

Varghese Daniel Vs. Balakrishan and Another

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Court : Chennai

Decided On : Aug-31-1998

Reported in : 1998(2)CTC337

Judge : S.M. Abdul Wahab, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) -- Sections 115 -- Order 39 -- Rule 1

Appeal No. : C.R.P.No. 1231 of 1996 and C.M.P.No. 6783 of 1996

Appellant : Varghese Daniel

Respondent : Balakrishan and Another

Advocate for Def. : Mr. S. Jayaraman for;Mr. C. Rajan, Adv.

Advocate for Pet/Ap. : Mr. V. Ayyadurai, Adv.

Disposition : Petition allowed

Judgement :

ORDER

1. This civil Revision Petition has been preferred against the fair and decretal order made in C.M.A.No.175 of 1995 by the IV Additional City Civil Judge, Madras, on 7.2.1996, dismissing the said Civil Miscellaneous Appeal and vacating the interim injunction granted in I.A. No.788 of 1995 in O.S.No.551 of 1995 on the file of the IV Assistant Judge, City Civil Court, Madras, dated 29.6.1995.

2. The suit O.S.No.551 of 1995 was filed by the petitioner for permanent injunction restraining the defendants etc., from evicting him unlawfully or interfering with his peaceful possession of the suit property i.e., Ground and premises bearing door No.74, 'G' Block, Anna Nagar East, Madras - 102. According to the plaintiff, the suit property was allotted to one R.P. Samuel, by the Tamil Nadu Housing Board. Mr. Samuel constructed the residential house for which construction plaintiff lent Rs.65,000. Mr. Samuel permitted the plaintiff to occupy the suit property. Hence, the plaintiff is occupying the suit property and paying property tax to the corporation on behalf of Mr. Samuel. The voters list and the ration card show the suit property as the residence of the plaintiff. While so, one Thiruvengadam, a neighbour started to give trouble. Hence, the plaintiff filed a suit O.S.No.2833 of 1992 before the IV Assistant Judge, City Civil Court, Madras, for injunction in I.A. No.8828 of 1992. He has obtained interim injunction against the said Thiruvengadam from interfering with his possession. When he learnt about the Tamil Nadu Housing Board preparing to issue sale deed to some third party, he sent a notice to the chairman, Tamil Nadu Housing Board, Nandanam, on 20.11.1993 requesting him not to issue the sale deed to any one except to the said Samuel.

3. At the instructions of the second defendant, the first defendant gave a police complaint against the plaintiff. The Inspector of Police K-6 T.P. Chatram Police Station, on 6.1.1995, directed the plaintiff to sign a statement in Tamil. But the plaintiff did not do so. Hence on 9.1.1995, the plaintiff sent, a representation to the Commissioner of Police. On 13.1.1995 the first defendant with four men entered the house of the plaintiff and threatened to vacate him. Hence, the plaintiff filed the suit.

4. With the same allegations, he filed I.A. No.788 of 1995 for interim injunction. In the counter by the first respondent for himself and on behalf of the second respondent as power of attorney agent, it is stated that Samuel is the father of the Second respondent. The plaintiff did not advance Rs.65,000. After the death of the father Samuel, the second defendant and her husband were looking after the house and maintaining it for about two years. The plaintiff, who was residing at Thiruvalluvar Nagar (R.V.Nagar) East Anna Nagar, Madras - 102, was carrying on

his mechanic business near the suit premises and he was known to the second defendant and his husband closely. When the second defendant and her husband left the suit premises, they requested the plaintiff to have a look on the suit property. As the second defendant's husband was affected with kidney problem he had to take treatment in the C.M.C. Hospital, Vellore. In the year 1992, he received a telegram from the plaintiff in connection with the payment of property tax to the Corporation. As the second defendant continued to be with her husband in C.M.C. Hospital, Vellore, she gave power of attorney to the first defendant. When the first defendant visited the property, he found the plaintiff trespassed into the suit property. Hence, a Police complaint was given for removing the trespass. The plaintiff has no right in the suit property. The threat of the first defendant to the plaintiff with four persons was denied. The plaintiff is only a trespasser. Even assuming that without admitting that he was in possession, his possession is in the nature of a licensee hence, he is not entitled for injunction.

5. A reply was filed to the said counter by the petitioner. In it, it was denied that the second defendant is the daughter of Mr. Samuel. It is further denied that there was any permission given by the second respondent and her husband to look over the property. Only to throw the petitioner out, these allegations are made. The sending of the telegram is also denied. The property tax were paid only by the petitioner with his funds. It is further stated that Mr. Samuel lived with one woman Violet, but he did not marry her. No child was born to her. The alleged power deed has been created with ulterior motive. The first respondent knowing about the enjoyment of the suit property by the petitioner with a view to grab at the suit property has attempted to throw the petitioner out.

6. The trial court has dismissed the injunction petition. According to the trial Court, the petitioner has trespassed into the suit property, hence, he is not entitled for injunction against the second respondent, who is the legal heir of R.P. Samuel.

7. The petitioner preferred C.M.A. No. 175 of 1995 on the file of the IV Additional Judge, City Civil Court, Madras. The lower appellate court has observed that the petitioner has been acting as the care-taker of Mr. Samuel and was in possession in that capacity. It has further observed that the petitioner has been in possession

with the permission of the owner of the property viz., R.P. Samuel. According to the lower appellate court, the contention that the petitioner trespassed into the suit property was acceptable. Hence, he was not eligible to get the injunction.

8. The learned counsel for the petitioner Thiru V. Ayyadurai, contended that while the trial court found that the petitioner was a trespasser, the lower appellate court has differed with the view and found that the petitioner was in possession of the suit property as a care-taker. He has also contended that as his possession has been admitted and the said possession has been continued for over twelve years, the petitioner is entitled to protect his . possession till he is evicted under due process of law.

9. On the other hand, the learned counsel for the respondents Thiru S. Jayaraman, contended that the Courts below have found that the petitioner is only a trespasser and he has no consistent case, hence, he is not entitled for injunction against the owner.

10. Exs. P.1, P.2, P.3 and P.5 have been filed by the petitioner. Ex. P.1 is the ration card issued during 1993. The petitioner's address in the said ration card is given as 74, 'G' Block, Anna Nagar, Madras-102, i.e., the suit property, Ex. P.2 is the Corporation property tax receipt showing the payment of tax from 1/88-89 to 2/91-92. The petitioner paid the tax for the suit property. Under Ex. P.3 also the petitioner paid tax to the suit property from 1/92-93 to 2/93-94. Ex. P.4 is a notice dated 20.11.1993 addressed to the Chairman, Tamil Nadu Housing Board. In the said notice, it is stated that R.P. Samuel had authorised the petitioner to reside in the suit property and has also entered into an agreement of sale. In the said notice, the Housing Board was called upon not to execute the sale deed in respect of the suit property to any person without proper verification about the legal heirship. Ex. P.5 is the property tax payment challan dated 29.12.1994. The property tax has been paid by the petitioner for the suit property. Ex. P.6 is dated 9.1.1995 and it is a notice by the petitioner to the Commissioner of Police, Madras. Ex. P.7 dated 9.1.1995 is the receipt of acknowledgement of Ex. P.6 by the Commissioner of Police. Ex. P.8 is the Voters list of the year 1979 for Anna Nagar Assembly Constituency. From these documents, one can see that the petitioner

has been in possession of the suit property from the year 1979 onwards. On the side of the respondents no documents have been produced to show the possession. On the other hand Ex. R.1 is a communication by the Tamil Nadu Housing Board to the second defendant to the Kerala Address for production of legal heir certificate and other documents for transfer of ownership. Ex. R.6 is the death certificate showing the death of Samuel of Karakunneth House, Kuriachira on 2.12.1976. Ex. R.7 is the Burial Certificate of Samuel of Karakunneth. Ex. R.3 is the legal heirship certificate dated 28.1.1994 given to the second respondent, showing her as the legal heir of Samuel. The certificate gives the address of Samuel as No.1, Balfour Road, Kellys. It has been issued by the Tahsildar, Purasawalkam, Parambur Taluk. The purpose of the certificate is said to be for transfer of Tamil Nadu Housing Board allotment. The death of Samuel and the burial has taken place at Thrichur as per Exs. R.6 and R.7. From the documents produced by the respondents, they are not able to establish their possession. The suit is for bare injunction not to evict the plaintiff/petitioner unlawfully and interfering with his peaceful possession. The court below have also found that the petitioner is in possession. According to them, the petitioner is a trespasser, but he has proved to be in possession from 1979 upto the date of filing of the suit in 1995. The respondents have produced Ex. R.9. Under the said document, it is stated that the petitioner has sent a telegram to the second respondent to come to Madras for giving certain clarification to the Commissioner of Corporation of Madras. The telegram is dated 7.4.1992. It has been sent by the petitioner. If the petitioner has been a trespasser, the second respondent who has received the telegram in 1992 and would have taken action against him for his eviction. But in the counter affidavit, it is stated that after receipt of the telegram Rs.2000 was sent to the petitioner by the second defendant for payment of Corporation tax. This to some extent belies the case of trespass, on the other hand, it has acknowledged the possession of the petitioner either as a licensee or as a care-taker. Further, in the counter also it is stated that the second respondent asked the petitioner to have a look at the suit property. But at the same time, it is stated that he was not given permission to occupy the house. It is also worthwhile to note that the second respondent has not sworn to the counter affidavit, but the affidavit has been sworn to by the first respondent only as power of attorney. Further, in paragraph 7 it is

stated that even if the petitioner's possession is assumed it must be only in the nature of a licensee.

11. The petitioner's possession is admitted, but the nature of possession is disputed. It is true that the petitioner has not come with a definite case as regards the nature of possession. In one place, he has stated that he had advanced money to the original owner and in another place he states that there is an agreement of sale. But in the plaint his case is that Samuel has permitted the plaintiff to occupy the house. Under these circumstances, the question is whether the petitioner is entitled for injunction.

12. There is no dispute about the possession of the petitioner. It is also admitted that he has no title to the property. But however, it cannot be straightaway assumed from the materials placed before the Courts below and here that the second defendant is the legal heir of late Samuel and she is the owner of the property. From the exhibits mentioned above, a legal heirship certificate Ex. R.3 has been issued by the Tahsildar. It has been issued to one Samuel of No.1, Balfour Road, Kellys. The property in question is in door No.74, 'G' Block Anna Nagar East, Madras-102. It is not the case of the petitioner that the property is situate within the jurisdiction of Purasawalkam, Parambur Taluk. Further, the latest decision of this Court reported in Thirumurthy, E & another v. Collector of Chennai etc., 1998 W.L.R. 347 Justice E. Padmanabhan, has held that no power or authority has been conferred on Tahsildar or Revenue Department to issue legal heirship certificate or to adjudicate on the claims of the legal heirs or issue of legal heirship certificate for patta or other benefits. As against this, in addition to the legal heirship certificate, Ex. R.9 is said to be the telegram sent by the Corporation of Madras to the second respondent. Ex. R.2 is the original allotment order produced by the respondents. Under Ex. R.5, the second respondent has paid Rs.25 to the Tamil Nadu Housing Board. No doubt, these documents go to prove to some extent that the second respondent is the legal heir of one Samuel. But they do not conclusively prove that the second respondent is the legal heir of the original owner, Samuel. That has to be found out only after the trial. If it is found that the second respondent is the legal heir of the original owner, she is definitely entitled for possession of the suit property. But even then, the case of the

petitioner has also to be considered. Even though the petitioner claims to be a permissive occupier, the undisturbed long period of possession has to be taken note of and hence he cannot be lightly thrown out calling him as a trespasser.

13. If a person enters into possession unauthorisedly, his entering in possession may be construed to be trespass but if he is allowed to continue for several years as it is in the present case, certainly, the nature of his possession cannot be said to be as trespasser. By the long continued possession, certain amount of interest enures in him. In the case where he claims possessory title or adverse possession that requires consideration and therefore taking note of nature of his entering into possession alone, he cannot be driven away or thrown out.

14. In *Nabekishore Sahu v. M/s. East India Arms Co.*, : AIR1998 Ori95 a learned Single Judge of the Orissa High Court, after considering a number of judgments has taken a view similar to one expressed by me as above. It reads as follows:

'The question, however, may be different, as in the present case, whether a person who admittedly has no title but for his long and uninterrupted possession can approach the Equity Court to protect his possession till final adjudication of the 'lis'. It is no doubt true that an owner has every right to enter upon his property and restrain the trespasser from perpetuating his illegal occupation. It is not necessary for him to take recourse to a legal proceeding in order to vindicate his rights of ownership and possession in respect of his property of which another person without having any right or title enters into possession. He can throw out a trespasser while he is in act of or process of trespassing but this right is not available to the true owner if the trespasser has been successful in accomplishing his possession to the knowledge of the true owner. In such circumstances, the law requires that the true owner should disposses the trespasser by taking recourse to the remedies available under the law. It is well settled that where a person is in settled possession of property, even on the assumption that he had no right to remain on the property, he cannot be dispossessed by the owner of the property except by recourse to law.'

15. In *Walter Louis Franklin v. George Singh*, : (1997)3SCC503 , the Apex Court has held that when the trial Court and the first appellate Court has concurrently

found that the appellant was in possession of the property, his possession cannot be disturbed by a person claiming title simply because he did not prove adverse possession.

16. The learned counsellor the respondents Thiru S. Jayaraman, however cited the following authorities and contended that as against the owner no injunction can be granted in favour of the trespasser. 1. Alagi Alamelu Achi v. Ponniah Mudaliar, : AIR1962 Mad149 , 2. Oriental Hotels Limited Owing Taj Coromandal Hotel v. Mrs. Parameswari Devi etc., 1994 (2) L.W. 300. Permji Ratansey Shah v. Union of India, 1994 (2) L.W. 735.

17. In Alagi Alamelu Achi v. Ponniah Mudaliar, : AIR1962 Mad149 Justice Veeraswami, as he then was, held that once a Court finds that the plaintiffs' possession of property is wrongful, such possession cannot be protected by assistance of Court. The fact that if the lawful owner instituted the suit, he may possibly fail on the ground that he was not in possession within twelve years make no difference. This case has already been cited in Nabekishore Sahu v. M/s. East India Arms Co, : AIR1998 Ori95 . In the said case, the principle of acquiescence was not considered. The facts of the present case go to show that the petitioner cannot be termed as a trespasser. As per the appellate Court, the petitioner is a care-taker of the suit property and has been taking care of the property. After having said so, in another place, it is stated that the contention that he trespassed into the suit property when he had no right to do so is also acceptable. As there is no categorical finding by the appellate Court as in the case reported in Alagi Alamelu Achi v. Ponniah Mudaliar, : AIR1962 Mad149 , the principle laid down in the said case is not helpful to the respondents.

18. Oriental Hotels Ltd., owning Taj Coromandal Hotel v. Mrs. Parameswari Devi etc.. 1994 (2) L.W. 300 is also not helpful to the respondents because at the end of the said judgment in paragraph 11, the learned Judges have clearly stated that for the reasons as they have found that the plaintiff/respondent had not established a prima facie case for possession, they were inclined to interfere with the impugned judgment. In this case, the possession of the plaintiff is admitted.

19. In *Premji Ratansey Shah v. Union of India*, 1994 (2) L.W. 735 also the Apex Court has held that under Section 41(j) of the Specific Relief Act, 1963, the plaintiff must have personal interest in the matter. The interest of right not shown to be in existence cannot be protected by injunction. As we have already seen, by the long and continued possession, the petitioner has acquired some semblance of right to be in possession. The lower appellate Court has also recognised this fact and says that he has been in possession as a care-taker and has been taking care of the suit property. Further, unlike in the case of the Apex Court, the title of the defendants as the lawful owner is not admitted in the case on hand. Therefore, the principle laid down in the Apex Court is also not helpful.

20. The learned counsel for the respondents Thiru S. Jayaraman, contended that the courts below have concurrently found that the petitioner is only a trespasser and this Court cannot go into the question of nature of possession and arrive at a different finding. He cited the decision reported in *Masjid Kacha Tank, Nahan v. Tuffail Mohammed*, : AIR 1991 SC455 . In the said case, the Apex Court has held as follows:

'The High Court is empowered only to interfere with the findings of fact if the findings are perverse or there has been a non-appreciation or non-consideration of the material evidence on record by the Courts below. Simply because another view of the evidence may be taken is no ground by the High Court to interfere in its revisional jurisdiction.'

This case would be helpful to the respondents if the lower appellate Court categorically has found that the petitioner is a rank trespasser. On the other hand, as mentioned above, it has found that the petitioner has taken possession from the original allottee Samuel and has been looking after the property. Therefore, the said case is also not helpful.

21. The learned counsel Thiru S. Jayaraman, finally contended that in view of the inconsistent case of the petitioner, injunction should not be granted. In *Rajeswari v. Dhanammal*, : (1994)1MLJ401 Justice Abdul Hadi, has held that where one party did not seek the relief on the basis of the relief of the party, but only on the facts established on record though they were at variance with his own pleading,

relief can be granted. In a case where parties lead in evidence and the facts established enable a party to obtain a particular relief, based on the facts established, equity and justice rush to his rescue notwithstanding the variance in the pleading to grant the relief to which he is entitled to as per the facts established. This cardinal principle fundamental for Courts is to render justice to parties as otherwise after arriving at the finding on the evidence produced before if the Court has to shut its eyes and direct the party to another litigation, the basic purpose of establishment of Courts of law i.e., to maintain peace, law and order in a society is defeated. Therefore, the attempt of the Courts must always be to minimise the litigation and not to multiply it.

22. The findings and the observations rendered in this Civil Revision Petition is only for the purpose of the Interlocutory application and they will not bind the Trial Court while disposing the suit after trial.

23. For the foregoing reasons, I am of the view that the petitioner is entitled to an injunction till the disposal of the suit. Therefore, the Civil Revision Petition is allowed. However, there will be no order as to costs. Consequently, C.M.P. Nos.6783 of 1996 and 8933 of 1998 are closed as unnecessary.

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