. Before the trial Court, on the side of the plaintiff, three witnesses were examined. Exs.A-1 to A-31 were marked. On the side of the defendant, two witnesses were examined and Exs.B-1 to B-3 were marked.

6. The trial Court has considered the pleadings, documents and deposition relied on by the respective parties both in the present suit and in the earlier suit. The trial Court found that the area which is in dispute and marked as "ABCD" in the present suit is the property shown as "EABF" in the earlier suit. The landlord of the property is Sri Thanpureeswarar Devasthanam, which fact is not disputed by either of the parties. The disputed portion of the property is found to be in the

possession of the defendant by the trial Court and the First Appellate Court. The plaintiff has not preferred further appeal. Thus, the judgment has reached finality. The suit property is abutting the house site of the defendant in S.No. 216/1. In the earlier suit, the Courts have held that the plaintiff is not entitled for the relief of injunction as far as the portion of the property marked as 'EABF' ('ABCD' in the present suit) is concerned since, the plaintiff has failed to prove his title as well as possession.

7. Pointing out that the relief sought for and the issues framed in the earlier suit and the later suit are different, the trial Court held that though the property in dispute is one and the same in both the suits, the present suit is not hit by the principle of *res-judicata*. Therefore, the plaintiff is entitled to lay a suit for recovery of possession under the Specific Relief Act.

8. After holding that the subsequent suit for recovery of possession not barred by the principle of *res judicata* and maintainable, the trial Court gone into the merit of the plaintiff claim seeking recovery of possession and held that the property is admittedly in possession and enjoyment of the defendant for more

than 12 years. In the earlier suit, both the trial Court and the First Appellate Court have concurrently held that the defendant is in constructive possession of the suit property, which is open, continuous and hostile to the plaintiff. Therefore, further held that the possession of the defendant though may not be adverse to the landlord Devasthanam, it is adverse to the plaintiff who is the tenant under the Devasthanam. Therefore, the plaintiff is not entitled for recovery of possession.

9.The plaintiff, being aggrieved by the dismissal of his suit, has preferred an appeal before the Principal Subordinate Judge, Mayiladuthurai. Pending appeal, the appellant/plaintiff filed application to receive the certified copy of the surveyor report and the sketch filed along with the report and the certified copy of the commissioner report and the sketch which were marked as court exhibits in the earlier suit in O.S.No.23 of 1986. The said Interlocutory Application was allowed and these two documents were admitted into evidence and marked as additional documents Exs.A-32 series and A-33 series.

10.The First Appellate Court while concurring the view expressed by the trial Court regarding the issue of *res judicata*, disagreed with

the trial Court in respect of other issues and allowed the appeal. As a reason to disagree with the trial Court, the First Appellate Court has referred Section 109 of the Hindu Religious and Charitable Endowment Act, to hold that the suit for recovery of possession is not barred by limitation since, the law of limitation will not apply to a temple property.

11.The First Appellate Court has further observed that the effective date to calculate the adverse possession starts only from 16/12/1994 the date of judgement in the earlier suit in O.S.No. 23 of 1986. In the result, the suit for recovery of possession was allowed. The defendant was granted 3 months time to vacate the suit property and hand over the vacant possession.

12.Against the reversal finding of the First Appellate Court, the present second appeal is filed. While admitting this Second Appeal, this Court has framed the following substantial questions of law:-

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“(i)Whether the judgment of the Lower Appellate Court is in accordance with the Mandatory Provisions of Order 41 Rule 31 CPC?;

(ii)Whether the judgment of the Lower Appellate Court is vitiated for applying section 109 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, especially when the present suit was not on behalf of the Trust?;

(iii)Has not the Lower Appellate Court erred in law in decreeing the suit ignoring the earlier decision in O.S.No.23/1986 wherein the title of the petitioner has been negatived?;

(iv)Whether the present suit claim is hit by doctrine of res judicata in view of the findings in O.S.No.23/1986?;

(v)Whether the Lower Appellate Court has failed to follow the procedure contemplated under Order 41 Rule 27 and 28 CPC while admitting additional evidence ? and

(vi)Whether the present suit is not maintainable in view of bar under Order 2 Rule 2 CPC ?”

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13.Heard the learned counsel for the appellant and the learned counsel for the respondent and also perused the documents and pleadings.

14. The learned counsel for the appellant would point out that the First Appellate Court has not framed any point for determination as per Order 41 Rule 31(a) of C.P.C. Further, he would submit that, the earlier suit in O.S.NO.23 of 1986 filed by the plaintiff claiming that he purchased 7 cents of inam punjai land from one Ramachandra Mudaliar and in possession and enjoyment of the entire extent along with the 2 cents of natham land which he got from his family partition deed. Alleging that the defendant in the present suit and his family members are trying to encroach upon 5 cents of land, sought for injunction. The property which was subject matter of the earlier suit includes the 2 cents which is the subject matter of the present suit. While so, in the earlier suit the Courts held that neither the plaintiff nor his predecessor, Ramachandra Mudaliar were in possession of the 2 cents of land marked as "EABF", which is now identified as "ABCD" in the present suit. The said finding of the First Appellate Court in the prior proceedings operate as *res-judicata*. When the claim of the plaintiff that he was in possession of the property was negated by the trial Court in the earlier suit and same was confirmed in the First Appeal, the present suit is not at all maintainable.

15.The learned counsel for the appellant also submitted that, Section 109 of HR & CE Act will apply only if the suit is laid by the temple in respect of temple land and not for a suit between two individuals who claim possessory right upon the temple land. The plaintiff ought to have sought for recovery of possession in the earlier suit itself. Having omitted to seek whole claim, the subsequent suit is hit by Order 2 Rule 2 of C.P.C.

16.In response to the submission of the learned counsel for the appellant, the learned counsel for the respondent placing reliance on the judgment of the Apex Court rendered in **Sajjadanashin Sayed Md.E.D.EDR (D) –vs- Musa Dadabhai Ummer and others** reported in 2000 (3) SCC 350 submitted, in the earlier suit the issue of title was dealt incidentally and not substantially so as to attract the principle of *res judicata*. The pleadings, issues framed and the finding of the Court in the earlier suit will show that the subsequent suit is not hit by the principle of *res judicata*.

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17.The documents relied on by the parties disclose that the earlier suit for injunction in respect of 5 cents land is inclusive of the 2 cents of land which is the subject matter of the present suit. Ex A-32

series and A-33 series are documents marked as Court exhibits in the earlier suit. Considering the documents and Commissioner report, the Courts in the earlier proceedings have held that the plaintiff had proved his possession of 2 cents of natham land which he got through the partition deed and 5 cents out of 7 cents of inam punjai land which was made over by Ramachandra Mudaliar. Except the 2 cents of land which is marked as 'EABF' in the sketch, the plaintiff have title and possession in respect of remaining portion therefore, he is entitled for injunction in respect of remaining portion of the land except the portion marked as 'EABF' (2 cents). In the earlier proceedings, the Courts have concurrently held that the defendant have positively proved their constructive possession over the present suit schedule property, hence, the injunction relief declined to the land marked as 'EABF'. While holding so, the Courts below have observed that the documents relied by the plaintiff to trace title also not adequate.

18. Having lost their case in injunction suit based on the adverse finding regarding possession, the present suit is laid for recovery of possession. The Courts below had concurrently held that the matter in issue in the former suit in O.S.No.23 of 1986 was not directly and substantially same in the subsequent suit. The plaintiff claims right

over the suit property through the partition deed dated 12/07/1966 (Ex A-13) and the made over document dated 13/09/1985 executed by T.S.Ramachandra Mudaliar in favour of the plaintiff. The suit property portion marked as 'ABCD' is the portion of the land covered under the made over deed Ex A-13. Admittedly the title to the property vest with the Shri Thala Pureeswarara Devasthanam and what the plaintiff got through the Ex A-13 is the lease hold right made over by Ramachandra Mudaliar. The plaintiff, in his deposition, in the earlier suit admits that he came to know in the year 1985, the suit portion land has been encroached by the defendant. However, when he laid the suit for injunction in the year 1986, he claimed as if the suit portion was in his possession and enjoyment. The said claim has been held to be not proved concurrently by both the courts in the earlier suit.

19.The additional documents Ex A-32 and A-33, marked in the appeal are the commissioner report and the surveyor reports which were documents exhibited in the earlier suit between the same parties. The learned counsel for the respondent would submit that, the encroachment made by the defendant are recorded in these documents which were produced as additional documents before the

First Appellate Court after due notice to the appellant. The First Appellate Court has allowed the documents to be marked without examining the authors of the documents because these documents are only certified copies of the document already admitted and marked in the earlier suit in O.S.No.23/1986 between the same parties. Therefore, this Court finds there is no miscarriage of justice in admitting these two documents. In fact, these two documents throw more light about the dispute between the parties.

20. This Court finds that the First Appellate Court instead of framing the point for determination which is a mandatory requirement under Order 41 Rule 31(a) of C.P.C., has re-appreciated the issues framed by the trial court afresh. The First Appellate Court has agreed with the trial Court in respect of issue No. 3 and disagreed with the trial court in respect of other issues. But, when all the facts controverted by the parties had been discussed by the appellate court though it has not formulated the point for determination, it has to be held that it is in consonance to Order 41 Rule 31 (a) of C.P.C., since, the First Appellate Court, substantially complied the required mandate prescribed in Order 41 Rule 31 (a) of C.P.C. At the same time, by allowing the suit for possession holding that the law of limitation is not

applicable to the facts of the case in hand in view of Section 109 of HR & CE Act, the First Appellate Court has committed grave legal error. Therefore, the judgment passed by the First Appellate Court cannot be allowed to be sustained.

21. Section 109 of the HR & CE Act, exempts the provision of Limitation Act from its application to HR & CE Act. This exemption is to protect the trust properties from the encroachers claiming adverse possession by prescribing title by possession beyond the period of limitation. This protective provision cannot be extended to litigations between two individuals without involving the trust. In this case, the Devasthanam which is the title holder is not a party to the proceedings. The suit for possession is not by or against the Devasthanam. The suit for possession is not filed under HR & CE Act. Therefore, grave legal error has been committed by the First Appellate Court by invoking Section 109 of the HR & CE Act, though it is not applicable to the facts of the case. The plaintiff himself has not pleaded that the Limitation Act is not applicable. In fact, he has specifically pleaded that, the suit for possession is well within the period of limitation by reckoning the period of limitation starts from the date of dismissal of his prior suit.

22. Therefore, it is necessary to find out when the limitation for the suit for possession commences. Whether from the day when the possession of the defendant became adverse to the plaintiff or from the date of dismissal of the earlier suit for injunction and the appeal. The plaint in the present suit presented on 21/12/1998. After return for defective filing, it has been represented on 02/01/1999 and taken on file as O.S.No.2 of 1999 by the District Munsif Court, Sirkali. A.S.No.48 of 1995, the appeal preferred by the plaintiff aggrieved by the dismissal of his suit O.S.No.23 of 1986 was dismissed on 30/04/1996. Therefore, the plaintiff has averred in his plaint that his suit for recovery of possession is not barred by limitation since, the limitation commences from the date of dismissal of his suit for injunction by the appellate court in A.S.No.48 of /1995.

23. Under the law, a person entitled to the possession of specific immovable property may recover it in the manner provided by the Code of Civil Procedure, 1908 (Section 5 of Specific Relief Act, 1963). If any person is dispossessed of immovable property otherwise than due process of law without his consent, a suit for recovery of possession can be filed within 6 months from the date of dispossession (Section 6 of the Specific Relief Act). The limitation prescribed for

seeking relief of recovery of possession of any immovable property is 12 years (Article 64 and 65 of the Limitation Act, 1963). The plaintiff in this case seeks possession of immovable property based on title. Therefore, he should have filed the suit within a period of 12 years from the possession of the defendant became adverse to the plaintiff. The material evidence available from the records, the long and continuous possession of the suit land by the defendant has been affirmed by the Court in the prior suit in O.S.No.23 of 1986. Therefore, the fact that the defendant had the possession of the suit land long before T.S.Ramachandra Mudaliar made over his lease hold right to the plaintiff is a proven fact which cannot be ignored in the present suit for possession. The trial court has properly appreciated these facts and has held that defendant have perfected their title by adverse possession.

24.According to the learned counsel for the respondent/plaintiff conferring title by adverse possession even without pleading and issue framed to that effect is not sustainable and the trial court finding is not legal. The illegality in the trial court judgment has been rectified by the lower appellate court by setting aside the decree passed by the trial court. This submission has no legal force for the reasons recorded below.

25. In the earlier suit, when injunction was sought tracing title through the partition deed among the family members and made over document executed by Ramachandra Mudaliar, the court has observed that the plaintiff has not examined the representatives of Shri Thana Pureeswarar devasthanam which owns the land or Ramachandra Mudaliar who has made over the leasehold right to the plaintiff. Therefore held that the title claimed by the plaintiff not proved.

26. According to the learned counsel for the respondent/plaintiff, it was only an observation incidental and not substantial to act as *res judicata* for the subsequent suit. Both the courts below have also accepted this submission and held that the earlier suit O.S.No.23 of 1986 will not stand as a bar for the subsequent suit. This court also does not find any good reason to differ from the view expressed by the courts below regarding this issue.

27. However, while holding so, the courts below ought to have pointed out that, when the defendant has disputed the made over document conferring title to the plaintiff and the court in the prior suit has incidentally discussed about the title though without framing any

issue, then in the subsequent suit without seeking declaration of title, mere relief of recovery of possession alone is not sustainable. Alternatively, if, the plaintiff claims recovery of possession based on previous possession and not on title, the judgment in the prior suit will act as a bar under *res judicata*. Either way the plaint as framed is not sustainable.

28. Under Section 5 of the Specific Relief Act, any person entitled to the possession of specific immovable property may recover it in the manner provided under CPC. Therefore, the plaintiff has to first prove that he is entitled to the possession of the specific immovable property. But, the plaintiff has failed to include the declaratory relief regarding title. Without establishing his entitlement for seeking possession, the suit for recovery of possession is filed. Even for that relief, the suit should have been instituted within 12 years from the date of defendant possession became adverse to the plaintiff. The present suit is filed long after the expiry of the 12 years period. Therefore the plaintiff has lost his entitlement what so ever he had to seek recovery of possession. When the plaintiff has lost his entitlement to claim possession based on title and when the earlier proceedings between the parties have held that the plaintiff is not in possession of

the suit property, neither based on title nor on based on possession lost the plaintiff can sustain the suit for recovery of possession. In the light of the above discussion, this court holds that the judgment and decree of the lower appellate court passed in A.S.No.39 of 2002 is liable to be set aside.

29.In the result, this Second Appeal is allowed. The judgment and decree of the First Appellate Court passed in A.S.No.39 of 2002 is set aside and the judgment and decree passed by the trial court in O.S.No.2 of 1999 is restored. The parties have to bear their respective costs. Consequently, connected miscellaneous petition is closed.

jbm

Index: Yes

Speaking order/non speaking order

02.01.2019

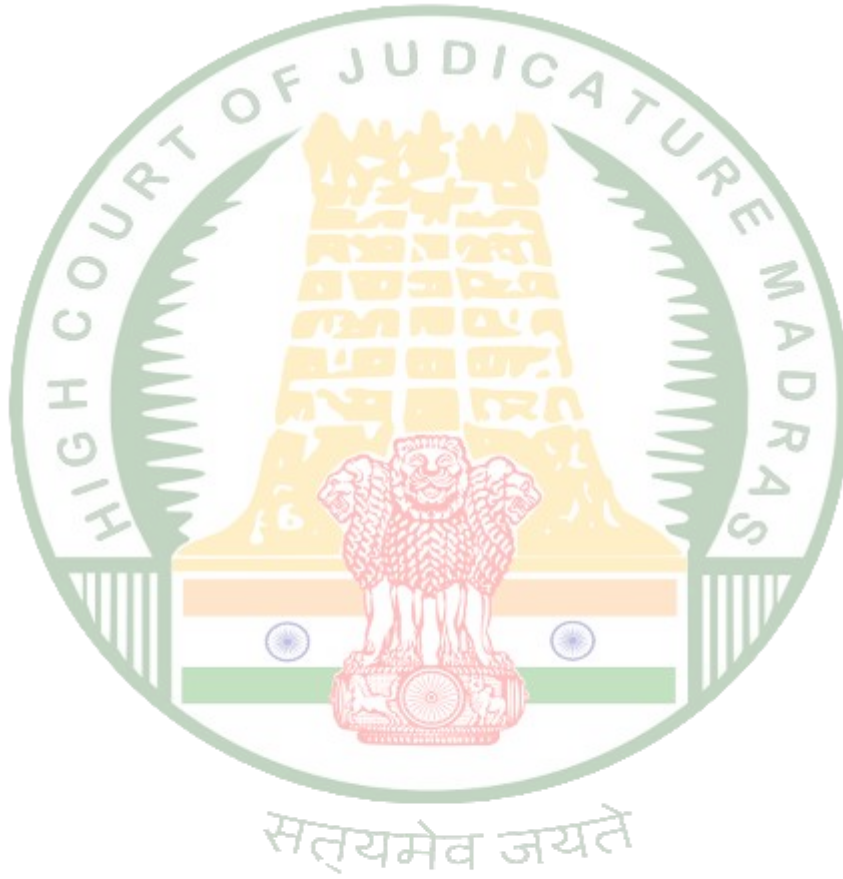
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To

1.The Principal Subordinate Judge,
Mayiladuthurai.

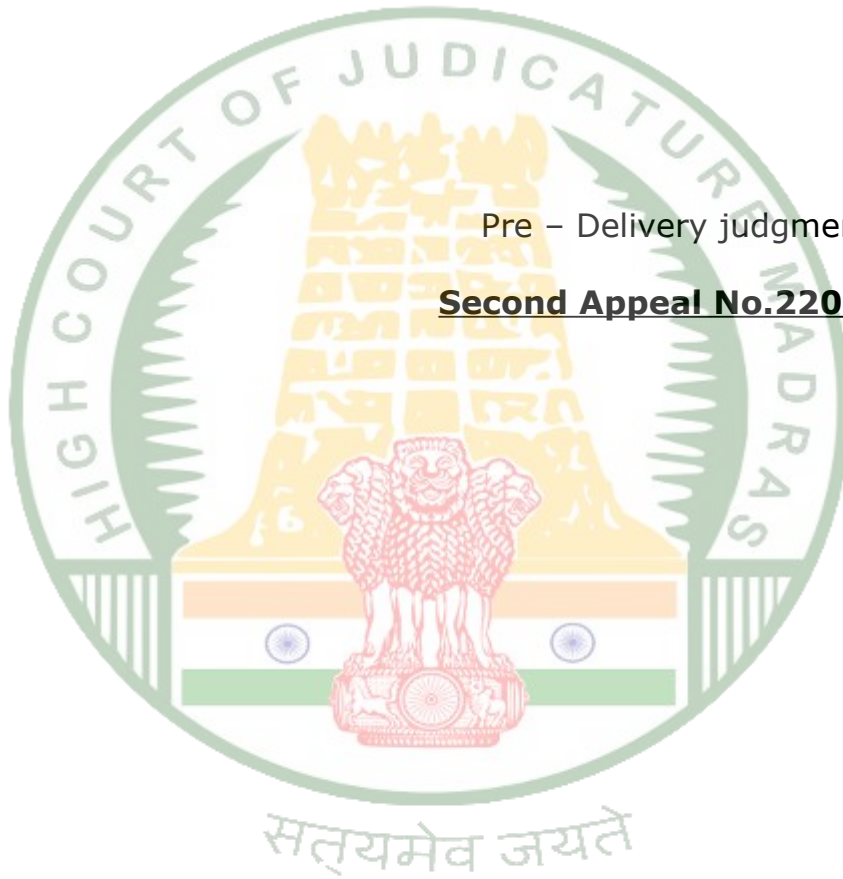
2.The District Munsif,
Sirkali.



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Dr.G.JAYACHANDRAN.J.,

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Pre – Delivery judgment made in

Second Appeal No.2201 of 2004

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