



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 13.07.2022

Pronounced on : 18.08.2022

CORAM :

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

S.A.No. 778 of 2005

1. Periyasamy (died)
2. Murugesan
3. Ramakrishnan
4. Sengottaiyan
5. Vivekanandan ... Defendants/appellants/appellants

[Appellants 2 to 5 are LR's of the deceased 1st appellant vide Court order dated 16.04.2021 made in Memo Sr.1550 dated 18.01.2021.]

Vs.

Santhi Krishnan ... Plaintiff/Respondent/Respondent

PRAYER: This Second Appeal is filed under Section 100 of Civil Procedure Code, against the Decree and Judgment dated 08.02.2005 in A.S.No. 7 of 2004 on the file of the Principal Sub Judge, Salem, confirming the decree and Judgment of the trial Court dated 09.02.2004



passed in O.S.No. 565 of 2002 on the file of the Principal District Munsif of Salem.

For Appellants : Ms. N.Alamelumangai

For Respondent : Mr.T.R.Rajaraman

JUDGMENT

The defendants in O.S.No. 565 of 2002 on the file of the Principal District Munsif Court at Salem, are the appellants herein. Pending the Appeal, the first appellant died but his legal representatives were already on record as 2nd to 5th appellants. A memo filed in that regard had been recorded.

2. The suit in O.S.No. 565 of 2002 had been filed by the respondent Santhi Krishnan against the defendants Periyasamy and his sons Murugesan, Ramakrishnan, Sengottaiyan and Vivekanandan, seeking a Judgment and Decree in the nature of permanent injunction restraining the defendants from interfering with her peaceful possession and enjoyment of the suit schedule properties and for costs.



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3. The suit schedule properties were agricultural lands in patta Nos. 772, 623 and 654 in Kothanur Village, Salem.

4. By Judgment dated 09.02.2004, the learned Principal District Munsif, Salem, had decreed the suit.

5. Aggrieved by such Judgment, the defendants filed A.S.No. 7 of 2004 before the Principal Sub Court at Salem. They also filed I.A.No. 48 of 2004 under Order 41 Rule 27 CPC, seeking permission to file two additional documents.

6. By Judgment dated 08.02.2005, the learned Principal Sub Judge, Salem, had allowed I.A.No. 48 of 2004, and by consent, permitted marking of the said two documents, but had dismissed A.S.No. 7 of 2004, thereby confirming the Judgment and Decree in O.S.No. 565 of 2002.

7. Aggrieved by the Judgment of the First Appellate Court, the defendants filed the present Second Appeal.



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8. The Second Appeal had been admitted on the following substantial questions of law:-

“i) Whether a party to a suit could abandon the suit abruptly and institute another suit in the borrowed name by creating a sale deed as a document of title and file a fresh suit by abusing the process of the Court?

ii) Whether the lower appellate Court can decide only few of the issues and omit others on being satisfied with the points decided?

iii) Whether the revenue records are documents of title?

iv) Whether documents brought into existence subsequent to the filing of the suit could be used to prove any fact which is in dispute in the suit?”



O.S.No. 565 of 2002 [Principal District Munsif Court, Salem]:

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9. The plaintiff claimed that the suit schedule properties had been purchased by her husband Krishnan on 04.11.1998 from one Palani Gounder and his children. The husband of the plaintiff died on 19.09.2001. The plaintiff claimed that her husband was in possession of the suit properties and that patta was also transferred to his name. Thereafter, she continued to be in possession. However, taking advantage of the death of her husband, the defendants tried to encroach into the suit properties necessitating instituting the suit seeking permanent injunction.

10. A written statement was filed by the first defendant which was adopted by the other defendants. It was claimed that the sale deed in favour of the husband of the plaintiff was a sham and nominal document created collusively with the vendors. It was claimed that possession was never handed over to the husband of the plaintiff. It was stated that even the predecessors in title were never in possession. It was stated that the defendants had been in continuous, uninterrupted possession of the suit



property openly for past 22 years adversely against the vendors of the plaintiff and against the plaintiff. It was also stated that the possession remained unchallenged. It was stated that therefore, the defendants had prescribed title by adverse possession. It was stated that item Nos. 1, 2 and 9 are also contained in patta no. 64 issued to the father of the first defendant. It was stated that the Vendors of the plaintiff had earlier filed a suit in O.S.No. 39 of 1998 before the Principal District Munsif Court at Salem, wherein a written statement was also filed questioning his right and title. Thereafter that particular suit was abandoned. It was therefore stated that the suit filed by the plaintiff seeking for injunction is not maintainable. It was stated that owing to the abandonment of the earlier suit, the present suit is not maintainable. It was therefore claimed that the suit should be dismissed.

11. On the basis of the aforementioned pleadings, the learned Principal District Munsif framed the following issues for trial:-

“1. Whether the plaintiff is entitled for permanent injunction;



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2. *Whether the defendants had prescribed title by adverse possession?;*
3. *Whether the suit property had been properly described?;*
4. *Whether the suit is maintainable?;*
5. *Whether the suit is bad for non-joinder of necessary parties?;*
6. *To what reliefs is the plaintiff entitled to?"*

12. During trial, the plaintiff examined herself as PW-1 and examined another witness as PW-2. The first defendant examined himself as DW1 and examined another witness as DW-2. The plaintiff marked Exs. A-1 to A-11. Ex. A-1 was the sale deed in favour of the husband of the plaintiff dated 04.11.1998. Exs. A-2 and A-3 were the adangal in the name the vendor Palani Gounder and Exs.A-5 and A-7 were the adangal in favour of the husband of the plaintiff. Exs. A-4 and A-6 were the chitta in the name of the husband of the plaintiff. Ex.A-11



was the proceedings of the Tahsildar, Salem. The defendants marked Exs. B-1 to B-40. Ex.B-1, B-34, B-35, B-37 and B-38 were documents relating to the earlier suit in O.S.No. 39 of 1998. Exs. B-2 to B-18 were house tax receipts and land revenue receipts in the name of the father of the first defendant and in the name of the first defendant.

13. On the basis of the pleadings and the oral and documentary evidence adduced, the Principal District Munsif, Salem, found that the plaintiff had produced title deed for the properties mentioned in the schedule and also co-related the revenue documents with the suit schedule properties and therefore held that the plaintiff had established title to the properties. With respect to the claim of adverse possession, the Principal District Munsif however found that the revenue documents filed by the defendants did not relate directly to the suit properties. It was therefore concluded that the defendants were not in possession of the suit schedule properties.

14. The Principal District Munsif then proceeded to declare the title of the plaintiff when the plaintiff herself had not filed any suit for



declaration of title. The Principal District Munsif also entered into a detailed discussion regarding the claim of adverse possession and stated that the said claim had not been established by the defendants.

15. With respect to the earlier suit filed by the predecessors in title of the plaintiff in O.S.No. 39 of 1998, it was stated that the said suit had been dismissed for non prosecution and therefore, would not be a bar for the present suit. In effect, the suit was decreed as prayed for.

A.S.No. 7 of 2004 [Principal Sub Judge, Salem]:

16. The defendants then filed the said Appeal suit. They also filed I.A.No. 48 of 2004 under Order 41 Rule 27 CPC to take on record, two further documents, namely, the extract of the relevant register in Kothanur Village and a receipt of Sivathapuram Primary Agricultural Co-operative Society. Since there was no objection, both those documents were taken on record as Exs. B-41 and B-42. The First Appellate Judge practically confirmed the findings of all the issues as decided by the Principal District Munsif Court, Salem. Once again, it was found that the



plaintiffs have title to the property and the claim of the defendants that they had perfected title by adverse possession was brushed aside. The Appeal Suit was dismissed.

S.A.No. 778 of 2005:

17. The defendants then filed the present Second Appeal. The Second Appeal had been admitted on the following substantial questions of law:-

“i) Whether a party to a suit could abandon the suit abruptly and institute another suit in the borrowed name by creating a sale deed as a document of title and file a fresh suit by abusing the process of the Court?

ii) Whether the lower appellate Court can decide only few of the issues and omit others on being satisfied with the points decided?

iii) Whether the revenue records are documents of title?



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iv) Whether documents brought into existence subsequent to the filing of the suit could be used to prove any fact which is in dispute in the suit?”

18. Let me address all the questions of law together since they require a discussion on the evidence adduced during the course of trial.

19. Let me address the appellants as defendants and the respondent as plaintiff.

20. The suit had been filed for permanent injunction to protect possession.

21. It had been the case of the defendants that they had been in continuous possession of the suit schedule properties hostile to the interest of the vendors of the husband of the plaintiff and therefore, they claimed that they had prescribed title by adverse possession.



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22. The schedule of the property shows that it is spread over several survey numbers. The boundaries are not given. The area alone has been given. They are all agricultural lands.

23. The contention of the defendants is that the lands are not contiguous and are in separate places and that the defendants are also in possession and are doing agriculture.

24. With respect to the same lands in the said survey numbers, there was an earlier suit in O.S.No. 39 of 1998 filed against the defendants. That suit was filed by the Palani Gounder who was the vendor of the suit schedule lands in the sale deed executed in favour of the husband of the respondent and also by his sons. They had instituted the suit as against the present appellant/defendant and also against two others. They claimed in that plaint, that they were in possession and enjoyment of the suit properties and that the suit properties had been purchased by the first plaintiff's father by two separate sale deeds dated 21.04.1923 and 31.01.1952. It was also stated that the suit properties have been subject to changes in survey numbers and had been divided



into several parts. There had also been division of the properties among the plaintiffs in that suit.

25. That suit was also filed for permanent injunction to protect possession.

26. A written statement had been filed in the said suit by the present appellants/defendants and in the written statement, they had denied and disputed the right and title of the plaintiffs therein. The defendants had asserted in that earlier suit also that they had prescribed title by adverse possession. The defendants also claimed that the suit for injunction was not maintainable without seeking declaration of title. They also claimed that they had been paying kist for the suit lands. They claimed that they had perfected the title to the knowledge of the plaintiffs therein.

27. In that particular suit in O.S.No. 39 of 1998, the plaintiffs therein did not graze the witness box and therefore, the suit was dismissed for non prosecution.



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28. The plaint in that particular suit had been marked as Ex.B-37 and the written statement had been marked as Ex.B-38. The Judgment dismissing the suit for non prosecution had been marked as Ex.B-1. The decree had been marked as Ex.B-35.

29. Order 23 CPC is as follows:-

“[1. Withdrawal of suit or abandonment of part of claim.-

(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

(4) Where the plaintiff-

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in



sub-rule (3),

he shall be liable for such costs as the Court may award and shall be preclude from instituting any fresh suit in respect of such subject-matter or such part of the claim.

30. The first substantial questions of law is whether this dismissal of the suit in O.S.No. 39 of 1998 for non prosecution instituted the vendors of the plaintiff would prevent the plaintiff from instituting another suit.

31. The earlier suit in O.S.No. 39 of 1998 was filed seeking injunction complaining threat of possession. The present suit in O.S.No. 565 of 2002 from which the present Second Appeal has emanated had also been filed owing to threat to dispossess the plaintiff from possession. The dates of the cause of action are different.



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32. If the earlier suit had been filed for declaration of title and then had been abandoned then a discussion would be required whether the second suit is maintainable on the same issue of declaration of title. But when the complaint was one of threat to dispossess, I hold that the suit filed by the plaintiff in O.S.No. 605 of 2002 for injunction is maintainable.

33. It must however be pointed out that both in the earlier suit in O.S.No. 39 of 1998 and in the present suit in O.S.No. 605 of 2002, the defendants had raised issues relating to possession hostile and consolidation of such possession hostile to the adverse interest of the true owner. They claimed title by adverse possession. In view of such stand taken, the suit filed for bare injunction would not be maintainable. The plaintiff had not amended the plaint in O.S.No. 605 of 2002 seeking declaration of title. The plaintiff cannot claim innocence of the earlier suit particularly when her husband had purchased the suit properties from the plaintiffs in the earlier suit in O.S.No. 39 of 1998. Even after the written statement had been filed, the plaintiff had not amended the relief



sought to seek declaration of title. In the absence of any such relief sought, I hold that both the Courts below had travelled beyond the scope of the lis by entering into a discussion on title.

34. I hold that the parties must be relegated to institute a separate suit seeking declaration of title and claim protection of possession as a consequential right.

35. I hold that the defendants must be given opportunity to properly put up a case for adverse possession. Even the defendants can institute a suit seeking prescription of title by such adverse possession. Without that particular issue of title being decided, a suit for bare injunction is not maintainable.

36. The 2nd, 3rd and 4th substantial questions of law relate to the evidence produced before the Court. In view of the above reasonings, I would refrain from entering into a discussion on that particular aspect, since it would only be prudent that the parties are relegated to file a suit for declaration of title.



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37. In 2008 4 SCC 594 [Anathula Sudhakar Vs. P.Buchi Reddy (dead) by Lrs. & Others], the Hon'ble Supreme Court had given directions as to the procedure to be adopted when there is a defence raised questioning the title of the plaintiff and the possession of the plaintiff.

“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.

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 the defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of the 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 the plaintiff's title raises a cloud on the title of the 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



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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 the 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 raise a serious dispute or cloud over the 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.”



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38. The Hon'ble Supreme Court had very clearly held that when there is a denial of title by the defendant or a challenge to the title of the plaintiff which raises a cloud on the title of the plaintiff to the suit properties, it would only be appropriate that the parties are relegated to institute a suit for declaration of title and seek injunction.

39. In *2006 7 SCC 570 [T.Anjanappa and Others Vs. Somalingappa and another]* the Hon'ble Supreme Court had held as follows:-

“12. The concept of adverse possession contemplates a hostile possession i.e. a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's rights but denies them. The principle of law is firmly established that a person who bases his title



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on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of his title to the property claimed. For deciding whether the alleged acts of a person constituted adverse possession, the animus of the person doing those acts is the most crucial factor. Adverse possession is commenced in wrong and is aimed against right. A person is said to hold the property adversely to the real owner when that person in denial of the owner's right excluded him from the enjoyment of his property.

13. Possession to be adverse must be possession by a person who does not acknowledge the other's rights but denies them:

“24. It is a matter of fundamental principle of law that where possession can be referred to a lawful title, it will not be considered to be adverse. It is on the basis of this principle that it has been laid down that since the possession of one co-owner can be



referred to his status as co-owner, it cannot be considered adverse to other co-owners.”

14. Adverse possession is that form of possession or occupancy of land which is inconsistent with the title of the rightful owner and tends to extinguish that person's title. Possession is not held to be adverse if it can be referred to a lawful title. The person setting up adverse possession may have been holding under the rightful owner's title e.g. trustees, guardians, bailiffs or agents. Such persons cannot set up adverse possession:

“14. ... Adverse possession means a [hostile possession] which is expressly or impliedly in denial of title of the true owner. Under Article 65 [of the Limitation Act,] burden is on the defendants to prove affirmatively. A person who bases his title on adverse possession must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In deciding whether the acts, alleged by a



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person, constitute adverse possession, regard must be had to the animus of the person doing those acts which must be ascertained from the facts and circumstances of each case. The person who bases his title on adverse possession, therefore, must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed. ...

*15. Where possession can be referred to a lawful title, it will not be considered to be adverse. The reason being that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another's title. One who holds possession on behalf of another, does not by mere denial of that other's title make his possession adverse so as to give himself the benefit of the statute of limitation. Therefore, a person who enters into possession having a lawful title, cannot divest another of that title by pretending that he had no title at all. (See **Annasaheb Bapusaheb Patil v. Balwant** [(1995) 2 SCC*



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*543, p. 554 : AIR 1995 SC 895, p. 902] ,
SCC p. 554, paras 14-15.)”*

40. It is thus seen that an adverse possession contemplates hostile possession denying title of the true owner.

41. In the instant case, the defendants had denied the title of the vendors of the husband of the plaintiff and also of the plaintiff herself in their written statements filed in the earlier suit in O.S.No. 39 of 1998 and in the present suit in O.S.No. 565 of 2001.

42. They have clearly stated the names of the individuals person against whom they claim such adverse title.

43. In view of such assertion by the defendants in their written statement it would only appropriate that the plaintiff clear the cloud over her title by filing necessary suit for declaration of title.

44. It is also to be noted that the suit schedule lands are vacant lands. Possession follows title. They are agricultural lands and the



defendants also claims to be cultivating the lands.

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45. I hold in view of the above facts and reasoning that the Judgments of the trial Court and the First Appellate Court will necessarily have to be interfered with. Let a finding be given on the basis of a suit for declaration of title.

46. The substantial questions of law are answered that the second suit for injunction is valid in law but that the Courts should have relegated the parties to seek declaration of title and the evidence adduced will have to be examined only in a separate suit seeking declaration of title. The suit in O.S.No. 605 of 2002 not having been filed for declaration of title is not maintainable particularly in view of the stand taken by the defendants.

47. In the result, the Second Appeal is allowed with costs.

48. The parties are relegated to file a suit for declaration of title and seek consequential reliefs.



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49. The Judgment and Decree dated 09.02.2004 in O.S.No. 565 of 2002 on the file of the Principal District Munsif, Salem and dated 08.02.2005 in A.S.No. 7 of 2004 on the file of Principal Sub Court, Salem are both set aside.

18.08.2022

Index :Yes/No
Internet:Yes/No
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To

1. Principal Sub Court, Salem.
2. Principal District Munsif Court, Salem.



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C.V.KARTHIKEYAN, J.

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**Pre-Delivery Judgment made in
S.A.No. 778 of 2005**



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18.08.2022