



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 19.11.2020	Pronounced on: 30.11.2020
-------------------------	---------------------------

Coram::

THE HONOURABLE Dr. JUSTICE G.JAYACHANDRAN

S.A.No.1666 of 2008
and
M.P.No.1 of 2008

Manohar .. Appellant /Defendant

/versus/

Velayudham .. Respondent/Plaintiff

Prayer: Second Appeal has been filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 31.10.2008 in A.S.No.38 of 2008 on the file of the Court of the Principal Subordinate Judge, Cuddalore confirming the judgment and decree dated 31.07.2008 in O.S.No.57 of 2005 on the file of the Principal District Munsif, Cuddalore.

For Appellant :Mr.R.Sunilkumar

For Respondent :Mr.B.Mahendra Naidu

JUDGMENT

(The case has been heard through video conference)

This Second Appeal is against the concurrent finding of the Courts below, filed by the defendant in the suit.

2. Gist of the plaint:

The suit is filed for declaration and permanent injunction or in alternate recovery of possession and mandatory injunction in respect of the property morefully described under 'B' schedule of the plaint.

3. According to the plaintiff, his father Natesa Mudaliar purchased 26 feet North-South x 180 feet East-West land under sale deed dated 01.03.1941 and another piece of land adjacent measuring 28 feet North-South x 160 feet East-West under sale deed dated 19.09.1943. Though the North-South linear measurement

is shown as 160 feet in the sale deed, it is in fact 180 feet in the field. The said property is the 'A' schedule property in the plaint. Equal measurement of North-South 56 feet x East-West 180 feet on the South of 'A' schedule property is the ancestral property of the plaintiff's father. The entire extent of property was converted into mango grove, in which, the defendant was employed as a watchman for a few years. The defendant was permitted to stay in the small thatched hut in the portion of the ancestral property.

4. Under the Registered Will dated 31.08.1986 executed by the plaintiff's father, the 'A' schedule property given to the plaintiff and the ancestral property on the south given to his brother Rajaguru. The Will came into effect from 21.12.1987 on the death of the plaintiff's father. Due to poor yield, the mango grove was destroyed and the entire land is now vacant. However, out of gratis the defendant was permitted to reside in the hut. When the plaintiff wanted to put up construction in his 'A' schedule property, the defendant is causing obstruction, with an intention to extract money and make unjust enrichment.

5. In the middle of December 2004, the defendant attempted to put up a permanent structure over an extent of 100 sq.ft morefully described under 'B' schedule of the plaint. He has put up the construction upto basement level in spite of objection. When complaint given to police on 09.01.2005, the defendant agreed to remove the structure. But, he failed to remove as promised. Hence, suit for declaration and injunction or in alternate, mandatory injunction and recovery of possession.

6. Gist of the written statement:

The description of 'A' and 'B' schedule property is wrong and misleading. The defendant's father, in fact, had encroached upon the suit property to an extent of East-West 130 feet and North-South 102 feet. In the encroached land, he and his family are residing since 1965. He is in exclusive possession of the property. His father put up a thatched house and raised trees. His marriage held in the property. In the year 1993, the father of the defendant died. In the year 1995, he put up a pacca kitchen room in brick. He is enjoying the usufructs of the trees without any interference. For more than the statutory period continuously with the knowledge of the plaintiff, he is enjoying the property without any interruption. The defendant had perfected the title by adverse possession, hostile to the plaintiff and his brother. The defendant is enjoying the usufructs of the mango trees planted by his father. There are also bamboo bushes, 3 coconut trees, two tamarind trees and banana garden with guava trees and neem trees.

7. When the plaintiff and his family members tried to drive away the defendant by force and used filthy language, he gave complaint to the police. To counter blast that complaint, the plaintiff gave a false complaint and with his influence with police got signatures in blank papers from him under threat. He did not consent to vacate the land. The plaintiff is not in possession of any inch in 'A' or 'B' schedule property.

8. The Trial Court, based on the pleadings framed the following issues:-

(1). Whether the plaintiff is entitled for the relief of declaration in respect of 'B' schedule property?

(2). Whether the plaintiff is entitled for the relief of permanent injunction in respect of 'B' schedule property?

(3). Whether the plaintiff is entitled for the alternate relief of recovery of possession?

(4). Whether the plaintiff is entitled for the alternate relief of mandatory injunction in respect of the 'B' schedule property?

(5). Whether the defendant had perfected his right over the suit property by 'adverse possession'?

(6). Whether it is right to say the plaintiff is not in possession of 'B' Schedule property?

(7). What relief the plaintiff entitled for?

9. Before the Trial Court, two witnesses on the side of the plaintiff was examined. 8 Exhibits were marked as Ex.A-1 to Ex.A-8. Three witnesses on the side of the defendant was examined. 25 exhibits were marked as Ex.B-1 to Ex.B-25. Besides, Ex.X-1 and Ex.X-2 were marked.

10. The Trial Court, after considering the sale deeds and the Will which are marked as Ex.A-1 to Ex.A-3 held that, the title to the suit property is with the plaintiff. On considering Ex.B-1 to Ex.B-25 which are the family cards, current bills and consumption cards, voter identity card and house tax receipts held that the defendant is in occupation of the suit property. However, his occupation is only a permissive occupation. It will not be a possession adverse and hostile to the plaintiff who is the real owner. The admission of the defendant in the cross examination that, he is not claiming any right against Velautham (plaintiff) adverse to his interest and he has no

intention to encroach upon Velautham land and the defendant's ignorance when his father encroached the suit land besides his admission that the dispute arose only in the year 2004 when he removed the hut and put up concrete structure, were taken as proof that the defendant had no animus to encroach the plaintiff land and his long and continuous possession in the suit land is only permissive in nature which will not confer him any right to claim adverse possession. Relying Ex.A-6 letter of the defendant promising to vacate the land and hand over the possession to the plaintiff was another reason for the Trial Court to reject the plea of adverse possession raised by the defendant. For the above said reasons, the suit was allowed.

11. Aggrieved by that the defendant filed Appeal Suit before the Principal Subordinate Court, Cuddalore. The First Appellate Court, after appreciating the evidence, confirmed the judgment and decree of the Trial Court.

12. Against the concurrent findings, the present Second Appeal is filed by the defendant.

13. The Learned Counsel appearing for the appellant, placed his submission on three fold. (i). The very description of the suit property in the plaint is not in conformity with Order VII Rule 3 of C.P.C. There is no survey number mentioned in the schedule to identify the property. (ii). The Courts below failed to consider the evidence produced by the defendant regarding his continuous and uninterrupted possession for more than 45 years hostile to the real owner. (iii). The plaintiff, who claim title and possession had not produced any document to support his plea of possession. The Will Ex.A-3 upon which the plaintiff claim right and title over the property is not proved in the manner established. The plaintiff had projected, as if only 10 x 10 feet land mentioned in 'B' schedule is in dispute. Whereas, the defendant had placed evidence to show a larger extent of land is in his possession from his father's day. The Electricity card, Tax receipts, voter ID cards and other documents without any doubt proves the possession on his own and not on permission by any one. Ex.A-6 letter obtained under coercion in the police station ought not to have considered by the Courts below as a document given with free consent.

14. Per contra the learned counsel for the respondent submitted that, the Title deed Ex.A-1 and Ex.A-2 are proof of title over the property which was purchased by Natesa Mudaliar and on his death through Ex.A-3 Will, the 'A' schedule property

was given to the plaintiff. The defendant, who was put in the property as watchman to look after the mango grove, taking advantage of his permissive occupation, to grab the property had pleaded as if, he is not aware who is the real owner and he had been in possession with exclusive enjoyment for more than 45 years, without any disturbance. The Schedule of the property been described by boundaries and linear measurement. The defendant had contested the case all along knowing the property for which, he is claiming adverse possession based on long occupation. The Courts below based on the evidence with clear reasoning had allowed the suit and negative the defendant's plea of adverse possession.

15. Heard the Learned Counsel for the appellant and the Learned Counsel for the respondent. Records perused.

16. The Appellant contention is that, his father and after his father's demise, he is in possession of the entire suit property and enjoying notoriously against the true owner. In fact, he even refuse to recognise the plaintiff as true owner. To prove possession Ex.B-1 to Ex.B-25 are relied by the appellant. On examination of these documents, it indicates the appellant/defendant and his family members are residing at Kamachijpettai Street, C.N.Palayam. In most of the Exhibits in 'B' series, the door number not given. In some of the Exhibits the Door number is shown as "49" and in some of the Exhibits the Door No is shown as "49/1". New Door No.48/1. In the cross examination, the defendant could not assertively say the correct Door number of the house, in which, he is residing. Even in the proof affidavit filed in lieu of chief examination, he has not mentioned the Door number of his residence. Ex.A-9 is the field map for field Survey No.303/1 and 2. This document is marked through the Village Administrative Officer examined as D.W-3. From the deposition of D.W-3, the Village Administrative Officer, it is evident that Ex.B-25, the certificate given by this witness to the defendant for obtaining Electricity connection for the hut in 0.01 ares land. This document is of the year 2002. P.W.3 has further deposed that, defendant had obtained electricity connection for the big hut found in the photograph marked as Ex.A-7 based on his certificate Ex.B.25. He had deposed that near this big hut, there is a small brick build thatched hut. Examining Ex.A-9 Field map, these huts are located middle of new survey No.303/1 and 303/2. D.W-3 had further clarified that the old survey number of this field is S.No.110/1, it has been resurveyed and subdivided as 303/1 and 303/2 and it is owned by the plaintiff and his brother Rajaguru.

17. The Learned Counsel appearing for the appellant strenuously argued that when the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers. Order III Rule (3) and Order XX Rule (9) of C.P.C mandates for recovery of immovable property, the identification of the property must be by boundaries or numbers in a record of settlement or survey, in this case the plaint schedule is not clear with demarcation or identification either by a sketch or by report of an Advocate Commissioner. Therefore, the suit framed without proper description is liable to be dismissed.

19. In support of his submission, the learned Counsel for the appellant has relied upon the following judgments.

(i). Joint Family Manager Vs. Nagaraj (S.A.No.1199 of 1277 of 2011), Madras High Court.

(ii). Davood Ali Vs. John Basha, (S.A.No.372 of 2011), Madras High Court.

(iii). Chutahura Bhagat and others Vs. Hialal and others reported in AIR 1950 Patna 306.

(iv). Manik Paramanika since dead Vs. State of Orissa & others Orissa High Court.

(v). Palani Kunnakudi Vs. S.Venkatamanan, S.A.No.1375 of 1996, Madras High Court.

20. The said submission by the Learned Counsel and the judgments relied by him does not carry any merit for the case in hand. In the plaint, the schedule of property been described by boundaries and linear measurement. The field map of the property being marked as Ex.A.9. One of the witness D.W.3 has spoken about the physical features of the suit property. Above all the defendant had at no point of time impliedly or explicitly expressed that the suit property is not identifiable and he is not able to defend the case due to want of description of property or the property which he claims adverse possession does not fall within the description of "A" & "B" schedule property.

21. Yet another arguments by the Learned Counsel for the appellant is that stray sentenced of D.W.3 in the cross examination cannot be pitted against the defendant without considering the evidence in entirety. In case of suit for declaration, the burden is always on the plaintiff and in this

case, the Courts below has failed to note that the plaintiff has not discharged the said burden.

22. There cannot be no two opinion about the said preposition of law and there are catena of judgments reiterating the said preposition. In this case, it is not a stray sentence of D.W.1, in his deposition but also other documents particularly the title deed Ex.A.1 to Ex.A.2 and will executed by Natesa Mudaliyar marked as Ex.A.3 discharge the preliminary burden of proving title by the plaintiff and the burden has shifted upon the defendant, who claims adverse possession.

23. The documents and evidence clearly proves the ownership over the suit land vest with the plaintiff. The defendant, who could able to prove his occupation in a minuscule portion of the property claims adverse possession over the 102 x 130 feet land as land encroached by his father and in possession for more than 45 years. However, to prove adverse possession the documents relied by him even accepted as proved, it is only for a small portion about 0.01 ares. The appellant had not placed satisfactory evidence that his possession was continuous and hostile to the real owner. Leave alone the entire suit property, even the portion in which he claims to be his residence, he had not proved his possession is adverse to true owner over and continuous over and above the statutory period. The nature of property, the nature of title vesting in the rightful owner, the kind of possession which the adverse possessor is exercising, are all relevant factors needs consideration for deciding adverse possession.

24. On analysing the case in hand, the Courts below had rightly taken note of the fact that out of 56 x 180 feet land, the disputed portion is only 10 x 10 feet land. The defendant, in his own deposition, besides other evidence, admitted that, he had no animus to hold the property hostile to the real owner. From the cumulative assessment of the evidence, it is clear that the defendant, who was permitted to put an hut in the portion of the property by Natesa Mudaliar, after his demise had extended the area of his hut by putting up additional construction without the consent and knowledge of the owners, who are absentee landlords. When same came to the notice of the owner, police complaint has been lodged and the defendant had agreed to remove the structure put up by him. Since, he had failed to honour his promise and the undertaking given vide Ex.A-6 (its original marked as Ex.X-2) the suit has been filed. The Courts below had rightly considered the evidence on proper appreciation held in favour of the plaintiff and allowed the suit. The appellant, who failed to pass the test of 'Nec vi, Nec clan and Nec precario' while claiming adverse possession,

bound to fail.

25. To put it in the words of the Supreme Court, Animus Possidendi is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus, the period for prescription does not commence. In the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that, he did not have the requisite animus. (Md. Mohammad Ali (Dead) By Lrs vs. Sri Jagadish Kalita & Ors reported in (2004) 1 SCC 271)

26. A peaceful, open and continuous possession as engraved in the maxim 'Nec vi', 'Nec clam', 'Nec precario' can be tested in the following terms:

"Physical fact of exclusive possession and the Animus Possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show:

- (a) On what date he came into possession,
- (b) What was the nature of his possession,
- (c) Whether the factum of possession was known to the other party,
- (d) How long his possession has continued, and
- (e) His possession was open and undisturbed.

(Karnataka Board of Wakf v. Government of India and Others reported in [(2004) 10 SCC 779]

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" Munichikkanna Reddy & Ors Vs. Revamma and Ors reported in (2007) 6 SCC 59)

27. The facts of the instant case under consideration, this Court finds that both the Courts below, on facts has held, for reasons recorded, the plaintiff has proved Title and right to recover the possession. Whereas the defendant/appellant pleading the defence of adverse possession, failed to clear the

test of "Nec vi, Nec clan, Nec precario". This Court confirms the judgment of the Court below since there is no material to support any other view. In the absence of any substantial question of law involved in this case, the Second Appeal is dismissed. No order as to costs. Consequently, connected Miscellaneous Petition is closed.

-s/d-
Assistant Registrar

True Copy
Sub-Assistant Registrar

bsm

Copy To:-

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

+1 cc to M/s.B.Mahendran Advocate sr38148

S.A.No.1666 of 2008
and
M.P.No.1 of 2008

cnr(co)
aa27/01/2021