



SA.No.1011 of 1999

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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DATED: 09.07.2024

CORAM

THE HON'BLE Mr.JUSTICE C.KUMARAPPAN

S.A.No.1011 of 1999

and

CMP.Nos.10522 of 1999 & 9541 of 2024

Parvatham Ammal (Died)

2. Durga Devi

(2nd appellant brought on record as LR of the deceased
first appellant vide order dated 08.11.2022 made
in CMP.Nos.16452, 16455 & 16454/2022)

... Appellants

- Vs -

1. Natesa Mudaliar (Died)

2. Marimuthu Ammal

3. Periyasamy (Died)

4. Dhanabagyam

5. Virudhambal

6. Selvi

7. Gnanambal

8. Banu

(R2 to R8 brought on record as LR's of the deceased
sole respondent vide order dated 06.01.2003 made in
CMP.No.8917/2000)

9. Vasuki

10.S.P.Arun Natesh

(R9 & R10 brought on record as LR's of the deceased
3rd respondent vide order dated 21.03.2017 made in
CMP.Nos.2693 to 2695/2015)



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11.T.Selvam

WEB CO (R11 impleaded as respondent vide order dated 03.07.2023
made in CMP.No.10441/2023)

... Respondents

Second Appeal is filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 11.04.1997 made in A.S.No.289/96 on the file of the Senior Subordinate Judge, Kallakurichi reversing the judgment and decree dated 28.04.1995 made in O.S.No.824/90 on the file of the Principal District Munsif of Kallakurichi.

For Appellants : Mr.Mukunth
Senior Counsel
for M/s.Sarvabhauman Associates

For Respondents : Mr.N.Manoharan for RR4 to 7 & RR9&10
Mr.R.Sunil Kumar for R8
Mr.P.Tamilavel for R11
R1 to R3-Died

J U D G M E N T

As per the order of My Lord The Hon'ble Acting Chief Justice dated 12.06.2024, this Second Appeal has been listed before this Court.

2. The plaintiff is the appellant herein and the defendant is the respondent in the instant Second Appeal.

3. For the sake of convenience, the parties will be referred to according to their litigative status before the Trial Court.



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4.1. The brief facts which give rise to the instant second appeal is that, the suit property absolutely belongs to the plaintiff. It is the submission of the plaintiff that the defendant's brother Vadivel Mudaliar has purchased the suit property in the year 1943 from whom, who has no title over the same. Therefore, the plaintiff's husband Ponnurangam Pillai filed a suit for declaration and for possession in O.S.No.34 of 1947. Wherein, he obtained decree on 13.11.1947. In pursuance of the said decree, the plaintiff's husband Ponnurangam Pillai has took delivery of possession of property on 28.04.1951 from Vadivel Mudaliar. Even after such delivery, when Vadivel Mudaliar has again interfered with the possession of the plaintiff, the plaintiff's husband Ponnurangam Pillai has again filed a suit in O.S.No.45 of 1953 and obtained a decree on 23.04.1954. In pursuance of such decree, a delivery of possession was effected in his favour on 28.09.1954. Not satisfying with the two litigations, Vadivel Mudaliar has again interfered with the plaintiff's husband's possession. Hence, the plaintiff's husband Ponnurangam Pillai has filed the third suit in O.S.No.469 of 1968, where the said Vadivel Mudaliar has submitted to a decree on 15.10.1968 and based upon such submission, the suit was decreed in favour of the plaintiff.



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4.2. It is the further submission of the plaintiff that, her husband has executed a Will dated 02.07.1971. Therefore, by virtue of the Will dated 02.07.1971, she became the absolute owner of the property, after the demise of her husband on 07.12.1972. Since the defendant, without having any manner of title or possession over the suit property, interfering with the possession and enjoyment of the plaintiff, necessitated the plaintiff to file the instant suit for the relief of permanent injunction.

5. The said suit was resisted by the defendant by contending that the entire suit property is not belonged to the plaintiff. According to the defendant, the boundaries given in the plaint is wrong and that the defendant has been in possession and enjoyment of item 2 property qua an extent of 10½ yards East-West, and 9¼ yards South-North with a Well. Thus, it is the case of the defendant that they have prescribed title to the suit property by adverse possession as their possession was open, continuous and adverse to the plaintiff for more than a statutory period. It is the submission of the defendant that he has got two brothers by name Vadivel Mudaliyar and Nallathambi Mudaliyar and that the defendant and his brothers were joint till 1946. Thereafter, there was an amicable, oral partition. In pursuance of



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such oral partition, they were in possession and enjoyment of their respective shares. Only to evidence the above said partition, a registered partition deed was entered between the parties on 22.11.1974. According to this defendant, by virtue of the above partition deed, the suit property was fell to the share of the defendant and his younger brother Nallathambi Mudaliyar jointly. It is also the submission of the defendant that, they have been using the suit property as cattle shed and for storing haystack and manure. It was the further contention of the defendant that O.S.Nos.34/1947 and 469/1968 will not bind upon this defendant as they were not the party to those suits. This defendant has specifically denied the possession receipt dated 28.09.1954. He would further submit that, he did not know as to how to write and read, but he would only know to sign. Therefore, it is his contention that the alleged possession receipt will not bind upon him. Hence, this defendant prayed to dismiss the suit.

6. Before the Trial Court, the plaintiff herself was examined as PW1 and marked 5 documents as Exs.A1 to A5. On behalf of the defendant, the brother of the defendant was examined as DW1 and marked one document as Ex.B1.



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7.1. The Trial Court, after having considered the oral and documentary evidence, more particularly the possession receipt attested by the defendant under Ex.A3 and also the decree stands in the name of the plaintiff, found that the plaintiff has established his possession over the suit property and ultimately decreed the suit.

7.2. Not satisfying with the judgment of the Trial Court, the defendant preferred the First Appeal. The First Appellate Court, on re-appreciation of evidence found that the plaintiff has not established his title over the suit property and that the document, which has been relied by the plaintiff viz., Exs.A2 and A3 deals about the property in S.F.No.524/2, whereas the suit property situate in S.F.No.521/6. Therefore, the First Appellate Court found that the plaintiff has not established his title over the property and it was also the finding of the First Appellate Court that the plaintiff has not even proved Ex.A1-Will, which is the basis of his right over the suit property. It was the further finding of the First Appellate Court that the plaintiff has not at all proved his possession over the property and ultimately dismissed the suit by allowing the First appeal.

7.3. Not satisfying with the judgement of the First Appellate court, the plaintiff has come forward with this Second Appeal.



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8. At the time of admission of the Second Appeal on 12.01.2001, this Court has framed the following substantial question of law:-

“1. Whether the Lower Appellate Court is right in law in wrongly applying the principles of resjudicata and estoppel inasmuch as the defendant claims title only under Ex.B1 as well as the purchaser under the same, who was a party to the earlier proceedings under Exs.A2 to A5 by which the title and possession of the plaintiff's husband was upheld?

2. It is open to the defendant to deny delivery of possession of the suit property to the plaintiff's husband under Ex.A4 especially when he was a witness to taking possession by the plaintiff's husband?

3. Whether the lower Appellate Court is correct in concluding that the subject matter of the earlier suits are different from the present suit in the absence of any dispute in this regard being raised by the defendant?”

9. The learned Senior Counsel appearing on behalf of the appellants would vehemently contend that the specific case of the defendant is that they have perfected title by way of adverse possession. But there are no documents or any other evidence available before this Court to establish their prescriptive title by adverse possession. It was further contended that their very pleading that they perfected title by way of adverse possession over the suit property



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would indirectly affirm the right of the plaintiff, therefore, the defence raised by the defendant that the plaintiff has not proved her title is contrary to their pleading. It was also the contention of the learned Senior Counsel that though the defendant has contended that they have partitioned the property in the year 1974, they have not submitted any documents more particularly, the partition deed. It is the further contention of the learned Senior Counsel that when a suit was filed for a permanent injunction, the defendant ought to have examined himself as a witness. Whereas, the defendant has not deposed before this Court. Hence, by relying upon the judgment of this Court in ***Kanagambaram Ammal Vs. Kakammal and others*** reported in **2004 (4) CTC 596**, the learned Senior Counsel would require this Court to draw the adverse inference against the defendant. It was also the contention of the learned Senior Counsel that by virtue of the judgment in Ex.A2 and Exs.A3 and A4-delivery receipts, the title of the plaintiff could be very well established. Therefore, by applying the axiom of possession goes with the title, prayed to allow this Second Appeal by granting decree to the plaintiff for a permanent injunction.

10. In addition to the above contention put forth by the learned Senior Counsel for the appellants, the counsel appearing on behalf of the R11, who



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is subsequent purchaser of the suit property from the plaintiff would independently contend that they are the *bona fide* purchaser for valuable consideration. It is their further contention that since 2002 then they have been in continuous possession of the property and that electricity connection stands in their name and that they have been using the suit property as the parking shed. Therefore, R11 has filed an application under Order 41 Rule 27 of CPC seeking leave of this Court to receive the additional documents as those documents would help in pronouncing the judgment of this case.

11. Per contra, the learned counsel appearing for the defendant would contend that, the defendant is entitled to plead as many as inconsistent pleas. Therefore, their mere pleading that they perfected title by way of adverse possession does not absolve the plaintiff's onus of proof, and does not mean that the suit property belongs to the plaintiff. The learned counsel would further contend that, here the non examination of the defendant himself cannot be put against the defendant as the defendant has examined his brother, who according to the pleading is also the joint owner of the property. Therefore, contended that the argument of the appellant for drawing adverse inference is nothing, but a futile argument. It was also the contention of the



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learned counsel for the defendant that, when a plaintiff has sought for a relief of permanent injunction by paying Court fee under Section 27(c) of the Tamil Nadu Court Fees and Suit Valuation Act, apart from title, it is the duty of the plaintiff to establish his settled possession over the suit property. Whereas the defendant did not submit any document beyond 1968 and he was not in position as to when and how the delivery of possession had taken place. Therefore, the case of the plaintiff that he has been in possession of the property is not supported by evidence. Hence, it is the contention of the learned counsel for the defendant that the findings recorded by the First Appellate Court is well merited and does not require any interference.

12. The learned counsel for the defendant would also strongly object in receiving the additional documents filed by the respondent under Order 41 Rule 27 of CPC on the specific ground that those documents are subsequent to the suit more particularly, subsequent to the Second Appeal. It was also the contention of the learned counsel for the defendant that *pendente lite* purchaser cannot take a defence of *bona fide* purchaser. Therefore, the learned counsel would submit that the documents cannot be received as the same is not come within triumvirate condition as enunciated under Order 41



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Rule 27 of CPC. Hence, prayed to dismiss the application.

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13. I have given my anxious consideration to either side submissions.

14. As rightly contended by the learned counsel for the respondents/defendant, here is the case the plaintiff has come forward with a specific prayer seeking a permanent injunction restraining the defendant not to interfere with their peaceful possession, on payment of Court fee under Section 27(c) of The Tamil Nadu Court Fees and Suit Valuation Act. In this regard, the learned Counsel for the defendant has relied upon the judgment of this Court in ***Kanniyapa Naidu & Others Vs. Krishnaveni*** reported in **2024-2-L.W.457**, wherein the Hon'ble Single Judge of this Court has elaborately discussed about the scope and ambit of Section 27(c) of the Tamil Nadu Court Fees and Suit Valuation Act, and also had discussed as to what are all the material requirement to establish their possession in such suit. While perusing the plaint averment, though the plaintiff has contended that they are the owner of the property and they have been in possession and enjoyment of the property, as rightly observed by the First Appellate Court during cross examination, PW1 has admitted that the suit property has been leased out to a third party and that she has been in possession and enjoyment of the property through his tenant. But, this factum was not at all been pleaded in



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the plaintiff.

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15. While considering the submissions made by the learned Senior Counsel for the plaintiff, his contention is that the defendant has not proved the adverse possession and that the defendant has not submitted the 1974 partition deed and that the defendant himself has not stepped into the witness box. If we carefully scrutinise the above arguments, it is nothing but projecting the weakness of the defendant's case. It is pertinent to mention here that whenever the plaintiff has approached the Court seeking the relief of permanent injunction, there is a duty cast upon the plaintiff to prove their case independently with their documents. In this regard, it is useful to refer the judgment of this Court in *S.Madasamy Thevar Vs. A.M.Arjuna Raja* reported in **2003-3-L.W-793**.

16. If we go by the documents submitted by the plaintiff, to substantiate their title, they are relying upon 5 documents. Out of which according to the plaintiff, the plaintiff's husband derived title from Exs.A2 to A5. In which, the plaintiff has succinctly rely that the defendant himself has attested in the possession receipt pertains to the suit property under Ex.A3.



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But, if we go by the plaint pleading, there is no specific averment as to the plaintiff's knowledge about the contents of the said document [Ex.A3]. Even while perusing the Written Statement, the defendant has categorically disputed his knowledge about the possession receipt. Therefore, since because the defendant has signed in Ex.A3-possession receipt, that by itself will not be sufficient to impute knowledge. To put it differently, the mere attestation will not *ipso facto* impute knowledge of the content of the document.

17. Apart from that, as rightly contended by the learned counsel for the defendant, the plaintiff has not pleaded as to the knowledge of the defendant about the contents of Ex.A3. Therefore, mere attestation in Ex.A3-document is not sufficient to hold that the plaintiff has got title over the property. Further, the plaintiff has been very much relying upon Ex.A1-Will as the basis for the title. As rightly contended by the learned Senior Counsel, notwithstanding the Will, the plaintiff, being the wife of the testator, she became the owner of the property as the successor to the original owner. Even then when the documents (Exs.A2 to A5) are not between the plaintiff and the defendant. The ultimate document relied by the plaintiff to prove her title is, the Will of the year 1971. As rightly found by the First Appellate



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Court in order to prove the Will, the plaintiff has not even examined any of the attesor as mandated under Section 68 of The Indian Evidence Act. Therefore, the finding recorded by the First Appellate Court that Ex.A1-Will has not been proved, is well merited.

18. At this juncture, the argument advanced by the learned counsel for the respondent assumes much importance.

19. Here it is the case of the plaintiff that they have been in possession and enjoyment of the suit property for quite long time. Therefore, notwithstanding the title in respect of the suit property, there is a duty cast upon the plaintiff to establish her settled possession in the property. As rightly observed by the First Appellate Court, the plaintiff did not submit any documents to prove her settled possession since 1968. Apart from that, the document which has been relied to substantiate the plaintiff's right over the suit property does not relate to the suit property. If we closely read Exs.A2 and A3, it is in respect of S.F.No.524/2. Whereas the suit property comprised in S.No.521/6. Therefore, this Court is of the firm view that the finding of fact recorded by the First Appellate Court that the plaintiff has not proved his possession over the suit property is well merited and this Court could not find any semblance of material to deviate from such finding. It is



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also pertinent to mention here that, the findings recorded by the First Appellate Court that the decree in O.S.No.469 of 1968 will not bind upon the defendant as the defendant was not a party to the said suit is also a well merited finding.

20. At this juncture, whether the document filed by R11 is relevant for passing the judgment in the Second Appeal, is to be seen. As rightly contended by the learned counsel for the respondents/defendant, these are all the documents emanated subsequent to the filing of Second Appeal. Therefore, to decide the Second Appeal, these documents are not at all relevant. As rightly contended by the learned counsel for the respondents, the *pendente lite* purchaser cannot plead and contest the case on the ground of *bona fide* purchaser for valuable consideration. As he had taken a calculated risk in spite of knowing the pendency of the litigation. Therefore, by virtue of Section 52 of the Transfer of Property Act, *pendente lite* transaction is absolutely prohibited except with authority of the Court. In this regard, it is useful to refer the judgment of the Hon'ble Supreme Court in ***Guruswamy Nadar Vs. P.Lakshmi Ammal (dead) through LRs and others*** reported in (2008) 5 SCC 796.

21. On perusal of the additional documents, two documents are photos



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and the other documents are electricity receipts. Those documents emerged only during 2022, well after the suit of the year 1990. Apart from that, as rightly contended by the learned counsel for the respondent/defendant, in order to grant leave to receive additional documents, triumvirate precondition as mandated under Order 41 Rule 27 of CPC has to be complied. But in this case, precondition mandated under Order 41 Rule 27 has not been met with. Therefore, this Court is of the firm view that the petitioner/R11 in CMP.No.9541 of 2024 has not made out any case to receive these documents. Further, when the plaintiff, from whom this R11 purchased the property, has not established his possession and title over the suit property. Therefore, the question of receiving those documents does not arise.

22. The learned Senior Counsel for the appellant has very much relied ***Kanagambaram Ammal***'s case (cited supra) to buttress his contention to draw adverse inference against the defendant, as he has not got me into the witness box. But, this argument was stoutly objected by the learned counsel for the respondent/defendant on the simple ground that the defendant has established his pleadings by examining a witness, who is none other than the brother of the defendant. It was also contended that only because of the



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medical condition of the defendant, his brother (DW1) came to the witness box and deposed. More pertinently, according to the averments made in the pleadings, this witness has also got some rights over the suit property. In view of the above submissions made by the learned counsel for the respondent, this Court could not be persuaded with the submissions made by the learned Senior Counsel, to draw adverse inference against the respondent under Section 114 (g) of The Indian Evidence Act. Thus, in view of the above detailed discussion, all the substantial questions of law are answered in favour of the respondents.

23. In the result, this Second Appeal is dismissed. There shall be no order as to costs. Consequently, connected CMPs are closed.

09.07.2024

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Index : Yes

Speaking Order : Yes

NCC : Yes

To

1. The Senior Subordinate Court,
Kallakurichi.
2. The Principal District Munsif Court,
Kallakurichi.

C.KUMARAPPAN, J

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