

Poorani Vs. Panjali Thanjammal

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Court : Chennai

Decided On : Jun-26-2014

Judge : M. Duraiswamy

Appellant : Poorani

Respondent : Panjali Thanjammal

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED :

26. 06.2014 C O R A M THE HONOURABLE MR. JUSTICE M. DURAISWAMY
Second Appeal No.1309 of 2009 & M.P.Nos.1 of 2009 & 1 and 2 of 2013 Poorani
... Appellant v. Panjali @ Thanjammal .. Respondent Second Appeal filed under
section 100 C.P.C. against the judgment and decree dated 29.09.2009 made in
A.S.No.17 of 2008 on the file of Principal Sub Judge, Pondicherry, reversing the
Judgment and Decree dated 22.01.2008 made in O.S.No.760 of 2006 on the file of
II Additional District Munsif Court, Pondicherry. For Appellant : Mr.T.P.Manoharan
For Respondent : Mr.R.Natarajan

JUDGMENT

The above second appeal arises against the judgment and decree passed in
A.S.No.17 of 2008 on the file of Principal Sub Court, Pondicherry modifying the
judgment and decree passed in O.S.No.760 of 2006 on the file of II Additional

District Munsif Court, Pondicherry.

2. The plaintiff is the appellant and the respondent was the defendant in the suit.
3. The plaintiff filed the suit in O.S.No.760 of 2006 for declaration and recovery of possession.
4. The brief case of the plaintiff is as follows:- (i) According to the plaintiff, the suit property originally belonged to one Natesan Gounder. The suit property forms part of the total extent of 2 kuzhies and one veesam. The said Natesan Gounder sold his half share i.e. 'A' schedule property to the plaintiff by a notarial sale deed dated 29.2.1968 and put him in possession of the property. The plaintiff's husband, who was working as a Teacher in the Government School, died 12 years back. The defendant got married with one Ethiraj and subsequently she deserted him and living separately. The said Ethiraj filed a divorce petition and the same was granted in his favour. Thereafter, the defendant requested the plaintiff to allow her to live in a portion of the 'B' schedule property and the plaintiff permitted her to live in a thatched house in the property under a leave and licence about 10 years ago. (ii) The plaintiff was living in the 'B' schedule property and after the defendant came into possession of the property, she used to quarrel with her with a view to vacate her from the 'B' schedule property. The plaintiff put up a thatched house adjacent to 'B' schedule property on the northern side measuring 4 feet x 13 feet. A passage of 3 feet width to the East of one Sengeni's house leading to the suit property was in existence. The said Sengani is the brother of the plaintiff and the defendant. The said Sengani had left 3 feet passage to the plaintiff's property and in lieu of the same, he took 4 feet on the northern side from the plaintiff's property. The plaintiff's brother had constructed a pucca brick house covering the entire back portion. The defendant has no right, title or interest over the suit property. (iii) The defendant and her son obstructed the plaintiff from repairing the thatched house and cattle shed in the suit property. Since the defendant denied the title and obstructed the plaintiff from repairing the house, the plaintiff cancelled the leave and licence. The plaintiff is the absolute owner of 'A' schedule property. In these circumstances, the plaintiff filed the suit for declaration and recovery of possession.

5. The brief case of the defendant is as follows: (i) According to the defendant, the suit property was originally owned by one Ammakannuammal and she has been enjoying the suit property uninterruptedly for the past 60 years and thus obtained right by prescription. The plaintiff, by virtue of leave and licence granted by the said Ammakannuammal is residing in the suit property. The plaintiff is not her sister. Since the plaintiff is not having any iota of right or title over the 'A' schedule property, she has no locus standi to file the suit. The plaintiff has been giving trouble every day to the defendant and has also removed the thatched roof put up by her in the 'A' schedule property. (ii) According to the defendant, in the Panchayat, the plaintiff agreed to vacate the 'A' schedule property and subsequently she has gone back on her word and has been illegally squatting on the property and harassing the defendant. In these circumstances, the defendant prayed for dismissal of the application.

6. Before the trial Court, on the side of the plaintiff, 3 witnesses were examined and 4 documents Ex.A.1 to Ex.A.4 were marked and on the side of the defendant, 2 witnesses were examined and 7 documents Ex.B.1 to Ex.B.7 were marked.

7. The trial court after taking into consideration the oral and documentary evidences of both parties decreed the suit. Aggrieved over the judgment and decree of the trial court, the defendant preferred an appeal in A.S.No.17 of 2008 and the lower appellate court modified the judgment and decree of the trial court by dismissing the suit in respect of 'B' schedule property. Aggrieved over the judgment and decree of the lower appellate court, the plaintiff has filed the above second appeal.

8. Heard Mr.T.P.Manoharan learned Counsel appearing for the appellant and Mr.R.Natarajan, learned Counsel appearing for the respondent.

9. At the time of admission of the above Second Appeal, the following substantial question of law arose for consideration:- (i) After declaring that the appellant is the owner of the suit 'A' schedule property, was the Court below right in rejecting the consequential relief prayed by her for recovery of possession of a portion of the said property viz., the suit 'B' schedule property?. (ii) When the suit 'B' schedule property is a portion and forms part of the suit 'A' schedule property, was the Court

below right in proceeding that those are different properties and rejecting the consequential relief prayed by the appellant for recovery of possession of the suit 'B' schedule property?. 10. On a careful consideration of the materials available on record and the submissions made by the learned Counsel on either side, it could be seen that according to the plaintiff, she is the absolute owner of the 'A' schedule property by virtue of Ex.A1 notarial sale deed dated 29.2.1968. She had purchased the suit property from one Natesan Gounder under the said sale deed. Though the defendant had stated that the plaintiff is not her sister, one Sengani was examined as P.W.2 and in his evidence, he had stated that plaintiff and defendant are his sisters. He had also stated that the plaintiff had purchased the suit property under Ex.A1 sale deed. The reason for the defendant to deny her relationship with the plaintiff is not known. But, she went to the extent of denying even her relationship with the plaintiff. However, in her evidence, the defendant has stated that her father's name is Krishnan Gounder. In the evidences of P.Ws, they have stated that the plaintiff's father name is Krishnan Gounder. Therefore, it cannot be disputed that the plaintiff and the defendant are sisters.

11. According to the defendant, the suit property originally belonged to Ammakannuammal and she is enjoying the suit property for more than 60 years and that she obtained right by prescription. The suit was filed on 28.2.1996. Except Exs.B2 and B3 documents, all the other documents produced by the defendant are subsequent to the filing of the suit.

12. The learned counsel appearing for the appellant, in support of his contention, relied upon the following judgments:- (i) 2003 (8) SCC289(Ravinder Kaur v. Ashok Kumar and another) wherein Apex Court held that the Courts should be vigilant to see through the diabolical plans of the judgment-debtors to deny the decree-holders, the fruit of the decree obtained. (ii) 2004 (10) SCC779(Karnataka Board of wakf v. Government of India and others). In this judgment the Apex Court held that a person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. (iii)2012(5)SCC370(Maria Margardia Sequeria Fernandes and others v. Erasmo Jack De Sequeira (dead) through LRs) wherein the Apex Court held that there is a

presumption that possession of a person, other than the owner, if at all it is to be called possession, is permissive on behalf of the title-holder. (iv) 2008(2) SCC741(Dharmarajan and others v. Valliammal and others) wherein the Apex Court held that there is no necessity to go into the question of identity of the suit property without there being any pleading. (v) 2007(6) SCC401(M.Venkataramana Hebbar dead By LRs v. M.Rajagopal Hebbar and others) wherein the Hon'ble Supreme Court held that where a plea which was relevant for the purpose of maintaining a suit had not been specifically traversed, held, the court was entitled to draw an inference that the same has been admitted. (vi) 2012(6) SCC430(A.Shanmugam v. Ariya Kshatriya Rajakula Vamsathu Mandala Nandhavana Paripalanai Sangam, Rep. By its President and others). In this judgment, the Apex Court held that mere production of ration card or house tax receipts by such person would not establish his claim of adverse possession.

13. The learned counsel appearing for the appellant submitted that under the Article 2262 of the French Civil Code, the defendant should establish atleast 30 years of her possession to claim title by prescription. Since in the case on hand, the defendant had not established her possession for more than 30 years, the defendant cannot be entitled for title by prescription. Further, the learned counsel submitted that since 'B' schedule property forms part of 'A' schedule property, the lower Appellate Court should have decreed the suit in respect of 'B' schedule property also.

14. Countering the submissions made by the learned counsel appearing for the appellant, learned counsel appearing on behalf of the respondent submitted that the respondent is in settled possession of the suit property and therefore, she cannot be evicted from the suit property. Further, the learned Counsel submitted that the lower Appellate Court has rightly dismissed the suit in respect of 'B' schedule property. In support of his contention, the learned counsel for the respondent relied upon the following judgments:- (i) 2004 (1) SCC769[Rame Gowda (Dead) by LRs v. M.Varadappa Naidu (Dead) by LRs]. wherein the Apex Court held that if a party is in settled possession of the property, he can be evicted only under due process of law. (ii)2001(3)CTC393Murugaiyan and others v. Suibbaiyan) wherein the Apex Court held that the plea of adverse possession can

be raised only as a shield and not as a sword i.e., the plea of adverse possession is available only as a defence to the defendant and the same cannot be pleaded by the plaintiff.

15. As already stated, though the defendant contended that she was in possession of the property for more than 30 years, she has not established her possession by any acceptable evidence. That apart, she has produced only Exs.B2 and B3 documents, which are prior to the filing of the suit. Except those two documents, she has not produced any other document to establish her possession. Mere production of those documents would not establish her possession well over the statutory period. Apart from that there was no other independent oral evidence on the side of the defendant to prove her possession. Further, she had contended that her property was originally belonged to one Ammakannuammal and that she got the property through her. But, in order to substantiate the said contention and prove the same, she has not produced any evidence. Therefore, the said contention cannot be accepted.

16. It is pertinent to note that the Lower Appellate Court instead of framing points for consideration under Order 41, Rule 31 of Civil Procedure Code, erroneously formulated the substantial questions of law and decided the appeal. The substantial questions of law can be formulated under section 100 of Civil Procedure Code whereas, the First Appeal was filed under section 96 of Civil Procedure Code before the Lower Appellate Court. Therefore, the Lower Appellate Court being the last court of facts, is duty bound to decide all the issues involved in the matter. But the Lower Appellate Court only formulated the substantial questions of law and decided the appeal.

17. It cannot be disputed that 'B' schedule property forms part of the 'A' schedule property. Even in the schedule of property, it has been clearly mentioned that 'B' schedule property forms part of 'A' schedule property.; The prayer sought for in the suit is for declaration in respect of 'A' schedule property and recovery of possession in respect of 'B' schedule property. The Trial Court decreed the suit in toto. However, the Lower Appellate Court though confirmed the judgment and decree so far as 'A' schedule property is concerned, dismissed the suit in respect

of 'B' schedule property holding that the defendant has not established her title over the 'B' schedule property. When 'B' schedule property forms part of 'A' schedule property and when the Courts below concurrently declared the title in respect of 'A' schedule property, there is no necessity for declaring the title in respect of 'B' schedule property separately. But the Lower Appellate Court erroneously dismissed the suit in respect of 'B' schedule property holding that the plaintiff has not established her title over the same. When the plaintiff had clearly established that the defendant was occupying the property only under leave and licence, which was also cancelled by her, she is entitled to take back possession of the same from the defendant. Therefore, the judgment and decree of the Lower Appellate Court are liable to be set aside.

18. In these circumstances, the substantial questions of law are decided in favour of the appellant. The judgment and decree of the Lower appellate court made in A.S.No.17 of 2008 on the file of Principal Sub Court, Pondicherry are set aside. The judgment and decree of the Trial Court made in O.S.No.760 of 2006 on the file of II Additional District Munsif Court, Pondicherry are restored. The second appeal is allowed. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed. 26.06.2014 Index : No Internet : No
rj To 1.The Principal Sub Judge, Pondicherry.

2. II Additional District Munsif Court, Pondicherry.. M. DURAISWAMY J.

rj Judgment in Second Appeal No.1309 of 2009 & M.P.Nos.1 of 2009 & 1 and 2 of 2013 26.06.2014

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