

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09/07 / 2018
DELIVERED ON : 27/05 / 2020

C O R A M

THE HONOURABLE MR.JUSTICE M. GOVINDARAJ

S.A NO.1261 of 2008

1.Dhanam
2.Nirmala
3.Sharmila
4.Premila

.....Appellants/R5 to R8

Vs

1.S.Palvannan

... 1st Respondent/Appellant/
Plaintiff

2.S.Chelliah

3.S.Arunachalam

4.S.Doraisamy (Deceased)

R2 to R4/Defendants 3-5

5.Ravi

6.D.Malliga

7.D.Navaneetha Selvan

8.D.Nagarajan

9.D.Venkatesh

10.D.Shanmuga Velayudham

... Respondents

R6-10 brought on record
as Lr's of the deceased R4 vide
order of Court dated
30.01.2018 made in
C.M.P.No.18519 to 18520/2017

Prayer: Second Appeal filed under Sec.100 of the Civil Procedure Code praying to set aside the judgment and decree dated 07.02.2007 passed in A.S.No.12 of 2002 on the file of Additional Subordinate Court (Fast Track Court), Chengelpet, reversing the judgment and decree dated 09.1.1992 passed in O.S.No.544 of 1982 on the file of the Principal District Munsiff Court, Poonamallee.

For Appellants : Mr.T.V.Ramanajuma, Senior Advocate
for
Mr.T.V.Krishmanachari

For Respondents : Mr.S.Rajendra Kumar

JUDGMENT

Defendants are the appellants. Suit for recovery of possession and mesne profits. Trial Court dismissed the suit and the first appellate reversed the decree of the trial Court. Aggrieved over granting of decree of recovery of possession and mesne profits by the First Appellate Court on appeal preferred by the plaintiffs, the defendants preferred the above Second Appeal U/Sec 100 C.P.C.

2. The case of the plaintiffs are that their father Shanmugavelayutham Chettiar purchased a piece of land comprised in R.S.No.148/1 of an extent of 125 feet North to South and 42 feet East to West along with a well and thatched shed in Kadaperi Village, by a duly registered Sale deed No.1775 dated 27.06.1968 at the Office of Registrar, Tambaram and took possession of the property. He died in the year 1970. After his death the Plaintiffs and defendants 2-5 have become entitled to absolute rights of ownership and possession as Co-owners and continue to hold the property as co-owners.

3. The first defendant, who is residing in the adjoining land, trespassed into their property in July, 1968. The plaintiff had to make a complaint to police, but in vain. The Plaintiff's father caused a legal notice to first defendant's father drawing attention to the illegal trespass committed by them, but replies dated 29.07.1968 were received containing false, frivolous and untenable allegations.

4. Since the first defendant is a trespasser he is liable to be evicted and the plaintiff is entitled to mesne profits from 1968, however restricted the same to three years prior to filing of the suit, viz., July 1977. Taking trespassing from 25.07.1968 as cause of action filed a suit for recovery of possession and past mesne profits of Rs.300/= from first defendant in June, 1980.

5. Countering the averments, the defendant filed a written statement denying the Sale dated 27.06.1968 itself as sham, nominal, collusive and fraudulent questioned the very status of the Vendor of the suit property, namely Lokanayaki Ammal as wife of Parthasarathy Iyengar and she had no valid right, title and interest in the property to convey the same. Further it was

stated that the alleged sale deed was not acted upon even by Parthasarathy Iyengar, much less by Lokanayaki Ammal and Plaintiff's father. They never had taken possession of the property and the first defendant and his father were in continuous and uninterrupted possession with the knowledge of Parthasarathy Iyengar for more than 30 years and they had perfected their title by long continuous and exclusive possession. Thus they are entitled to adverse possession also. When the Plaintiff's father himself had no title; the plaintiff cannot have any title. The defendants 2-5 are quite aware that they have no right and hence not joined with the plaintiff. The first defendant is in enjoyment of the suit property in his own right and not a trespasser and hence is not liable to pay mesne profits. The valuation of the suit is wrong and the court has no pecuniary jurisdiction to try the suit. The suit is vexatious and speculative and is liable to be dismissed.

6. The defendants 2-5 remained ex-parte.

7. The trial court framed appropriate issues and the Plaintiff examined two witnesses and marked Ex A1-A8. The defendant examined six witnesses and marked Ex B1 - B-6. Advocate Commissioners report and sketch were marked as Ex C1 and C2. Court exhibits were marked as X-1 to X-6. After elaborate trial the trial court had found that the sale is valid, but since the plaintiff has not proved that the Vendor Lokanayaki Ammal was in possession and that he had taken possession, held that the first defendant is entitled to title through adverse possession and negatived the prayer for recovery of possession.

8. On appeal by the Plaintiff, the lower Appellate Court has held that possession of the Vendor of Plaintiff's father viz., Lokanayaki Ammal stand proved through Ex A-6 & A-7 and that she had handed over possession to Shanmugavelayutham Chettiar. The first defendant's father trespassed into the property after 27.06.1968 and before 25.07.1968 on which date the plaintiff's father issued a legal notice. Since the suit is filed within 12 years as per Article 65 of Limitation Act, it is not barred by limitation. The contentions that Lokanayaki Ammal is not a legally wedded wife of Parthasarathy Iyengar and that she has no right to execute the sale deed in Ex.A-2 are found to be frivolous and vexatious. The defendant failed to produce the Patta of his property and hence documents produced on his side cannot be taken as proof of possession. The other documents came into existence subsequent to the sale deed cannot be also relied on and hence the claim of adverse possession was found against the defendant. The legal heirs of defendants 2-5, after being impleaded have supported the case of the plaintiff and hence the first defendant was directed to hand over possession

of the property within two months. In so far as mesne profits are concerned it was ordered to be enquired separately under Or.20 Rule 12. The judgment of trial court was set aside and appeal was allowed.

9. This court admitted the Second Appeal on the following questions of law.

a) Whether the Lower Appellate Court was right in law, in reversing the well considered judgment of trial court?

b) Whether the Plaintiff has filed the suit within time frame and whether suit is not barred by limitation?

c) Whether the Lower Appellate Court has properly considered the material evidence in the case while reversing the finding of the trial court that the suit is barred by limitation?

d) Whether the Lower Appellate Court is right in law in granting decree for recovery of possession and for mesne profits?

e) Whether the suit filed by the Plaintiff is barred by limitation?.

10. The Learned Senior Counsel appearing for the appellant would contend that the conveyable interest of Lokanayaki Ammal over the property and proof of taking possession by her and by Plaintiff's father has been specifically disputed. When there is cloud over title suit for recovery of possession without the relief of declaration of title is not maintainable. The first appellate court erred in believing Ex.A-6 and A-7 , as they are contrary to Sec.16 and 114 of the Evidence Act and unreliable as the authors and recipients of documents were not examined to prove the same. Further the identity of the property conveyed itself ambiguous, vague and nebulous, as the correlation of survey numbers was not proved by documentary evidence. The first appellate court rejecting the adverse possession on non production of Patta by the defendant amounts to picking holes in the case of the defendant, rather than putting the plaintiff to prove his case on his own strength. In support of his contentions he would place reliance on the judgments reported in 2008 (4) SCC 594 and 95 LW 708.

11. Per contra the learned counsel for the respondents would contend that the first defendant admits Partition of his family properties in the year 1937 and other conveyances with respect to the suit property from 1937 onwards. The trace of title has been proved through Ex- A1 to A5 & A-8. In the year 1941 it was purchased by Sadagopa Pillai, who in turn sold it to Parthasarathy Iyengar in the year 1947 by virtue of a registered sale deed. The first defendant did not claim any right over the property on the other hand claims only adverse possession. Once adverse possession is claimed the right, title interest of the owner stands proved. The situations which lead to conveyance of

the property and the intention of the Vendor have been proved by Ex.A-6 and A-7. Lokanayaki Ammal was identified as title holder at the time of registration of the sale deed. The disgruntled neighbour, who was unsuccessful in purchasing the property, cannot take shelter under vexatious and flimsy grounds. Once title is accepted, the burden shifts to the shoulders of the defendant, who claims adverse possession. He would refer to the judgment of Bhagavathy Pillai and another Vs Savarimuthu and another reported in AIR 1976 Madras 124(1) for the proposition that "if in a suit falling under Art 65 of the Limitation Act, the defendant wants to defeat the rights of the plaintiff, he has to establish his adverse possession for the period of 12 years". For the same proposition "that the plaintiff could not be denied the relief of possession only if the defendant succeeded in showing that he was in adverse possession of the property in dispute for more than 12 years," as held in AIR 1978 Allahabad 555 Smt.Bitola Kuer vs Sri Ram Charan and others. Having failed to prove "Animus Possidendi", he is not entitled to adverse possession. Plaintiff's father issued legal notice on 25.07.1968 and replied by the first defendant's father on 29.07.21968. From the date of cause action the suit came to be filed one month before the lapse of 12 years. Hence as per sec 65 of Limitation Act the suit is well within the period of limitation. He would rely on the judgment of Hon'ble Supreme Court in Dr. Mhesh Chand Sharma Vs Raj Kumari Sharma, CDJ 1995 SC 139 wherein it is held "that a person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession." In all the sale documents, first defendant's property has been shown as eastern boundary. The first appellate court has rightly drawn adverse inference for not producing patta to show adverse possession as per Sec.114(g) of Evidence Act. He would rely on the judgment of this court in Chinnathayammal and other Vs Padmavathy and another reported in 2011 (2) MWN (Civil) 494 "for withholding best evidence, adverse inference drawn against the defendants." Therefore trespassing into the respondent's property from June,1968 stood proved and the Second Appeal is liable to be dismissed. In support of his contentions, he would rely upon; 2011 (2) MWN(Civil)494;

12. I have considered the rival submissions.

13. The factual disputes narrated above can be narrowed down to the question of law as to right to sue, Validity of conveyable rights and identity of suit property and adverse possession.

14. It is not disputed that through partition the suit property fell into the share of his agnates vide Ex. A-4 and one

Sadagopa Pillai purchased it through Ex.A-5. By an unilateral Sale deed vide Ex.A-1, it was sold to Parthasarathy Iyengar in the year 1947. Thus far there is no dispute. A specific plea has been raised by the first defendant that the said Lokanayaki Ammal is a stranger to the property and that she did not have any conveyable right title interest over the property. In that event the Plaintiff is duty bound to establish his title through his vendor Lokanayaki Ammal. Only because he proved the trace of title up to Parthasarathy Iyengar, it will not automatically confer right on Lokanayaki Ammal. For the said purpose the relationship and devolution of right has to be established. The Plaintiff as PW 1 would depose that Lokanayaki Ammal is the wife of Parthasarathy Iyengar, but during cross examination would depose that he does not know as to existence of other wife and children of Parthasarathy Iyengar. That he denied the suggestion that since the first wife and children are there, Lokanayaki Ammal has no right over the property. That he has not obtained legal heir certificate of Parthasarathy Iyengar. Materials available before this court does not disclose any evidence as to conferment of title to Lokanayaki Ammal to validly convey the property in favour of Plaintiff's father. In that situation the evidence of the vendor of the property Lokanayaki Ammal can only explain the link. But the said Lokanayaki Ammal was not examined as witness on the side of the plaintiff. Though it was argued by the learned counsel for the respondent/ Plaintiff that she was proved to be the owner of the property at the time of registration before the Registrar. Unfortunately the attesting witnesses who identified the said Lokanayaki Ammal were also not examined. The Death Certificate, Legal Heir certificate of Parthasarathy Iyengar were not produced by the court. The family members of the said Parthasarathy Iyengar would have non-suited the first defendant from raising the cloud over title of Lokanayaki Ammal and thereby the title of the Plaintiff's father. But there is no iota of evidence to connect Parthasarathy Iyengar and Lokanayaki Ammal other than the statement of PW-1, who said to have seen her only at the time of registration of the property. No documentary evidence as to mutation of records in the name of Lokanayaki Ammal or other evidences of owing or possessing or enjoying or residing in the property was produced. It is admitted by PW 1 that there was no Patta or House tax receipt in the name of Lokanayaki Ammal or the Plaintiff. In the absence of any evidence, it cannot be held that by claim adverse possession the defendant had admitted the title and it stands proved. It is well settled by law that when the plaintiff has clear title supported by documents, a third party stranger cannot raise a cloud over the title by mere denial of title and compel that a suit for declaration shall be filed. It falls under the principle that possession follows title and in such a situation it is incumbent on the defendant to prove adverse possession over the statutory period of 12

years. But in the present case the defendant claims possessory right through long, continuous, interrupted possession and enjoyment beyond the statutory period i.e., 53 years. In such circumstances, a duty is cast upon the plaintiff to clear his title by suitable evidence, if it lacks, the plaintiff cannot maintain a suit for mere recovery of possession.

15. The Honble Supreme Court in case of Anathula Sudhakar vs P.Buchi Reddy(Dead) and others 2008 (4) SCC 594 has held as follows:

".....

13. The general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief, are well settled. We may refer to them briefly.

13.1) Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

13.2) Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

13.3) Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.

14. We may however clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to plaintiff's title raises a cloud on the title of

plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. Where the plaintiff, believing that defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised only the issue of possession and not any issue of title.

16. But what if the property is a vacant site, which is not physically possessed, used or enjoyed? In such cases the principle is that possession follows title. If two persons claim to be in possession of a vacant site, one who is able to establish title thereto will be considered to be in possession, as against the person who is not able to establish title. This means that even though a suit relating to a vacant site is for a mere injunction and the issue is one of possession, it will be necessary to examine and determine the title as a prelude for deciding the de jure possession. In such a situation, where the title is clear and simple, the court may venture a decision on the issue of title, so as to decide the question of de jure possession even though the suit is for a mere injunction. But where the issue of title involves complicated or complex questions of fact and law,

or where court feels that parties had not proceeded on the basis that title was at issue, the court should not decide the issue of title in a suit for injunction. The proper course is to relegate the plaintiff to the remedy of a full-fledged suit for declaration and consequential reliefs."

16. The first appellate court would rest its decision on Ex.A-6 and A-7 to hold that the said Lokanayaki Ammal is the title holder. By relying on Ex-A-6 and A-7 and its contents therein that the first defendant's father Ranganatham Pillai approached Lokanayaki Ammal through Meikkappa Devar, Land Broker, for purchase of the suit property for a sale consideration of Rs.2000/- and that the letter of Lokanayaki Ammal addressed to Shanmugavelayutham Pillai about the threat by Ranganatha Pillai and urgency to register the property immediately, held that the contentions of the defendant that Lokanayaki Ammal is not the legally wedded wife of Parthasarathy Iyengar and that she has no right to execute the Sale Deed Ex.A-2 are found to be frivolous. But the first appellate court has failed to observe as to how the documents stand proved. Admittedly, Ex,A-6 written by one Meikkappa Devar and received by Lokanayaki Ammal. Ex.A-7 was written by Lokanayaki Ammal and received by Shanmugavelayutham Chettiar the father of the Plaintiff. Neither the authors of the document nor the recipient were examined as witnesses. In the absence of any evidence, it cannot be said those documents were proved and they can be relied on. The first appellate Court without any basis held them as genuine and without assigning any reasons simply proceeded on the basis of statements contained in the letter, as if title was admitted and the defendant had trespassed into the land. The finding of the first appellate court is erroneous.

17. Admittedly, the sale deed was executed on 27.06.1968. In natural course a Creditor, after having adjusted the debt towards sale consideration and got the sale deed executed would pressurize the Vendor, that too, when there is competition to purchase the same to register the document forthwith. Contrary to the same the Vendor requests the Purchaser to come and register the document, even though his signature was not required during that period. According to PW1 there was delay on the part of Lokanayaki Ammal in handing over possession. Strangely the letter (Ex.A-7) was posted at Kadaperi on 18.07.1968 to the addressee at Madras and the registration had taken place on 20.07.1968 without even producing the death and legal heir certificate as stated in the letter and possession was delivered on the same day. If that be so, there could not have been delay on the part of the vendor. Feasibility of the sequence of events and the conduct of the parties does not

appear natural and the argument of the learned counsel for appellant on the basis of Sec 16 and 114 of Indian Evidence Act, 1872 has some force.

18. With regard to adverse possession is concerned DW 4 was an ex Karnam of that Village, DW5 was the Village Administrative Officer and DW 6 was the Town Planning Inspector. DW 4 deposed during the period he held the Office of Karnam between 1967 and 1978, the first defendants father was in possession of the property. He had not seen Sadagopa Pillai, Parthasarathy Iyengar and Lokanayaki Ammal during that period and that they were never in possession. The Survey No. 148/2 can not be changed from 148/2 to 148/1. But during cross examination there was no suggestion about the possession of the predecessors of the plaintiff and identity of the property. According to DW-5, Survey No.148/2 pertains to poramboke lands. The Town Planning Inspector, through whom Ex. X-1 to X-6 marked would speak about Survey done in 1961 and entries made thereon. Even through these survey records it was not elicited that suit property was in possession of Plaintiff's predecessors and correlation between S.No.148/2 and Survey No.148./1. The entries show the name of Renganatha Pillai, the first defendant's father. In the reply notice dated legal notice caused by the Plaintiff's father dated 25.07.1968 it was stated that first defendants father was in possession for more than 15 years as on 29.07.1968. The Vendor Lokanayaki Ammal herself had valid, transferable right, title interest in the said plot as the deceased Parthasarathy Iyengar himself had not claimed any right or title or interest in the said plot enjoyed by him. Despite the receipt notice, which is marked as Ex.A-3, there were no specific pleadings about the title and possession of the Vendor of the predecessors of the Plaintiff. The property sold to Parthasarathy Iyengar situated in Survey No.148/2. It is stated that Survey number 148/2 was changed to Survey number 148/1, but correlating documents as admitted by PW.1 in his cross examination was marked. As per the evidence of DW 5, 148/2 is a Poramboke land and according to DW 4, Ex.Karnam Survey number 148/2 will never be changed as 148/1. In that event, the identity and possession of the suit property by the Vendors of the plaintiff itself doubtful. Even after omitting the evidence of DW 2 and 3, there is overwhelming evidence as to the possession of the first defendant and his father. The trial Court has rightly found that the first defendant had proved adverse possession over and above the statutory period.

Contrary to the available evidence on record the first appellate Court had found that adverse possession was not proved by production of Patta in the name of first defendant's father in respect of the suit property. It is the well settled principle that the Plaintiff shall succeed in the suit on his own strength. He cannot pick up holes in the defendants case to

establish his title. A Hon'ble Division Bench of this Court in P.Thangvelu Vs. R.Dhanalakshmi Ammal and other reported in 2008 (4) SCC 594 and 95 LW 708 has held as under:

"The Plaintiff can succeed in the suit for declaration under the plaint as amended only on the basis of a valid title to the property. If he did not have any title to the property, then he cannot pick holes in the title of the defendants and try to succeed.. that the plaintiff can succeed only on the basis of the proof of his own allegation in the plaint as regards his title and he cannot succeed by picking holes in the title of the defendants is too well established to need citation of any authority."

19. The above judgment will squarely apply to the case on hand. The lower appellate court had picked holes in the case of the defendant instead appreciating the evidence available on record in proper perspective. On the basis of evidence it is clearly proved that

i) The conveyable right, title and interest of Lokanayaki Ammal over the suit property is not proved.

ii) The first defendant/ Appellant herein, as found by the trial court, has proved his long and continuous possession adverse to the interest of the Plaintiff and his Vendors;

iii) In view of the finding of adverse possession, the suit is barred by limitation.

20. Accordingly, the questions of law on which this Second Appeal was admitted has been answered in favour of the appellant. The decree and judgment of the first appellate court is hereby set aside and the judgment of the trial stands restored.

21. In the result the Second Appeal is allowed. No order as to costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

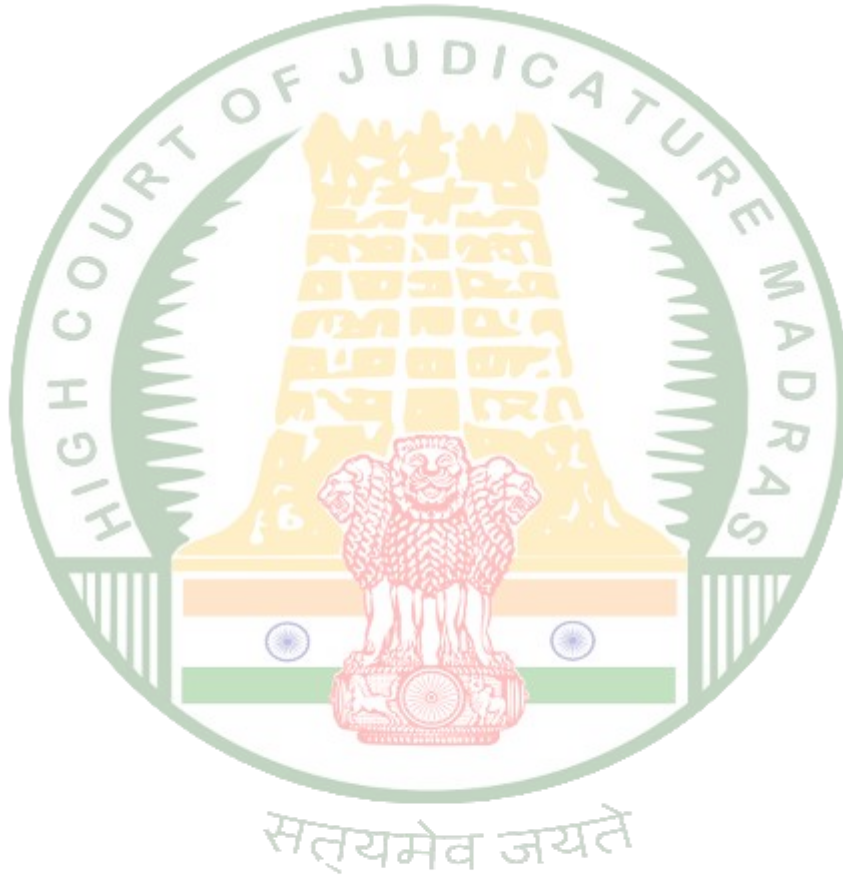
To

1. The Additional Subordinate Judge
(Fast Track Court), Chengelpet.

2. The Principal District Munsiff Judge,
Poonamallee.

S.A.NO.1261 OF 2008

KS (CO)
GN (29/09/2020)



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