

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.10.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.511 of 2005

Swaminathan ... Appellant/defendants

Vs.

Thandapani ... Respondent/Plaintiff

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 10.12.2004 made in A.S.No.41 of 2003 on the file of Sub Court, Tiruvarur confirming the judgment and decree dated 28.02.2003 made in O.S.No.26 of 2000 on the file of District Munsif-Cum-Judicial Magistrate Court at Nannilam.

For Appellant : Mr.Srinath Sridevan
No appearance

For Respondent: Set ex-parte

JUDGMENT

This second appeal has been filed by the defendant against the judgment and decree passed by the Sub-Judge, Tiruvarur, in A.S.No.41 of 2003 dated 10.12.2004 confirming the judgment and decree passed by the District Munsif-Cum-Judicial Magistrate, Nannilam, in O.S.No.26 of 2000 dated 28.02.2003.

2. The respondent herein had filed a suit in O.S.No.26 of 2000 on the file of District Munsif-Cum-Judicial Magistrate, Nannilam, for the relief of permanent injunction to restrain the defendant, his men, agents, etc., from interfering with his peaceful possession and enjoyment of the suit property. The learned District Munsif-Cum-Judicial Magistrate, Nannilam, by the Judgment dated 28.02.2003 had decreed the suit as prayed for with costs. Aggrieved by the same, the defendant had filed an appeal in A.S.No.41 of 2003 on the file of the Sub-Judge, Tiruvarur. The learned Sub-Judge, Tiruvarur, by the

Judgment dated 10.12.2004 had dismissed the said appeal without costs and thereby confirmed the judgment and decree passed by the trial court. Feeling aggrieved further, the defendant has filed the present second appeal.

3. For the sake of convenience, the parties are referred to as described before the trial court.

4. The averments made in the plaint are in brief as follows:

The plaintiff is the absolute owner of the suit property by virtue of the registered sale deed dated 26.08.1999. From the date of purchase, the plaintiff has been in possession and enjoyment of the suit property. The defendant is not having any right over the suit property. The defendant's house is situated on the west of the suit property and his property's extent is 9 cents. The defendant has attempted to encroach the suit property and hence the plaintiff was constrained to file the suit for the relief of permanent injunction.

5. The averments made in the written statement are in brief as follows:

5 (a) The plaintiff is not in possession of the suit property. The suit property has not been properly described. The plaintiff has to prove that his vendor had subsisting title to execute the sale deed. Infact the property as described in the written statement has been in the possession and enjoyment of the defendant and his predecessor in title. The alleged sale deed did not convey title to the plaintiff. The defendant and his father have acquired title to the suit property by adverse possession. It is understood that R.S.No.73/3 measuring total extent of 61 cents belonged to one Narayanan and S.R.Subramaniam and enjoyed by them without division and jointly. The property abutting the road on the west was enjoyed by them dividing them as north-south. Northern portion being 9 cents and southern portion being 15 cents and accordingly sold by them. The northern portion was purchased by one Ramasamy Iyengar i.e., 9 cents from S.R.Subramaniam by sale deed dated 29.02.1981 which was again sold to the defendant's father by sale deed dated 19.04.1982. The southern portion of 15 cents has been sold by Narayanan to one Govindasamy Pillai, son of Swaminatha Pillai by sale deed dated 11.11.1974. The property purchased by the defendant's father has been sub-divided as R.S.No.73/3A as early as in 1984 or 1985. There is yet another land in east of R.S.No.73/3A and R.S.No.73/3B, which is measuring about 35 cents in R.S.No.73/3C. Eastern portion of 73/3C was stated to belong to Narayanan which Sivasamy Vagaiyara are possessing. West of Sivasamy vagaiyara's possession is about 21 cents which have been stated to belong to S.R.Subramaniam. That piece of 21 cents have always been

enjoyed and possessed by the defendant and prior to him, his father for atleast from 1982. When western portion purchased from Ramasamy Iyengar which sub-divided as R.S.No.73/3A. The defendant and his predecessor in interest have fenced the said 21 cents in R.S.No.73/3c along with his R.S.No.73/3A purchased by him as a single unit which is "L" shaped and openly and adversely possessed the 21 cents in R.S.No.73/3c (suit property in derogation of right and title of S.R.Subramaniam). The said S.R.Subramaniam himself lost title to the said 21 cents namely western portion in R.S.No.73/c. Therefore, the alleged purchase by the plaintiff itself is invalid in law and does not pass title, interest and possession to plaintiff.

5(b). When attempts were made by the plaintiff to dispossess the defendant by force, police complaint was preferred even in July 1999 against the plaintiff and caveat also lodged before the District Munsif-Cum-Judicial Magistrate Court, Nannilam. The said S.R.Subramaniam lost title by adverse possession by the defendant's father and the defendant. The plaintiff and his father to secure possession filed false suit by creating documents. The allegation that the plaintiff is in possession and enjoyment of the suit property in which the defendant attempted to trespass are all false. Infact, the defendant is in possession and enjoyment of the suit property and therefore, the defendant prayed to dismiss the suit.

6. Based on the aforesaid pleadings, the learned District Munsif-cum-Judicial Magistrate, Nannilam, had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined him as PW.1 and also examined two more witnesses as Pws.2 and 3. He marked Exs.A1 to A4 as exhibits on his side. On the side of the defendant, the defendant examined himself as DW.1 and marked Exs.B1 to B4 as exhibits.

7. The learned District Munsif-Cum-Judicial Magistrate, Nannilam after considering the materials placed before him found that the plaintiff has purchased the suit property under Ex.A.1 Sale Deed on 26.09.1999 and from that date onwards, he has been in possession and enjoyment of the same. She further found that the defendant failed to prove adverse possession. Accordingly she decreed the suit as prayed for with costs. Aggrieved by the same, the defendant had filed an appeal in A.S.No.41 of 2003 on the file of the Sub-Judge, Tiruvarur. The learned Sub-Judge, Tiruvarur, had dismissed the said appeal confirming the judgment and decree passed by the trial court. Feeling further aggrieved, the defendant has filed the present second appeal.

appeal has formulated the following substantial questions of law:

" (1) Whether the Courts below are right in granting injunction to the plaintiff when the plaintiff has not filed any document to show that he is in possession of the property?

(2) Whether defendants cannot take the plea of adverse possession against the plaintiff's vendor and also the plaintiff?"

9. The respondent after receipt of notice had entered appearance through Advocate, but for the past several hearings, there was no representation for the respondent. Today (24.10.2019) also, there is no representation for the respondent. Hence, the respondent is called absent and set ex-parte. After hearing the arguments of the learned counsel for the appellant/defendant and perusing the records, the judgment is being passed in this second appeal.

10. Substantial Questions of Law 1 and 2:

The learned counsel for the appellant has submitted that the trial court erred in granting the decree in favour of the plaintiff and the first appellate court had mechanically confirmed the same. He further submitted that the courts below failed to consider that the description of the property is not properly given in the plaint schedule. He further submitted that the courts below failed to consider that the plaintiff has not produced any documentary evidence to show his possession of the suit property. He further submitted that the courts below placed burden of proof on the defendant and came to the conclusion that since the defendant failed to prove adverse possession, the plaintiff is entitled to the relief of permanent injunction and the said approach is against the settled principles of law. Therefore, he prayed to allow the second appeal and set aside the judgment and decree passed by the courts below and dismiss the suit.

11. Though the defendant had raised a plea in his written statement that the description of property given in the plaint schedule is not correct, he has not stated how the said description is defective. In the plaint schedule, survey number, extent and boundaries of the suit property have been given. As per Order 7 Rule 3 of CPC where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case, such property can be identified by boundaries or number in record of settlement or survey, the plaint shall specify such boundaries or numbers. In this case, as already pointed out that in the plaint schedule, the plaintiff has not only mentioned the survey number but also mentioned the

boundaries and from the aforesaid description, the suit property can easily be identified.

12. It is also to be pointed out that the defendant also claimed right over the suit property. His case is that he and his father have been in possession of the suit property for more than 22 years and hence they perfected title over the suit property by adverse possession. So, it is clear that there is no dispute with regard to identity of the property. Both the courts below concurrently found that the plaintiff has given description of property properly in the plaint schedule. In the factual concurrent findings, this court cannot interfere.

13. The next contention of the learned counsel for the appellant/defendant is that the plaintiff has not produced any documentary evidence to prove his possession over the suit property. A perusal of the description of the property given in the plaint schedule would show that it is only a vacant site in which some trees are there. According to the plaintiff, he purchased the suit property under Ex.A1 Sale deed dated 26.09.1999. His further case is that his vendor S.R.Subramani Iyer got the suit property in the partition which took place between himself and his family members. The plaintiff has produced a registration copy of the said partition deed marked as Ex.A.2. A perusal of the said document would show that the plaintiff's vendor namely S.R.Subramani Iyer got the suit property through partition. The said S.R.Subramani Iyer had sold his share under Ex.A1 to the plaintiff. Since, the suit property is a vacant site, the Principle that the Possession follows title will apply. Therefore, the contention of the defendant that the plaintiff has not produced any documentary evidence to show his possession cannot be accepted.

14. It is also to be pointed out that the defendant has pleaded adverse possession and in such a case, it is to be presumed that he has admitted that the plaintiff is the original owner. Since the defendant has pleaded adverse possession he has to plead and prove from which date he is in possession of the suit property and when the said possession has become adverse to the original owner. In this case, the defendant has not specifically pleaded in the written statement that from which date he has been in possession and when the said possession has become adverse to the plaintiff and in the evidence also he has not stated the aforesaid facts. The trial court taking into consideration of the aforesaid facts rightly accepted the case of the plaintiff and rejected the case of the defendant and the same has been confirmed by the first appellate court. In the said factual concurrent findings, this court cannot interfere. Accordingly the substantial questions of law are answered against the appellant/defendant.

15. In the result, the second appeal is dismissed confirming the judgments and decrees passed by the courts below. No costs.

Sd/-
Assistant Registrar (ADI-MDU)

//True Copy//

Sub Assistant Registrar

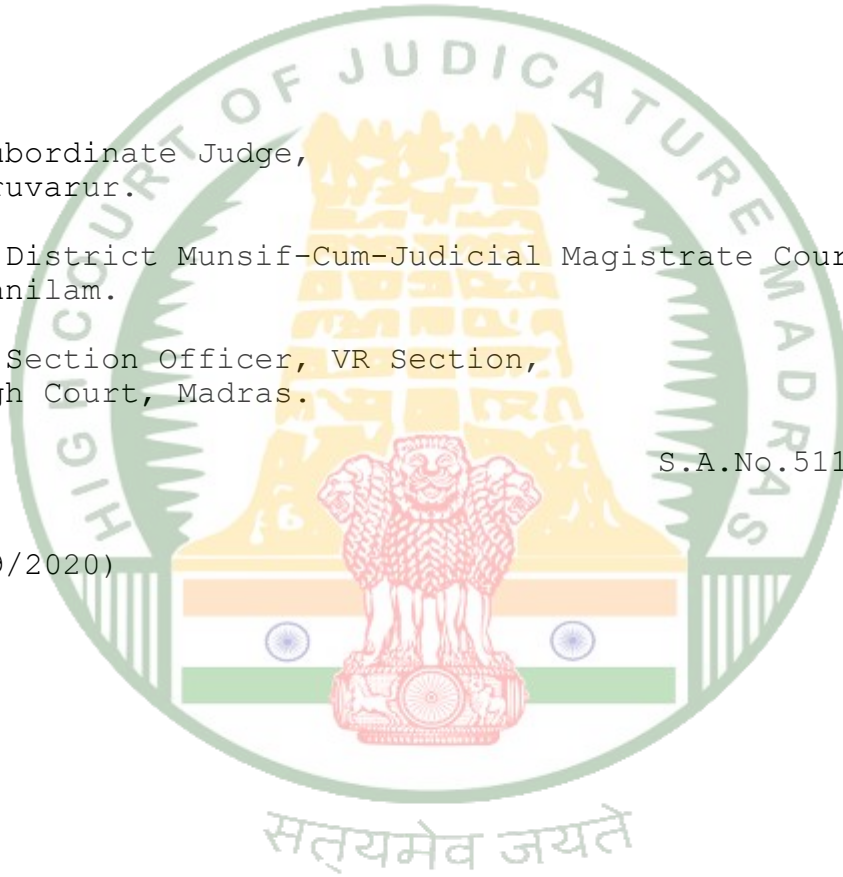
Vv

To

1. The Subordinate Judge,
Tiruvarur.
2. The District Munsif-Cum-Judicial Magistrate Court
Nannilam.
3. The Section Officer, VR Section,
High Court, Madras.

S.A.No.511 of 2005

MG (CO)
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