

Reserved on :25.03.2019

Pronounced on :29.03.2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Second Appeal No.1544 of 2010 &
M.P.No.1 of 2010

Jayaraman ... Appellant/Defendant

Vs

Palani ... Respondent/Plaintiff

Prayer in S.A.No.1544 of 2010 :- Second Appeal has been filed under Section 100 of C.P.C. against the judgment and decree dated 10.12.2008 passed in A.S.No.25 of 2006 on the file of the Additional District Court, FTC-4, Ponneri confirming the judgment and decree dated 29.11.2005 passed in O.S.No.337 of 1997 on the file of the District Munsif cum Judicial Magistrate Court, Thiruvottiyur.

For Appellant : Ms.Jayalakshmi
for M/s.Paul & Paul

For Respondent : Ms.V.J.Latha

JUDGMENT

Aggrieved over the concurrent finding of the Courts below decreeing the suit filed for permanent injunction, this Second Appeal has been filed.

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

3. The plaintiff has become the owner of the suit property by virtue of a settlement deed dated 30.11.1993 executed by his father and his grand mother. He is in possession and enjoyment of the suit property. Originally the suit property belong to his grandfather Parthasarathy. The plaintiff's father Durai is the only son to his grandfather and he is in continuous possession and enjoyment of the suit property for more than the

statutory period. The plaintiff has also perfected his title by adverse possession. The defendant is residing in the north of the suit property and he is a stranger to the suit property and he has no right in the suit property. On 08.03.1997, the defendant tried to trespass into the suit property. At the timely intervention of villagers and elders it was prevented. Hence, the suit for permanent injunction.

4. Denying the entire allegations in the plaint, it is the contention of the defendant that the suit property Survey No. is 76 /7 and plot No.25. Originally several persons have encroached upon the land in Survey No.76 and put up construction and residing there. The Government itself divided the survey No.76 into various plots and ordered assignment of those lands to the encroachers. One Bommiammal, who was in possession of the suit site as an encroacher has put up thatched house thereon, the Government has Ordered assignment of the site of the suit property on payment of land value to the said Bommiammal. The Bommiammal has become entitled to the owner of the thatched hut put up on the suit property. She was also paying the land value in instalments. While so, her daughter Tamilselvi has sold the property along with the super structure to the defendant's wife by a registered sale deed dated 14.05.1984 for a sum of Rs.15,000/-. The defendant's wife Vasantha took possession of the suit property and put up two thatched huts and also paid the house tax for those houses through her husband namely, the defendant herein. This defendant is in possession of the suit property. Superstructure tax in respect of the houses in the suit property stands in the name of the defendant.

5. The defendant has been regularly paying electricity consumption charges for the houses in the suit property. Out of the two houses put up by the defendant, one house was let out to one Manickam and other was let out to one Senthil, who are residing there. The old house which was originally put up and sold by Bommiammal was in dilapidated condition. Even today, this defendant continues to pay the instalment due to the Government and as such except the defendant's wife, no one has got any manner of right or interest over the suit property. The defendant has got his own land lying to the north of the suit property, which was originally assigned by the Government to one Mohanavelu from whom this defendant purchased the same. In any event the present suit is bad for non-joinder of necessary party to the suit. Hence, prayed for dismissal of the suit.

6. The trial Court framed the following issues for determination in the suit :

1. Whether the plaintiff entitled for permanent injunction as prayed for?
2. To what relief?.

7. On the side of the plaintiff, P.W.1 and 2 have been examined and Ex.A.1 to Ex.A.9 marked. On the side of the Defendants D.W.1 and D.W.2 have been examined and Ex.B.1 to B.5 marked.

8. The trial Court decreed the suit. As against which an appeal has been filed and the first appellate Court also confirmed the decree and judgment of the trial Court. As against which the present Second Appeal came to be filed.

9. The following substantial questions of law have been framed in this Second Appeal :

1. Whether the lower appellate Court has right in law in arriving at a finding that the plaintiff was in possession of the suit property through his tenants, in the absence of such pleading or evidence of the alleged tenancy or the tenants to whom the plaintiff claims to have let out the suit property particularly, in view of the inconsistencies in the evidence of P.W.1, P.W.2 and the clear evidence of D.W.2?

2. Whether the lower appellate Court is entitled to reject Ex.B.5, the electricity card filed by the defendant on mere conjecture that the said connection could pertain to the property of the defendant on the northern side of the suit property, without appreciating that the sketch, Ex.C.1 filed by the advocate Commissioner clearly shows that the electricity connection is first taken to the suit property from where the same is taken to the defendant's house on the northern side of the suit property?

3. Whether the lower appellate court could reject Ex.B.1, Ex.B.2 and Ex.B.4 series, in support of the possession of the defendant, even though the said

documents contained details of survey numbers correlating with the suit property?

10. The learned counsel appearing for the appellant submitted that the appellant's wife is the actual owner of the property and she has purchased the property in the year 1984. The boundaries of the above document clearly show that the suit property was purchased in the year 1984. Therefore, the respondent claiming title over the suit property on the basis of the settlement deed in the year 1983 cannot be countenanced.

11. The contention of the plaintiff that he has also perfected his title by adverse possession itself clearly show that only the defendant's wife is the owner of the property and the plaintiff is not in possession of the property. Ex.A.8 has been issued by the Officer who has no authority to issue such certificate. No document has been filed to show that the plaintiff is in possession of the suit property. In fact, for the suit property electricity connection has been obtained in the name of the wife of the defendant. The same clearly prove that the defendant is in possession of the entire property. Hence, submitted that the Courts below have not assessed the entire facts properly and decreed the suit.

12. Whereas, it is the contention of the learned counsel appearing for the respondent that the Courts below have clearly found that the suit property is the absolute property of the plaintiff and the boundaries also clearly show that the suit property is not purchased by the defendant or his wife. Hence, submitted that the Courts below have factually found that the plaintiff is in possession of the property. The alleged title of the defendant has not been established and in fact, the communication sent by the Government clearly indicate that the assignment was not complete at the relevant point of time in favour of the said Bommiammal. Therefore, any such purchase from the said Bommiammal did not convey any title to the respondent or his wife. Whereas, the documents filed on the side of the plaintiff clearly prove his possession and the Commissioner's report also clearly establish the possession of the plaintiff. Hence, submitted that the judgment of the Courts below does not require any interference and there is no substantial question of law involved in this appeal.

13. It is the case of the plaintiff that his father and grandmother executed a settlement deed in respect of the suit property in the year 1993. It is his further case that his grandfather Parthasarathy was enjoying the suit property. It is also case of the plaintiff that he has also perfected the title

by way of adverse possession. Therefore, it is the contention of the plaintiff that he is in possession of the suit property from the year 1993.

14. Whereas, it is the specific case of the defendant that the suit property was originally allotted to one Boomiammal in Survey No.767/07 and thereafter, the said Boomiammal's daughter Tamilselvi sold the property in favour of the wife of the defendant on 14.05.1984. It is the case of the defendant that the electrical connection to the suit property is also in the name of the defendant and he has let out the thatched huts to one Manickam and Senthil, who are residing as tenants.

15. It is well settled that a person who claims permanent injunction has to establish their possession on the date of the suit. In the plaint, the plaintiff has not pleaded anything about the occupation of the tenants in the suit property. Mainly he has placed reliance on Ex.A.1 settlement deed dated 30.11.1993. A careful perusal of Ex.A.1, it is seen that the boundaries are said to be north by Jayaraman house, south by Mahakaliyamman Koil Street, east by 3 ½ feet lane and west by Shanmuga Mudaliar house and site. The total extent as per Ex.A.1 is about 1980 sq.ft.

16. Whereas, it is the specific case of the defendant that north of the suit property originally belonged to one Mohanavelu. The defendant has purchased the suit property from Mohanavelu. Further, it is the specific contention of the defendant that the suit property was assigned to one Bommiammal long back and her daughter has sold the same in favour of the wife of the defendant. Ex.B.3 has been filed to show that an extent of 3 ½ cents is sold in favour of Vasantha, wife of the defendant by Tamilselvi on 14.05.1984. The boundaries set out in Ex.B.3 shows that north belongs to Jayaraman house, south by Mahakaliyamman Koil Street, West by Parameswariammal house and east by Municipal school. The boundaries in Ex.B.3 and Ex.A.1 almost tally with each other. The Commissioner's Report and plan Ex.C.1 and Ex.C.2 when carefully seen with the boundaries in both the documents tally with each other. Ex.B.1 and Ex.B.2, when seen, it is clear that in suit Survey No.76/7 the property was allotted to one Bommiammal by the Government.

17. The plaintiff claims title on the basis of the allotment in favour of his grandfather. However, there is no material whatsoever filed except Ex.A.1 settlement deed of the year 1993. It is further to be noted that it is the evidence of

P.W.1 that he is in possession of the property through his tenants. But the plaint is silent about the tenants. His evidence also indicate that he is temporarily residing in some other place and not in the suit property. According to him, he does not know the name of the tenant. He does not know who is the tenant in the suit property from the year 1993. His evidence also show that he does not know the name of the tenant and only his father is receiving the rent. He has also admitted that northern side of the property originally owned by one Mohanavelu and his property has been purchased by the defendant. Further, he also admitted that in the suit property, the electrical service connection is available in the name of the defendant's wife.

18. According to the evidence of P.W.2, father of P.W.1, he has stated that from the year 1993 to 2005, he has let out the property to 4 or 7 people and he do not know their names and the plaintiff was manging the property and he is receiving the rent from the year 1973. The evidence of P.W.1 and 2 is inconsistent with each other with regard to the tenants in the suit property. Whereas P.W.2 says that only the plaintiff is receiving rent and their evidence is highly improbable. If really, the plaintiff is in possession of the property and receiving rent, nothing prevented him from examining any tenant, who is paying rent to him. P.W.2 evidence that the plaintiff is receiving rent from 1973 is highly improbable. In 1973, the plaintiff was only a minor. Whereas, it is the specific case of the defendant that they have let out to the property to the tenants. D.W.2 one of the tenant is also examined before the Court.

19. The plaintiff claims right only on the basis of Ex.A.1 said to have been executed in the year 1993. The Commissioner Report and the plan of the Commissioner, when carefully seen, the suit property is shown as ABCD and there are two huts in the suit property. In the end of the suit property on the eastern side one bathroom is available. In one of the hut electric meter is shown as 'E' is available in the suit property. It is the specific admission of P.W.1 in his evidence that the electrical meter service connection is available in the name of the defendant's wife. These facts coupled with the inconsistent evidence of P.W.1 and P.W.2 with regard to the tenants, their contention that they are in possession of the property is highly doubtful.

20. Admittedly Ex.B.1 and Ex.B.2 clearly show that as far as the suit property is concerned, the assignment was granted to one Boomiammal long back. Even much before 1984 and so called notice was issued in the year 1991. Whether the assignment in favour of Boomiammal is cancelled or not, there is no evidence in this regard. Whereas, the defendant's wife has purchased the above property in the year 1984 as per Ex.B.3 and the boundaries also tally with Ex.A.1 except on the western side. In Ex.A.1, it is shown as Shanmuga Mudaliar property. Whereas Ex.B.3 it is shown as Parameswariammal property. But the fact remains that in both the documents, northern side, the property belong to this defendant. The Commissioner Report also clearly indicate that the entire property in the eastern side the front portion casuarina fencing is available. If the properties are in possession of two different persons, availability of common fencing is highly improbable. Merely because some kist have been paid by the plaintiff for the year 1993 and encumbrance has been filed, possession cannot be inferred, since the defendant's wife has purchased the property in the year 1984. Though both sides claim title on the basis of the earlier assignment, the defendant has proved that the original assignment was given to Bommiammal. The plaintiff contention that their grandfather was given assignment has not been established. Therefore, the defendant has proved better title than the plaintiff.

21. The plaintiff was unable to prove their actual possession, the name of the alleged tenants has also not been proved by them. The evidence of P.W.1 and P.W.2 is highly contradictory with each other. When there is cloud over title, injunction cannot be granted without proving the exclusive possession of the property. The evidence of P.W.1 itself clearly indicate that northern side of the property has been purchased by the defendant from one Mohanavelu. In fact, the above statement probabalize the defendant's case that northern portion of the property belong to the defendant and Ex.B.3 proves the purchase of the southern property. Further, the electricity connection in the name of the defendant's wife is available in the suit property. If really, the plaintiff was in possession of the suit property, the electrical connection in the name of the defendant's wife would not be in the suit property. All these facts create serious doubt over the exclusive possession of the suit property by the plaintiff.

22. Further, the defendant's wife also claim title over the property. She has not been made as a party. Since, there is a cloud over the title of the property, the plaintiff ought to have sought declaration of title in respect of the suit property. Whereas, he has not done so. Hence, the suit for bare injunction has to necessarily fail in the absence of proof with regard to the possession. The Courts below failed to assess the evidence properly and erroneously held that the

plaintiff is in possession of the property. Accordingly, the substantial questions of law are answered in favour of the appellant.

23. Accordingly, this Second Appeal is allowed and the judgment and decree of the Courts below are set aside with liberty to the plaintiff to file a comprehensive suit for declaration and consequential reliefs. Consequently, the connected miscellaneous petition is closed. No cost.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

vrc

To

1. The Additional District Judge,
FTC-4, Ponneri.
2. The District Munsif cum Judicial Magistrate,
Tiruvottiyur.

Copy TO

The Section Officer,
V.R. Section, High Court,
Madras. (2 copies)

+1cc to Mr. Paul & Paul, Advocate, S.R.No. 3039
+1cc to Ms. V.J. Latha, Advocate, S.R.No. 30299

Second Appeal No.1544 of 2010

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