

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.08.2019

CORAM

THE HONOURABLE MS.JUSTICE P.T.ASHA

S.A.NO.934 OF 2013

AND

M.P.NO.1 OF 2013

P. Arasu

... Appellant/Defendant

Vs.

E. Adhilakshmi

... Respondent/Plaintiff

PRAYER:

Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 24.07.2013 in A.S.No.37 of 2013 on the file of the learned II Additional Judge, City Civil Court, Chennai, confirming the Judgment and Decree dated 29.11.2012 in O.S.No.1829 of 2011 on the file of the learned XII Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.N.Sankaravadivel

For Respondent : Mr.K.P.Chandrasekaran

JUDGMENT

The above Second appeal is filed challenging the Judgment and Decree in A.S.No.37 of 2013 on the file of the learned II Additional Judge, City Civil Court, Chennai, confirming the Judgment and Decree of the learned XII Assistant Judge, City Civil Court, Chennai, in O.S.No.1829 of 2011. Parties are referred in the same array as in the suit.

2.The suit O.S.No.1829 of 2011 has been filed by the respondent herein for bare injunction restraining the defendant from encroaching into the suit schedule property. The Suit schedule property has been described as vacant site measuring an extent of 1135 sq.ft. comprised in S.T.No.83/2010/2011, T.S.No.669/240, Patta C.A.No.710/2010, R.S.No.669/9, Pallath Street, Vyasarpadi Village, Chennai.

3.The case of the plaintiff is that the suit schedule property belonged to the plaintiff's maternal grandfather Velayutha Naicker, who had owned several properties including

the suit schedule property. It is the case of the plaintiff that the property was settled on her mother Padmavathi and after the settlement, the defendant who is a relative of the plaintiff made a false claim that the property belonged to him and he has filed a suit O.S.No.135 of 2004 which was dismissed by the learned I Assistant Judge, City Civil Court, Chennai. It is the further case of the plaintiff that there is a passage between the plaintiff and the defendant's property which is a 5ft wide common passage and the defendant had attempted to encroach upon into his property which is a vacant land.

4.The plaintiff had contended that the defendant was claiming that his father had put up a hut in the property and let it out on rent to some third parties. The plaintiff would further submit that her mother had executed a Settlement Deed bequeathing the property in her favour and he had come to the absolute owner of the suit property. However, since the defendant attempted to enter into the suit property on 12.01.2011, the plaintiff was forced to approach the Civil Court for an injunction. She had not lodged a criminal complaint to the police as she thought that it would not yield the desired result as the issue is of a civil nature.

5.The defendant, who is the appellant herein, had resisted the suit inter alia contending that the suit schedule property was occupied by his father nearly 70 years back and he has been in continuous possession and enjoyment of the same. The defendant's father had put up a hut in the suit schedule property and had let out the same to the third parties. It is the case of the defendant that the suit property is not a vacant site and that there is a house constructed thereon bearing Door No.10. The defendant would also contend that he owned the adjacent property bearing Door No.15. The suit schedule property, according to the defendants, bears the following address, namely, Door No.10, Subramaniyar Kovil Street, 6th Cross Street, which is also known as No.10, 1st Pallath Street. The defendant had further contended that the earlier suit O.S.No.135 of 2004 was for permanent injunction restraining the plaintiff's mother from interfering with the peaceful possession of the property. In the suit, the plaintiff's mother had filed a counter claim seeking recovery of possession which was also denied by the learned I Assistant Judge, City Civil Court, Chennai. The defendant had preferred an appeal, however, on account of ill health, had not proceeded further with the appeal. In short, the defendant would contend that the suit schedule property as described in the suit schedule is totally incorrect and is not as per the property available on site and that there is a house in existence on the suit schedule property and the same is in possession of the defendant. Therefore, they sought for dismissal of the suit.

6.The learned XII Assistant Judge, by his Judgment and Decree dated 29.12.2019, has framed the following issues:

“1.வாதி தாவாவில் கோரும் நிரந்தர உறுத்துக்கட்டளை பரிகாரத்தைப் பெற அருகரா?

2.பிரதிவாதிக்கு தாவா சொத்தில் எதிரிடை அனுபவ உரிமையுள்ளதா?

3.தரப்பினர்களுக்கு வேறு என்ன பரிகாரம்?

7.The learned Judge returned a finding in favour of the plaintiff and had also observed that the suit is not hit by principle of res judicata as the plaintiff is not a party in the earlier suit in O.S.No.135 of 2004. The document that has been filed on the side of the defendant to show possession, i.e., Ex.B.9 has been rejected by the trial Court on the ground that the suit property is only a vacant site.

8.Challenging the said Judgment and Decree, the defendant had filed A.S.No.37 of 2013. The learned Appellate Court curiously picks holes in the Settlement Deed executed by Velayutha Naicker in favour of the plaintiff's mother by stating that the plaintiff has not produced any parent document to show that the property belonged to Velayutha Naicker and the property referred to as ancestral property is also the self-acquired property. The Appellate Court has proceeded to confirm the Judgment and Decree of the trial Court on the ground that the defendant had not proved his adverse possession in the earlier suit and the Settlement Deed produced by the plaintiff which is executed by her mother in her favour and the rent collected would go to show that she is in possession of the property and the Appellate Court observed that the earlier counter claim by the plaintiff's mother has been dismissed on the ground of non production of Settlement Deed and therefore, the earlier suit would not be act as res judicata. With these observations, the Appeal filed by the defendant has been rejected. The learned Judge has further observed that the defendant had failed to prove his plea of adverse possession and therefore, the Appeal deserves to be dismissed. Challenging the said Judgment and Decree, the defendant is before this Court.

9.While admitting the Second Appeal, this Court has framed the following Substantial Questions of Law:

“1. Whether Decree for injunction granted by the Courts below is legal in spite of the finding against mother of the respondent/plaintiff in Ex.A.6 (Judgment in the earlier suit)?

2. Whether the Courts below are correct in

accepting the claim of plaintiff that she had been in possession from 07.03.1984 (date of settlement on her mother) when she was only 8 years old?

3.Whether the decision of Courts below is correct when she herself disposes that she is not aware of contents of her own proof affidavit and earlier suit?

4.Whether the Decree is not against legal dictum that the plaintiff should succeed or fail on her own case?"

10.The plaintiff has come forward with the case that she is entitled to a Decree for injunction in respect of the suit schedule property which is vacant site which has been settled in her favour by her mother Padhmavathi. The mother in turn had got the property by virtue of the Settlement Deed Ex.A.1 dated 07.03.1984 executed by the plaintiff's paternal grandmother in favour of her mother. A perusal of the recitals in the Settlement Deed Ex.A.1 would show that the mother had only got

a life interest in the suit property. The schedule to this document clearly describes the existence of a house in the said Door Number. That apart, in the earlier suit which has been filed by the defendant in O.S.No.135 of 2004, the property has been described as follows:

"All that piece and parcel of the house and ground in Chennai - 600 039, Vyasarpadi Village, Erukkancherry Road, Subramaniam Kovil 6th Cross Street, 1st Palla Road, No.10, comprised in Survey No.669/9, ad-measuring 1153 sq.ft

North by : Ponnusamy House
South by : Dharman House
East by : E. Manogaran House
West by : E. Perumal House"

11.As it evident from Ex.B.3, the Memorandum of Grounds of First Appeal filed against the Judgment in O.S.No.135 of 2004, the plaintiff's mother has filed a counter claim in this suit claiming recovery of possession which means that the plaintiff's mother had requested possession of this property, namely, Door No.10 by the defendant. Therefore, it is incumbent upon the plaintiff to prove his case as to the date on which she has thereafter come into possession of the suit property and when the building constructed thereon has been demolished and the property converted to a vacant site. The Plaint does not contain any such detail. On the contrary, the Plaint proceeds on the basis that the property has been settled as a vacant site. The Settlement in favour of the plaintiff is on 08.06.2010

and the suit has been filed on 03.01.2011 itself.

12.The Courts below have failed to consider the documents filed on the side of the defendant to show his possession of Door No.10, First Pallavath Street, on the ground that the suit property is a vacant site. Admittedly, the plaintiff would contend that the property that had been settled on her by her mother and the property subject matter of the counter claim relates to the very same property, namely, Door No.10, First Pallavath Street. In fact, in the earlier suit, the counter claim has been rejected on the ground that the plaintiff's mother has not been able to prove her title to the suit property. Therefore, considering the fact that the mother had only got the life estate to the property and the Settlement Deed clearly mentioned that after the life time of the plaintiff's mother, it should devolve on the male heirs, the Settlement executed by the mother in favour of the plaintiff does not convey title to the plaintiff. The possession of the suit property has also not been proved by the plaintiff. Both the Courts below relied heavily on Ex.A.1 which is receipt for payment of kist.

13.On perusal of Ex.A.1, it is evident that the same has been paid within six days of the Settlement in favour of the plaintiff and that too for a period spanning over 38 years on one single day. This will not, in any fashion, prove continuous possession by the plaintiff. Both the Courts below have failed to address the suit from the correct perspective. The Substantial Questions of Law are answered in favour of the defendant.

14.The Second Appeal is allowed. The Judgment and Decree of the Courts below are set aside. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

सत्यमेव जयते
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

mps/mm

To

1. The II Additional Judge,
City Civil Court,
Chennai.

2. The XII Assistant Judge,
City Civil Court, Chennai.

+2cc to Mr.N. Sankaravadivel, Advocate, S.R.No.70632
+2cc to Mr.K.P.Chandrasekaran, Advocate, S.R.No.71377

S.A.No.934 of 2013
and
M.P.No.1 of 2013

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