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S.A.(MD) No.642 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **03.11.2023**

CORAM:

THE HONOURABLE MR.JUSTICE **G.CHANDRASEKHARAN**

S.A.(MD) No.642 of 2023
and
C.M.P.(MD) No.14971 of 2023

Agilandam @ Ayilammal

..Appellant

Vs.

Pavun @ Pavunammal (died)

1.Balu

2.Chithra

...Respondents

PRAYER: Second Appeal filed under Section 100 of C.P.C., to set aside the decree and judgment of Sub Court, Thuraiyur in A.S.No.23 of 2018 dated 26.06.2023 confirming the decree and judgment of District Munsif Court, Thuraiyur in O.S.No.352 of 2003 dated 20.09.2017.

For Appellant

: Mr.A.Haja Mohideen

JUDGMENT

This second appeal is filed challenging the concurrent judgments in A.S.No.23 of 2018 on the file of the Sub Court, Thuraiyur in O.S.No.352 of 2003 on the file of the District Munsif Court, Thuraiyur.



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2.The deceased respondent, namely, Pavun @ Pavunammal, filed a suit in O.S.No.352 of 2003 for declaration of title and recovery of possession in respect of the suit property against the appellant/defendant.

3.The case of the plaintiff is that the suit property, which is a tiled house, belongs to the plaintiff. The suit property originally belonged to the plaintiff's grandmother, Mookayi Ammal through a registered sale deed dated 22.04.1943. Mookayi Ammal died leaving her only daughter, Palayiammal as her heir on 02.02.1951. Palayiammal was enjoying the suit property and she died leaving the plaintiff and her sister, Thangammal as legal heirs.

4.On 04.06.1987, plaintiff and her sister, Thanngammal had entered into a partition through a registered partition deed and that the suit property was allotted to the plaintiff. The defendant has no right in the suit property, however, the defendant filed a suit in O.S.No.90 of 1999 claiming a novel right in the suit property. After trial, the suit was dismissed. The appeal filed against the judgment in O.S.No.90 of 1999 was also dismissed by the Subordinate Court, Trichy in A.S.No.120 of 2001. Even thereafter, the defendant had been claiming possession in the suit property and using the property for taking bath. In the said circumstances, the suit was filed for the aforesaid reliefs.



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5. In the written statement filed by the appellant/defendant, the title set up by the plaintiff ie., sale deed dated 22.04.1943 and partition deed dated 04.06.1987 are denied. It is further stated that the plaintiff filed RCOP for evicting the defendant. The defendant denied the relationship of landlord and tenant. Therefore, RCOP was dismissed. RCA filed against the dismissal of RCOP was also dismissed. Though the remedy of counter claim was available to the plaintiff in O.S.No.90 of 1999, plaintiff had not chosen to seek the relief of counter claim. The defendant is in continuous uninterrupted possession for a period of more than 12 years in the suit property to the knowledge of the plaintiff and acquired the title to the suit property by way of adverse possession. The suit is barred under Order II Rule 2 CPC.

6. The trial Court, on the basis of the oral and documentary evidence, found that having filed the suit in O.S.No.90 of 1999 for the relief of declaration and other reliefs and failed and that there was a specific finding in O.S.No.90 of 1999 that the suit property belonged to the plaintiff in this case, it is not open to the defendant to again claim a title on the basis of the adverse possession. The trial Court also negated the claim of acquiring title by adverse possession and bar of the suit under Order II Rule 2 CPC and ultimately, decreed the suit. The judgment of the trial Court was confirmed by the first appellate Court in A.S.No. 23 of 2018. Therefore, this second appeal.



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7.The learned counsel for the appellant mainly canvassed this second appeal on the ground that the plaintiff is not in possession of the suit property for more than 12 years and it is an admitted case of the parties that the defendant is in possession of the suit property and therefore, the plea of acquiring title by adverse possession by the defendant is not properly addressed and adjudicated by the Courts below. That apart, the bar of the suit under Order II Rule 2 CPC is also not properly considered.

8.From the consideration of the material produced and the submission of the learned counsel appearing for the appellant, it is seen that the appellant/defendant filed a suit in O.S.No.90 of 1999 seeking the relief of declaration of title and for other reliefs in respect of the suit property. It is not in dispute that the Court had dismissed the suit. Appeal filed against the dismissal of O.S.No.90 of 1999 in A.S.No.120 of 2001 on the file of the Sub Court, Trichy, had also ended in dismissal. Thus, effectively the independent claim of title was negated by two Courts. It appears that there is no second appeal filed against the judgment in A.S.No.120 of 2001 and thus, the judgment in A.S.No.120 of 2001 becomes final. When a claim of independent title is set up and negated, it is not open to the appellant to again set up a claim in the suit property on the basis of acquiring title by adverse possession.



9.It is held in *V.Muthiah Pillai (died) and others v. Vedambal and others* reported in *1998 LW 606* that the concept of adverse possession contemplates a hostile possession, i.e., a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's rights, but denies them. The principle of law is firmly established that a person who bares his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed.

10.Foundational basis should be there with proper pleadings supported by evidence for a claim of adverse possession. That is miserably missing in the case of defendant. Ever since the dispute arose between the parties, the plaintiff in this case had been stoutly resisting the claim of the defendant in the suit property either by proprietary right or by right by adverse possession. The Courts below have also considered this aspect and negatived the plea of the defendant claiming right on the basis of adverse possession.

11.As regards the submission of the learned counsel for the appellant that the plaintiff in this case should have raised a counter claim in O.S.No.90 of 1999 and therefore, the suit is barred under Order II Rule 2 CPC, this Court is of



the considered view that this position taken by the learned counsel appearing for the appellant is against the law.

12.Order II deals with frame of suit. It reads as follows:-

“1.Frame of suit:- Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

2.Suit to include the whole claim: 1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

.....

13.The reading and understanding of this provision is that as far as practicable a suit has to be framed to prevent further litigation concerning the issue involved and the suit shall include the whole of the claim, for which the plaintiff is entitled to make in respect of the cause of action. However, this provision applies only to the case filed by the plaintiff. O.S.No.90 of 1999 was filed by the defendant in this case and not by the plaintiff in this case. Therefore, Order II Rule 2 CPC has no application to the facts of this case and the submission made by the learned counsel for the appellant in this regard is rejected. Both the Courts below, on the basis of the oral and documentary evidence, have concurrently found that the plaintiff/respondent is the owner of the suit property and is entitled for the relief of declaration of title and recovery of possession.



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14.In *Sir Chunilal V. Mehta and Sons v. The Century Spinning Co.*

Ltd., 1962 reported in *AIR 1962 SC 1314*, the Hon'ble Supreme Court formulated what amounts to a substantial question of law, as follows:

1. Whether it is of general public importance (or)
2. Whether it directly and substantially affects the rights of parties *and if so*,
3. Whether it is *either* an open question (in the sense not finally settled by this Court or Privy Council or Federal Court) *(or)*
4. The question is not free from difficulty and calls for discussion of alternative views.

15.In the case before hand, the appellant has not made out any of the aforesaid grounds to formulate substantial question of law. There is no substantial question of law arises for consideration in this second appeal.

16.In fine, this Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Speaking : Yes / No
NCC : Yes / No
Internet : Yes / No
Index : Yes / No

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To

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



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