

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.02.2019

PRONOUNCED ON : 14.03.2019

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.1299 of 2005

Ambika

...Appellant

Vs.

Swaminathan

...Respondent

Prayer:

Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 30.12.2004 in A.S.No.27 of 2004 on the file of the Principal Subordinate Court, Mayiladuthurai, confirming the judgment and decree dated 01.09.2003 in O.S.No.7 of 2001 on the file of the Principal District Munsif Court, Mayiladuthurai.

For Appellant : Mr.S.Sarath Chandran
for M/s.K.M.Vijayan Associates

For Respondent : Mr.S.Sounthar

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 30.12.2004 passed in A.S.No.27 of 2004 on the file of the Principal Subordinate Court, Mayiladuthurai, confirming the judgment and decree dated 01.09.2003 passed in O.S.No.7 of 2001 on the file of the Principal District Munsif Court, Mayiladuthurai.

2. The parties are referred to as per their rankings in the trial court for the sake of convenience.

3. The second appeal has been admitted on the following substantial questions of law:

"a. Whether the plaintiff who had not filed the suit for declaration of title not entitled to claim mere recovery of possession from the defendant who has been in possession

of the suit lane for over 50 years?

b. Whether the documents filed by the plaintiff in the Trial Court Ex.A1 and A2 the notice and the reply notice and the document said to have been marked in the Appellate Court viz., the Patta cannot support the plaintiff's claim to exclusive ownership of the suit lane?

c. Whether the plaintiff even accepting his own case that he had the right to go through the suit lane, cannot claim ownership of the suit lane but can only claim the right to use the suit pathway?

d. Whether the Courts below have failed to hold that the long possession of the defendant who has put up the fencing, grown plantation trees and installed the grinder without any objection from the plaintiff negated the plaintiff's claim for the recovery of possession of the suit property?"

4. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

5. The suit has been laid by the plaintiff claiming the relief of the recovery of possession of the suit property from the defendant.

6. In brief, according to the plaintiff, the suit property as well the property lying on the western side of the same has been enjoyed by his father by obtaining Patta and after his demise, the plaintiff and his brother had put up the super structure in the front and rear portion of the above said property by constructing tiled houses and residing therein respectfully and the suit property is the lane on the eastern side measuring 23 meters in length and 1 meter in breadth and to the east of suit property, the defendant is having a shop in a tiled building and however the defendant is not the owner of the site in which the shop building is put up and the plaintiff has been using only the suit property as a lane for reaching his rear portion and other than the suit lane there is no other way for the plaintiff to have access to his rear portion. The plaintiff is engaged as a Sculptor and on account of this avocation he used to travel outside and taking advantage of the same, the defendant with the intention of grabbing the suit property, on 15.10.2000, encroached into the suit property and planted plantain saplings and also put up bamboo fencing in order to prevent the plaintiff from gaining access through the

suit property for reaching his rear portion. The defendant without any entitlement or ownership has annexed the suit property and enjoying the same and accordingly, seeking the recovery of the possession of the suit property, the plaintiff issued a legal notice on 07.11.2000 to the defendant to remove the encroachments made by him and to the same, the defendant sent a reply notice containing false allegations and hence, according to the plaintiff, he has been necessitated to lay the suit for appropriate relief.

7. The case of the defendant is that it is true that the plaintiff is the owner of the property on the western side of the defendant, however, it is false to state that the plaintiff has a lane on the eastern side of his house namely the suit property and the plaintiff has never been in the possession and enjoyment of the lane to the east of the property and never enjoyed the same from his father's period as alleged in the plaint and it is also false to state that the plaintiff has been using the suit lane portion for having access to his backyard portion and on the other hand to the north of the plaintiff's property, there is a street by name Kollan street and only through the said street, the plaintiff and his brother had been having access to their backyard portions and it is false to state that on 15.10.2000, the defendant trespassed into the suit property and planted plantain saplings and put up bamboo fencing by taking advantage of the absence of the plaintiff and on the other hand, the defendant has been in the possession and enjoyment of the suit lane for more than 50 years and except the defendant no one has got right over the same and the defendant has put up the gate in the suit property and suit is not maintainable and the reply notice sent by the defendant contain the true facts and accordingly, sought for the dismissal of the plaintiff's suit as being devoid of any cause of action.

8. In support of the plaintiff's case, PW1 and PW2 were examined and Exs.A1 to A3 were marked. On the defendant's side, DW1 was examined and no document was marked.

9. The Trial Court after considering the oral and documentary evidence adduced by the respective parties and submissions made, was pleased to decree the suit in favour of the plaintiff as prayed for.

10. The defendant has preferred the first appeal. In the first appeal, it is seen that an additional document come to be marked on behalf of the plaintiff as Ex-A4. The first Appellate Court also considering the materials placed on record and the submissions made, was pleased to concur with the judgment and decree of the Trial Court and thereby dismissed the appeal preferred by the defendant. Impugning the same, the present

second appeal has been levied.

11. The suit property is stated to be a lane portion measuring about 23 meters in length and 1 meter in breadth lying on the eastern side of the plaintiff's house property and according to the plaintiff, the suit lane portion as well as the property on the western side has been enjoyed by his father by obtaining Patta and after his demise, he and his brother has been using the front and rear portion by putting up tiled house and according to the plaintiff for gaining access to the backyard portion, he had been using the suit lane portion only and other than the suit lane portion, there is no other way for reaching the backyard portion and according to the plaintiff taking advantage of his absence, the defendant on 15.10.2000 encroached into the suit property and put up the plantain saplings and also bamboo fence by intruding into the suit property and thereby prevented the plaintiff from using the same and gaining access to the backyard portion and as the defendant failed to hand over the suit property to the plaintiff despite notice, on the other hand repudiated the entitlement of the plaintiff to the possession of the same, according to the plaintiff, he has been constrained to institute the suit against the defendant.

12. The defendant has in toto disputed the claim of title and the possession of the suit lane portion of the plaintiff as alleged in the plaint. According to the defendant neither the plaintiff nor his father has been in the possession and enjoyment of the suit lane portion as claimed in the plaint and on the other hand it is pleaded by the defendant that it is he who had been in the possession and enjoyment of the suit lane portion for more than 50 years and accordingly, enjoying the same by raising plantain saplings and putting up bamboo gate, etc., and inasmuch as the plaintiff has no title or entitlement to the suit lane portion in any manner and not enjoyed the same at any point of time, accordingly sought for dismissal of the plaintiff's suit.

13. Inasmuch as the plaintiff has levied the suit claiming the recovery of the possession of the suit lane portion from the defendant who is stated to have encroached into the same without authority on 15.10.2000 and raised plantain saplings and put up bamboo fencing, etc., and particularly, when the defendant in the written pleas has disputed the entitlement of the plaintiff to the suit lane portion as claimed by him and furthermore, when even, prior to the institution of the suit, the defendant had disputed the plaintiffs title to the suit lane portion in the reply to the notice sent to the plaintiff, naturally, the plaintiff should have endeavoured to seek the relief of declaration of title to the suit property for enabling him to

seek the recovery of the possession of the same as per law. When a query to the said position is put forth by the Court to the counsel for the plaintiff, he would contend that inasmuch as the plaintiff has levied the suit seeking the recovery of the suit property based upon his previous possession and enjoyment of the same and further when according to the plaintiff, the defendant has no entitlement to the suit property in any manner, it is put forth by him that as per Article 64 of the Indian Limitation Act, the plaintiff is entitled to seek the recovery of the possession of the suit property based on prior possession and in such circumstances, there is no need on the part of the plaintiff to establish his title to the suit property as such and in this connection, placed reliance upon the judgment reported in 1968 (3) SCR 163, Nair Service Society Ltd., Vs. Rev. Father K.C. Alexander and others. No doubt as per the abovesaid decision as well as Article 64 of the Indian Limitation Act, it is seen that the plaintiff would be entitled to maintain the suit for recovery of possession based on the prior possession of the same. In such circumstances, it is evident that the plaintiff is not necessary to establish the title to the suit property as such for maintaining the suit. In such circumstances, it is for the defendant to establish that he has a better title to the suit property for claiming the retention of the possession of the suit property against the plaintiff.

14. Now, according to the plaintiff, inclusive of the suit property, which is a lane said to be lying on the eastern side of the plaintiff's property for enabling him to have access to the backyard portion, the Patta had been granted in favour of his father in respect of 72 ares of land and after the demise of his father, he and his brother had been enjoying the property by putting up tiled houses and enjoying the suit property as a lane portion. It is seen that the defendant is running a shop to the east of the suit property. It is the specific case of the plaintiff that prior to 15.10.2000, it is he who has been in the possession and enjoyment of the suit property and according to him, in specific, taking advantage of his absence, on 15.10.2000, the defendant without any authority, encroached into the suit property and put up the plantain saplings and also erected bamboo fencing in the suit property and thereby hindered his enjoyment of the same in having access to the backyard portion.

15. Per contra, it is specifically pleaded by the defendant that the suit property has been in his possession and enjoyment for more than 50 years and it is he who had been enjoying the same by putting up plantain saplings and bamboo gate, etc., and the plaintiff has no entitlement to the suit property in any manner as claimed in the plaint and never used the suit property

as a lane for gaining access to the rear portion of his property. Further, according to the defendant, the plaintiff and his brother had been reaching their backyard portion only through Kollan street lying on the northern side of his property.

16. Inasmuch as the plaintiff claims to have laid the suit for seeking the recovery of the suit property based on the prior possession of the same and when according to the plaintiff, the defendant had encroached into the suit property only on 15.10.2000 unlawfully during his absence and prior to the same, it is he who has been in the possession and enjoyment of the suit property as claimed in the plaint and on the other hand, when according to the defendant it is he who has been in the possession and enjoyment of the suit property for more 50 years, it is for the plaintiff to establish that he has been in the possession and enjoyment of the suit property prior to 15.10.2000 as sought to be made out by him. However, in the Trial Court, absolutely, there is no material projected on the part of the plaintiff to establish that he has been in the possession and enjoyment of the suit property prior to 15.10.2000 at any point of time, even during the days of his father. In the Trial Court other than the notices exchanged between the parties and the acknowledgment card which has been marked as Ex-A3, no other material was placed on the part of the plaintiff to claim the possession and enjoyment of the suit property as putforth in the plaint, particularly, to show that he has been in the possession and enjoyment of the suit property prior to the alleged trespass committed by the defendant into the same on 15.10.2000. In such view of the matter, when the plaintiff has miserably failed to establish before the Trial Court that he has been in the possession and enjoyment of the suit property prior to the alleged trespass committed by the defendant and also not placed any document to establish his claim of title to the suit property as putforth in the plaint in any manner, it does not stand to reason as to how come the Trial Court had chosen to uphold the plaintiff's case in his favour as prayed for. Apart from the abovesaid documentary evidence projected by the plaintiff in the Trial Court, the plaintiff has examined himself as PW1 and another witness as PW2. Therefore, it should be seen whether from the evidence of PW1 and PW2, the plaintiff has established his claim of prior possession of the suit property anterior to 15.10.2000. The plaintiff during the course of his evidence has admitted that there is one Kollan street on the rear side of his property and also further admitted that through Kollan street he could have access to his property. Therefore it is found that as putforth by the defendant the plaintiff would be having access to his property through Kollan street lying on the rear side of his property. Furthermore, the plaintiff has admitted during the course of his

evidence that he has at no point of time measured his property and also admitted that till date he has not measured his property with the surveyor and stated that to the east of his house, the defendant is having a shop and clearly admitted that the defendant used to have access to his property only through the lane lying on the western side of his property. Admittedly, the suit lane is lying on the western side of the property where the defendant has put up his shop and house, furthermore, the plaintiff has clearly admitted that plants and trees had been raised in the suit property earlier and the same had been raised only by the defendant and also admitted that bamboo gate had been put up in the front portion of the suit lane and also the bamboo fencing had been put up on the rear side of the suit lane and the bamboo gate in the front side is found locked and it is only the defendant who has locked the same. Therefore, from the abovesaid evidence adduced by the plaintiff, it is found that even much earlier, the defendant had put up the plantain saplings and trees in the suit lane and enjoying the same for having access to his property and also exclusively using the same by putting bamboo gate with lock and in such view of the matter, the claim of the plaintiff that he has been using the suit lane portion prior to the alleged trespass of the defendant into the same, as such, cannot be readily accepted.

17. PW2 examined on behalf of the plaintiff, during the course of the cross-examination, has stated that he has not seen any documents pertaining to the suit property and does not know to what extent the Patta had been issued in respect of the property seen by him two years ago and clearly deposed that the defendant had encroached into the suit property and put up the fence for nearly 40-50 years and the defendant has put up the grinder in his property and only through the suit lane portion, the defendant would have access to reach the grinder and the defendant has been running a firewood shop in the property and even the customers of the firewood shop used to have access only through the said lane portion and such being the evidence of PW2, it is found that he has clearly admitted the possession and enjoyment of the suit lane portion by the defendant for more than 40-50 years by putting fencing, etc., and also using the same as an access for reaching his property and in such view of the matter, when even as per Article 64 of the Indian Limitation Act, the plaintiff would be entitled to recover the suit property based on prior possession, when the alleged prior possession of the plaintiff in respect of the suit property has been totally challenged by the defendant and despite the same, the plaintiff, as above noted, has failed to place any material, either oral or documentary to establish his prior possession of the suit property in any manner and furthermore, when the plaintiff has miserably failed to establish his claim of title to the suit property before the Trial Court, I am unable to

accept the reasonings and conclusions of the Trial Court in upholding the plaintiff's case and granting the relief of the recovery of the suit property from the defendant.

18. The plaintiff for the reasons best known to him has not chosen to place the Patta document in the Trial Court said to have been issued in favour of his father in respect of the property measuring an extent of 72 ares of land which according to the plaintiff includes the suit lane portion. However in the first Appellate Court, on his part, the said Patta has been marked as Ex-A4. With reference to the same, the plaintiff has marked the Patta and tendered evidence. However, during the course of the cross-examination, the plaintiff has admitted that the said Patta marked as Ex-A4 has been issued only during the Natham Land Tax Scheme and other than the Ex-A4 Patta, he has no other title document and claimed that he has been allotted the property as per Ex-A4, however, would admit that he is unable to explain or point out as to what extent of the property had been allotted by way of Ex-A4 Patta and admitted that as per the said document, he does not know as to the actual extent of the property which had been allotted and also claimed ignorance that he does not know whether the Patta (Ex-A4) has been issued after measuring the property and according to him the same is known only to his father and accordingly, the challenge has been made by the defendant to the truth and validity of Ex-A4 document, which, however, had been repudiated by the plaintiff. According to the defendant, the plaintiff by way of Ex-A4 Patta is not entitled to claim title, possession and enjoyment of the suit lane portion, as prayed for.

19. In the light of the abovesaid evidence of the plaintiff as regards Ex-A4 Patta, when the plaintiff is unable to clearly point out as to what extent of the property had been allotted by way of the said document and clearly admitted that he does not know whether the property had been measured before the issuance of the said Patta and the same is known only to his father and when the Patta projected by the plaintiff does not clearly depict that the same include the suit lane portion also and with reference to the same, the plaintiff has not endeavoured to take out a commission to inspect and measure the suit property with the aid of the surveyor to ascertain whether the property described in Ex-A4 Patta also includes the suit lane portion and as above pointed out, when the plaintiff has miserably failed to establish his possession and enjoyment of the suit property at any point of time, particularly, his claim of the possession and enjoyment of the suit property prior to 15.10.2000, in such view of the matter, the first Appellate Court has also had committed a serious error in upholding the plaintiff's case by holding that it is only the plaintiff who has been in the possession and enjoyment of the suit property as claimed by him and that the

defendant had encroached into the suit property on 15.10.2000 during the absence of the plaintiff and thereby the defendant is liable to hand over the possession of the suit property to the plaintiff. With reference to the abovesaid determination, it is seen that reliance is found to be placed upon certain admission made by the defendant during the course of the cross-examination. No doubt, the defendant is not the owner of the site in which he is having the shop building. Admittedly, the site where the defendant is carrying on his business belong to a third party. That by alone would not entitle the plaintiff to claim that it is he who has been in the possession and enjoyment of the suit lane portion, sans any material pointing to the same. No doubt, the defendant has also failed to establish that it is he who is the owner of the super structure i.e., the shop building run by him. The defendant during the course of his evidence has stated that he has been residing in the property for more than 45 years and enjoying the suit lane portion also. However, he would at one place state that the plaintiff has obtained Patta for the suit property and enjoying the same. The abovesaid stray admission of the defendant has been taken into consideration by the Courts below and on that basis, they had preceded to hold that the plaintiff had secured the Patta for the suit property and enjoyed the same and it is only the defendant who has encroached into the suit property during the absence of the plaintiff. However, as rightly putforth by the defendant's counsel, the evidence of a witness should not be read in isolation but should be read as a whole and accordingly, the evidence of the defendant as adduced by him during the course of the chief examination as well as the cross-examination, if read cumulatively, it would go to show that the defendant, in fact, has disputed the claim of title, possession and enjoyment of the suit property by the plaintiff as putforth in the plaint. In such view of the matter, on the basis of a stray admission on the part of the defendant, as abovenoted, it cannot be held that the defendant has admitted the plaintiff's case and that the defendant is in the possession, enjoyment of the suit lane portion as a trespasser. When as abovenoted, the plaintiff has failed to establish his claim of the possession and enjoyment of the suit property at any point of time by placing acceptable and reliable documents and when the alleged Patta document projected by the plaintiff has not been established to be covering the suit property also and when the plaintiff has failed to co-relate the Patta document with the suit property as such and also not endeavoured to take out a commission to establish that the suit property also forms part and parcel of the property comprised in Ex-A4 Patta document and when the plaintiff's witness have admitted that it is only the defendant who has been in the possession and enjoyment of the suit property by putting up fencing for more than 40-50 years, in such view of the matter, the Courts below are found to

have committed a total error in accepting the plaintiff's case without there being any valid material pointing out to either the title or possession of the said portion till 14.10.2000 and in such view of the matter, when the defendant is admittedly found to be in the possession and enjoyment of the suit property over a long period of time and when the case of trespass alleged to have been committed by the defendant on 15.10.2000 has been failed to be established by the plaintiff and furthermore, when the plaintiff has failed to establish that he has a better title to the suit property than the defendant or as abovenoted failed to establish his claim of prior possession of the same at any point of time, in such circumstances, the judgment and decree of the Courts below upholding the plaintiff's case cannot be countenanced in the eyes of law and liable to be set aside.

20. In the light of the abovesaid discussions, the substantial questions of law formulated in the second appeal are accordingly answered against the plaintiff and in favour of the defendant.

21. In conclusion, the judgment and decree dated 30.12.2004 passed in A.S.No.27 of 2004 on the file of the Principal Subordinate Court, Mayiladuthurai, confirming the judgment and decree dated 01.09.2003 passed in O.S.No.7 of 2001 on the file of the Principal District Munsif Court, Mayiladuthurai, are set aside and resultantly, the suit laid by the plaintiff in O.S.No.7 of 2001 is dismissed with costs.

Accordingly, the second appeal is allowed with costs. Connected, miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

nsd

To

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

Copy to

The Section Officer,
V.R.Section,
High Court, Madras

+1cc to Mr.S.Sounthar, Advocate, S.R.No.24151

+1cc to M/s.K.M.Vijayan Associates, Advocate, S.R.24815

S.A.No.1299 of 2005

AD(CO)
CS/16/04/2019



WEB COPY