



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On :11.03.2022
Delivered On : 19.04.2022

CORAM

THE HONOURABLE MRS. JUSTICE R. THARANI

S.A. (MD)No.507 of 2015
and M.P. (MD)No.1 of 2015
and CMP(MD)No.1942 of 2016

1.Veerasamy (Died)

(Memo presented in Court on 09.07.2018 and memo recorded as 1st appellant died vide Court order, dated 09.07.2018 in SA(MD)No.507 of 2015.

2.Pappathi @ Periya Pappa

3.Chinna Pappa

4.Veeraiah

5.Rajathi

... Appellants / Respondents /
defendants

Vs.

1.Veeran @ Appayee

2.Veera Manikandan

... Respondents / Respondents /
Plaintiffs

Prayer : This Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree, in A.S.No.13 of 2014 on the file of the Sub Court, Theni, dated 31.03.2015, reversing the judgment and decree in O.S.No.46 of 2012 on the file of the District Munsif Court, Theni, dated 04.12.2013.

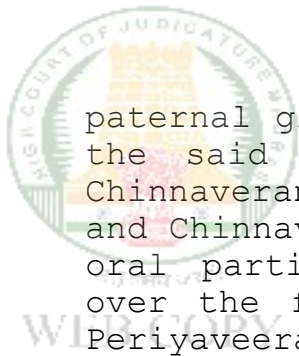
For Appellants : Mr.S.Natrajan
For Respondents : Mr.D.Sivaraman

JUDGMENT

This second appeal has been filed against the judgment and decree, in A.S.No.13 of 2014 on the file of the Sub Court, Theni, dated 31.03.2015, reversing the judgment and decree in O.S.No.46 of 2012 on the file of the District Munsif Court, Theni, dated 04.12.2013. The appellants herein are the defendants, the respondents herein are the plaintiffs in the original suit.

2.Brief substance of the plaint, in O.S.No.46 of 2012, is as follows:

2.1. The suit properties are the ancestral properties of the first plaintiff. The suit first schedule property belonged to the



paternal grand father of the first plaintiff, by name, Veeranan and the said Veeranan had two sons, viz., (i) Periyaveran and (ii) Chinnaveran. After the demise of Veeranan, his sons Periyaveeran and Chinnaveeran divided the property among themselves, by way of an oral partition. Subsequently, Chinnaveeran, released his rights over the first schedule property and handed over the property to Periyaveeran. After the death of plaintiffs' father, the plaintiffs were in enjoyment of the properties. The second schedule property is adjoining the first schedule property.

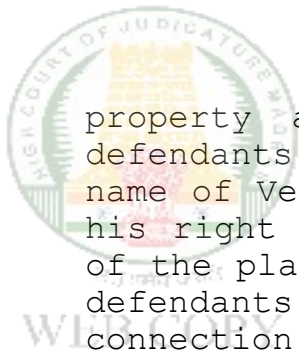
2.2. The second schedule property belonged to Chinnaveeran. The first plaintiff purchased the second schedule property on 29.11.1974 by way of a registered sale deed. Both the first schedule and the second schedule properties are in the possession of the plaintiff. Two houses therein are having the same EB connection. The first plaintiff executed a settlement deed in favour of his son, the second plaintiff and the second schedule property is in the enjoyment of the second plaintiff. The fifth defendant with the help of the defendants 1 to 4, fabricated a sale deed, dated 20.01.2010. The fifth defendant and the others trespassed into the property and they chased away the plaintiffs. The fifth defendant filed a suit in O.S.No.44 of 2010 against the first plaintiff's wife and her children. Subsequently, the case was dismissed for default. Hence, the suit is filed for permanent injunction.

3. Brief substance of the written statement filed by the first defendant and adopted by the defendants 2 to 4, in O.S.No.46 of 2012, is as follows:-

The original name of Chinnaveran is Veeraiah. The first schedule property is the ancestral property of the grand father of the first defendant. After his death, his sons entered into an oral partition. The first schedule property was allotted to the share of the father of the defendants 1 to 4. There is a lane on the western side of the first schedule property and beyond the lane, the first plaintiff's father was allotted a share and both the brother constructed houses in their respective share of the property. The door number of the first schedule property is 4. The first schedule property never belonged to the father of the plaintiffs or the plaintiffs. The defendants 1 to 4 sold a property adjoining the northern side of the first schedule property to the fifth defendant. The house in the first schedule property was transferred to the name of the fifth defendant and he is in enjoyment of the property. Without a prayer for declaration of title, the suit is not maintainable. There is no objection with regard to the second schedule property.

4. Brief substance of the written statement filed by the fifth defendant, in O.S.No.46 of 2012, is as follows:-

The suit property is the ancestral property of the defendants 1 to 4. After the death of the father of the defendants 1 to 3, the first plaintiff's wife, Periammal constructed a house in the first schedule



property and she resided there with her children viz., the defendants 1 to 3. The house tax, water tax, EB charges are in the name of Veerammal. It is wrong to state that Chinnaveeran released his right over the first schedule property in favour of the father of the plaintiffs. The fifth defendant purchased the property from defendants 1 to 4. After carrying out the repair works, he got EB connection in his name. The door number of the house in the first schedule property is only 4. The plaintiffs have wrongly stated the house Number as 2. There is no such door No.2 in ward No.6. The settlement deed was created only for filing this case. The property tax, water tax, EB connection are in the name of the fifth defendant. The plaintiffs are not having any right over the first schedule property. It is wrong to state that on 05.02.2010 and on 05.01.2012, the fifth defendant disturbed the possession of the plaintiffs.

5. Brief substance of the additional written statement filed by the fifth defendant is as follows:-

The suit second schedule property belonged to the first plaintiff and the defendants 1 to 4, one Chinnavellaiyan and Karuthakannan. All the four groups were doing laundry business in that locality. In the sale deed for the suit second schedule property, the southern boundary was mentioned as the share of Chinnaveran, which is the suit first schedule property. The first plaintiff and his wife and their son failed to repay a loan to the co-operative agricultural Bank and hence, the Bank has taken action against the second schedule property. In the written statement filed by the present plaintiffs in O.S.No.49 of 2010, they have stated that they have been removed from the suit first item of the property and prayed the suit to be dismissed.

6. Brief substance of the reply statement filed by the plaintiff is as follows:-

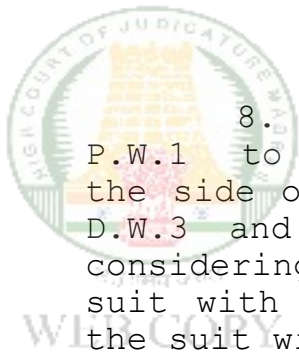
The fifth defendant cannot claim any right over the second schedule property. In the written statement of the defendants 1 to 4, they have admitted that they have not denied the right of the plaintiffs in suit second schedule property. Even in the evidence of D.W.1, it is admitted that the defendants 1 to 4 have no title or possession over the second schedule property and prayed the suit to be decreed.

7. On the above said pleadings, the following issues were framed by the trial Court:

" 1. Whether the suit property is in the possession of the plaintiff'?"

2. Whether the plaintiffs are entitled for a prayer of permanent injunction?

3. What are the other reliefs available to the plaintiff's ?



8. On the side of the plaintiff, 4 witnesses were examined as P.W.1 to P.W.4 and 20 documents were marked as Exs.A1 to A20. On the side of the defendants, 3 witnesses were examined as D.W.1 and D.W.3 and 20 documents were marked as Exs.B1 and B20. After considering the pleadings and evidence, the trial Court decreed the suit with regard to the second schedule of property and dismissed the suit with regard to the first schedule property.

9. Against the judgment and decree, the plaintiffs has preferred an appeal in A.S.No.46 of 2012 on the file of the Sub Court, Theni. After hearing both sides, the first appellate Court has allowed the appeal suit in A.S.No.46 of 2012.

10. Against which, the defendants in the original suit (appellants herein) have come forward with this Second Appeal, on the following grounds:-

The lower Appellate Court has failed to consider that the plaintiffs are not in possession of the property and they have admitted that they were not in possession as seen from Ex.A12. The plaintiffs have failed to prove the possession and hence the plaintiffs are not entitled to get an order of injunction. The lower Appellate Court has failed to consider that the defendants are having the right over the property and that the fifth defendant is in possession and enjoyment of the property. The plaintiffs have failed to prove that Chinnaveeran transferred his right over the property to the father of the first plaintiff. When there is a serious dispute about the title a suit for bare injunction is not maintainable. The plaintiffs have failed to produce any house tax receipt or water tax receipt, to prove their possession. Ex.A2 reveals the earlier partition and allotment of the suit property to Chinnaveeran. Ex.A15 was not proved due to the non examination of the photographer. The age of P.W.1 is 31, but, he has deposed that he was in the photograph taken 40 years ago and the first appellate court is wrong in relying on this photograph. The finding of the first appellate Court that the defendants have admitted that the suit property was allotted to the first plaintiff's father is wrong. The first appellate Court has failed to consider the documents viz., Ex.B5, Ex.B6, B7, B10, B11 and B12.

11. This Court, by its order, dated 01.09.2018, has admitted the second appeal and has framed the following substantial questions of law:-

“(I) When the plaintiffs seek for an injunction decree, he should prove that he is in possession and enjoyment of the suit property as held in 2008(4) SCC 182?

(II) When there is serious dispute about the title, is the bare injunction suit maintainable, without a prayer for declaration of title?



(III) Whether the Lower Appellate Court is right in relying on Ex.A.15, the photo, when the photographer was not examined, as held in 2006(2) CTC 43?

(IV) Whether the Lower Appellate Court is justified in shifting the burden of proof on the defendant to prove their possession and enjoyment?"

Issue No.I:

12. On the side of the appellants / defendants, it is stated as follows:-

The suit properties are the ancestral properties of one Veeranan. In the oral partition between his sons Periyaveeran and Chinnaveeran the suit first schedule property was allotted to the share of Chinnaveeran. After the death of Chinnaveeran, the defendants 1 to 4 are in enjoyment of the property. Subsequently, they sold the property to the fifth defendant. The plaintiff did not question the sale deed. There is no prayer to set aside the sale deed.

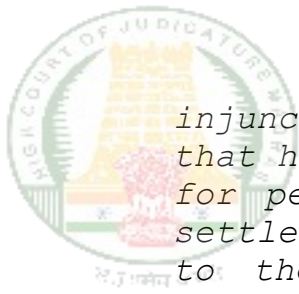
13. On the side of the appellants / defendants, it is stated the plaintiff claimed the property stating that Chinnaveeran released his right over the first schedule property in favour of his brother Periyaveeran and that it is the duty of the plaintiffs, who are seeking a prayer of injunction to prove that they are in possession of the property.

14. On the side of the appellants, it is stated that the plaintiffs are not at all in possession of the property and that the door number of the house in first schedule property is Four, but in the plaint, the door number of the house was wrongly mentioned as two and that the plaintiffs have given no number in the description of the property and that the plaintiffs herein have mortgaged a property with the Co-operative Bank and in that mortgage deed, in the boundary recitals, the suit property was shown as the property of Chinnaveeran.

15. On the side of the appellants, it is further stated that in an earlier suit in O.S.No.44 of 2010 in the written statement, the present plaintiffs have mentioned that they were thrown out from the property and that when the first plaintiff himself was not having any right over the property, the settlement in favour of the second plaintiff is also invalid.

16. On the side of the appellants / defendants, it is stated that the plaintiff, who is seeking a decree of injunction has to prove possession. A judgment of the Hon'ble Supreme Court reported in **2008-4-SCC-182 [Thimmaiah V. Shabira]** is cited, wherein, it is stated as follows:-

10. Undisputedly, the suit was one for permanent



injunction and in such a suit the plaintiff has to establish that he is in possession in order to be entitled to a decree for permanent injunction. The general proposition is well settled that a plaintiff not in possession is not entitled to the relief without claiming recovery of possession. Before an injunction can be granted it has to be shown that the plaintiff was in possession.

17. Another judgment of this Court reported in **2020-5-CTC-695 [John Pushparaj V. Kasi Nadar]** is cited by the learned counsel for the appellants / defendants, wherein, it is stated as follows:-

28. Now, the suit in O.S.No.397 of 1996 was filed only for permanent injunction on the basis of earlier judgment in O.S.No. 158 of 1962. Though the earlier judgment declared the title of Gnanaprakasam, there is no evidence available on record to show that he has filed any suit to recover the alleged possession after the judgment. But, at the same time, it is the specific case of the defendants that the plaintiffs are never in possession of the property even after the finding by Court in earlier suit. The present suit has been filed only on the basis of the alleged possession pursuant to the earlier finding. Therefore, a person, who was seeking injunction on the basis of the alleged possession, must establish his possession on the date of suit at least. The suit in O.S.No.397 of 1996 was not filed for declaration of title on the basis of prescription of title by adverse possession. What the plaintiffs sought is only permanent injunction on the basis of the alleged possession. Whereas, as stated above, it is the specific contention of the defendants that despite the finding in the earlier suit about the possession, only Gnanaprakasam was continued in possession of property.

18. On the side of the respondents, it is stated as follows:-

The first schedule property is on the southern side of the second schedule property and that Chinnaveeran had handed over the property to Periyaveeran. The trial Court has dismissed the suit on the impression that the plaintiffs were removed from possession and that in the written statement filed by them, in an earlier suit filed by the present fifth defendant in O.S.No.44 of 2010 the plaintiffs have admitted that they were dispossessed. The trial Court failed to consider Ex.A9, the police complaint lodged by the plaintiff against the defendant. In the second paragraph of the police complaint, it was stated that the defendants chased the plaintiffs and their family members. This fact was mentioned in the written statement in O.S.No.44 of 2010, but the same was misconstrued by the trial Judge. Without considering the wordings in Ex.A9, the trial Court has made a wrong observation that the written statement amounts to dispossession.



19. On the side of the respondents, it is further stated as follows:-

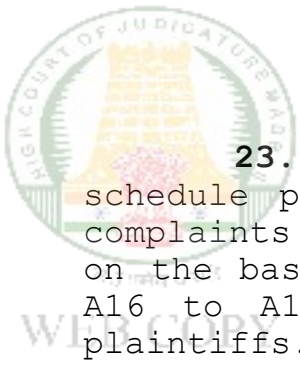
The defendants are not in possession of the property. The first defendant is residing in Vatlagundu. The second defendant is residing in Allinagaram, Theni District. The third defendant is residing at Madurai. The fourth defendant is residing in some other place. D.W.1 has deposed that he did not know the Door Number of the first schedule property and he did not know the boundaries of the first schedule property. A person, who was in possession till 2010, ought to have known the Door number and the boundaries and the defendants were not at all in possession of the property.

20. On the side of the respondents / plaintiffs, it is further stated as follows:-

Ex.B2 was not marked through the Municipal officers and that the Municipal officers were not examined as witnesses. There was no rubber seal in the document and that except Ex.B2, there was no other document on the side of the defendants, to prove that they were in possession and that there is a doubt regarding the name Veerammal, since the name of the daughter of Periyaveeran is also Veerammal.

21. On the side of the respondents / plaintiffs , it is stated that Door Number of the suit property is 2 and that the fifth defendant has filed a suit in O.S.No.44 of 2010 against the present plaintiffs and that the address of the present plaintiffs / defendants in the earlier suit was shown as Door No.2. In O.S.No.44 of 2010, summon was served to the present plaintiffs, in the above door No.2. Ex.A20, notice to the present second plaintiff was served in Door No.2, Madasamy Kovil Street and that in the sale deed, in favour of the fifth defendants, the existence of the house and the Door number of the house were not at all mentioned.

22. It is seen that the claim of the plaintiffs is that they are in possession of Door No.2, but Door No.2 was not mentioned in the plaint schedule of property. Only in para - 6 of the plaint, it was stated that the door number is 2. Ex.A16 - voter ID and Ex.A17 - Ration card were filed to prove the door number. Ex.A17 is in the name of one Sakthivel and not in the name of the plaintiffs. The said Sakthivel was not examined as a witness. The defendant denied the door number. On the side of the defendants, it is stated that there is no door number 2 in that street. A reply received under RTI Act was marked as Ex.B6. Both the suit schedule of properties are situated in Madasamy Kovil Street. On the western side of the first item of the property, there is a lane beyond the lane plaintiff is having a property, which was originally allotted to the share of Periyaveeran. When the dispute is with regard to first schedule property, it is the duty of the plaintiffs to prove the door number.



23. Ex.A2 and Ex.A7 are documents relating to the second schedule property. Ex.A9 and Ex.A10, A13, A14 and A18 are police complaints and acknowledgment cards. Possession cannot be decided on the basis of this documents. In total, Ex.A2, A10, A13, A14, A16 to A19 are not sufficient to prove the possession of the plaintiffs.

24. Ex.A11 is the copy of the plaint in the earlier suit in O.S.No.44 of 2010 filed by the fifth defendant against the plaintiffs herein. Ex.A12 is the copy of the written statement in the earlier suit. On the side of the appellants, it is stated that in Ex.A12, the present plaintiffs have stated that they were removed from the property. In Ex.A9, it was mentioned that the defendants were chased out, thereby, they have admitted that they were not in possession.

25. On the side of the appellants, it is stated that the door number of the first schedule property is 4. The property was transferred to the name of Veerammal M/o.defendants 1 to 4. Ex.B2 is the name transfer order. Ex.B5 is the EB receipt. Ex.B7, B10 and B11 are in the name of Veerammal. Later, the property was transferred to the name of the fifth defendant. Ex.B12 is the name transfer order and that P.W.4 has admitted that they never paid house tax or EB charges for the first item of the suit property. P.W.1 has admitted in his evidence that Chinnaveeran and Veerammal resided in the first schedule property.

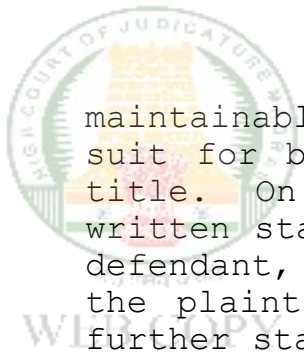
26. Item No.2 of the property was purchased by the plaintiffs, through Ex.A2, a registered sale deed. The southern boundary of second schedule property was shown as the house and share of Chinnaveeran. Ex.A4 is a mortgage deed with regard to the second item of the suit properties. In the boundary recitals, the first item of the suit property was mentioned as the property of the father of the defendants 1 to 4. In Ex.A12 the plaintiffs have admitted that they were removed from possession.

27. It is the duty of the plaintiffs to prove that they are in possession of the property. The plaintiffs cannot pick up holes in the case of the defendants. No house tax receipt was produced on the side of the plaintiffs to prove possession. The plaintiffs failed to produce sufficient document to show that they are in possession with regard to the first schedule property.

Issue No.2:

28. On the side of the appellants / defendants, it is stated as follows:-

The plaintiffs have prayed only for bare injunction, without a prayer for declaration of title and that the suit is not



maintainable. When there is a serious dispute regarding title, a suit for bare injunction is not maintainable, without a prayer of title. On the side of the appellant, it is stated that even in the written statement, the title of the plaintiff was questioned by the defendant, but, even then the plaintiffs have not chosen to amend the plaint and to add a prayer for declaration of title. It is further stated that the plaintiffs failed to prove that Chinnaveeran released his right over the property in favour of his brother / Periyaveeran. P.W.1 has admitted that he has not produced any document to prove that Chinnaveeran has released his right over the first schedule property in favour of his father Periyaveeran.

29. On the side of the appellants /defendants, it is stated that the plaintiffs failed to seek a relief of declaration of title and without a prayer of declaration of title, the injunction suit is not maintainable. To substantiate this claim, the learned counsel for the plaintiffs referred a case reported in **2013-4-MLJ-414 [N.Raman V. P.Sivalingam]**, is cited, wherein, it is stated as follows:-

12.A mere reading of it would show that if there is serious title dispute, the bare injunction suit should be dismissed. Accordingly, the first appellate Court correctly au fait with law dismissed the original suit after setting aside the judgment and decree of the trial Court.

30. Another judgment of the Hon'ble Supreme Court reported in **2018-6-CTC-101 [Jharkhand State Housing Board V. Didar Singh]** is cited, wherein, it is stated as follows:-

11. It is well settled by catena of Judgments of this Court that in each and every case where the defendant disputes the title of the plaintiff it is not necessary that in all those cases plaintiff has to seek the relief of declaration. A suit for mere injunction does not lie only when the defendant raises a genuine dispute with regard to title and when he raises a cloud over the title of the plaintiff, then necessarily in those circumstances, plaintiff cannot maintain a suit for bare injunction.

31. On the side of the respondents/ plaintiffs, it is stated that there is no dispute regarding title. It was the defendants, who are trying to grab the property of the plaintiffs and that in Ex.B9 - sale deed in favour of the fifth defendant, it was stated that only a vacant land was in possession of the defendants and that the sale deed is not relevant to the suit property. The contention of the defendants is that the fifth defendant purchased the property only in the year 2010 and at the time of execution of Ex.B9, the house was in a dilapidated stage and hence, the same was not mentioned in the sale deed.



32. On the side of the respondents / plaintiffs, it is stated that there is no necessity to pray for a declaration of title in all the cases and a suit for bare injunction is maintainable. A judgment of this Court made in **S.A.Nos. 2112 and 2113 of 2002 [Krishnamoorthy V. Nageshwari]**, dated 10.04.2013, is cited, wherein, it is stated as follows:-

13. At this juncture, I would like to fumigate my mind with the following decision of the Honourable Apex Court:

AIR 2004 SC 4609 [Rame Gowda (D) by L.Rs. vs. M.Varadappa Naidu (D) by L.Rs and another].

"8. It is thus clear that so far as the Indian Law is concerned the person in peaceful possession is entitled to retain his possession and in order to protect such possession he may even use reasonable force to keep out a trespasser. A rightful owner who has been wrongfully dispossessed of land may retake possession if he can do so peacefully and without the use of unreasonable force. If the trespasser is in settled possession of the property belonging to the rightful owner, the rightful owner shall have to take recourse to law; he cannot take the law in his own hands and evict the trespasser or interfere with his possession.

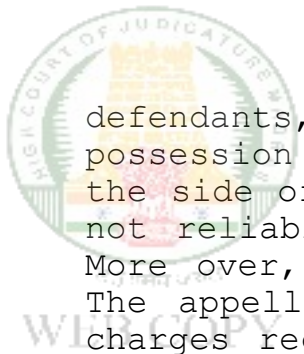
33. Admittedly one Veeranan was the original owner of the property. A partition between the two sons of Veeranan, viz. Periyaveeran and Chinnaveeran is also admitted. The plaintiffs have admitted that the first schedule property was allotted to the share of Chinnaveeran. In the above circumstances, the plaintiffs are duty bound to prove that Chinnaveeran relinquished his right and handed over the property to his brother. No document was filed on the side of the plaintiffs, to show that Chinnaveeran relinquished his right and handed over the property to Periyaveeran.

34. When the title was questioned, it is the duty of the plaintiffs, to sought for a prayer of declaration of title. In a bare injunction suit, the plaintiffs have to prove the possession of the property and how they got the possession of the property, hence, this question of law raised by the appellants / defendants is sustainable.

Issue Nos. III and IV:

35. On the side of the appellants / defendants, it is stated as follows:-

The first appellate Court shifted the burden on the defendants. But, it is the duty of the plaintiffs to prove possession and enjoyment. On the side of the appellants /



defendants, it is further stated that the plaintiffs failed to prove possession and enjoyment. Except a photo no document was filed on the side of the plaintiffs, to prove possession. The photograph is not reliable, unless the same is proved through the photographer. More over, a photograph cannot be a document to prove possession. The appellants produced house tax receipt, water tax receipt, EB charges receipt to prove possession. The defendants are denying the title and that there is no necessity for the defendants to prove title or possession.

36. On the side of the appellants, it is further stated as follows:-

Admittedly the property was allotted to the share of Chinnaveeran. P.W.4 has admitted that the plaintiffs have not paid any property tax or water tax etc. P.W.2 has admitted that he did not know the number of the house. Ex.B12-Patta was also changed in the name of the fifth defendant. Prior to the occupation of the fifth defendant, the property stand in the name of Veerammal, who is the mother of the defendants 1 to 3. Even P.W.1 has admitted that the defendants were in possession and the fifth defendant is residing in the property. Mere photograph is not sufficient enough to prove possession. The photographer was not examined and hence, Ex.A15 is not reliable.

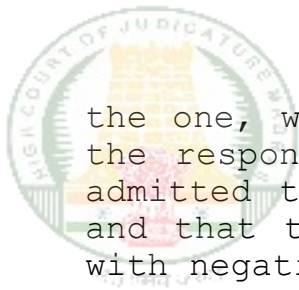
37. On the side of the appellants /defendants, it is stated that a photograph is inadmissible, without the examination of the photographer. A judgment of this Court reported in **2006-2-CTC-43 [P.Rama Srinivasa Rao V. Dr.N.Ragavan]** is cited, wherein, it is stated as follows:-

16. Generally, photographs are admissible only if the photograph has been properly verified on oath by a person able to speak to its accuracy. Photographs should not be admitted in evidence without examining the person who took the photographs and the negatives of the same being produced on record or at whose instance the photographs were taken.

17. Mere admission of the plaintiff that it is a photograph would not amount to correctness / accuracy of the photography or the angle of the building thereon.

38. On the side of the respondents / plaintiffs, it is stated as follows:-

The first appellate Court is correct in relying on Ex.A15 - Photograph. The trial Court failed to consider the photographs on the ground that the photograph was not marked through the photographer. A photograph can be marked, through the photographer or through the person, who instigated the photo to be taken or through a person, who is available in the photograph. The plaintiffs in the suit were available in the photograph and he is



the one, who instigated the photograph to be taken. On the side of the respondents / plaintiffs, it is further stated that D.W.3 has admitted that the location in the photograph is the suit property and that the plaintiffs are in the photo. The photos were marked with negative and hence the photos can be taken as a valid evidence.

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39. On the side of the plaintiffs, a judgment of this Court reported in **AIR-1993-Madras-346[Kumari Baghyavathi V. Smt.Llakshmi kanthammal]** is cited, wherein, it is stated as follows:-

"14. Both D.W. 1 Rajalakshmi and P.W. 1 Baghyavathi state in their evidence that some six years after the of the house in Thaiyappa Mudali street under the original of Ex.D1 by the former, housewarming ceremony was performed. Exs. P14 and P15 are photographs taken on that occasion. According to D.W. 1 she and Srinivasulu Naidu are found in these photographs. The learned counsel for the 3rd defendant assailed these photographs on the ground that in the absence of their negatives no importance could be attached to them. In these days of advanced photographic purchase technology there is every possibility of producing trick photos (sic). But it may be borne in mind that no objection was taken by the 3rd defendant when these photographs were admitted in evidence during the chief examination of D.W. 1 Rajalakshmi. While so the admissibility of these photographs cannot be questioned (sic) merely on the suggestion put to D.W. 1 Rajalakshmi (sic) that these photographs have been get up for the occasion. And Ex.14 and Ex.P15 photographs coupled with the evidence of P.W. 1 and D.W. 1 also probabillise in view that D.W. 1 Rajalakshmi and Srinivasulu Naidu had a separate residence of their own."

40. On the side of the respondents/ plaintiffs, it is further stated that the trial Court has discussed only two lines from a judgment of this Court reported in **2006-3-MLJ-625 [P.Rama Srinivasa Rao V. Dr. N.Ragavan]**. But has failed to consider the other observations made in that judgment. It is stated that no questions were raised in the cross-examination of P.W.1 and the photograph was admitted by D.W.3 and hence, the photograph is admissible in evidence and that in the judgment cited above this Court has made an observation as follows:-

11. Main point for consideration is, can such a photograph be marked through Plaintiff during his cross-examination, by the Defendant. As noted earlier, the lower Court has observed :



12. To appreciate the merits of the above contention, we may consider marking of documents during cross examination by showing the documents to the witness. The documents in the possession of the cross-examiner may either be admissible in itself or inadmissible. In this case, the Document/ Photograph is an admissible document. Though the document is admissible, can the document be admitted in evidence through the Plaintiff who had neither taken the photograph nor at whose instance the document was marked. Undoubtedly, the document being shown to the witness, when the witness asserts or admits the same, the document could be marked through that witness. But the "photograph" cannot be equated to such categories of documents which could be marked through cross-examination of witness.

13. Whether a photograph is a correct reproduction of the original, whether it correctly depicts the picture of the location depends on many factors viz., correctness of lens, state of weather and time taken, photographic skill adopted by the photographer, accuracy of the angle, availability of light and such other factors. The proof of identity of the site, location, objects and persons in the photograph photograph could be admitted in evidence only by examining the photographer.

41. There is no doubt that a photograph can be marked through a photographer or through a person, who instigated the photo to be taken or through a person who is available in the photograph. Whether a photograph is sufficient enough to prove possession is to be decided in this case. No door number was mentioned in the schedule of property. Two properties are mentioned in the case, there is no dispute with regard to second schedule property admittedly, the plaintiffs are in possession of the second schedule property. The plaintiff is residing in the house situated on the western side of the first schedule property. In the above circumstances, the admission of P.W.3 alone is insufficient to prove that the photo is with regard to the first schedule property. The availability of the house was not mentioned in Ex.B9. When the photograph was taken, what was the door number of the house in the photograph were not proved by the plaintiffs. It is not the duty of the defendants to disprove the case of the plaintiff. But, the first appellate Court made an observation that the defendants failed to prove his case. In the above circumstances, it is decided that Ex.A15 is not sufficient enough to prove the possession of the plaintiffs in the first schedule property. It is further decided that the first appellate Court is wrong in allowing the appeal, on the ground that the defendants failed to prove the case.



42. The plaintiffs have failed to prove their possession in the first schedule property. Ex.A15 is not sufficient enough to prove the possession of the plaintiffs in the first schedule property. The defendants need not disprove the case of the plaintiffs. The question raised by the appellants are sustainable.

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43. For the above reasons, this Second Appeal is allowed by setting aside the judgment and decree, in A.S.No.13 of 2014 on the file of the Sub Court, Theni, dated 31.03.2015 and by confirming the judgment and decree in O.S.No.46 of 2012 on the file of the District Munsif Court, Theni, dated 04.12.2013. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

Ls

To:

- 1.The Subordinate Judge,
Theni.
2. The District Munsif,
Theni,
- 3.The V.R. Section,
Madurai Bench of Madras High Court,
Madurai. (2 COPIES)

+1 CC to M/s.D. SIVARAMAN, Advocate (SR-19474[F] dated 19/04/2022)

+1 CC to M/s.S. NATARAJAN, Advocate (SR-19583[F] dated 20/04/2022)

S.A.(MD)No.507 of 2015

19.04.2022

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