



S.A.No.39 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 12.06.2023

Judgment Pronounced on : 19.06.2023

CORAM : JUSTICE N.SESHASAYEE

S.A.No.39 of 2019
and CMP.No.765 of 2019

M.Amutha @ Ponnammal

.... Appellant / Appellant / Defendant

Vs

S.Murugesan

.... Respondent / Respondent / Plaintiff

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code praying to set aside the decree and judgment in A.S.No.18 of 2016 dated 25.04.2018 on the file of III Additional District Court, Vellore at Tirupattur confirming the decree and judgment in O.S.No.28 of 2010 dated 13.04.2016 on the file of Sub Court, Tirupattur.

For Appellant : Mr.P.A.Sudesh Kumar
For Respondent : Ms.T.Ramadevi



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JUDGMENT

The defendant in O.S.No.28 of 2010 on the file of Sub Court, Tirupattur is the appellant herein. The suit is laid for declaration of plaintiff's title and for recovery of possession. The dispute pertains to a residential building plus the site thereof. The suit was successively decreed in favour of the plaintiff both by the trial Court and the First Appellate Court. Hence, the defendant is before this Court. Parties would be referred to by their rank before the trial Court.

2.The case of the plaintiff is as follows:

- The plaintiff is the brother of the defendant. The suit property originally belongs to a certain Thirupathi Gounder from whom the plaintiff had purchased it vide Ex.A1, sale deed dated 20.06.1991, and also had the revenue records mutated in his name. After the said purchase, the plaintiff had put up a residential building therein and has been duly paying the property tax to the local body which is seen supported by Exts.A3 to A11 and Ext.A12.



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- The plaintiff was working in RPSF since 1988, and was serving in eastern and central India. When the plaintiff left home for his job, he left his parents in the suit property, and to support them he required the defendant to be with his parents in the suit property. Few years down the line, the plaintiff's father passed away and the defendant continued to remain in the suit property, but she did not care her mother well. Indeed, the mother was constrained to leave the house to be with the brother of the plaintiff.
- It is in these circumstances, the plaintiff required the defendant to vacate the premises and handover vacant possession of the property, to which the defendant would make a counter request seeking sometime to vacate, as she had to undertake some maintenance work in the suit property. As this was dragging for some time, the plaintiff was constrained to issue Ex.A13, suit notice dated 13.02.2010.

3. The defendant had filed her written statement where she would plead that the plaintiff had executed a power of attorney in favour of their father Sanjeevi, who in turn had executed a sale agreement dated 05.03.1996, for the sale of the suit



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property in favour of the defendant and her sister Mala for a total consideration of Rs.1.30 lakhs, out of which Rs.1.20 Lakhs had been paid in advance and the balance amount of Rs.10,000/- has to be paid within a period of six months thereafter. As the plaintiff and his power of attorney evaded performance of their part of the contract, the defendant and her sister Mala had laid a suit for specific performance in O.S.No.149 of 1996, against the plaintiff and their father cum power of attorney of the plaintiff. On 26.11.1996, the trial Court had passed an exparte decree. Subsequently, the defendant herein had laid E.P.No.13 of 1997, for obtaining a sale deed in execution of the decree passed in the aforesaid suit. The entire facts are within the knowledge of the plaintiff. The suit is therefore, barred by limitation. Ever since the defendant had acquired the property, she has been paying property tax for the same.

4.1 The dispute went to trial and before the trial Court, the plaintiff examined himself as P.W.1, his mother as P.W.2 and an independent witness as P.W.3. On the side of the defendant, she examined herself as D.W.1 and also examined another as D.W.2. While the plaintiff had filed Ex.A1 to Ex.A17, the defendant had produced Ex.B1 to Ex.B6. On appreciating the evidence, the trial Court chose to decree the suit. Indeed, during trial, the plaintiff has produced Ex.A17,



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which is a copy of an order passed in E.P.No.13 of 1997, and it shows that on 08.01.2003, the said E.P was dismissed for non prosecution. The trial Court reasoned that inasmuch as the sale deed has not been executed in favour of the defendant in terms of the decree passed in O.S.No.149 of 1996, and it continues to remain with the plaintiff, the plaintiff is entitled to the relief sought.

4.2 This decree was challenged by the defendant before the First Appellate Court, and the First Appellate Court too subscribed to the line of reasoning of the trial Court. This is now under challenge in this appeal.

5. This second appeal is admitted for considering the following substantial questions of law:

a) Whether the Courts below considered the various capacity of the defendant's possession to the suit property, at various stages which varies from permissive occupier, agreement holder and finally culminated in to decree holder after paying the remaining sale consideration in to court to the suit property?

b) Whether the Courts below considered the plaintiff's



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capacity at various stages as owner of the property giving permission to the defendant, principal, when he appoints his father as power of attorney agent and as a Judgment Debtor on a date of decree in O.S.No.149 of 1996, which disentitled him to seek the relief of recovery of possession after the prolonged delay ?

- c) Whether the Courts below erred in not considering Article 65 of law of limitation, which bars the plaintiff to seek recovery of possession as he was ceased to be a owner after he became a judgement debtor?*
- d) Whether a judgement debtor in a suit can maintain a suit for declaration and recovery of possession of the same subject matter of the suit property in another suit after the lapse of 19 years ?*
- e) Whether both the Courts below are right in holding that the appellant could not get protection of his possession under Sec.53-*A of the Transfer of Property Act, without analysing the ingredients, which the present appellant had satisfied to avail the benefit of protection to her possession of the suit property?*



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- f) *Whether the appellate Court is right in holding that the protection of possession available to the transferee under Sec.53-A of the Transfer of Property Act is temporary in nature and having time limit for its existence, in the absence of an instrument of transfer, which is not completed in manner prescribed by the law?*
- g) *Whether there is any other perversity or illegality stands in the face of the decree and judgments of both the Courts below?*

6. On 12.06.2023, this Court framed the following additional substantial questions of law for consideration of this second appeal :

- i. *Is it not the "right to sue first accrues" for the relief of declaration to the plaintiff in the present suit from the date of decree in which the present plaintiff is happened to be a judgment debtor as prescribed in Article-58 of the Limitation Act, 1963?*
- ii. *Though the title does not pass to the plaintiff through a decree for specific performance, which in furtherance required a document required to be registered, is it not the cause of action for "denying or interested to deny"*



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made available to the decree holder on the date of decree for specific performance as enumerated under Section 34 of Specific Relief Act ?

7. Learned counsel for the appellant confined his arguments essentially to substantial questions (c) and (d) and the additional substantial questions framed, and made a pointed argument :

(a) The defendant was in possession of the property even prior to the sale agreement dated 05.03.1996. Once the sale agreement is obtained and when once a decree came to be passed in O.S.No.149 of 1996 on 26.11.1996, the character of defendant's possession ceased to be a permissive owner, at least from the date of the decree and after the decree, the defendant's possession can be traced only to the decree and not to anything that might have justified her possession prior to that and consequently her possession has become adverse to the title of the plaintiff.

(b) For the suit to be maintained, it should have been filed within 12 years from 26.11.1996. However, the present suit is laid well beyond 12 years, to be precise on 08.03.2010. When once a decree is obtained



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and E.P is laid, it is a notice to the plaintiff that the defendant is holding the property hostile to the title of the plaintiff. It cannot be denied by the plaintiff that the defendant's possession is not open as she is in occupation of a building belonging to the plaintiff. The suit therefore, is terribly barred by limitation which the Courts below have omitted to take into consideration.

8. Per contra, the counsel for the plaintiff argued that the plaintiff has not pleaded adverse possession as a line of her defence.

9. This Court finds it difficult to be persuaded by the submissions of the learned counsel for the appellant/defendant. The defendant builds her argument founded on adverse possession, but without pleading it. The foundation for adverse possession is *nec vi, nec clam, nec precario*, each of which involves a question of fact. It commences with an animus to hold possession hostile to the title of the title-holder of the property. The argument is that the defendant's possession had become adverse to the title of the plaintiff the moment she obtained a decree for specific performance in O.S.149 of 1996, but what interjects it is her non prosecution of E.P.No.13 of 1997. Did the defendant



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continue to have a hostile animus to hold the property thereafter? This is a material fact, and it is hence pleading adverse possession is mandatory. The defence of adverse possession is not a question of law, but is a mixed question of fact first and law next, and limitation operates only upon proof of each of the facts essential for constituting adverse possession.

10. In conclusion, this Court does not find any merit in the submissions of the learned counsel for the appellant and the substantial questions are liable to be answered against the appellant/defendant. The appeal is dismissed and the judgment and decree in A.S.No.18 of 2016 dated 25.04.2018 on the file of III Additional District Court, Vellore at Tirupattur confirming the decree and judgment in O.S.No.28 of 2010 dated 13.04.2016 on the file of Sub Court, Tirupattur is hereby confirmed. No costs. Consequently, connected miscellaneous petition is closed.

19.06.2023

Index : Yes / No
Speaking order / Non-speaking order
ds



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To:

- 1.The III Additional District Judge
District Court, Vellore.
- 2.The Sub Judge
Tirupattur.
- 3.The Section Officer
VR Section, High Court, Madras.



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N.SESHASAYEE.J.,

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Pre-delivery Judgment in
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