



S.A.No.39 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.11.2022

PRONOUNCED ON : 31.01.2023

CORAM

THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

S.A.No.39 of 2012
and M.P.No.1 of 2012

- 1.Govindasamy
- 2.Murugaiyan
- 3.Ayyasamy
- 4.Ayyanar
- 5.Chandra
- 6.Parameswari
- 7.Nithesh
- 8.Sathish
- 9.Radha
- 10.Sundari
- 11.M.Ayyanar
- 12.Ramesh
- 13.Annamalai

...Appellants

[Appellants 4 to 8 brought on record as the legal heirs of the deceased 1st appellant vide order vide order of this Court dated 01.04.2016 made in C.M.P.No.966 to 968 of 2016 in S.A.No.39 of 2012]



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[Appellants 9 to 12 brought on record as the legal heirs of the deceased 1st appellant vide order vide order of this Court dated 01.04.2016 made in C.M.P.No.969 to 971 of 2016 in S.A.No.39 of 2012]

[2nd respondent transposed as 13th appellant vide order of this Court dated 01.04.2016 in C.M.P.No.965 of 2016 in S.A.No.39 of 2012]

Vs.

Munusamy

...Respondent

PRAYER : Second Appeal filed Under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 15.07.2011 made in A.S.No.2 of 2011 on the file of the Subordinate Judge, Tindivanam, partly allowing the Judgment and Decree dated 29.09.2010 made in O.S.No.154 of 2008 on the file of the Additional District Munsif, Tindivanam.

For Appellants	: Mr.N.Suresh
For Respondent	: Mr.T.T.Ravichandran

JUDGEMENT

This Second Appeal is preferred as against the Judgment and Decree dated 15.07.2011 made in A.S.No.2 of 2011 on the file of the Subordinate Judge, Tindivanam, partly allowing the Judgment and Decree dated

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29.09.2010 made in O.S.No.154 of 2008 on the file of the Additional District Munsif, Tindivanam.

2.The appellants 1 to 3 herein are the defendants 2 to 4 in the suit; appellants 4 to 8 are the legal heirs of the 1st appellant and appellants 9 to 12 are the legal heirs of the 2nd appellant. The 2nd respondent was transposed as 13th appellant and the respondent herein is the plaintiff in the suit.

3.For the sake of convenience, the parties are referred to as per their ranking before the trial Court.

4.The suit property has been situated in Survey No.62/1, New Survey No.107/1, in Vizhukam Village, Tindivanam Division, and the extent of property is 2 acres 97 cents. According to the plaintiff, the suit property as well as some other properties were acquired by way of inheritance by one Ponnusamy Nainar and after his demise, his three sons Pushpanatha Nainar, Anandharaji Nainar and Krishnadoss Nainar divided the properties in terms of the partition deed dated 19.09.1960, wherein, 1.48 acres of the suit



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property was given to Pushpanatha Nainar and 1.40 acres was given to Krishnadoss Nainar. The said partition deed has been marked as Ex.A.1.

5.The said two persons were in possession and enjoyment of the property and subsequently, the property allotted to Krishnadoss Nainar, was sold to Appavu Nainar S/o.Ayyanna Nainar vide sale deed dated 26.06.1963 which has been marked as Ex.A.2. Likewise, the property allotted to Pushpanatha Nainar was sold to one Ramesh S/o.Appavu Nainar vide sale deed dated 03.03.1979, which has been marked as Ex.A.3. Thus, the suit property which was allotted to Pushpanatha Nainar and Krishnadoss Nainar in the partition dated 19.09.1960 was purchased by Appavu Nainar and his son Ramesh as per Sale deed dated 26.06.1963 and 03.03.1979 respectively and ever since they were in possession and enjoyment of the property till it was sold to the plaintiff/ Munusamy on 18.06.1996 by the legal heirs of the Appavu Nainar after his demise. The said sale deed has been marked as Ex.A.4.



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6. Thereafter, the plaintiff was in possession and enjoyment of the same. The plaintiff stated that the patta was transferred to his name and kist was also paid by him. Prior to his purchase, the kist was paid by his predecessors and a copy of the patta issued in the name of plaintiff has been marked as Ex.A.5 and the kist receipts relating to the suit property has also been marked as Ex.A.6 to Ex.A.17. Thus, the plaintiff contends that he and his vendors were in possession and enjoyment of the property for nearly 48 years and accordingly, they have got right, title over the property. According to the plaintiff, the defendants have no right, title or interest in the said property and they were never in enjoyment and possession of the same. Since the defendants were making attempts to trespass into the property since 29.03.2008, the plaintiff has come forward with the suit.

7. On the other hand, opposing the claim of the plaintiff, it is contended by the defendants that the suit property in Survey No.62/1, measuring 2 acres was purchased by one Ayyanan @ Kattaiyan as per sale deed dated 09.08.1941 and after his demise on 22.02.1943, his sons,



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Samikannu and defendants 2 to 4 got the property. Subsequently the said

Samikannu died on 15.06.1987, leaving his only daughter as legal heir. The property belongs to the defendants herein and they are in possession and enjoyment of the same. The defendants stated that the property was purchased by them from the original owner of the property Samuthra Vijaya Nainar, who was the father of the vendor of the plaintiff and ever since the purchase in 1941, their father and after him, the defendants are in possession and enjoyment of the property. According to them, the vendors of the plaintiff have no right or title to sell the property and hence, the defendants sought for dismissal of the suit.

8.Before the trial Court, on behalf of the plaintiff, P.W.1 to P.W.3 were examined and Exs.A1 to A17 were marked. On behalf of the defendants, D.W.1 to D.W.3 were examined and Exs.B1 & B2 were marked.

9.The trial court, after considering the oral and documentary evidence placed before it by both sides, decreed the suit as prayed for holding that the



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plaintiff has got valid title and he is in possession and enjoyment of the property.

10. Aggrieved over the same, the appellants herein/defendants, preferred the First Appeal in A.S.No.2 of 2011 and the First Appellate Court, while coming to the conclusion that the suit property title vests with the defendants and the plaintiff has no title over the property, set aside the conclusion arrived at by the trial court, regarding the declaration of title in favour of the plaintiff but confirmed the Trial Court's finding by granting permanent injunction restraining the defendants from interfering with the possession of the plaintiff on the ground that the plaintiff has established possession in respect of the suit property.

11. Aggrieved over the judgment and decree passed by the First Appellate Court, the present second appeal has been preferred and the appeal was admitted by this Court by framing the following substantial questions of law:-

(i) Whether the Court below has erred in granting



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the relief of injunction in favour of the plaintiff when it is proved that the suit property remain vacant from 1967 and as such the principle possession follows title should have been adopted by the court below?

(ii) Whether the Court below is right in granting blanket permanent injunction in favour of the plaintiff in the face of its findings that the plaintiff is not even a bonafide purchaser for value?

12.Mr.N.Suresh, learned counsel appearing for the appellants/defendants would submit that the First Appellate Court ought not to have granted permanent injunction against the defendants who are the legal owners, when it has rejected the title of the plaintiff over the suit property.

13.Learned counsel would further submit that the suit property is the vacant land and no cultivation is taken place. The defendants are in



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possession and enjoyment of the suit property ancestrally. When the suit schedule property is vacant land based on Ex.B1/sale deed, the possession of the property has to be decided and accordingly, the defendants are deemed to be in possession since they are the true owners of the property. The plaintiff is not entitled to raise a plea of adverse possession since he filed the suit for declaration of title.

14.Learned counsel appearing for the defendants would submit that once the substantial relief of declaration of title is rejected, the Court below ought not to have granted consequential relief of permanent injunction. On this aspect, the judgment and decree passed by the First Appellate Court is perverse and the same is liable to be set aside.

15.In support of his contention, he referred the following judgments rendered by the Hon'ble Supreme Court.

(i) *Banarsi and others vs. Ram Phal* reported in *AIR 2003 SUPREME COURT 1989*.



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(ii) Padhiyar Prahladji Chenaji (deceased) through L.Rs vs.

Maniben Jagmalbhai (deceased) through L.Rs in Civil Appeal No.1382 of 2022 dated 03.03.2022.

16.Per contra, Mr.T.T.Ravichandran, learned counsel appearing for the respondent/plaintiff would submit that, at present, the plaintiff is in possession of the suit property. Since the possession is with the plaintiff, the First Appellate Court has rightly considered the submission of the plaintiff and granted injunction. He would further submit that the possession follows the title. The plaintiff proved his possession over the property from 1962 to till the date of filing of the suit by producing Exs.A1/partition deed, A2 to A4/sale deeds, A5/patta, Exs.A6 to A15/tax receipts and Ex.A16/patta. However, the defendants have only produced the sale deed pertaining to the year 1941 which was marked as Ex.B1 and one more document Ex.B2, which is the death certificate of Kattaiyan.

17.Further, he referred Order 41 Rule 22 and 33 CPC and submitted that though he lost the declarative relief before the First Appellate Court, it



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has considered the plea of the plaintiff and granted injunction in his favour.

Therefore, even without filing any cross objection for the relief of declaration, the plaintiff is entitled to make his case before this Court for declarative relief in terms of Order 41 Rule 22 and 33 CPC and this Court empowers to deal with the issue without cross-objection being filed by the respondent/plaintiff. Therefore, he would submit that as per the aforesaid exhibits, the plaintiff is in possession of the property and holding the title. Hence, he prayed to uphold the judgment and decree passed by the First Appellate Court and set aside the judgment of the First Appellate Court to the extent of rejection of the declarative relief in favour of the plaintiff and consequentially grant relief of declaration in favour of the respondent/plaintiff.

18.In support of his contention, he referred the judgment rendered by the Hon'ble Supreme Court in the case of ***K.Muthuswami Gounder vs. N.Palaniappa Gounder*** reported in ***(1998) 7 Supreme Court Cases 327***.



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19. Admittedly, the suit property is situated in Survey No.62/1, Vizhukam Village, Tindivanam Division, Vallam Sub Division and the property is stated to have been purchased by the plaintiff as per Ex.A.4, sale deed dated 18.06.1996. The parent documents of the same has been produced as Exs.A-1 to A-3 and they are dated 19.09.1960, 26.06.1963 and 03.03.1979 respectively. On the other hand, the defendants/appellants would submit that the property was purchased by their father on 09.08.1941 as per Ex.B.1/Sale deed. As per Ex.B.1/sale deed, the father of the defendants one Ayyannan @ Kattaiyan has purchased the properties from Samuthra Vijaya Nainar. It is admitted by the plaintiff in his evidence that the said Samuthra Vijaya Nainar is the father of Ponnusamy Nainar. According to the plaint averment, it is stated that the property was originally belonged to Ponnusamy Nainar and the same was partitioned after his death by his sons as per Ex.A.1/partition deed. Pointing it out, the learned counsel for the defendants contended that as the property had already been sold by the father of Ponnusamy Nainar in 1941 as per Ex.B.1/Sale deed, the so called partition deed dated 19.09.1960 by the legal heirs of the Ponnusamy Nainar is invalid and no title can be passed on them on the basis of the said



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document. It is also pointed out that the plaintiff in his evidence admitted that he did not secure encumbrance certificate at the time of purchase and the sale was effected on the basis of the parent documents only. In such circumstances, in the absence of any evidence being placed before the Court to show as to how the property sold away in 1941 as per Ex.B.1/sale deed and thereafter become the property of the family of Ponnusamy Nainar. In the absence of any evidence to prove the same, the alleged partition on 19.09.1960 by the legal heirs of Ponnusamy Nainar and subsequent sale of the suit property dated 09.08.1941 will not have any legal sanctity

20.As rightly pointed out by the First Appellate Court, the plaintiff has not examined any of his vendors or any other persons before the Court to establish as to how the property sold in the year 1941 by virtue of Ex.B.1, and came back to the family of Ponnusamy Nainar. P.Ws.2 and 3 were examined on the side of plaintiff and they have not stated anything about the preceding ownership of the suit property. P.W.2 has deposed that he was not aware about the original ownership of the property. P.W.3 has also deposed that he is also not aware of the Survey number and ownership



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details of the suit property. In such circumstances, it is clear that the sale effected in favour of the father of the defendants in 1941 by Samuthra Vijaya Nainar, who was the father of Ponnusamy Nainar is the prior sale and it gives the defendants right over the property as there is no material to show that the property was subsequently purchased or reclaimed by Ponnusamy's family. Further, the said finding of the First Appellate Court to that effect is not challenged by the plaintiff and hence, the same needs no interference.

21.However, the First appellate Court, after holding that the defendants are the true owners of the property, granted permanent injunction against them on the ground that the plaintiff is in possession of the property and as the same was established by Exs.A.5 to A.17. The said documents are patta and kist receipts relating to the suit property. The learned counsel for the appellants disputed the same and contended that the plaintiff, who claims the property under the sale deed has taken a contradictory plea of having adverse possession of the property and the same is fatal to the case of the plaintiff. Further, according to the



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appellants/defendants, patta and kist receipts is not sufficient to prove the possession of the property. It is also pointed out that the findings of the First Appellate Court is categorical that the defendants are the true owners of the property and in such circumstances, there cannot be permanent injunction against them, even assuming that the plaintiff is in possession of the property.

22.The learned counsel for the defendants in support of his contention relied upon judgment of the Hon'ble Apex Court in the case of ***Premji Ratansey Shah and others Vs. Union of India and others*** reported in ***(1994) 5 SCC 547***, wherein, it is held as follows:-

“5. It is equally settled law that injunction would not be issued against the true owner. Therefore, the courts below have rightly rejected the relief of declaration and injunction in favour of the petitioners who have no interest in the property. Even assuming that they had any possession, their possession is wholly unlawful possession of a trespasser and an injunction cannot be issued in favour of a trespasser or a person who gained



unlawful possession, as against the owner. Pretext of dispute of identity of the land should not be an excuse to claim injunction against true owner.”

23. It is clear that in view of the fact that the defendants are held to be the true owners of the property and the said finding of the First Appellate Court being not challenged by the plaintiff, there cannot be a permanent injunction against the true owners. Further, in the case on hand, even though the plaintiff produced Ex.P.6 to Ex.P.17 kist receipts which stands in the name of Plaintiff as well as his predecessors, it is admitted by the plaintiff in his evidence that after 1967, there is no cultivation in the suit property. Therefore, when the property is a vacant land without cultivation or any building, the possession is deemed to follow title and on that ground, the First Appellate Court is not justified in granting injunction as sought for by the Plaintiff, since the defendants are the real owner of the property. Therefore, the findings of the First Appellate Court that the Plaintiff is entitled for permanent injunction is unsustainable and the same is liable to be set aside.



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24.Further, when the plaintiff claims title over the property, he cannot claim adverse possession and he cannot take contrary stand and the finding of the trial court that Plaintiff has prescribed title to the property by adverse possession is not correct and the First Appellate Court has correctly answered the issue relating to the title.

25.In the present case, the plaintiff has sought for two reliefs, (i) declarative relief and (ii) permanent injunction. The declarative relief is the substantial relief and the injunction sought by the plaintiff is the consequential relief.

26.Admittedly, in the present case, the plaintiff has failed to get the substantial relief of declaration. When the plaintiff is not entitled for the substantial relief of declaration, certainly, he is not entitled for consequential relief of permanent injunction. In all grounds, the plaintiff has failed to prove that he is in possession of the property and also his ownership. When such being the case, the First Appellate Court while



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partly allowing the case of the plaintiff by granting permanent injunction and rejecting the declarative relief, has committed serious error in rendering the judgment and decree.

27.As far as the contention made by the learned counsel appearing for the respondent/plaintiff to set aside the judgment and decree passed by the First Appellate Court to the extent of rejection of declarative relief without filing any cross-objection in terms of Order 41 Rule 22 CPC is concerned, the plaintiff may defend himself without filing a cross-objection to the extend the decree which is in his favour, but if he intends to assail any part of the decree, it is obligatory on his part to file the cross-objection. After 1976 amendment of Order 41 Rule 22, the following insertion made in Sub-Rule (1), which makes it permissible to file a cross-objection.

(i) Grant decree partly in favour of the appellant and partly in favour of the respondent.

(ii) Decree is entirely in favour of the respondent, though the issue decided against the respondent.

(iii) Decree is entirely in favour of the respondent and all the issues also been answered in



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favour of the respondent but there is a finding in the judgment which goes against him.

28.The present case falls under the first category. In terms of the first category, it is necessary for the plaintiff to take cross-objection against that part of the decree, which is against him if he seeks to get rid of the same though he is entitled to support the part of the decree which is in his favour without taking any cross-objection.

29.In the present case, the plaintiff failed to get the substantial relief of declaration and he got only the consequential relief of injunction. Therefore, without filing cross objection before this Court to set aside the judgment of the First Appellate Court to the extent of the rejection of the declarative relief against the plaintiff, he is not entitled to claim such relief. Further, the plaintiff cannot insist this Court to interfere, to set aside the order or modify the decree passed by the First Appellate Court against him without filing any cross-objection.

30.With regard to the submission made by the learned counsel



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appearing for the plaintiff by referring Order 41 Rule 33 CPC is concerned,

Order 41 Rule 33 enables the appellate Court to pass any decree or order which ought to have been made and to make such further order or decree as the case may be in favour of all or any of the parties even though (i) the appeal is as to part only of the decree and (ii) such party or parties may not have filed an appeal. The Necessary condition that exercising under Order 41 Rule 33 of CPC is parties to the proceedings are before the Court and the question raised properly arises out of the judgment of the Lower Court. In that event, the First Appellate Court could consider any objection to any part of the order or decree and set it right. No hard and fast rule can be laid down in the circumstance under which the power can be exercised under Order 41 Rule 33 CPC. Each case must depend upon its own facts. Further, Order 41 Rule 33 CPC enables the appellate Court to pass any decree or order which ought to have been made.

31.The general principle is that a decree is binding on the parties to it until it is set aside in appropriate proceedings. Ordinarily, the Appellate Court must not vary or reverse a decree or order in favour of a party, who



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has not preferred any appeal and this Rule holds good notwithstanding Order 41 Order 33 CPC . However, in exceptional cases, the rule enables the Appellate Court to pass such decree or order as ought to have been passed even if such decree would be in favour of parties who have not filed any appeal. The power though discretionary should not be declined to be exercised merely on the ground that the party has not filed any appeal.

32.The plea of the respondent under Order 41 Rule 33 CPC cannot be considered when the Court below rejected the substantial relief of declaration. Without any title, the consequential relief of permanent injunction is not permissible. In the event, the declarative relief was granted, the Court is certainly empowered to consider the plea under Order 41 Rule 33 CPC but in the present case, it is not so. Therefore, it is not a case to comply Order 41 Rule 33 CPC to consider the plea without any cross-objection.

33.Accordingly, the substantial questions of law framed by this Court is answered.



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34.In the result, the Second Appeal is allowed. The judgment and decree passed by the First Appellate Court granting permanent injunction against the defendants is set aside. The suit in O.S.No.154 of 2008 is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

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Index : Yes / No
Internet : Yes / No

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To

1. The Subordinate Judge, Tindivana.
2. The District Munsif Court, Mettur.

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