

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.02.2019

PRONOUNCED ON : 29.04.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.4 of 2013

1. Jegathambal
2. Anandakrishnan
3. Tamilselvi
4. Sasikaladevi ... Appellants/Appellants/Defendant 1 to 4

Vs.

1. V.L.Kaliyannan ...1st Respondent/Respondent/Plaintiff
2. Mayinthakumar ...2nd Respondent/5th Defendant

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 24.07.2012 passed in A.S.No.30 of 2011 on the file of the First Additional Subordinate Court, Erode confirming the judgment and decree dated 07.04.2011 passed in O.S.No.112 of 2009 on the file of the Second Additional District Munsif Court, Erode.

For Appellants : Mrs.Chitra Sampath, Senior Counsel
for Mr.I.C.Vasudevan

For Respondents : Mr.V.Lakshmi Narayanan
for Mr.M.Guru Prasad for R1

: R2 Dispensed with

JUDGMENT

This second appeal has been filed by the defendants 1 to 4 against the judgment and decree passed by the First Additional Sub Judge, Erode in A.S.No.30 of 2011 dated 24.07.2012 confirming the judgment and decree passed by the Second Additional District Munsif, Erode in O.S.No.112 of 2009 dated 07.04.2011.

2. The first respondent herein had filed a suit in O.S.No.112 of 2009 on the file of the Second Additional District Munsif, Erode to declare that he is the absolute owner of the suit properties and consequently to restrain the defendants,

their men etc., agents etc., from in any manner either trespassing into the suit properties or disturbing his peaceful possession and enjoyment of the suit properties by means of a permanent injunction.

3. The learned Second Additional District Munsif, Erode by the Judgment dated 07.04.2011 declared that the plaintiff is the absolute owner of the suit properties and consequently restrained the defendants by means of permanent injunction from interfering with the plaintiffs' peaceful possession and enjoyment of the suit properties except the portion in which the fifth defendant is running a garments factory in the name and style of "Prakash Garments." He also directed the defendants to pay the cost of the suit to the plaintiff. Aggrieved by the same, the defendants 1 to 4 had filed an appeal in A.S.No.30 of 2011 on the file of the First Additional Sub Judge, Erode.

4. The first respondent/plaintiff had filed an application in I.A.No.798 of 2011 under Order 41 Rule 27 and Section 151 of CPC to receive certain documents as additional evidence. The learned First Additional Sub-Judge, Erode by the Judgment and Order dated 30.08.2011 had dismissed the said application, however, he allowed the appeal setting aside the judgment and decree passed by the Trial Court and remanded the matter to the Trial Court for framing necessary issues with regard to the title and possession of superstructures and valuation of suit property and payment of Court fees and to give a finding. Aggrieved by the same, the defendants 1 to 4 had filed CMA.No.3267 of 2011 on the file of this Court. The first respondent/plaintiff had filed Cros.Obj.No.195 of 2011.

5. This Court by the judgment dated 25.01.2012 had disposed of the said CMA.No.3267 of 2011 and cross objection No.195 of 2011. In the said judgment, it was held that the additional documents sought to be marked at the appellate stage by the Cross Objector shall be received in accordance with law and to that extent, both the parties are permitted to let in evidence. Further, the Appellate Court was directed to dispose of the appeal after giving sufficient opportunities to both parties in accordance with law within the period of two months from the date of receipt of a copy of the said judgment. In pursuance of the said judgment, the learned First Additional Sub Judge, Erode had restored the appeal in A.S.No.30 of 2011 on his file and posted the matter for arguments. At that stage, the first respondent/plaintiff had filed an application in I.A.No.277 of 2012 seeking permission of the Court to amend the plaint. The First Appellate Court by the Order dated 02.04.2012 had dismissed the said application; as against which, the first respondent/plaintiff had filed a Civil Revision Petition in C.R.P(NPD) No.1752 of 2012 before this Court. This Court by the

Order dated 25.06.2012 had dismissed the said C.R.P. Thereafter, the First Appellate Court had marked Exs.A.17 to A.21 as exhibits on the plaintiff's side and finally by the judgment dated 24.07.2012 had dismissed the said appeal confirming the judgment and decree of the Trial Court. Feeling aggrieved, the defendants 1 to 4 have filed the present second appeal.

6. For the sake of convenience, the parties are referred to as described before the Trial Court.

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

The defendants 2 to 4 are the sons and daughters of the first defendant. The husband of the first defendant and father of the defendants 2 to 4 namely Periyasamy is the brother of the plaintiff. The fifth defendant is the hench man of the defendants 1 to 4. The suit properties originally belonged to one Chinnammal @ Pavayammal and others, from whom, the plaintiff had purchased the same under a registered sale deed dated 13.12.1985. From the date of said purchase, the plaintiff has been in possession and enjoyment of the suit properties. Patta also granted in favour of the plaintiff. The plaintiff is paying kist to the Government. The plaintiff is owning lands at Samraj Nagar in Karnataka State. Taking advantage of the fact that the plaintiff is away from the suit properties, the defendants 1 to 4 with a view to grab the suit properties created a document, purported to be a release deed dated 08.05.2007, as if the defendants 1 to 4 are the absolute owners of the suit properties and thereby the defendants 3 and 4 have released their right in favour of the defendants 1 and 2. The defendants 1 to 4 are strangers and they are not in physical possession of the suit properties. So, the said release deed will not bind upon the plaintiff. On the strength of the said release deed, the defendants 1 and 2 created a lease deed dated 25.09.2007 in favour of the fifth defendant and leased out the suit properties to him for monthly rent of Rs.750/- and received a sum of Rs.5,000/- towards advance. The fifth defendant is not in physical possession of the suit properties. Therefore, the said lease deed also will not bind upon the plaintiff. When the plaintiff questioned the defendants 1 to 5 about the creation of aforesaid documents, they threatened the plaintiff with dire consequences and hence, the plaintiff had lodged a complaint before the Police on 16.04.2008 and 24.04.2008. Further, the plaintiff had filed CrI.OP.No.852 of 2009 before this Court seeking police protection and this Court also by the Order dated 19.01.2009 directed the police to provide police protection to the plaintiff. The plaintiff is the absolute owner of the suit properties and he never allowed the defendants to enjoy the same at any point of time and that being so, on 01.03.2009, the defendants attempted to trespass into the suit properties and

hence the plaintiff was constrained to file the above suit for declaration and consequential relief of permanent injunction.

8. The averments made in the written statement filed by the second defendant and adopted by the defendants 1, 3 and 4 are in brief as follows:

a) The relationship between the plaintiff and the defendants 1 to 4 is admitted, but, it is wrong to say that the fifth defendant is the henchman of the defendants 1 to 4. The plaintiff is not in possession and enjoyment of the suit properties as claimed by him in the plaint. The defendants 1 to 4 are in possession and enjoyment of the suit properties for more than statutory period and hence they have perfected title by adverse possession. It is not disputed that the plaintiff owns lands at Samraj Nagar at Karnataka State and he always been living at Samraj Nagar, Karnataka State. He never looked after the suit properties. It is false to state that with a view to grab the suit properties, the defendants 1 to 4 have created a release deed dated 08.05.2007 and subsequently, they created a lease deed dated 25.09.2007 in favour of the fifth defendant. It is false to state that the defendants 1 to 4 threatened the plaintiff with dire consequences. The lodging of complaints and filing of Crl.OP are nothing but an attempt of the plaintiff to create evidence for the purpose of filing of the suit. The vendor i.e, predecessor in title owned 1 acre land; on 13.12.1985, two sale deeds were executed, one in favour of the late Periyasamy (father of the defendants 2 to 4 and husband of the first defendant) to an extent of 0.50 acres which is the western half of the said one acre and another sale deed was executed in the name of the plaintiff for an extent of 0.50 acres which is the eastern half of the said one acre.

b) Though the suit property was purchased by the plaintiff, the plaintiff abandoned the suit property and only the father of the defendants 2 to 4 took possession of the suit property, even within six months from the date of purchase, with the knowledge of the plaintiff. The said one acre of land has been enjoyed by the said Periyasamy as a single block and there are no boundaries demarcating between the said two pieces of land. The father of the defendants 2 to 4 namely Periyasamy raised a compound wall covering the entire one acre of land and put up two gates, one on the western side and another on the southern side. The said Periyasamy had dug an open well on the northern end of the said one acre land for agricultural use. He planted coconut trees bounding the entire one acre land. He obtained electricity service connection for the agricultural purpose. Thereafter, he put up underground pipe lines from the said open well to cover the entire one acre land for irrigation purpose. He had installed drip irrigation pipe lines for all the coconut trees planted by him. In the year 1993, the father of the defendants 2 to 4 namely Periyasamy had levelled the land

and converted the said one acre for commercial use. He put up buildings. He put up godown for weaving factory in one portion of the land and dyeing unit in another portion of land. He also leased out the suit property to third parties. At present, the fifth defendant is the tenant in the said building. The possession and enjoyment of the said Periyasamy was continuing without any interruption for more than statutory period. After the death of the said Periyasamy, the defendants 2 to 4 continued the possession and enjoyment of the suit properties. In the above mentioned circumstances, the defendants 3 and 4 executed a release deed dated 08.05.2007 releasing their right and title over the suit property in favour of the defendants 1 and 2. The fifth defendant was inducted as a tenant for the building in the suit property. The suit has not been properly valued for the purpose of court fees and jurisdiction. The alleged cause of action is false. The plaintiff is not in actual possession of the suit property and as such, he is not entitled for the relief of permanent injunction. Therefore, the defendants 1 to 4 prayed to dismiss the suit.

9. The averments made in the written statement filed by the fifth defendant are in brief as follows:-

The fifth defendant entered into a registered lease agreement dated 25.09.2007 with the defendants 1 and 2 and from that date onwards, he is in actual and physical possession of a portion of the suit property. He is running a garments factory under the name and style of 'Prakash Garments'. He is a statutory tenant and he is entitled to protect his possession. The plaintiff is not entitled to ask permanent injunction against the fifth defendant, because he is in actual and physical possession and therefore he prayed to dismiss the suit against him.

10. The averments made in the reply statement filed by the plaintiff are in brief as follows:

It is false to state that the plaintiff never enjoyed the suit property from 1986 onwards. It is also false to state that the defendants 1 to 4 inherited the property from the said Periyasamy and also perfected their title by adverse possession. The defendants have colluded together and altered the physical features by creating documents in their favour which will not bind upon the plaintiff. The plaintiff is the absolute owner of the suit properties and he is in possession and enjoyment of the suit properties and hence, he prayed to decree the suit as prayed for.

11. Based on the aforesaid pleadings, the learned Second Additional District Munsif, Erode had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1 and he has also examined

two more witnesses as PW2 and PW3 and he has marked Exhibits A1 to A16 as exhibits. On the side of the defendants, the defendants 1, 2 and 5 were examined as DWs 1, 2 and 5 and they also examined two more witnesses as DW3 and DW4. They had marked Exhibits B1 to B8 as exhibits on their side. Exhibits X1 to X10 were marked as third party exhibits. The Advocate Commissioner's reports and plan were marked as Exs.C1 to C3.

12. The learned Second Additional District Munsif, Erode, after considering the materials placed before him found that the defendants 1 to 4 failed to prove that they are in possession and enjoyment of the suit properties by adverse possession. He further found that the plaintiff has established title over the suit properties and also his possession. Accordingly, he decreed the suit for declaration. Further, he granted permanent injunction in respect of the suit properties except the portion which is in possession of the fifth defendant.

13. Aggrieved by the aforesaid judgment and decree of the Trial Court, the defendants 1 to 4 had filed an appeal in A.S.No.30 of 2011 on the file of the First Additional Sub-Judge, Erode. The first respondent/plaintiff had filed an application in I.A.No.798 of 2011 under Order 41 Rule 27 and Section 151 of CPC seeking leave of the court for adducing additional evidence. The learned First Additional Sub Judge, Erode by the Judgment and Order dated 30.08.2011 had dismissed the application in I.A.No.798 of 2011, however he allowed the appeal and set aside the judgment and decree passed by the Trial Court and remanded the matter to the trial Court for framing necessary issues with regard to the title and possession of superstructures and valuation of the suit properties and payment of court fees and to give a finding. Aggrieved by the same, the defendants 1 to 4 had filed CMA.No. 3267 of 2011 before this Court. The first respondent/plaintiff had filed a cross objection in Cros.Obj.No.195 of 2011. This Court by the Judgment dated 25.01.2012, set aside the order of remand passed by the first appellate court and the matter was remanded back to the First Appellate Court for hearing the matter on merits and also adducing evidence on both sides. In pursuance of the aforesaid judgment, the First Appellate Court had restored the said appeal on file and during pendency of the said appeal, the first respondent/plaintiff had filed an application in I.A.No.277 of 2012 seeking permission of the first Appellate Court to amend the plaint interalia to add the thatched shed and two asbestos sheds admeasuring 16' x 60' and 20' x 11' in the plaint schedule. The First Appellate Court after hearing both sides, dismissed the said I.A. Against, which, the plaintiff had filed a revision in C.R.P.(NPD)No.1752 of 2012. This Court by the Order dated 25.06.2012 had dismissed the said C.R.P confirming the Order passed by the First Appellate Court. Thereafter, the

First Appellate Court had marked Exs.A.17 to A.21 as exhibits on the side of the plaintiff and finally by the judgment dated 24.07.2012 had dismissed the appeal confirming the judgment and decree passed by the Trial Court. Feeling aggrieved, the defendants 1 to 4 have filed the present second appeal.

14. This Court at the time of admitting the second appeal has formulated the following substantial questions of law:

" 1) Whether the Courts below have committed an error in granting the relief of declaration and permanent injunction, when the description of property does not include the superstructure, which is admittedly there in existence?

2) Whether the Courts below have properly considered the fact of suppression of fact in taking a decision regarding the exercise of discretion in granting the relief in favour of the plaintiff? "

15. Heard Mrs.Chithra Sampath, the learned Senior Counsel assisted by Mr.I.C.Vasudevan, the learned counsel for the appellants and Mr.V.Lakshmi Narayanan for Mr.M.Guru Prasad, learned counsel for the first respondent/plaintiff.

16. Substantial Questions of Law 1 and 2:

The learned Senior Counsel for the appellants has submitted that the evidence of PW1 would clearly show that on the date of filing of the suit itself, a superstructure was in existence in the suit property and the Commissioner's report and plan also would show the existence of superstructures in the suit property, but, the plaintiff had filed the suit suppressing the existence of the said superstructure. She further submitted that the First Appellate Court by the Judgment dated 30.08.2011 had clearly observed that there were superstructures in the suit property and that the plaintiff has not taken any steps to amend the plaint as well as the description of the suit property and in the said circumstances, he is not entitled for declaration and permanent injunction and remanded the matter back to the trial Court for framing necessary issues with regard to the title and possession of superstructures and valuation of the suit property and payment of Court fees and to give a finding. She further submitted that as against the said order of remand, the defendants 1 to 4 have filed CMA.No.3267 of 2011 on the file of this Court and the plaintiff had filed a Cross Objection in Cros.Obj.No.195 of 2011, against the dismissal of the application in I.A.No.798 of 2011 to receive additional documentary evidence. She further submitted that this Court while disposing of the said CMA.No.3267 of 2011 and Cross Obj.No.195 of 2011 by the Judgment dated 25.01.2012 set aside

the order of remand and the matter was remitted back to the first Appellate Court for hearing the matter on merits and also giving an opportunity of adducing evidence on both sides.

17. The learned Senior Counsel for the appellants further submitted that in pursuance of the aforesaid directions of this Court, the First Appellate Court had restored the appeal on file and during pendency of the appeal, the plaintiff had filed an application in I.A.No.277 of 2012 seeking permission to amend the plaint inter alia, to add the superstructures in the plaint schedule, but, the First Appellate Court had dismissed the said application; as against which, the plaintiff had filed a revision in C.R.P.(NPD) 1752 of 2012 before this Court. She further submitted that this Court had dismissed the said revision confirming the order passed by the Appellate Court in I.A.No.277 of 2012. She further submitted that this Court while dismissing the said Civil Revision, gave a direction to the Appellate Court to see from the available evidence as to when the superstructures emerged in the suit property and if it finds that the said superstructures were constructed during pendency of the suit, the Appellate Court has inherent power to pass suitable orders, but, on the other hand, if the erection took place prior to the filing of the suit then it is for the Appellate Court to take into account such facts and decide the appeal based on the available materials as per law. She further submitted that the Appellate Court without taking into consideration of the aforesaid directions of this Court, held that merely by putting up some temporary construction, by taking advantage of the absence of plaintiff in the suit property, the defendants cannot dispute the title to the suit property. She further submitted that the first Appellate Court cannot go against the earlier view which was taken in the judgment dated 30.08.2011 that the plaintiff has suppressed the existence of the superstructures in the suit property. She further submitted that the First Appellate Court has erroneously applied the principle that the possession follows title. She further submitted that the said principle will apply only in respect of a vacant site, whereas, the suit property, according to the plaintiff, is the agricultural land and as such the aforesaid principle will not apply. She further submitted that once the First Appellate Court comes to the conclusion that the defendants 1 to 4 are in possession of the suit property, it should not have granted relief of permanent injunction and therefore she prayed to set aside the judgments and decrees of the Courts below and dismiss the suit.

18. In support of the aforesaid contentions, the learned Senior Counsel for the appellants relied upon the following decisions:

(i) Bachhaj Nahar Vs. Nilima Mandal and Another -

(2008) 17 Supreme Court Cases 491;

17 Supreme Court Cases 491

(ii) Bothumani Vs.K.Rameena - 2010 (2) CTC 262

19. Per Contra, the learned counsel for the first respondent/plaintiff has submitted that the defendants have not disputed the fact that the plaintiff had purchased the suit property under Ex.A.1 Sale Deed dated 31.12.1985. He further submitted that they also not disputed the fact that in pursuance of Ex.A.1 Sale Deed, the plaintiff took possession of the suit property and that being so, it is for the defendants to prove that when they took possession of the suit property, but the defendants miserably failed to prove that when they took possession of the suit property. He further submitted that since the plaintiff is having lands at Samraj Nagar at Karnataka State, also he had permitted his brother Periyasamy to look after the property and the said Periyasamy was in possession of the suit property only in pursuance of the said permission. He further submitted that after the death of the said Periyasamy, his sons and daughters (defendants) have continued in possession of the suit property and their possession is only permissive possession and they cannot seek any protection from the Court. He further submitted that the fifth defendant had surrendered the possession to the plaintiff in respect of the portion in which he was a tenant and that itself would show that the plaintiff is the absolute owner of the suit property. He further submitted that it is true that during continuance of the tenancy, the tenant cannot deny the landlords title; in this case, the said issue is between the defendants 1 to 5 in which the plaintiff is not cerned.

20. The learned counsel for the first respondent/plaintiff further submitted that the defendants have pleaded adverse possession and hence the burden is upon them to prove the plea of adverse possession, but, in this case, the defendants failed to prove the adverse possession. He further submitted that the revenue records (Exs.A2 to A4) would clearly show that the plaintiff is in possession of the suit property. He further submitted that Exs.A.17 to A20 would show that the said Periyasamy had filed a suit in O.S.No.339 of 2001 against the Town Panchayat regarding the assessment of property tax wherein he has claimed right only in respect of his property and not in respect of the suit property. He further submitted that if really the said Periyasamy was in possession of the suit property adverse to interest of the plaintiff, he would have filed a suit in respect of the suit property also. He further submitted that as per Ex.A.1 Sale Deed, the suit property is only an agricultural land and the same has been valued with reference to the kist value. He further submitted that when the suit property is classified as agricultural land and it is

assessed to revenue kist, the market value of the said property will be reckoned only under Section 7 (2) (a) of the Court Fees and Suits Valuation Act. He further submitted that merely by putting up some temporary constructions by taking advantage of absence of the plaintiff, the defendants cannot dispute the title of the plaintiff. He further submitted that even assuming that the defendants are in possession of the suit property and that should be only in pursuance of the permission granted by the plaintiff and therefore, the defendants cannot have any independent right over the suit property. He further submitted that taking into consideration of the aforesaid facts, the Trial Court has rightly decreed the suit and the same has been confirmed by the First Appellate Court and in the said factual concurrent findings, this Court cannot interfere and therefore he prayed to dismiss the Second Appeal.

21. The learned counsel for the first respondent/plaintiff in support of his contentions, relied upon the following decisions:

- (i) Aathi Chettiar Vs. P.Vaikuntavalli
Manu/TN/3727/2009 CRP(PD)No.1097/2009
dated 01.10.2009
- (ii) Suseela and Others Vs. A.S.L.Rajan CDJ 1999 MHC
252
- (iii) D.Satyanarayana Vs. P.Jagadish - (1987) 4 SCC
- (v) Maria Margarida Sequeira Fernandes Vs. Erasmo
Jack De Sequeira (Dead) Through LRs (2012) 5 SCC

22. It is an admitted fact that the plaintiff and one Periyasamy who is the husband of the first defendant and father of the defendants 2 to 4 are brothers. It is also an admitted fact that the plaintiff had purchased the suit property under Ex.A1 sale deed dated 13.12.1985, but the dispute is only with regard to possession of the suit property.

23. In Aathi Chettiar Vs. P.Vaikuntavalli (cited supra), this court has held that the ryotwari land should be valued under Section 7 (2) (a) of the Tamil Nadu Court Fees and Suit valuation Act, 1955, and the court should not conjecture upon the nature of such land by taking into consideration the probabilities of its user in future or its potentialities.

24. In Suseela and Others Vs. A.S.L.Rajan (cited supra), this court has held that the issue with regard to court fee is between the court and the suitor. Further, it was held that when the suit property is classified in the Revenue records as agricultural land and it is assessed to revenue kist, the market value of the property of any land which is assessed to the Revenue records will be reckoned only under Section 7 (2) (a) of the Tamil Nadu Court-fees and Suits Valuation Act.

Further it was held that when the lands have been registered as agricultural lands in the Revenue records, it cannot be said that the lands ceased to be agricultural lands, merely because the lands were kept vacant.

25. In this case, though in the plaint schedule, the suit property has been described as agricultural land, admittedly there are superstructures in the suit property. In such a case, the suit should have been valued in respect of the superstructures also. The plaintiff also realising the same filed I.A.No.277 of 2012 before the first Appellate Court seeking amendment of the plaint inter alia to include the superstructures in the suit property and also valuation column. The said application has been dismissed by the first Appellate Court and confirmed by this Court in CRP (NPD) 1752 of 2012. Hence, the plaintiff is estopped from taking a plea that the suit property is only an agricultural land and the suit has been properly valued for the purpose of Court fees. In this case in the written statement, the defendants 1 to 4 specifically pleaded that there are superstructures in the suit property and the same were not included in the suit property. Further they have stated that the suit has not been properly valued. Therefore the aforesaid decisions will not help the plaintiff.

26. According to the plaintiff, he is in possession of the suit property from the date of purchase. The case of the defendants is that within six months from the date of purchase, the father of the defendants 2 to 4 Periyasamy took possession of the suit property and from that date onwards, he was in exclusive possession and enjoyment of the same till his death and after his death, the defendants are continuing in possession of the suit property.

27. At this juncture, it would be relevant to refer to Ex.B1 wherein the plaintiff has categorically admitted that within few months of purchase, he went to Samraj Nagar, Karnataka State and stayed there. Further, he admitted that the defendants have encroached the suit property and they also blocked the entrance. He further made a request to retrieve this property and give to him. The plaintiff while examining himself as PW1, in his cross examination, has admitted that he has sent Ex.B1 the complaint to the Sub-Inspector of Police (Economic Offences Wing) Erode and hence the said complaint has been marked through him only. Further, he has admitted in his evidence that in Ex.B1, he made a request to the police to retrieve his property and handover to him. In paragraph No.7 of the reply statement also, the plaintiff has stated that the defendants have colluded together and altered the physical features by creating documents in their favour. The said statement also would clearly show that the defendants are in

possession of the suit properties.

28. It is also to be pointed out that in the plaint, it is not stated as to whether any superstructure is in existence in the suit property. But, the first appellate court by the judgment dated 30.08.2011 made an observation that there are superstructures in the suit property but the plaintiff has not mentioned the said superstructures in the plaint schedule and remanded the matter to the trial court for framing necessary issues with regard to the title and possession of the superstructures and to give a finding. As against the said judgment and decree, the defendants had filed CMA.No.3267 of 2011 before this court, in which, the plaintiff has filed cross objection contending that the first appellate court ought to have entertained I.A.No.798 of 2011. He has not challenged the findings of the first appellate court with regard to the existence of the superstructures in the suit property.

29. This court by the judgment dated 25.01.2012, set aside the first appellate court's order of remand and remitted the matter to the first appellate court for hearing the matter on merits and also giving an opportunity of adducing evidence on both sides. In pursuance of the said order, the first appellate court had restored the appeal in A.S.No.30 of 2011 on file and posted the matter for arguments and at that stage, the plaintiff had filed an application in I.A.No.277 of 2012 seeking permission of the first appellate court for amending the plaint inter alia in the plaint schedule to add a thatched shed and 2 asbestos shed admeasuring 16x60 feet and 20 ft x 11 ft. The learned Appellate Judge had dismissed the said application by the order dated 02.04.2012, as against which, the plaintiff had filed a civil revision petition in CRP (NPD) No.1752 of 2012. This court in the order dated 25.06.2012 had dismissed the said CRP confirming the order passed by the first appellate court in I.A.No.277 of 2012. While dismissing the said CRP, this court has observed in paragraph Nos.9 to 11 as follows :

"9. At this juncture, I would like to recollect the trite proposition of law that in an injunction suit if the defendant trespass into the suit property pendente lite, then that injunction suit can be converted into a suit for possession because of the fact that pending litigation the defendant drastically trespassed into the suit property. In appropriate circumstances, courts have even got power to mould the relief and grant possession of the suit property in a suit for injunction, if from the available evidence, the court could understand that the defendants pending suit trespassed into the suit property. But those

are all not the proposed pleading in this case.

10. A mere perusal of the plaint would display and demonstrate that absolutely there is no whisper about the erection of any super structure in the building at all. Had there been any reference of erection of any super structure then that fact can be elaborated by additional pleadings. I would like to raise a question as to who raised such super structures and when? For which in the affidavit accompanying the application in I.A. No.277 of 2012 there is no explanation. The appellate court, in view of the aforesaid facts, thought fit not to allow the interlocutory application and decided to dispose of the appeal as it is.

11. I could see no perversity or illegality in such approach. Merely because one of the defendants viz., D5 surrendered possession of a part of the suit property in favour of the plaintiff that would not weigh with the court to allow the I.A for amendment and it could be taken as a conduct of one of the defendants pending litigation and it is for the appellate court to see from the available evidence as to when the super structures emerged in the suit property either before filing of the suit or pending the filing of the suit. If it is pending filing of the suit, as I have highlighted above, the appellate court, has got inherent power to pass suitable orders. But on the other hand, if the erection took place anterior to the filing of the suit and that too not at the instance of the plaintiff then it is for the appellate court to take into account such facts and decide the appeal based on the available materials as per law. As such, I am of the view that no interference is warranted in this revision. "

30. In view of the aforesaid directions of this court, the appellate court has to see whether the superstructures emerged in the suit property either before filing of the suit or during pendency of the suit. If the superstructures emerged during the pendency of the suit, the appellate court has got inherent power to pass suitable orders and mould the relief and grant possession of the suit property even in a suit for injunction. But on the other hand, if the erection took place anterior to the filing of the suit and that too not at the instance of htre plaintiff, then, it is for the appellate court

to take in to account such facts and decide the appeal based on the available materials as per law.

31. In this case, the evidence on record would show that even before filing of the suit, the defendants 1 to 4 have constructed the superstructures and leased out to the fifth defendant and that being so, the appellate court should not have granted injunction. The appellate court ought to have directed the plaintiff to file a suit for delivery of possession.

32. In D.Satyanarayana Vs. P.Jagadish (cited supra), the Hon'ble Supreme Court has held that the rule of estoppel embodied under Section 116 of the Evidence Act is that, a tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not restored possession by surrender to his landlord. Further, it was held that if the tenant however gives up possession voluntarily to the title-holder, he cannot claim the benefit of this rule. In this case the fifth defendant has categorically admitted in his written statement that he took possession of the premises as a tenant only from the defendants 1 and 2 as per registered lease agreement dated 29.09.2007 and that being so, in view of the aforesaid decision of the Hon'ble Supreme Court, he is estopped from denying the title of the defendants 1 and 2 in respect of superstructures. But in this case, according to the plaintiff, after disposal of the suit, the fifth defendant has handedover the possession to him in respect of the superstructure but the same has been denied by the defendants 1 to 4. Even assuming that the fifth defendant has handed over possession in respect of the aforesaid superstructures to the plaintiff, in view of the aforesaid decision of the Hon'ble Supreme Court that it will not bind upon the defendants 1 to 4.

33. In Maria Margarida Sequeira Fernandes Vs. Erasmo Jack De Sequeira (Dead) Through LRs, (cited supra), the Hon'ble Supreme Court in paragraph No.97 has observed as follows:
"97. Principles of law which emerge in this case are crystallized as under:-

1. No one acquires title to the property if he or she was allowed to stay in the premises gratuitously. Even by long possession of years or decades such person would not acquire any right or interest in the said property.

2. Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand.

3. The Courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant.

4. The protection of the Court can only be granted or extended to the person who has valid, subsisting rent agreement, lease agreement or license agreement in his favour.

5. The caretaker or agent holds property of the principal only on behalf of the principal. He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession."

34. In this case, there is no evidence that the plaintiff permitted his brother Periyasamy to occupy the suit property. As already pointed out that the plaintiff himself has admitted in Ex.B1 that the defendants have encroached the suit property and they are not allowing him to enter into the suit property. He further made a request to the police to retrieve his property from the defendants and handover to him. So, it is clear that the defendants are in settled possession of the suit properties. When they are in settled possession, the plaintiff should have filed a suit for delivery of possession. Instead of doing so, he cannot maintain a suit for permanent injunction. Further, in this case, the defendants are not seeking any relief from the court to protect their possession. On the contrary, they are just resisting the claim of the plaintiff. Therefore, the aforesaid decision will not help the plaintiff.

35. In Bothumani Vs. K. Rameena (cited supra), this court in paragraph No.31 has observed as follows:

"31.It should be borne in mind that injunction is an equitable relief. For seeking the relief, one must come to court with clean hands. Suppressing the material facts no one can seek the equitable relief. It has been made clear from the evidence that the first respondent in both the second appeals has no title to the property and she is also not in possession and enjoyment of the suit property. In such circumstances, she is not entitled to seek the equitable relief. Even a person having title is not in possession and enjoyment of the property he should file a suit only for a declaration of title and recovery of possession and a person who is not

in possession cannot maintain a suit seeking injunction in respect of possession and enjoyment with the false averments that he is in possession and enjoyment of the property, even if the said person is the absolute owner of the property. "

36. In this case also, as already pointed out that the plaintiff is not in possession of the suit property. Therefore, as held in the aforesaid decision, he has to file a suit for a declaration of title and for recovery of possession. He cannot maintain a suit seeking injunction.

37. In Bachhaj Nahar Vs. Nilima Mandal and another (cited supra), the Hon'ble Supreme Court has held that no amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. In this case, the plaintiff has not pleaded in his plaint that he permitted his brother Periyasamy to look after the suit property. Further, he has not at all pleaded in his plaint that he constructed the superstructures and leased out either to the fifth defendant or to any other persons. Under the said circumstances, the evidence adduced by the plaintiff that he constructed the building and leased out to third party cannot be taken into consideration.

38. The trial court without taking into consideration of all the aforesaid facts has decreed the suit and the first appellate court also mechanically confirmed the same. Therefore, the judgments and decrees of the courts below are liable to be set aside. Accordingly, the substantial questions of law are answered in favour of the appellants/defendants 1 to 4.

39. In the result, the second appeal is allowed. The judgments and decrees passed by the courts below are set aside. The suit in O.S.No.112 of 2009 on the file of the II Additional District Munsif, Erode, is dismissed. It is open to the plaintiff to file a suit for declaration and for recovery of possession, if he is advised to do so. Considering the facts and circumstances of the case, the parties are directed to bear their respective costs.

Sd/-

Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

Vv/gv

To

1.The First Additional Subordinate Court,
Erode.

2.The Second Additional District Munsif Court,
Erode.

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

+1cc to Mr.I.C.Vasudevan, Advocate SR.No.42356

S.A.No.4 of 2013

MR(CO)
GMY(18/11/2019)



WEB COPY