



S.A.No. 99 of 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.11.2024

CORAM:

THE HONOURABLE Ms. JUSTICE R.N.MANJULA

S.A. No.99 of 2011
and M.P.Nos.1 of 2011

Mani Padayachi

... Appellant/ 1st Defendant

Vs.

1. Ananthayi (deceased)
2. Karthikeyan (deceased)
3. Vaidyanathan
4. Boovaragavan
5. Gunasekaran

... Respondents / Plaintiffs 2 to 6

6. Mayavan (given up)

... 6th Respondent / 2nd Defendant

(R1 and R2 died and R3 to R5 are recorded as legal heirs of the deceased R1 as per the memo dated 27.08.2021 and vide orders dated 28.09.2021 and 09.12.2021 made in S.A.No.99/2011)

Second Appeal is filed under Section 100 of Civil Procedure Code, 1908, against judgment and decree dated 08.01.2010 passed in A.S.No.29/2010 before the Additional Sub-Court No.I, Cuddalore reversing the judgment and decree dated 13.04.2010 passed in O.S.No.213/2006 on the file of the Principal District Munsif's Court, Cuddalore.



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For Appellant : Ms.Nilafer
for Ms.R.Meenal
For R3 to R5 : Mr.Kingston Jerold
R1 & R2 : Died
R6 : Given up
R4 : No appearance

JUDGMENT

Heard Ms.Nilafer, the learned counsel for the appellant and Mr.Kingston Jerold, the learned counsel for R3 to R5.

2. The appellant is the first defendant. The suit has been filed by the plaintiffs for the relief of declaration of title and consequential permanent injunction and subsequently amended for recovery of possession. The trial Court dismissed the suit. The first appeal preferred by the plaintiffs was allowed by reversing the judgment of the trial Court. Hence, the first defendant had preferred this Second Appeal.

3. The short facts pleaded in the plaint:

The suit property was purchased by the first plaintiff through a sale deed dated 17.02.1966. By mistake, the Survey numbers in the sale deed has



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been wrongly mentioned as “Dry S.No.1032” instead of “Wet S.No.99/3”.

However, the boundary details would show that the suit property is “Wet S.No.99/3” comprising of 1 acre 37 cents. The first plaintiff was in possession and enjoyment of the suit property from the date of its purchase. The suit property was leased out to one Natesa Padayachi and Jayaram and they cultivated the property for 10 years and then executed a lease release deed on 18.05.1983 and surrendered the possession to the first plaintiff. The first plaintiff had raised paddy crops and they were two months old at the time when the suit was filed.

3.1 The patta of the suit property stands in the name of the first plaintiff in No.415 and he was paying the kist. The first defendant owns his property on the West and he wanted to purchase the property of the plaintiff and committed default. Now the defendants, by colluding between themselves, have attempted to trespass the suit property on and from 07.04.2006. Pending the suit, the defendants trespassed the suit property on 03.12.2006 and they are in unlawful possession over the suit properties. Though the plaintiff had originally filed the suit for declaration and permanent injunction, later amended the suit for adding the prayer for recovery of possession as well.



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WEB COPY 4. The brief averments of the written statement and additional written statement filed by the first defendant and adopted by the second defendant are as follows:

The villages by name “Senjikumarapalayam” and “Pillali” are adjacent villages and they have a common border. The plaintiff owns his property in Senjikumarapalayam village with water facility. When an adjacent property came up for sale, the plaintiff decided to buy the same. The plaintiff is also owning his property in Pillali village. Hence the plaintiff had decided to sell the suit property in Pillali village. By using the sale proceeds, he purchased the property in Senjikumarapalayam village adjacent to the property which he had already owned. The first defendant had agreed to purchase the suit property for a sale consideration of Rs.1,53,000/- and paid an advance of Rs.75,000/- and entered into a sale agreement on 11.05.1995. The plaintiffs have suppressed the material facts about the sale agreement in his plaint. The first defendant paid the balance sale consideration of Rs.78,000/- within a month and the property was delivered to the first defendant.

4.1 During the month of June, 1995, the first defendant was in possession over the suit property. As the first defendant and the first plaintiff



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were close friends from the year 1970, no execution of sale deed had taken place. The first defendant alone had been in enjoyment of the property since June, 1995. At the time of filing the suit, there were paddy crops and they were harvested by the first defendant and he again cultivated paddy crops. The first defendant is entitled to the benefit of Section 53 A of the Transfer of Property Act, as he had been in possession and enjoyment of the property through part performance of a contract and he had been ready and willing to have the sale deed executed in his favour. It is false to state that the first defendant had taken possession only during the pendency of the suit and hence the plaintiffs are not entitled to the relief as prayed.

5. On the basis of the above pleadings, the trial Court framed the following issues on 17.08.2006:

- “ 1) Whether the suit property purchased by the plaintiff under sale deed dated 17.02.1996 is true, valid and accepted and acted upon ?*
- 2) Whether the suit is maintainable ?*
- 3) Whether the plaintiff is entitled for declaration and permanent injunction ?*
- 4) To what other relief the plaintiff is entitled to ?”*

The following are the additional issues framed on 23.11.2006:

- 1) Whether the agreement dated 11.05.1995 mentioned in the*



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written statement filed by the first defendant is true ?

2) Whether the first defendant is entitled to Section 53-A of Transfer of Property Act ?

The following are the additional issues framed on 03.04.2007:

“ 1) Whether the plaintiff is entitled for recovery of possession of the suit property ?”

6. During the course of trial, on the side of the plaintiffs two witnesses were examined as P.W.1 and P.W.2 and Exs.A1 to A7 were marked. On the side of the defendants four witnesses were examined as D.W.1 to D.W.4 and Exs.B1 to B3 were marked.

7. At the conclusion of the trial and considering the materials available on record, the trial Court dismissed the suit. The first appeal preferred by the plaintiffs was allowed by the first appellate Court and the suit was decreed. Now the first defendant had filed this second appeal by raising the following Substantial Questions of law:

“ 1. Whether in law the lower appellate Court was right in omitting to protect the possession of the appellant under Section 53A



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of the Transfer of Property Act ?

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2. Whether in law the lower appellate Court was right in holding that the appellant had trespassed into the suit property without any proof ?”

8. Ms.Nilafer, the learned counsel for the appellant / first defendant, submitted that the evidence of P.W.1 and P.W.2 has been recorded before the plaint was amended on the allegation of trespass during the pendency of the suit; after the suit was amended by including the relief of recovery of possession, no witness on the side of the plaintiffs was recalled to depose evidence on the allegation of trespass and hence the factum of trespass has not been proved and that was not properly considered by the first appellate Court; the first plaintiff have not proved his title over the suit property and the first appellate Court has thrown the burden on the defendant to prove that he is in possession of the property; even though the trial Court has rightly rendered a finding that the plaintiff did not prove that the defendant had trespassed into the property, the first appellate Court had misguided itself with regard to the proof of factum of possession along with date from which the first defendant was in possession.



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9. Mr.Kingston Jerold, the learned counsel for the respondents 3 to 5, submitted that the first defendant who has pleaded that he had entered into a sale agreement with the first plaintiff, is not estopped from pleading that the first plaintiff did not have title over the suit property; even in Ex.B1 – sale agreement, nothing was stated about handing over the possession as pleaded by the first defendant; the first defendant did not prove the fact that he has paid the balance sale consideration to the plaintiffs; even the defendant's witness D.W.3 – Rajagopal, himself has admitted that the first defendant had trespassed in the suit property before two years; hence, the first appellate Court has rightly allowed the appeal.

10. Though it is the contention of the appellant / first defendant that he had entered into a sale agreement with the deceased plaintiff, it is submitted on behalf of the appellant / first defendant that the first plaintiff did not prove his title. The appellant / first defendant did not prove ownership of the property but the contention of the first defendant all along was that he is the agreement holder who had entered into a sale agreement with the plaintiff for the sale consideration of Rs.1,53,000/- and he had entered into a written sale agreement on 11.05.1995 and paid the earnest money of Rs.75,000/-. The appellant / first defendant also did not deny the fact that the sale agreement



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was entered into between himself and the deceased first plaintiff.

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11. The contention of the plaintiffs is that in pursuant to the sale agreement, the defendants were not inducted into the possession and they have only trespassed the suit property subsequently. It is further submitted that the first defendant had not paid the balance sale consideration as admitted by him and hence his possession over the suit property was illegal.

12. The first defendant who had entered sale agreement with the deceased first plaintiff by admitting the title of the first plaintiff cannot now claim that the plaintiff does not have the ownership over the suit property. If the plaintiffs does not have any valid title to pass ownership in favour of the appellant / first defendant, it would not have been possible for the first defendant to enter into a sale agreement with the first plaintiff. However, it is difficult to understand why the plaintiffs have raised a cause of action when the first defendant himself did not deny the title of the plaintiffs over the suit property. Even the defendants did not file any suit for specific performance.

13. The appellant / first defendant goes boldly with his submission that he had been inducted into possession right from the date of sale



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agreement and he has claimed that he has been in part performance of contract. For the reasons best known to the appellant / first defendant, he did not file any suit for the relief of specific performance. According to the first defendant, he has been in possession of the suit property for the past 15 years and the plaintiffs have set up a story that the defendants have trespassed during the pendency of the suit. The records would show that the plaintiff's witnesses have been examined before the suit was amended by seeking the relief of recovery of possession. But the non-examination of any witness from the plaintiff's side would deprive the plaintiffs from proving the allegation of unlawful possession over the suit property from any particular point of time. As the plaintiffs have filed the suit for recovery of possession, they have to prove that the defendants have trespassed the suit property during the pendency of the suit. Unless the plaintiffs discharge the said burden it cannot be fair in law to grant the relief of recovery of possession.

14. The learned counsel for the respondent 3 to 5 has attracted the attention of the Court to the evidence of D.W.3 wherein he has stated that the defendant was in enjoyment of the suit property for the past 15 years and hence it is claimed that the plaintiff has proved the illegal occupation of the first defendant. But the evidence of D.W.3 has to be read totally. On the first



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question which was put to D.W.3, prior to the question suggesting that the defendant was in two years enjoyment, it was submitted by D.W.3 that the deceased first plaintiff was in enjoyment of the suit property for 15 years. The next suggestion that was put to D.W.3 appears to have not been carried out by the stenographer properly. The lower appellate Court has shifted the burden on the defendants instead of placing the burden on the plaintiffs to prove that the defendants have trespassed the suit property during the pendency of the suit.

15. When the plaint was filed by the deceased first plaintiff, the burden is on him to prove that he was dispossessed from the suit property during the pendency of the suit. Only after the plaintiff proves the said fact, the burden would shift upon the defendant to prove that he was only inducted into possession of the suit property. Since the first plaintiff has failed to discharge his duty in establishing possession over the suit property at the time when the suit was filed, the first appellate Court is not right in granting the relief of recovery of possession. In fact the plaintiffs could not produce any original documents as the documents of title according to the plaintiffs, were lost. But the fact remains that the appellant / first defendant cannot deny the title of the first plaintiff as he himself has pleaded that he is



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an agreement holder for the suit property.

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16. The sale agreement was not denied and receipt of sale advance amount of Rs.75,000/- was also not denied by the plaintiff. The possession of the first defendant over the suit property has also been admitted though it has been claimed by the plaintiffs that it is after the filing of suit. In the absence of any evidence to show that the defendants have trespassed in the suit property only during the pendency of the suit, the enjoyment of the appellant in the suit property cannot be considered as illegal. Thus the substantial question of law (i) & (ii) are answered in favour of the appellant / first defendant.

17. As the first appellate Court has misdirected itself by shifting the burden of proof on the defendants and the defendants witnesses themselves have stated that the defendants were in enjoyment of the property for more than several years, the lower appellate Court ought to have appreciated the above evidence. The first appellate Court has not properly appreciated the evidence on record though it has been rightly approached by the trial Court. In view of the same, I feel the judgment of the first appellate Court should be set aside.



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18. In the result, the second appeal is allowed and the judgment and decree dated 08.01.2010 passed in A.S.No.29/2010 on the file of the Additional Sub-Court No.I, Cuddalore is hereby set aside and the judgment and decree dated 13.04.2010 passed in O.S.No.213/2006 on the file of the Principal District Munsif's Court, Cuddalore, is hereby confirmed. No costs. Connected miscellaneous petition is closed.

22.11.2024

Index:Yes/No

Speaking Order / Non-speaking order

Neutral Citation Case : Yes / No

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To:

1. The I Additional Subordinate Judge

Coimbatore.

2. The Principal District Munsif,

Coimbatore.



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R.N.MANJULA, J.

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