

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.04.2009

Coram:

THE HONOURABLE MR.JUSTICE G.RAJASURIA

S.A.No.775 of 2008

and

M.P.1 of 2008

1.Selvam

2.Mari

3.Devaraj

4.Sankar ... Appellants

vs.

1.Vajjiravely Mudaliar

2.Palani

3.Shanmugam

4.Anandaraj

5.Jaisankar

6.Thiyagu Respondents

This second appeal is filed against the judgement and decree dated 30.6.2006 passed by the learned Additional District Judge, Fast Track Court, No.III, Chengalpattu at Poonamallee, in A.S.No.46 of 2004, confirming the judgement and decree dated 27.4.2004 passed by the learned District Munsif, Court, Poonamallee, in O.S.No.78 of 1996.

For Appellants : Mr.N.Damodaran

For Respondents : Mr.T.K.Karunakaran

for R1

JUDGMENT

This second appeal has been filed by the the defendants 5 to 8, animadverting upon the judgement and decree dated 30.6.2006 passed by the learned Additional District Judge, Fast Track Court, No.III, Chengalpattu at Poonamallee, in A.S.No.46 of 2004, confirming the judgement and decree dated 27.4.2004 passed by the

learned District Munsif, Court, Poonamallee, in O.S.No.78 of 1996. For convenience sake, the parties are referred to here under according to their litigative status before the trial Court.

2. A summation and summarisation of the relevant facts, which are absolutely necessary and germane for the disposal of this second appeal, would run thus: (a) The first Respondent/plaintiff filed the suit O.S.No.78 of 1996 as against as many as nine defendants, seeking bare injunction on the ground that the defendants are trying to disturb his possession in his cultivation.

(b) The defendants entered appearance and resisted the suit by claiming that they are in possession and enjoyment of the suit property, by raising huts therein.

(c) During enquiry, the trial Court framed the relevant issues. The plaintiff examined herself as P.W.1 and Exs.A1 to A.15 were marked. The first defendant examined himself as D.W.1 and the 6th defendant examined himself as D.W.2 and Ex.B1 was marked. Exs.C1 and C2 were marked as Court document.

(c) Ultimately, the trial Court rejected the plea of the defendants and decreed the suit, recognising the plaintiff's possession to the effect that the plaintiff has been cultivating crops therein, as against which, the first appeal A.S.No.46 of 2004 was filed by the defendants 5 to 8 for nothing but to be dismissed by the first appellate Court. (d) Being disconcerted and aggrieved by the judgements and decrees of both the Courts below, this second appeal has been focussed on various grounds suggesting the following substantial questions of law, which are extracted here under:

"a) Whether the suit filed by the first respondent seeking for permanent injunction without seeking for the relief of declaration of title is maintainable in law, when the appellants have specifically denied the title of the first respondent to the suit property by adducing Ex.B1 document? b) Whether the courts below erred in law and misdirected themselves in granting a decree for permanent injunction when the first respondent has failed to prove his possession and enjoyment of the suit property on the date of the suit by adducing necessary evidence except list receipts? c) Whether the lower appellate Court as a final court of facts, erred in law and misdirected itself in merely confirming the findings of the trial Court without rendering any findings on each issues involved in the first appeal and much to the prejudice of the appellants herein? d) Whether the Courts below are correct in granting a decree for permanent injunction in favour of the first respondent, when admittedly the appellants herein have been in possession and enjoyment of the suit property on the date of the suit, even assuming and without admitting as trespassers, and as such they cannot be evicted except by due process of law?" (extract as found in the memorandum of second appeal)

3. Heard the learned counsel appearing for the defendants 5 to 8/appellants and the learned counsel appearing for the plaintiff/first respondent.

4. The learned counsel for the defendants would develop her argument to the effect that 'Keertheeswaran temple' is the actual owner of the suit property by virtue of Ex.B1-the 'Will' dated 30.9.1901 executed by Sandu Mudaliar and in such a case, the plaintiff is having no right to claim possession based on concocted documents.

5. Whereas, the learned counsel for the plaintiff would argue, by inviting the attention of this Court to paragraph No.17 of the judgement of the lower Court, that Palani/D1(D.W.1) deposed to the effect that ever since 1980 onwards only the plaintiff has been in possession and enjoyment of the suit property and cultivating paddy and ground nut crops. As such, based on such supine admission on the side of the defendants, the trial Court rendered its judgement. Over and above that under paragraph 14, the trial Court correctly commented as under:-

"14. The contentions of the plaintiff while filing the suit is that the defendants are trying to encroach on the suit property. Whether the new construction of huts, during the inspection of the Advocate-Commissioner

will lead to a actual possession of the suit property? The answer is 'No'. Because no one could be expected to live in a hut in which there is no wall and in which there is a wall for 4 feet, without door and window. There was not even a single finished hut in which one cannot expect the defendants could be living. In the absence of not even a single finished hut, the defendants' story that they are in possession of the suit property by constructing huts, long prior to suit is an utter concocted story."

As such, the trial Court commented upon the fact that simply because the Advocate Commissioner visited the suit property, who could see a few huts put up by the defendants, the Court cannot jump to the conclusion that the defendants have been in possession and enjoyment of the suit property.

6. At this juncture I would recollect and call up the concepts 'corpus possessionis and the animus possidendi'. An excerpt from the famous treatise Salmond's Jurisprudence would run thus: ". . . . Salmond considered that possession consisted of a corpus possessionis and an animus possidendi. The former, he thought, comprised both the power to use the thing possessed and the existence of grounds for the expectation that the possessor's use will not be interfered with. The latter consisted of an intent to appropriate to oneself the exclusive use of the thing possessed. It is certainly true that in assessing whether possession has been acquired, lost or abandoned intention may be highly relevant.

The test then for determining whether a man is in possession of anything is whether he is in general control of it. Unless he is actually holding or using it in which event he clearly has possession we have to ask whether the facts are such that we can expect him to be able to enjoy the use of it without interference on the part of others. There will always, of course, be border-line cases. Suppose I become paralysed: am I still in possession of the coat by my side? Such question need not detain us, for the ordinary concept of possession is not designed to cope with such marginal cases, while the existence of legal rules relating to legal possession will answer such questions and obviate the need for any decision in terms of possession in fact."

As such it is clear that to prove possession there should be requisite animus. The trial Court clearly held that absolutely there was no infinitesimal or miniscule extent of evidence to demonstrate that the defendants have been in effective possession of the suit property. Over and above that there is a clear finding by the trial Court that when the Commissioner visited the suit property, he had seen that crops were found just harvested in the suit property.

7. All these facts would clearly indicate and evidence that the plaintiff has been in possession and enjoyment of the suit property. In fact, the gist and kernel of the plea of the defendants is that they tried to invoke 'Jus tertii', which means 'no defendant in an action of trespass can plead the jus tertii the right of possession outstanding in some third person as against the fact of possession in the plaintiff'.

8. According to the defendants, the temple is the real owner and if that be so, they must be able to state as to whether they got permission or leasehold right from the temple to occupy the suit property. Absolutely there is no such plea. The list of documents appended to the trial Court's judgement would reveal that on the defendants' side one copy of the 'Will' dated 30.9.1901, purported to have been executed by Sendur Mudaliar in favour of the 'Keertheeswaran temple', was produced. If at all a person aggrieved because of the plaintiff's possession, it must be the temple authorities. But there is no indication that any temple authority much less the 'Keertheeswaran temple' instituted any proceedings as against the plaintiff. Hence, I could see no question of law much less substantial question of law involved in this matter.

9. At this juncture my mind is reminiscent and redolent of the following decisions of the Hon'ble Apex Court.

(i) (2006) 5 Supreme Court Cases 545 HERO VINOTH (MINOR) VS. SESHAMMAL, certain excerpts from its would run thus:-

"17. After the amendment a second appeal can be filed only if a substantial question of law is involved in the case. The memorandum of appeal must precisely state the substantial question of law involved and the High Court is obliged to satisfy itself regarding the existence of such a question. If satisfied, the High Court has to formulate the substantial question of law involved in the case."

18. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before a second appeal can be maintained and no court has the power to add or to enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts will not be disturbed by the High Court in exercise of the powers under this section. Further, a substantial question of law has to be distinguished from a substantial question of fact."

(ii) 2008(4) SCALE 300 KASHMIR SINGH VS. HARNAM SINGH AND ANOTHER.

(iii) 2009-1-L.W.1 STATE BANK OF INDIA & OTHERS vs. S.N.GOYAL

A plain reading of those precedents would reveal and demonstrate that under Section 100 of the Code of Civil Procedure, Second Appeal cannot be entertained, unless there is substantial question of law involved. Here as held supra, there is no substantial question of law is found exemplified.

10. Accordingly, the second appeal is dismissed. However, there shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.

msk

To

1.The Additional District Judge,

Fast Track Court, No.III,

Chengalpattu at Poonamallee.

2. The District Munsif, Court,

Poonamallee