



IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM:

Reserved on	21.01.2022
Pronounced on	08.02.2022

THE HONOURABLE Mr.JUSTICE R.PONGIAPPAN

S.A.No.1630 of 2011 &
M.P.No.1 of 2011

1. V.Prabakaran
2. P.Savithri

..Appellants/Respondents/Defendants

Vs.

V.Devendran

..Respondent/Appellants/Plaintiff

Prayer: Second Appeal is filed under Section 100 Civil Procedure Code against Judgment and Decree dated 10.10.2011 made in A.S.No.137 of 2010 on the file of the learned Principal Subordinate Judge, Salem reversing the Judgment and Decree made in O.S.No.1024 of 2008 dated 29.06.2010 on the file of I Additional District Munsif, Salem.

For Appellants :Mr.R.Bharanidharan

For Respondent :Mr.T.S.Vijaya Raghavan

J U D G M E N T

The Second Appeal is focused as against the Judgment and Decree dated 10.10.2011 passed in A.S.No.137 of 2010 by the learned Principal Subordinate Judge, Salem in reversing the Judgment and Decree dated 29.06.2010 passed in O.S.No.1024 of 2008 by the learned First Additional District Munsif, Salem.

2. The appellants are the defendants and the respondent is the plaintiff. The parties, for the sake of convenience are referred to according to their litigative status before the trial court.



3. The laconic averments found in the plaint filed by the plaintiff is as follows:-

WEB COPY The plaintiff is the brother of the 1st defendant and they have two other brothers. The plaintiff has filed a suit for partition in O.S.No.171 of 1975 on the file of Sub Court, Salem. After allowing the suit, in the final decree proceedings, 'A' schedule property was allotted to the plaintiff and 'B' schedule property was allotted to the defendants. At the same time, ten feet lane was earmarked for convenient enjoyment of either parties. In this regard, a plan was appended with the final decree. After passing the final decree, the plaintiff took possession of his portion, on the other hand, during February 2007, defendants started constructing in the portion allotted to him. The plaintiff preferred a complaint before the police stating that Corporation Authorities ought not to have granted permission for construction. However, inspite of protest made by the plaintiff, the 1st defendant made construction unauthorisedly without any permission. Hence the suit was filed for declaration, possession and mandatory injunction to remove the illegal construction.

4. The gist of the written statement filed by the defendants are as follows:-

The suit property originally belongs to one Veerappa pillai, on 26.12.1985, the said Veerappa pillai sold the suit property in favour of the defendants. Ever since from the date of purchase, the defendants are in continuous possession and enjoyment of the suit property for more than 23 years. The defendants put up RCC building in the suit property and paying property tax. The defendants have been in possession with the knowledge of the plaintiff. The title over the suit property is perfected by adverse possession and the suit is barred by limitation. There is no cause of action to file the suit, hence the suit is liable for dismissal.

5. Based on the above said pleadings, the trial court framed necessary issues and tried the suit. On the side of the plaintiff, P.W.1 was examined and 8 documents marked as Exs.A.1 to A.8. Similarly, on the side of the defendants, D.W.1 was examined and 6 documents marked as Exs.B.1 to B.6. Having considered the materials placed before him, the learned First Additional District Munsif, Salem came to the conclusion that the plaintiff is not entitled to any relief, which prayed in the suit. In the appeal preferred by the plaintiff, the learned Principal Subordinate Judge, Salem reversed the findings arrived



at by the trial Court and granted decree for declaration, permanent injunction and mandatory injunction in favour of the plaintiff. Feeling aggrieved over the same, the defendants are before this Court.

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6. When the Second Appeal is taken up for admission, this Court has formulated the following substantial questions of law for consideration:-

"1. Whether the Lower Appellate Court is right in reversing the Judgment and decree of Trial Court as made in O.S.No.1024 of 2008 dismissing the suit for declaration and mandatory injunction on the ground that the suit is barred by limitation?

2. Whether the Lower Appellate Court is right in holding that the suit in O.S.No.1204 of 2008 is not barred by limitation when the respondent has filed the file for recovery of possession based upon the final decree granted in O.S.No.171 of 1975, dated 13.09.1976 by filing a suit in the year 2008?

3. Whether the lower Appellate Court is right in holding that the respondent is deemed to have been in possession from the date of the final decree made in O.S.No.171 of 1975 dated 13.09.1976, when the respondent has not filed any execution petition to execute the final decree as made in O.S.No.171 of 1995?

4. Whether the Lower Appellate court is right in holding that the possession of the appellants in the suit property does not amount to adverse possession?

5. Whether the Lower Appellate Court is right in holding that the sale deed in Ex.A2 dated 26.12.1985 is invalid when the same has not been questioned by the respondent herein?

7. Heard the learned counsels appearing on either side and perused the documents placed on record.

8. The plaintiff, V.Deventhran, is the brother of the 1st defendant, namely, V.Prabakaran, they have two other brothers, by name Thyagarajan and Rajendran. The 2nd defendant, Savithri is the wife of the 1st defendant. One Veerappapillai, who is the father of the plaintiff and 1st defendant, vide sale deed dated 24.12.1970 purchased the suit schedule property from one PPN Chandrapal and Lakshmiammal. The said document has been marked before the trial Court as Ex.B.1. Apart from the suit property, the plaintiff's family is having some other property in a small town. Since there was no amenable partition in the plaintiff's family, the plaintiff herein and the 1st defendant jointly filed a



suit in O.S.No.171 of 1975 against their father and brothers. In the said suit filed by the plaintiff and 1st defendant, preliminary decree has been passed, through which the right of the parties are determined.

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9. Afterwards, both the plaintiff and the 1st defendant in the said suit filed an application in I.A.No.686 of 1976 wherein they prayed to pass a final decree in terms of the preliminary decree passed in O.S.No.171 of 1975. The learned Principal Subordinate Judge, Salem after appointing the advocate commissioner for partitioning the suit property and on receipt of report submitted by the Advocate Commissioner, on 13.09.1976 allowed the application filed in I.A.No.680 of 1976 and accordingly, final decree has been passed in O.S.No.171 of 1975. Before the trial court, the copy of the final decree dated 13.09.1976 marked as Ex.A.1. In the final decree, the 'A' schedule property comprising the present suit schedule property and some other property was allotted to the share of the plaintiff vide Ex.A.1. The above factual aspects are not disputed.

10. In this occasion, it is the case of the plaintiff that after passing the final decree, his father, Veerapa pillai vide sale deed dated 26.12.1985 [Ex.A.2] sold the suit schedule property to the 2nd defendant, Savithri and afterwards, against the interest of the plaintiff, after ignoring the objections raised by the plaintiff, she constructed a house in the property allotted to the plaintiff and therefore, the plaintiff is entitled to the relief of declaration and recovery of possession.

11. On the other hand, it is the case of the defendants that though in the final decree proceedings, the suit schedule properties are allotted to the plaintiff subsequent to the passing of the final decree, he was not put in the possession of the suit schedule property. Further, he has not initiated any execution proceedings for executing the final decree passed thereon. In this regard, the learned counsel appearing for the plaintiff would contend that after passing the final decree, it was not necessary for the plaintiff to file a separate application for execution, particularly for possession. The date on which, the final decree has been passed, it is deemed that the plaintiff is in possession of the suit property.

12. Now, on considering the said submissions with relevant records, admittedly, after passing the final decree, the plaintiff has not filed an application for execution. Since the suit filed in O.S.No.171 of 1975 is for the partition and



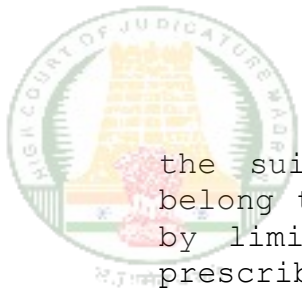
separate possession, it was necessary for the plaintiff to initiate execution proceedings for his separate possession in respect to the suit schedule property. Here it is the case while at the time plaintiff gave evidence as P.W.1, admitted in his cross examination as there was no document to show that the suit property was given in possession with him.

13. Therefore, it is a case that since the plaintiff has not filed any execution application within a period of 12 years for separate possession, now, claiming the right over the suit property by saying that the suit schedule property was allotted in his favour already in I.A.No.680 of 1976, cannot be sustained. In this aspect, the submissions made by the learned counsel appearing for the plaintiff is not having any significance.

In fact, the 1st defendant, who is one of the plaintiff in O.S.No.171 of 1975 preferred a suit in the year 2007 before the learned Principal District Judge, Salem, wherein he prayed to handover the possession of the suit schedule property in terms of final decree passed in O.S.No.171 of 1975. The said suit also went against him and thereafter, no appeal has been preferred by either parties. Accordingly, the suit filed for the relief of possession of the suit property is also not ended in favour of the plaintiff.

14. In otherwise, the 2nd defendant, is the absolute owner of the suit schedule property, vide Ex.A.2 sale deed dated 26.12.1985, wherein the deceased Veerappa pillai sold the suit schedule property to the 2nd defendant. In respect of the said transaction, the plaintiff, as P.W.1, gave evidence as during the time of executing the said sale deed, his father gifted some other property to his sisters. The said evidence is clear that the plaintiff knows the existence of Ex.A.2 immediately after its execution. Therefore, under Section 59 of the Limitation Act, he has to file a suit within a period of three years for cancelling the said sale deed. But in this case, the plaintiff has not taken any steps for cancelling the said sale deed.

15. In the said occasion, it is the submission made by the learned counsel appearing for the appellants / defendants that the exhibits marked on the side of the plaintiff would go to show that the 2nd defendant constructed house in the suit property in the year 2006. On the other hand present suit is filed in the year 2008 for the relief of declaration and possession, it was construed that the suit has been filed within a period of limitation. In this aspect, it is the submission made by the learned counsel appearing for the appellants / defendants that



the suit filed for declaration to declare that the property belong to the respondent / plaintiff herein is hopelessly barred by limitation under Section 113 of the Limitation Act, which prescribed that the suit for declaration or any other suit for which no limitation has been prescribed ought to have been filed within a period of three years. He would further submit that the plaintiff being the resident of the same locality, knowing very well that the 2nd defendant has put up construction in his property as early as in the year 1990, has filed the present suit only in the year 2008 and therefore, it should be decided that the present suit is barred by limitation.

16. Now, on considering the submissions made by the learned counsel appearing on either side, as already observed, since the suit has been filed for recovering the possession of the suit property, under Article 65 of the Limitation Act, the suit has been filed within a period of twelve years from the date on which the possession of the defendants become adverse to the plaintiff, as rightly pointed out by the learned counsel appearing for the appellants / defendants that in the year 1989 itself, vide Ex.B.5 dated 03.02.1989, the Deputy Tahsildar of the concerned area issued a patta in favour of the 2nd defendant. Afterwards in the year 1990, vide Ex.B.4, the defendants submitted a plan for constructing a house, in this regard, the plaintiff, as P.W.1 admitted in his evidence as he knows the construction of the building in the suit schedule property, so he have to file the suit within a period of 12 years, from the date on which his possession becomes adverse, but the present suit has been filed in the year of 2008, therefore the present suit filed by the plaintiff is hopelessly barred by limitation.

17. Though the defendants pleaded for adverse possession, the trial court has not framed any issue as to the issue of adverse possession claimed by the defendants. In this regard, the learned counsel appearing for the appellants / defendants fairly conceded that he is not arguing the case for adverse possession, as there was no issue framed for adverse possession. The other submission made by the appellants is that the suit filed by the plaintiff is barred by limitation. In this regard, it is necessary to see the Judgment of Hon'ble Supreme Court reported in (2004) 11 SCC 193, [Tej Narain and Another Vs. Shanti Swaroop Bohre and Another] wherein the Hon'ble Apex Court held as follows

".... This finding of the Court that the families had separated in the year 1928 and were in possession of the respective shares coupled with the fact that Saligram had admitted that Govind Prasad had



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taken forcible possession of the house in dispute in the year 1928 clearly establishes that Govind Prasad and his successors have been in continuous possession of the house since 1928 and the suit filed by the plaintiff-appellants in the year 1955 is clearly barred by limitation. The respondents have perfected their title by way of adverse possession. ..."

18. Further, he referred the Judgment of this Court reported in 2012 1 L.W. 74 [Chinnu Padayachi and Another Vs. Dhanalakshmi and others] wherein this Court, upon relying on the Judgment of the Delhi High Court reported in AIR 1994 Delhi 161. Faqir Chand (through L.Rs) Vs. Lila Ram (through L.Rs) held as follows:-

"18. In the plaint it was averred that this construction was made about 32 months prior to the filing of the suit. There was no specific denial of this particular fact in the written statement but still the court thought it advisable to examine the defendant - respondent in order to clarify his plea with regard to the date in the construction of the aforesaid tin-shed. At any rate, as the plaintiff-appellant himself had admitted in his testimony about the existence of this tin-shed for more than 3 years prior to the filing of the suit the first appellate court was not wrong in taking notice of this admission of fact and then drawing the legal inferences available flowing from such facts"

19. In the given case on hand it is alleged by the plaintiff that the defendants had put up the construction in the land belongs to the plaintiff. After knowing the fact that the defendants had constructed a house in the suit land in the year 1990, the plaintiff has not preferred a suit within a period of limitation. Finding of the lower appellate court that the appellants / defendants cannot claim ownership over the suit property by virtue of the sale deed executed from the father of the plaintiff dated 26.12.1985 and also the adverse possession is perverse, in view of the fact that there is no issue framed by the trial court in respect of the adverse possession, therefore, the same cannot be considered to be a decree of the court and the lower appellate court has only considered the question of adverse possession and did not go into issue of limitation to file a suit by the plaintiff and the defendants.

20. The fact that the plaintiff / respondent has filed the suit for declaration and recovery of possession makes it clear that the plaintiff did not take possession of the suit



property in pursuant to the final decree passed in the year 1975. The relief of mandatory injunction as claimed by the plaintiff also cannot be granted, as the same could be claimed only within a period of three years, as contemplated under the Limitation Act, 1963. Since the 2nd defendant / 2nd appellant has pleaded that she put up construction in the year 1990 and not being cross examined on this aspect, it would necessary to conclude the suit that the relief of mandatory injunction asked by the plaintiff is also barred under Limitation Act. Therefore, at any event, the case filed by the plaintiff is barred by the Limitation.

21. In the said circumstances, it is relevant to refer Section 27 of the Limitation Act, which is extracted as follows:-

Section 27: Extinguishment of right to property:
"At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."

The principle of the said Section is that if a person is having right to possession, suppose his right be barred by law of limitation, his title itself is extinguished in favour of the party in possession. So far as this Section is concerned, it expressly provides that when there exists a cause of action in favour of a person to file a suit for possession, then, if the suit is not filed within a period of limitation prescribed and the period of limitation stands determined, that not only period of limitation comes to an end, but his right will also come to an end and it will stand extinguished.

22. Further, the said Section assist the person in possession to acquire perspective title by adverse possession, but this Section cannot apply to a person, who are in possession, therefore, the inaction on the part of the plaintiff in filing the petition for possession, immediately after passing a final decree would extinguish his right in the suit property and all other applications filed belatedly after a period of limitation to extinguish the rights of the plaintiff in the suit schedule property. The First Appellate Court without considering this aspect allowed the suit in favour of the plaintiff, which is liable for setting aside.

23. Accordingly, the substantial questions of law are answered as above. The present Second Appeal is allowed and the order passed by the the learned Principal Subordinate Judge, Salem in A.S.No.137 of 2010 dated 10.10.2011 is set aside and



the order passed by the learned I Additional District Munsif, Salem in O.S.No.1024 of 2008 dated 29.06.2010 stands confirmed. Consequently, connected miscellaneous petition is closed. No costs.

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Sd/-

Assistant Registrar(CS-IV)

// True Copy //

Sub Assistant Registrar

ssd

To

1. The Principal Subordinate Judge,
Salem
2. I Additional District Munsif, Salem.

Copy to: The Section Officer,
V.R.Section,
High Court, Madras-104.

+1cc to Mr.R.Karthikeyan, Advocate SR.No.7859
+1cc to Mr.T.S.Vijayaraghavan, Advocate SR.No.7946

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CB(17/02/2022)