



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.03.2022
PRONOUNCED ON : 05.04.2022

CORAM:

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

A.S.NO.331 OF 2019
AND
C.M.P.NO.11236 OF 2019

Arun Kumar ...Appellant / 2nd Defendant

Vs

1.Mrs.Eswari

2.Mrs.K.Devi

3.Mrs.Ramani

4.Mr.N.Hari ...Respondents / Plaintiffs

PRAYER : Appeal filed under Section 96 C.P.C., read with Order 41 Rule 1 of CPC, against the Judgment and Decree dated 21.01.2019 in O.S.No. 3754 of 2013 on the file of the XVI Additional City Civil Court, Chennai.

For Appellant : Mr.D.Shivakumaran

For Respondents : Mr.R.Manickavel

JUDGMENT

The defendant in O.S.No. 3754 of 2013 on the file of the XVI Additional City Civil Court, Chennai, is the appellant herein.

2. O.S.No. 3754 of 2013 had been originally filed as O.S.No. 7662 of 2008 on the file of the XIV Assistant City Civil Court, Chennai and later transferred to XVI Additional City Civil Court, Chennai and renumbered as O.S.No. 3754 of 2013.

3. The said suit had been filed by the plaintiffs against D.Ragurama Reddy, who died during the pendency of the suit and his legal representative / son, Arun kumar had been brought on record as defendant. This Appeal had been filed by the said defendant Arun Kumar.



4. The suit had been filed seeking delivery of vacant possession of property described in schedule 'B' to the plaintiff after removal of the unauthorised superstructure put up by the defendant and in default for the Court to direct removal of the unauthorised superstructure and deliver vacant possession and also for costs of the suit.

5. The plaintiffs are the legal representatives of K.R.C. Nachi. It was stated that the property, namely, the land and building in Plot No. 1, Kumaran Nagar, Peravallur, Chennai - 600 082, measuring 1 ground and 1250 sq.ft., (3650 sq.ft.) was part of a larger area of land belonging to J.Jankirama Raja, who had acquired the larger area under a deed of partition registered as Document No. 705 of 44 in the Sub Registrar Office, Sembium. Subsequently, he had developed, subdivided and plotted out the land into house sites.

6. K.R.C. Nachi, the husband of the first plaintiff and father of the 2nd to 4th plaintiffs had purchased the property described in schedule 'A' measuring 3650 sq.ft., by a registered sale deed dated 17.08.1973 and registered as Document No. 2863 of 1973 in the Office of the Sub Registrar, Sembium. He died on 22.11.1980 and the plaintiffs are his legal heirs.

7. It had been stated that owing to absence from being in physical possession, there had been an encroachment over the said property. This necessitated K.R.C. Nachi to file O.S.No. 4629 of 1979 against the encroacher, Murugan for declaration of title and recovery of possession. The suit was decreed on 19.02.1980. The appeal filed by Murugan was dismissed.

8. The plaintiffs, who had stepped in as legal representatives of K.R.C. Nachi, filed E.P.No. 3484 of 1993 for delivery of possession.

9. At that time, the defendant, D.Raghunama Reddy, was permitted to take possession by Murugan and he filed OS.No. 5950 of 1994 for permanent injunction restraining the plaintiffs herein from interfering with peaceful possession. The said suit was dismissed on 28.07.2000. The defendant filed an appeal in A.S.No. 24 of 2012. In the Appeal, since additional documents were sought to be produced, the matter was remanded back for marking the additional documents. The defendant, D.Raghurama Reddy however did not further prosecute O.S.No. 5950 of 1994 after it had been remanded back and therefore, that suit was dismissed.

10. The plaintiffs entered into a compromise with the legal representatives of Murugan and executed a sale deed on



11.10.2000 for the portion in which they were in occupation, measuring 2413 sq.ft.

11. Claiming that the defendant herein was in unlawful possession of 'B' schedule property which was a part of the 'A' schedule property and which measured 1237 sq.ft., the suit in O.S.No. 7662 of 2008 was filed, which, on transfer had been renumbered as O.S.No. 3754 of 2013, seeking delivery of vacant possession.

12. In the written statement, the defendant, D.Raghurama Reddy claimed that he was a lessee of Chelliamman Temple under a registered Lease Deed dated 07.08.1982 registered as Document No. 3713 of 1982 in Sub Registrar Office, Sembium. He had put up the superstructure and claimed he has been in continuous possession. He denied the title of the plaintiffs. It had also been stated that the suit was barred by limitation. The defendant asserted title and right to be in possession of the 'B' schedule property to the plaint. He denied that he had been put up by Murugan. He further stated that since there was no threat of dispossession, he did not pursue O.S.No. 5950 of 1994 after it had been remanded and permitted it to be dismissed for default. The defendant claimed that the suit should be dismissed.

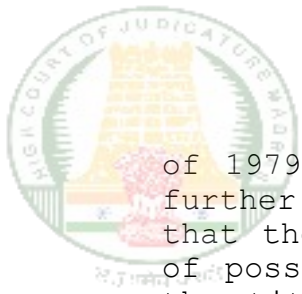
13. On the basis of the above pleadings, the following issues had been framed for trial:-

- (i) Whether the suit is maintainable?;
- (ii) Whether the plaintiffs are entitled for vacant possession as prayed for?;
- (iii) to what other relief if any the plaintiffs entitle to?

14. During the trial, the power agent of the plaintiffs was examined as PW-1 and Exs. A-1 to A-10 were marked. Ex.A-2 was the sale deed in favour of K.R.C.Nachi, Exs. A-3 and A-4 were the copies of Judgment and Decree in O.S.No. 5950 of 1994. Exs. A-6 and A-7 were the copies of the Judgment and Decree in A.S.No. 24 of 2012, Exs. A-8 and A-9 were copies of notices sent by the plaintiffs to the defendant.

15. On the side of the defendant, Arun Kumar was examined as DW-1 and an independent witness was examined as DW-2. Two documents were marked as Ex.B-1 and B-2, which were again copies of the Judgment and Decree in A.S.No. 24 of 2012.

16. On the basis of the pleadings and the oral and documentary evidence, the learned Trial Judge had first taken up for consideration issue Nos. 1 & 2 and observed that the plaintiffs filed an earlier suit against Murugan in O.S.No. 4629



WEB COPY

of 1979 which had been decreed in favour of the plaintiffs and further observed that the appeal was also dismissed and further that the plaintiffs had filed E.P.No. 3484 of 2020 for recovery of possession. It was further observed that in the said suit, the title of K.R.C.Nachi had been upheld and declared by the Court. It was therefore stated that the title of the cannot be reagitated by the defendant. It was also found that the defendant had filed O.S.No. 5450 of 1994 seeking protection of possession but that suit was also dismissed. The defendant had filed an appeal in A.S.No. 24 of 2012 but since a plea had been taken that the land belonged to a temple, the Appellate Court had remanded the matter back for recording evidence on that particular aspect. But however, the defendant did not take up that particular opportunity but rather permitted the suit to be dismissed for default. It was therefore observed and held by the learned XVI Additional City Civil Court Judge that the defendant had put up a claim that the temple owned the land only as an after thought and had not produced any documents to substantiate the same. It was therefore held that the title of the plaintiffs having already been declared by a Court of competent jurisdiction and the defendant having failed to establish that he was in lawful possession, that delivery of possession should be directed and accordingly, the suit was decreed. Questioning that particular Judgment and Decree, the defendant has filed the present First Appeal.

17. Heard arguments advanced by Mr.D.Shivakumaran, learned counsel for the appellant and Mr. R.Manickavel, learned counsel for the respondents.

18. The defendant in the suit is the appellant and the plaintiffs in the suit are the respondents. It would be judicious to retain the nomenclature of the parties in this Appeal as plaintiffs and the defendant.

19. Mr. D.Shivakumaran, learned counsel for the defendant stated that the plaintiffs have not come to Court with clean hands and had suppressed the fact that the land over which they claim title and from which they seek recovery of possession actually belonged to Chelliamman Temple and that, as a fact, had been admitted by the temple authorities during evidence in O.S.No. 5950 of 1994. It was stated by the learned counsel that the plaintiffs are attempting to usurp the land from lawful occupation of the defendant. He stated that the property for which the earlier suit was instituted was different and the property in which the defendant is in occupation is different. It was urged by the learned counsel that since the plaintiffs have no title over the property, recovery of possession cannot be granted.



20. Mr.R.Manickavel, learned counsel appearing for the plaintiffs on the other hand asserted that there is no dispute over the identity of the property and that, K.R.C.Nachi had purchased 3650 sq.ft., of land and since he was not residing there, encroachment was made to a larger area by one Murugan and he had to file a suit for declaration of title and recovery of possession and the suit had been decreed whereby the title of the plaintiffs in their status as legal representatives of K.R.C. Nachi had been declared by the Court. It was also pointed out by the learned counsel that the appeal filed had also been dismissed. It was also stated that an execution petition was filed and later, the legal representatives of Murugan also affirmed the title of the plaintiffs and had actually purchased that particular portion for valuable consideration. With respect to the defendant in the instant suit, the learned counsel pointed out that his earlier suit for permanent injunction had been dismissed and the appeal was remanded to establish whether the land belonged to the temple but the defendant did not take up that opportunity and permitted the suit to be dismissed for default. It was therefore stated that the right of the plaintiffs, who claimed recovery of possession had been recognised and therefore, the learned counsel stated that the suit had been properly adjudicated and decree passed in manner known to law. With respect to the issue of limitation, the learned counsel stated that the starting point of limitation was only after the suit in O.S.No. 5950 of 1994 had been finally dismissed and therefore stated that the suit had been filed within the period of limitation.

21. I have carefully considered the arguments and perused the relevant records.

22. The following points arise for consideration under Order 41 Rule 31 CPC:-

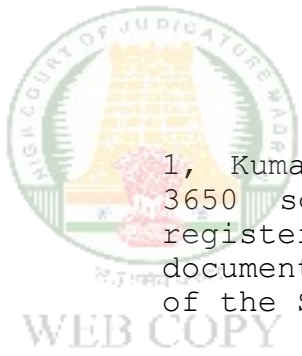
(i) Whether the suit for recovery of possession would be maintainable without a declaration of title particularly in view of the stand in the written statement that the land and the property belonged to Chelliamman Temple?

(ii) The effect of dismissal for non prosecution of O.S.No. 5950 of 1994 after remand, and whether the plaintiffs can take advantage of such dismissal of the suit?

The Points answered:

23. Since the discussion on the points overlap and converge on the same set of facts, they are taken up together for consideration.

24. The property which has been described in Schedule 'A' to the plaint was land and building bearing Plot No. 1, Door No.



1, Kumaran Nagar, Peravallur, Chennai - 600 082. It measures 3650 sq.ft. It had been purchased by K.R.C.Nachi by a registered sale deed from J.Janakirama Raja on 17.08.1973 by document registered as document no. 2863 of 1973 in the office of the Sub Registrar, Sembium.

25. K.R.C.Nachi died in an accident on 22.11.1980 at Vizhagapattinam. He was working as a Dam Contractor. Even before his death, since the property was not in his physical occupation, one Murugan had encroached to a portion of the land measuring 2413 sq.ft., out of the 3650 sq.ft., K.R.C.Nachi therefore filed O.S.No. 4629 of 1979 seeking declaration of title and recovery of that portion from Murugan. The suit was decreed. The appeal filed by Murugan was dismissed.

26. The plaintiffs stepped into shoes of K.R.C.Nachi as his legal representatives after his death. They filed E.P.No. 3484 of 1993 for recovery of possession. After the death of Murugan, the plaintiffs entered into a compromise with the legal representatives of the Murugan, who affirmed the title of the plaintiffs and purchased that particular property which had been encroached by Murugan measuring 2413 sq.ft., by a registered sale deed dated 11.10.2000. The remaining portion measuring 1237 sq.ft., had been encroached by the defendant in the suit, D.Ragurama Reddy. Since title had been declared in O.S.No. 4629 of 1979 with respect to the entire 3650 sq.ft., the plaintiffs instituted a suit for recovery of possession against D.Ragurama Reddy with respect to the 1237 sq.ft. This property has been described in schedule 'B' to the plaint.

27. In the written statement, the defendant / D.Ragurama Reddy claimed that he was in lawful occupation pursuant to a registered lease deed dated 07.08.1982 executed by Chelliamman Temple which document was registered as Document No. 3713 of 1982 in the Office of the Sub Registrar, Sembium. He therefore questioned and challenged the title of the plaintiffs to seek recovery of possession.

28. This stand would necessarily require a discussion whether the plaintiffs will have to again reassert their title over the property.

29. The defendant also filed O.S.No. 5950 of 1994 seeking protection of possession. In that particular suit, one of the defendants was the Executive Officer of Chelliamman Temple, Peravallur. That suit was dismissed by Judgment dated 28.07.2000. The defendant then filed A.S.No. 24 of 2002 which came up for consideration before the V Additional City Civil Court, Chennai. By Judgment dated 20.03.2003, the Judgment and Decree in O.S.No. 5950 of 2014 was set aside and the matter was



remanded back to the trial Court to examine the issue of title over the property.

30. This necessitated examination of the lease deed which the defendant claimed to have been executed in his favour by the temple which would indicate that the lessor had a right to lease out the land and which would further indicate that the lessor was a title holder of the land with right to lease out the land.

31. The suit in O.S.No. 5950 of 1994 was therefore remanded back to the V Assistant City Civil Court, Chennai, for marking of such related documents. After remand, the defendant had a burden to discharge, namely, to establish that the plaintiffs herein did not have any right over the property and that it was only the Chelliamman Temple which had right and title over the property. He however failed to appear before the Court. The suit was dismissed for default. This failure to establish a fact stated in his pleading, would only amount to abandonment of that fact and consequently of the relief claimed. Such abandonment is fatal to the reassertion of the same facts.

32. Order 23 Rule 1(4) CPC is as follows:-

"23-1(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 precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim."

33. The provision is clear. When the plaintiff abandons any suit, not only will he be liable for the cost to be paid but "he shall be precluded, from instituting any fresh suit in respect of such subject matter". This would imply that abandonment of the fact asserted that Chelliamman Temple was the owner of the land would directly imply that the defendant had taken a conscious decision to abandon to establish that fact that the title of the land belonged to Chelliamman Temple, to establish which fact, the First Appellate Court had actually remanded O.S.No. 5950 of 1984. Naturally this precludes and bars the defendant herein from putting up such a plea again. He cannot raise that particular plea in appeal even as a defence in view of such bar under Order 23 Rule 1 (4) CPC.



34. The learned Trial Judge had been aptly extracted the admission of DW.1 during his cross examination. It was observed as follows:-

“.....இந்த வாதி எனது சுவாதீனத்திற்கு இடையூறு செய்யக்கூடாது எனக்கூறி நான் அசல் வழக்கு எண் 5950/1994 என்றொரு வழக்கு தாக்கல் செய்துள்ளேன் என்றால் ஆமாம். அது தள்ளுபடி ஆனது என்றால் ஆமாம். அதற்கு மேல் ஏ.எஸ்.24/2002 இந்த மேல்முறையீட்டானது மீண்டும் விசாரணை நீதிமன்றத்திற்கு ரீமாண்ட் செய்யப்பட்டு மறுவிசாரணைக்கு அனுப்பப்பட்டு அங்கும் தள்ளுபடியானது என்றால் சரியானது.....”

35. The defendant had admitted that he had instituted a suit in O.S.No. 5950 of 1994 and that was dismissed. He had then filed A.S.No. 24 of 2002. A Judgment was passed remanding the matter back to the trial Court to establish the fact that the land belonged to Chelliamman temple. However, after remand the suit was dismissed for non-prosecution. Ex.A-6 is the Judgment in A.S.No. 24 of 2012 and it is seen that the reason for remand was only to determine whether the temple was the owner of the land. Neither the defendant nor the temple who was also a defendant in O.S.No. 5950 of 1994 had come forward after remand to establish that particular fact. They both abandoned that particular claim. Once that particular claim had been abandoned, it would not lie in the mouth of the defendant to reagitate that particular issue in this appeal in view of the bar under Order 23 Rule 1 (4) CPC.

36. Therefore, with respect to Point No.1, I would hold that the plaintiffs can take advantage of the fact that the defendant had failed to establish that the temple was the owner of the land and that even the temple had failed to establish that particular fact after remand of O.S.No. 5950 of 1994 and since they have both abandoned the suit itself, the said issue cannot be raised by the defendant to the disadvantage of the plaintiff. It would therefore mean that the plaintiffs need not file a suit for declaration of title but can seek recovery of possession on the basis of the title earlier declared in O.S.No. 4629 of 1979 which had also been affirmed in appeal and had become final.

37. The aforesaid discussion leads me to a natural conclusion that the effect of dismissal for non prosecution of O.S.No. 5950 of 1994 after remand was that the defendant had only raised a moonshine defence of title of the temple and the plaintiffs can take advantage of dismissal of O.S.No. 5950 of 1994 by which dismissal, the defendant herein had actually abandoned his claim that the temple was the owner of the land. The plaintiffs need not, as stated above, and as held above, institute any suit for declaration of title to maintain the suit for recovery of possession.



38. As a fact, the defendant is in possession. His possession has been found to be unlawful in O.S.No. 5950 of 1994 since protection to continue to be in possession had been negatived and the suit had been dismissed. Moreover, as against the true owner, an injunction cannot be granted to a person in unlawful possession. The plaintiffs are the true owners. Their title had been established by Ex.A-2 sale deed in favour of K.R.C.Nachi dated 17.08.1975. Their title had been further affirmed by the Judgment in O.S.No. 4629 of 1979, which was a suit for declaration of title. Their title had also been further affirmed by the legal representatives of Murugan, who had purchased the land under their occupation for valuable consideration and such land can be conveyed only by a title holder and the purchaser can purchase such land only from a lawful owner. The execution of that particular sale deed itself shows that the title of the plaintiffs has been affirmed. That particular sale deed had also been marked as Ex.A-5.

39. The Point No.2 is thus answered in favour of the plaintiffs that they can take advantage of the abandonment of the claim of the defendant to establish his assertion that the Temple was the owner of the land and that therefore, the suit for recovery of possession is maintainable.

40. The issue of limitation had not been agitated, but it has to be stated that the cause to institute the suit arose only after the defendant permitted O.S.No. 5950 of 1994 to be dismissed for non prosecution, abandoning his claim in the written statement.

41. I hold that the learned Trial Judge had considered all the issues in their proper perspective and even though the trial Judge had not examined the issue in the light of Order 23 Rule 1 (4) CPC, still a provision available in the statute can always be pressed into service.

42. I would therefore, dismiss the Appeal.

43. The Appeal is dismissed with costs. The Judgment dated 21.01.2019 in O.S.No. 3754 of 2013 on the file of XVI Additional City Civil Court, Chennai, is upheld. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CCC)

// True Copy //

Sub Assistant Registrar

vsg



To:

1.The XVI Additional Judge,
XVI Additional City Civil Court,
Chennai.

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

+1cc to Mr.D.Shivakumaran, Advocate Sr.No.23535

+2ccs to Mr.R.Manickavel, Advocate Sr.No.23163

A.S.No. 331 of 2019

And

C.M.P.No. 11236 of 2019

SSD(CO)
RVM(16/06/2022)