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S.A.(MD) No.46 of 2015

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **06.09.2019**

CORAM :

THE HONOURABLE MS.JUSTICE **P.T.ASHA**

S.A. (MD) No.46 of 2015

and

M.P. (MD) No.1 of 2015

G.Murugan ... Appellant/2nd Appellant/2nd Defendant

vs.

1.Mookkammai

2.Murugan

3.Shanmugavadivu

4.P.Bathirakali

5.Valli

6.Abirami

7.Malliga

8.Kanthammal ... 1 to 8 Respondents/Respondents/
Plaintiffs

9.S.Pandian ... 9th Respondent/1st Appellant/
1st Defendant

Prayer:- Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 24.04.2009 made in A.S.No.106 of 2004 on the file of the learned Subordinate Judge, Thoothukudi, confirming the judgment and decree dated 04.12.2003 made in O.S.No.249 of 2002 on the file of the learned District Munsif, Srivaikuntam.

For Appellant : Mr.P.Thiagarajan

For Respondents : Mrs.Jessi Jeeva Priya

<https://hcservices.ecourts.gov.in/hcservices/>



JUDGMENT

The second defendant is the appellant before this Court. The parties are referred to in the same array as in the suit.

The suit in O.S.No.249 of 2002 has been filed by the plaintiffs, who are the respondents 1 to 8 herein, for declaration that the suit property and the house constructed thereon belongs to them and consequently, for injunction, restraining the defendants and their men and agents in any manner from interfering with their peaceful possession and enjoyment of the suit property.

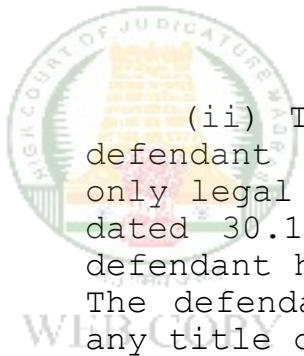
Plaintiffs' case:

(i) The plaintiffs have come forward with the case that on 15.04.1969, the husband of the first plaintiff one Velpandian, had entered into an agreement with one Manikka Nadar to take possession of the suit property for a period of 20 years with permission to put up a construction. It is the case of the plaintiffs that the husband of the first plaintiff had put up a construction and was in enjoyment of the same during his life time and after his demise, the property is in possession and enjoyment of the plaintiffs. The plaintiffs are now carrying on the business of vending tea/coffee shop.

(ii) The plaintiffs would contend that for the last 32 years, they have been in possession of the property and also perfected the title by adverse possession. While so, on 03.05.2002, the first defendant and his mother had trespassed into the suit property in the late hours of around 10.00 pm., and that they had threatened to throw out the plaintiffs and take possession of the suit property. The plaintiffs had immediately lodged a complaint with a jurisdictional police. Once again, on 05.07.2002, the defendants had threatened the plaintiffs. Therefore, left with no other alternative, the plaintiffs had come forward with the suit in question.

Defendants' case

(i) The defence to the above suit was that the husband of the first plaintiff was only granted permissive occupation of the suit property and there was no question of plaintiffs having perfected title by adverse possession. The agreement was entered between the husband of the first plaintiff, Velpandian, and one Manikka Nadar only for a period of 20 years. The defendants had also denied the construction of the house and the shop or the fact that they have continuously in possession and enjoyment of the suit property for over 33 years. The defendants had denied the allegation contained in the plaint that they had trespassed into the property and threatened the plaintiffs.



(ii) The second defence to the above suit was that the second defendant had purchased the property from one Elia Ubathiar, the only legal heir of the said Manikka Nadar under registered sale deed dated 30.10.1974 and that from the date of purchase, the second defendant has been in possession and enjoyment of the suit property. The defendants would contend that the first defendant did not have any title or interest over the suit property.

Trial Court:

(i) The learned District Munsif, Srivaikundam had framed the following issues.

(i) Whether the plaintiffs have proved their adverse possession to the suit property?

(ii) Whether the plaintiffs are entitled for declaration and permanent injunction?

(iii) What are the other reliefs, the plaintiffs are entitled too?

(ii) The first plaintiff had been examined as P.W1, one Muthaiah had been examined as P.W2 and Exs. A1 to A6 were marked on the side of the plaintiffs. The second defendant had been examined as D.W1, his father had been examined as D.W2 and Exs.P1 and P2 were marked on the side of the defendants.

(iii) On a perusal of the evidence both oral as well as documentary, the learned District Munsif, Srivaikundam, decreed the suit as prayed for.

Appellate Court:

(i) The defendants had filed A.S.No.106 of 2004 on the file of the learned Subordinate Judge, Thoothukudi. The learned Subordinate Judge, confirmed the judgment and decree of the trial Court and consequently, dismissed the appeal suit, aggrieved by the same, the second defendant was before this Court.

Second Appeal:

The second appeal was admitted on the following substantial questions of law:

i) When it is the case of the plaintiffs' that their predecessors in interest came to the possession of the suit schedule property pursuant to the permission given by the true owner, is the Court below right in decreeing the suit for declaration declaring that the plaintiffs are perfected their title by way of adverse possession?

ii) When the plaintiffs miserably failed to establish that they have satisfied all the ingredients of 'adverse possession' so as to declare their possessory title, whether the Court below is right in granting the decree?



iii) Whether the Court below right in shifting the burden on the defendants when the plaintiffs failed to prove their case that they have perfected title by way of adverse possession and decreeing the suit on the basis of the weakness in the defense?

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2.Mr.P.Thiyagarajan, learned counsel appearing for the appellant would contend that the plaintiffs have come forward with the suit for declaration on the premise that they have prescribed the title to the suit property by way of adverse possession. He would argue that the plaintiffs have miserably failed to prove as to when the title and possession had turned adverse. According to him, reading of the plaint no where indicates the point from which the plaintiffs would contend that their possession had become adverse.

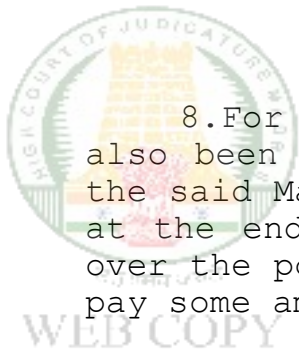
3.In the absence of said plea, the learned counsel would contend that the Courts below have erred in granting the relief of declaration. It is the further contention that the husband of the first plaintiff had been put in permissive possession of the suit property and therefore, by no stretch of imagination, the possession had turned adverse.

4.The learned counsel relied on the judgment of this Court in the case of **S.Nirmala Vs. Kanniammal and others** reported in **2017 (1) CTC 24** in support of his argument that the person claiming adverse possession has to specifically plead as to when the possession had turned adverse to the true owner.

5.Mrs.Jessi Jeeva Priya, learned counsel appearing for the respondents would contend that the plaintiffs have been in possession and enjoyment of the suit property since atleast 1969 and they have been asserting their rights over the same and therefore, they had perfected the title to the suit property. She would also rely on the judgment of the Hon'ble Supreme Court in the case of **Bondar Singh and others Vs. Nihal singh and others** reported in **2003 (2) CTC 635** by taking into consideration the unregistered sale deed.

6.Heard the learned counsel on either side and perused the papers.

7.On perusal of Ex.A1, which is the agreement that has been entered between the husband of the first plaintiff, Velpandian and one Manikka Nadar, it is seen that the said Manikka Nadar had given permission to the husband of the first plaintiff, Velpandian, to enter possession of the suit property and put up the construction. Upon such construction being put up, the husband of the first plaintiff has been permitted to continue in possession for a period of 20 years for a consideration of Rs.60/- per year.



8.For the said permissive occupation, consideration amount has also been paid on the date of agreement by the said Velpandian to the said Manikka Nadar. The said agreement would further state that at the end of 20 years, the said Velpandian would vacate and hand over the possession of the property and the said Manikka Nadar would pay some amount for the construction put up by the plaintiffs.

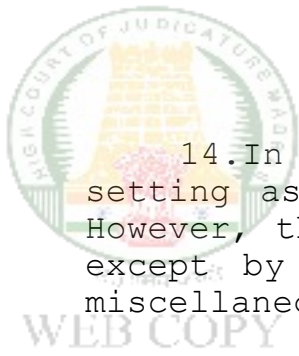
9.From a reading of the agreement, it is seen that for a period of 20 years ie., till 1989, the husband of the first plaintiff has been permitted to be in possession of the property. It is also seen that no steps have been taken by the said Manikka Nadar or his children to retake possession of the suit property from the said Velpandian after the period of 20 years had come to end.

10.The second defendant had purchased the property during the subsistence of the agreement in the year 1974. There is also no proof to show that he has asserted any right to the suit property at the end of the period of the agreement.

11.The plaintiffs have come forward with the case that they have perfected the title to the suit property by adverse possession but have not pleaded as to when their permissive possession had turned into a hostile possession to the knowledge of the true owner and the date of which hostile possession has been set up by the plaintiffs is neither averred in the plaint nor elucidated during the evidence and the owner had specifically pleaded that the exact time/period from which the plaintiffs had started to assert the hostile possession over the suit property is not stated.

12.In the judgment of this Court quoted by the appellant, namely, ***S.Nirmala Vs. Kanniammal and others*** reported in **2017 (1) CTC 24**, this Court has held that in order to establish the claim of possession, there must be a specific plea, as to whether the possession has been adverse to the true owner and also give details of the overtact, in which the person in possession has exercised against the true owner. The said judgment had further held that permissive possession can never be converted into adverse possession unless a hostile possession has been expressed against the real owner and proved in the court of law. The said exercise has not been done by the plaintiffs and therefore, the concurrent judgment declaring their rights to the suit property cannot be countenanced.

13.However, the defendants do admit that the plaintiffs have been in continuous possession and enjoyment of the property even after the period of the agreement. Under these circumstances, the possession has to be protected since it is an axiomatic principles of law that even to evict a trespasser, due process of law has to be followed.



14. In the result, this Second Appeal is partly allowed by setting aside the concurrent judgment and decree for declaration. However, the plaintiffs shall not be evicted from the suit property except by due process of law. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(AD-I)

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Sub Assistant Registrar

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To

1. The Subordinate Judge,
Thoothukudi.
2. The District Munsif Judge,
Srivaikundam.
3. The Section Officer, (2 copies)
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.P.THIAAGARAJAN, Advocate (SR-86211[F] dated 10/09/2019)

S.A. (MD) No. 46 of 2015
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JM/15.10.2019/6P/6C