



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	18.03.2021
Pronounced on	31.03.2021

CORAM

THE HON'BLE Ms. JUSTICE R.N.MANJULA

S.A.No.367 of 2010
and
M.P.No.1 of 2010

1.Raja
2.Pushpa
3.Andavar (Died)

... Appellants/Defendants

[*Appellant 3 died is recorded vide order of Court by R.N.M. J., dated 15.03.2021 in S.A.No.367 of 2010, as per the memo SR.9200/2021*]

Vs.

1.Nallamuthu (Died)
2.N.Senthilkumar
3.N.Selvakumari
4.N.Suresh Kumar
5.N.Umalalitha

... Respondents/Plaintiffs

[*RR2 to 5 brought on record as LR's of the deceased sole respondent viz., Nallamuthu vide order of Court by R.N.M. J., dated 26.02.2021 passed in CMP.No.1174 & 1175 of 2021 in S.A.No.367 of 2021*]

PRAYER : The Second Appeal filed under Section 100 of C.P.C., against the Judgement and Decree dated 11.11.2009 in A.S.No.3 of 2007 on the file of Subordinate Court, Attur, confirming the judgement and decree dated 31.01.2005 in O.S.No.391 of 2000 on the file of the District Munsif Court, Attur.

For Appellants : Mr.P.Jagadeesan

For Respondents: Mr.S.Kamadevan [RR2 to 5]
R1 - Died



JUDGEMENT

This Second Appeal has been filed against the Judgement and Decree dated 11.11.2009 passed in A.S.No.3 of 2007 on the file of the Subordinate Court, Attur, confirming the judgement and decree dated 31.01.2005 passed in O.S.No.391 of 2000 on the file of the District Munsif Court, Attur.

2. The Appellants are the defendants.

The short facts of the plaintiff's case are as under:-

3. The suit schedule properties were the self-acquired properties of the plaintiff. The plaintiff was in enjoyment of the same without any objection from anyone for more than 30 years and preferred a title through adverse inference. The suit property is Salem Highways Poramboke land on which the plaintiff had encumbered and put up a house and is in enjoyment. The electricity connection stands in the name of the plaintiff. The first defendant is the younger brother of the plaintiff and second defendant is the wife of the first defendant. At the request of the first defendant, the plaintiff permitted him to live in a portion of his house until the first defendant himself builds a house of his own. Taking advantage of the said permission, the first defendant got a separate electricity connection to the portion in which he was residing. On coming to know this, the plaintiff insisted the first defendant to vacate the premises. The door number of the plaintiff's house is 32/C. During the pendency of the suit, the third defendant who is residing on the eastern side of the permitted portion proclaimed that he got the house from the second defendant and started to disturb the peaceful enjoyment of the plaintiff. Even before 30 years, the plaintiff got permission from the Panchayat to build a house and he is also paying the house tax without fail. Since the defendants are disturbing the possession of the plaintiff over the suit property, he has filed the suit for permanent injunction.

The short facts of the statement of 1st defendant adopted by 2nd defendant and 3rd defendant.

4. The claim of the plaintiff is false. The suit property belongs to Meyappan, who is the father of the plaintiff and the first defendant and the property was in joint enjoyment of the deceased Meyappan, plaintiff and the first defendant. Since the plaintiff is the elder brother of the first defendant, the first defendant consented to get the documents in his name. The village elders also convinced the first defendant that just because the documents are in the name of the plaintiff, he would not become the owner and the first defendant has also got a share; the first defendant continued to believe it. The suit



property comprises two houses. By virtue of an oral partition, the plaintiff and the first defendant partitioned the same and as per the partition, the first defendant got the eastern portion and he is in enjoyment. As problem arose between the plaintiff and the first defendant, they entered a partition affirmation deed on 18.04.1997. Accordingly, the plaintiff consented to change the house tax assessment with respect to Door No.32/B in favour of the first defendant. He has also got a certificate from the Tahsildar to this effect. The third defendant purchased the portion of the house in occupation of the first defendant by virtue of a sale deed. Hence the plaintiff is not entitled to get any relief as prayed for.

5. On the side of the plaintiff, two witnesses were examined as P.W.1 & P.W.2 and EXs.A1 to A8 were marked. On the side of the defendants, four witnesses were examined as D.W.1 to D.W.4 and EXs.B1 to B5 were marked.

6. At the conclusion of the trial, the Trial Court considered the submissions of both parties and granted the relief of permanent injunction. Aggrieved over that, the defendants filed the first appeal and the First Appellate Court confirmed the judgement and decree of the Trial Court. Now, the defendants have filed the second appeal and the second appeal has been admitted on the following substantial questions of law:-

1. Whether the lower court has committed an error in shifting the onus of proof of possession on the defendant?
2. Whether the lower appellate court has committed an error in rejecting I.A.No.2/2009 holding that the documents produced along with the application pertain to the pre-suit period?
3. Whether the courts below have failed to consider Ex.B1 in proper perspective making the finding of the courts below perverse?

7. Admittedly, the suit property is a road Poramboke. The plaintiff has filed the suit on the basis of his alleged enjoyment over the same. The present door number for the suit property is 32/C and previously it was in 32/B and 32/B1. The eastern portion of the suit property bearing Door No.32/B was given to the enjoyment of the first defendant. The first defendant is the brother of the plaintiff. According to the plaintiff, he gave the eastern portion which bears Door No.32/B to the enjoyment of the first defendant on permission until he himself builds a house of his own. Since the first defendant tried to get the individual electricity connection in his own name, the plaintiff got prompted to vacate him from the suit property. The first defendant claimed that the suit property belongs to his father Meyappan and it was in the joint enjoyment



of the plaintiff, first defendant himself along with their father. The house tax of the whole of the property stands in the name of the plaintiff/respondent and that was not denied by the appellants/defendants. The first defendant has claimed that they entered into a partition and the partition confirmation deed was also executed between them on 18.04.1997. The said document is marked as Ex.B1. The defendants would claim that the first defendant got right over the eastern portion of the suit property (Door No.32/B) by virtue of partition.

8. The Courts below have observed that the first defendant did not produce any continuing documents to show his individual possession subsequent to the alleged oral partition which is said to have preceded 16 years prior to 18.04.1997. The first defendant was examined as D.W.2, has stated that despite of oral partition, he consented to have the assessment in the name of his brother plaintiff himself. In fact, the Trial Court has made a specific observation that even though the assessment might have stood in the name of the plaintiff with the consent of the first defendant, his name would have got reflected as the person who is paying the tax, but it was not found so in the tax receipts.

9. Had the suit properties stood in the name of the first defendant's father Meyappan then the earlier assessment should have been made in the name of Meyappan and he would have paid the house tax. But no document has been produced to show the same. The Courts below have correctly appreciated the evidence and fix the burden of proof on the respective parties in accordance with the proof and pleadings. So, I find no error in the approach of the Lower Courts in fixing the proof of possession on the respective parties. Hence the substantial question of law No.1 is answered against the appellant.

10. It was submitted by the learned counsel for the appellants that the Lower Court has decreed the suit on the basis of the weakness in the defendants' case and shifted the burden of proving the possession on the defendants. When the respondent/plaintiff has discharged his initial burden from the words of the first defendant himself that the tax for the suit property was assessed in the name of the plaintiff and the tax receipts also stood in his name, the burden would naturally shift upon the appellants/defendants who pleaded that the property was a joint family property and only with the consent of the first defendant the house taxation assessment and all other documents stood in the name of the plaintiff.

11. The learned counsel for the appellants submitted that the First Appellate Court has dismissed the petition filed to receive additional documents. The First Appellate Court has



stated that a few house tax receipts produced by the first defendant stood in the name of his wife Pushpa and few of the receipts stood in his name.

12. It is further observed that when the first appellant/first defendant claimed that he alone had the absolute right and is in possession over Door No.32/B, he should have produced the receipts which stood in his name even at the time of filing the suit. By making such an observation, the Lower Appellate Court has refused to receive the additional documents. But while submitting the arguments, the learned counsel for the appellants submitted as though the learned First Appellate Judge has refused to receive the document only because it pertains to the pre-suit period. As pointed out already, the First Appellate Court recorded other reasons for not receiving the documents and they are acceptable reasons. Hence I find no perversity in the order of the learned First Appellate Court in not receiving the additional documents and the substantial question of law No.2 is answered accordingly.

13. The learned counsel for the appellants has given much significance and has invited the attention of the Court to Ex.B1 and submitted that the Courts below did not consider Ex.B1 in a proper perspective. It is the submission of the appellants that even 16 years prior to Ex.B1, the eastern portion of the suit property was allotted to the exclusive share of the first defendant and he continued to be in enjoyment.

14. First of all, the property is a Poramboke property over which, only the Government has the right of ownership and the private individuals cannot claim any title. The patta may be given by the Government in accordance with the long possession and enjoyment. Even for the sake of argument, if a partition alleged by the first defendant is accepted to be an operative document, the burden is on the first defendant to prove that the suit property was originally occupied by his father Meyappan and he only built the house along with his sons. There is no document to show that the house tax assessment and other documents relating to the suit property stood in the name of Meyappan at any earlier point of time. The appellants did not produce any document to show the change of assessment from the name of Meyappan to the name of the plaintiff. Without proving the antecedent enjoyment of the father of the first defendant, the first defendant cannot raise the theory of partition and request much credence to Ex.B1. When the plaintiff has proved his enjoyment over the suit property by producing the document right from the year 1978, the Courts cannot shut their eyes and reject the claim of the plaintiff. The earliest document produced by the respondent/plaintiff is the building approval given by the Panchayat on 11.04.1978. After he put up his



house, the house tax was also assessed in his name by virtue of the house tax assessment memo dated 20.09.1979. From then onwards, the plaintiff has been assessed to pay tax and the plaintiff has also been paying it. The respondent/plaintiff has produced sufficient documents to show his continuous possession and enjoyment in the suit property as how he pleaded in the suit. The Courts below have correctly balanced the preponderance of probabilities on the basis of the materials produced before it and arrived at a correct conclusion. I find no error in the perspective of the Lower Courts in appreciating Ex.B1 and hence the substantial question of law No.3 also answered against the appellants.

15. It is further submitted on behalf of the appellants that the plaintiff ought to have filed the suit for declaration and possession. It is submitted that since the defendants have disputed the title of the plaintiff, the suit for bare injunction is not maintainable.

16. It is already observed that the suit property is a road Poramboke in which, the plaintiff has been in enjoyment for a long time. If the plaintiff intended to file a suit for declaration then that should have been filed by impleading the Government and not against the defendants. Between the parties to this suit, only the question of enjoyment and continuous possession from the date of their encroachment without interruption really matters. Since the respondent/plaintiff could establish his case through acceptable oral and documentary evidence and prove that the preponderance of probabilities is in his favour, the Courts below were pleased to grant the relief to the plaintiff. So, I find no factual or legal error committed by the Lower Courts so as to warrant interference.

17. In the result, the Second Appeal is dismissed and the judgement and decree of the First Appellate Court is confirmed. No costs. Connected miscellaneous petition in M.P.No.1 of 2010 is closed.

Sd/-
Assistant Registrar(CS-VIII)

//True Copy//

Sub Assistant Registrar

Sni



To

1.The Subordinate Court,
Attur.

2.The District Munsif Court,
Attur.

3.The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.S.Kamadevan, Advocate, S.R.No.21791

+1cc to Mr.P.Jagadeesan, Advocate, S.R.No.21851

S.A.No.367 of 2010

RR(CO)
CB(29/09/2021)