



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 09.12.2020

Pronounced on: 16.12.2020

WEB COPY

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.1392 of 1996

Balaraman

.. Appellant/Appellant/Defendant

/versus/

1.Kamalam (Deceased)

2.Kichenaradjou (Deceased)

3.Zanabaye
W/o.Virasamy

4.Zeachandirin
S/o.Kamalam

5.Ravindran
S/o.Kamalam

6.Mrs.Samala

7.Counassegarane
S/o.Kamalam

8.Mrs.Revady, A.Aladi Mahendran
D/o.Kamalam

9.Mrs.Saccoubaye
W/o.Sekar

(RR3 to RR9 brought on record as Lrs of the
Deceased RR1 and RR2 vide Court order dated
26.11.2015 made in CMP.No.1939/2007,CMP.
Nos.1937 to 1942/2010 in SA.No.1392/1996)

..Respondents

Prayer : Second Appeal has been filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 19.10.1995 made in A.S.No.70 of 1993 on the file of the Court of the Principal District Judge, Pondicherry, confirming the judgment and decree dated 30.04.1993 made in O.S.No.112 of 1992



on the file of the Court of the Principal District Munsif,
Pondicherry.

For Appellant : Mr.T.Sathiyamoorthy

For Respondents: No appearance

J U D G M E N T

(The case has been heard through Video Conferencing)

This Second Appeal is filed by the defendant in the suit, being aggrieved by the decree passed against him by the trial Court and the same being confirmed by the first appellate Court.

2. The subject matter of the suit is the immovable property situated in the village of Saram commune in Pondicherry bearing Survey No.248/2 cad and Nos.4370, 4372/1, 4373 paimash. The suit filed for delivery of "B" schedule property which is part of "A" schedule property with description as mentioned above.

3. According to the plaintiff, one Gopal Naicker was the absolute owner of the "A" schedule property. The plaintiff purchased from him on 28.01.1961 and enjoying the same as absolute owner. The "B" schedule property is the portion of "A" schedule property, which was let out to the defendant. Possession was given to the defendant on 01.02.1970 with permission to put up superstructure on it. After June 1980, the defendants wilfully failed to pay the rent. The well in the property was closed by the defendant causing damage to the property. On 28.02.1982, the plaintiff terminated the tenancy and called upon the defendant to vacate and handover the vacant possession of "B" schedule property on before 01.03.1982. The defendant failed to handover the property. Hence the suit for delivery of possession and recovery of damages.

4. The suit was resisted by the defendant stating that the plaintiff is not the owner of the suit property and the defendant is not a lessee under the plaintiff. The averment that the plaintiff was receiving rent from the defendant till June 1980 and the defendant closed the well causing damage to the property are not true. Initially one Ramasamy, the grand father of the defendant was residing in the suit property, after his death Angalagan, the father of the defendant was in possession in the suit property. After the death of Angalagan, the defendant continue to reside in the suit property. The defendant got prescriptive title in the suit property. The electricity connection in the suit property was obtained 25 years ago in the



name of his uncle Munisamy. The plaintiff's vendor Gopal Naicker had no right to sell the suit property to the plaintiff. The documents dated 28.01.1961 is a fabricated document.

5. Based on the pleadings, the trial Court has framed the issues as below:-

1. Whether the plaintiff is the absolute owner of the suit property?

2. Whether the defendant has perfected title to the suit property through prescription?

3. Whether the defendant has perfected title to the suit property under the plaintiff?

4. Whether the defendant has defaulted in paying rents and has also caused damages to the suit property?

5. Whether the plaintiff is entitled for eviction of the defendant from the suit property?

6. Whether the plaintiff is entitled for the recovery of arrears of rent?

7. To what relief is the plaintiff entitled?

6. The plaintiff who was represented by his Power Agent examined as PW.1 and two other witnesses by name Ponnukrishnan and the other Selvam as PW.2 and PW.3. On behalf of the defendant, the defendant examined himself as DW.1. Three exhibits for the plaintiff and five exhibits for the defendant were marked. Ex.A-2 is the sale deed dated 28.01.1961. The plaintiff has purchased the suit property through the notarial sale deed. The extract of the register of the transaction to prove the notarial sale marked as Ex.A-2. Quit notice dated 22.01.1982 issued by the plaintiff through her lawyer to the defendant is marked as Ex.A-3.

7. To controvert the case of the plaintiff, the defendant relied on Ex.B-3 - tax receipt dated 27.02.1991 and Ex.B-4 - tax receipt dated 22.07.1991. Ex.B-1 and Ex.B-2 the birth extracts to show his family residing in the suit property even prior to his birth.

8. The trial Court considering the evidence held the plaintiff's claim that the defendant came into the occupation of the suit property in the year 1970. Whereas, the defendant not able to produce any document to show that he and his ancestors were in possession of the suit land over 120 years as claimed in the written statement. Ex.B-3 and Ex.B-4 is the tax receipts of the year 1991, which proves that the superstructure came only in



the year 1991 and not before 1991. There is show reference to the suit property in the birth certificate of the defendant and his brother-in-law, which are marked as Ex.B-1 and Ex.B-2. Therefore, held that though both the parties have not filed patta in respect of the suit property, the evidence let in by the plaintiff and the deposition of PW.2 and PW.3 proves the plaintiff's ownership over the suit property and the defendant accepting the title and paying rent.

9. Aggrieved by the trial Court judgment, the defendant filed appeal A.S.No.70 of 1993 before the Principal District Judge at Pondicherry. The first appellate Court confirmed the trial Court judgment.

10. The second appeal filed against the concurrent finding was admitted and the following substantial questions of law was formulated:-

A) Whether the respondent as plaintiff is not bound to prove her claim by adducing materials and succeed in the suit irrespective of whether the appellant/defendant had proved his case or not and consequently in view of her failure to do so, the suit filed by her is not and consequently in view of her failure to do so, the suit filed by her is not liable to be dismissed?

B) Whether inspite of the appellant/defendant's specific denial of the respondent/plaintiff's title over the suit "B"schedule property in Ex.B5 Reply, dt.28.01.82 sent to Ex.A3, suit notice dt.22.01.82, the present suit filed by her on 13.12.91 i.e., about 10 years thereafter, without any relief for declaration of title or inclusion of the same by way of amendment atleast after filing of the written statement, is not liable to be dismissed as malafide, speculative and unmaintainable?

C) Whether Ex.B.1 to B5 and the oral evidence adduced on the side of the appellant r/w the respondent/plaintiff's failure to prove her title and possession of the suit "B"schedule property at any point of time within 30 years prior to the suit, would not establish that he and his ancestors are in continuous and uninterrupted possession of



the same for more than 30 years by obtaining electricity connection etc., and acquired title over it by prescription?

11. Pending appeal, the sole respondent/plaintiff died and her legal heirs were brought on record. In spite of notice, there was no representation for the impleaded parties. Therefore, paper publication was ordered and the same was effected before taking up the case for final disposal.

12. The learned counsel for the appellant would submit that the suit for recovery of possession of the "B" schedule property has been allowed by the Courts below without proper appreciation of evidence. The descriptive of property as shown in the plaint itself is very vague and ambiguous. There was no measurement and extent of "B" schedule property, which is sought to be recovered. The lower appellate Court erred in holding that since the defendant has referred the suit property is in his possession, he had no doubt in his mind about the description of the property. Therefore, the plea regarding identity of the suit property is just for the sake of rising objection. The Courts below erred in not considering the vital fact that the date of alleged lease between the plaintiff and the defendant, not disclosed by the plaintiff. The factum of lease is not supported by any other evidence. Furthermore, when the notice of eviction issued by the plaintiff in the year 1980 was suitably replied denying the title of the plaintiff, the plaintiff has not explained why the suit for recovery of possession filed only in the year 1992.

13. The learned counsel appearing for the appellant further submitted that, when the appellant proved through evidence that he was in continuous possession in the property. He denied the plaintiff title 10 years prior to institute of the suit and when there is no evidence of plaintiff's possession over the property, the Courts below ought not to have allowed the suit and dismissed the appeal.

14. The case of the plaintiff pegged on the document namely notarial sale deed dated 28.01.1961, which is marked as Ex.A-2. As per the plaint "B" schedule property, which is a portion of "A" schedule property was let out to the defendant on 01.02.1972. The plaintiff admits that the superstructure was put up by the defendant. There is no documentary evidence for leasing out the portion or payment of ground rent by the defendant. However the Courts below believed the words of the plaintiff contrary to the content of the reply notice issued by defendant through his lawyer, which is marked as Ex.B-5. After denial of title and after stoppage of rent, the plaintiff has taken 10 years to file the suit for recovery of possession.



There is no whisper in the plaint, why she did not seek for recovery of possession immediately on receipt of reply notice or on expiry of the period on termination of the lease.

15. It is specifically averred in the plaint that the defendant closed the well by filled up with garbage and caused damage to the property. There is no whisper in the plaint or in the evidence, why as a landlord the plaintiff did not take any action for destruction of the well. The deposition regarding the collection of rent by PW.2 and PW.3, who are the agents of PW.1 without any piece of evidence, is unbelievable. The defendant had denied the title of the plaintiff immediately on receipt of quit notice. The suit for eviction without declaration, when the title in under cloud, the Courts below ought not to have granted the relief.

16. The lower appellate Court had given adequate credence to Ex.A-2 sale deed and there is no error in it, but at the same time, when the plaintiff claim title over the property through her documents dated 28.01.1961 seeks recovery of possession only in the year 1992, without a piece of evidence to show that she had constructive possession over the property during this period. More particularly, when the title was denied through notice dated 28.01.1982, the stonic silence for about 10 years without any explanation ought to have ran adverse against the plaintiff. Unfortunately, both the Courts below have not addressed this vital issue and superficially based on Ex.A-2 had granted relief of recovery of possession.

17. In view of this Court, the plaint suffers several fundamental infirmity which has escaped the eyes of the Court below. Primarily the description of "A" schedule property and "B" schedule property no where indicates that the "B" schedule property falls within "A" schedule property with specific extent and measurement. Recovery of possession cannot be decreed and even if decreed cannot be executed unless the description of the property sought to be recovered is specific. The suit filed without proper description of the suit property with boundaries, measurement and extent is bound to be dismissed.

18. In this case, the plaint schedule lack clarity about the property description. The plaintiff has not proved the possession of the defendant was only permissive in nature. The suit filed for recovery of possession after 30 years of purchase under notarial sale not been properly appreciated by the Courts below. The open and hostile enjoyment of the property by the defendant has prescribed title on them.

19. The Courts below had placed the burden of proof on the defendant for continuous possession. The specific denial at



the earliest point of time when he received the quit notice on 28.01.1982 not been taken into consideration by the Courts below and the reasoning given by the lower appellate Court for entertaining the suit for recovery of possession without declaratory relief on the premise that the defendant were in constructive possession is a perverse finding.

20. Therefore this Court holds that the plaintiff has failed to adduce substantial evidence to prove her right for recovery of possession. 10 years delay in filing the suit for recovery of possession after specific denial of title and without relief of declaration of title and establish the right of her predecessor to alienate the suit "A" schedule property inclusive of "B" schedule property renders the suit for recovery of possession unsustainable. Also to add as far as "B" schedule property is concerned, the descriptive of the property without linear measurement and extent render the relief sought not executable. Therefore substantial questions of law framed are answered in positive in favour of the appellant.

21. As a result, this Second Appeal is allowed. The judgment of the trial Court as well as the lower appellate Court are set aside. The suit for recovery of possession is dismissed with costs throughout.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

rpl

To:

- 1.The Principal District Judge, Pondicherry.
- 2.The Principal District Munsif, Pondicherry.
3. The Section Officer, V.R.Section, High Court, Madras.

S.A.No.1392 of 1996

PVS (CO)
SB(27/05/2022)