

Krishnamoorthy Vs. Nageshwari

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Court : Chennai

Decided On : Apr-10-2013

Judge : G.Rajasuria

Appellant : Krishnamoorthy

Respondent : Nageshwari

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED :

10. 4.2013 Coram: THE HONOURABLE MR.JUSTICE G. RAJASURIA
S.A.Nos.2112 & 2113 of 2002 Krishnamoorthy .. Appellant in both the appeals Vs.

1. Nageshwari 2. Manimegalai .. Respondents in S.A.No.2112 o

1. The Superintending Engineer, Tamil Nadu Electricity Board, Mettur Road, Erode.

2. The Executive Engineer, Tamil Nadu Electricity Board, Bhavani 3. The Assistant Executive Engineer, Tamil Nadu Electricity Board, Ammapettai, Bhavani.

4. The Junior Engineer, Tamil Nadu Electricity Board, Vellithiruppur, Bhavani 5. Nageshwari 6. Manimegalai .. Respondents in S.A.No.2113 of 2002 These Second Appeals are focussed as against the common judgment and decrees dated 22.2.2002 passed by the Sub Court, Bhavani, Erode, in A.S.Nos.49 and 50 of 2001, reversing the common judgment and decrees dated 2.4.2001 passed by

the First Additional District Munsif Court, Bhavani, Erode, in O.S.No.504 of 1996 and O.S.No.270 of 1998. For appellant : Mr.N.Manokaran For respondents : Mr.D.Krishnakumar COMMON JUDGMENT These Second appeals are focussed by the plaintiff, namely, Krishnamurthy, animadverting upon the common judgment and decrees dated 22.2.2002 passed by the Sub Court, Bhavani, Erode, in A.S.Nos.49 and 50 of 2001, reversing the common judgment and decrees dated 2.4.2001 passed by the First Additional District Munsif Court, Bhavani, Erode, in O.S.No.504 of 1996 and O.S.No.270 of 1998, which were for permanent injunctions.

2. The parties, for the sake of convenience, are referred to hereunder according to their litigative status and ranking before the trial Court. 3. Combendiously and concisely, the germane facts absolutely necessary for the disposal of these second appeals would run thus: (i) Two suits, namely, O.S.No.504 of 1996 and O.S.No.270 of 1998 were filed by one and the same appellant herein, as plaintiff. (ii) In O.S.No.504 of 1996, the plaintiff sought for bare injunction so as to restrain the defendants from interfering with his peaceful possession and enjoyment of the suit property described in the schedule of the plaint. (iii) O.S.No.270 of 1998 was filed by the same plaintiff in respect of the same property, seeking the following relief: "to grant permanent injunction restraining the defendants 1 to 4, their men, agents, subordinates etc. from in any way and in any manner effecting service connection in favour of the defendants 5 and 6 or their agents over the suit property." (iv) The gist and kernel of the averments in both the plaints would run thus: While the plaintiff was in possession and enjoyment of the suit property, the defendants holus-bolus, without having any right, started interfering with his peaceful possession and enjoyment of the suit property, which necessitated the plaintiff to file the suits. (v) Per contra, the defendants in both the suits filed the written statement almost with identical averments, the warp and woof of the same would run thus: (a) The suit properties described in the schedules of the plaints are misleading; in fact, the houses bearing Door Nos.12/44 and 12/44A situated in S.No.755/11 belong to the defendants by virtue of Ex.A16-the adoption deed dated 1.9.1946 in favour of Semba Gounder, the biological son of one Samba Gounder and adopted son of Sembu Rakkiagounder. (b) The patta also stands in the names of the defendants in respect of the suit property. Accordingly the

defendants would pray for the dismissal of the suits. (vi)Whereupon issues were framed and in both the suits, joint trial was conducted. Up went the joint trial, during which, the plaintiff examined himself as P.W.1 along with P.W.2 and marked Exs.A1 to A20. The first defendant in O.S.No.504 of 1996, namely, Nageshwari examined herself as D.W.1 along with D.W.2 and Exs.B1 to B10 were marked on the defendants' side. (vii)Ultimately the trial Court decreed both the suits in favour of the plaintiff and as against which, the defendants, namely, Nageshwari and Manimegalai, preferred two appeals; whereupon the first appellate Court, by a common judgment, reversed the common judgment and decrees of the trial Court. 4.Challenging and impugning the common judgment and decrees of the first appellate Court, the plaintiff filed these two second appeals on various grounds and also suggesting the following substantial questions of law: "a)Whether the decision of the first appellate Court is vitiated for non consideration of the entire oral and documentary evidence in reversing the judgment of the trial Court especially when there is no document in favour of the defendants to disprove the possession of the plaintiff over the suit property? b)Whether the first appellate Court was correct in refusing to accept Ex.A21 which has been marked for collateral purpose to prove possession of the plaintiff over the suit property on the date of the suit? c)Whether the non compliance of Order 41 Rule 31 CPC will affect the validity of the judgment of the first appellate Court, in view of the law laid down by the Division Bench of this Honouable Court in 1997 (1) LW 704.d)Whether the judgment of the first appellate Court is correct in law for reversing the well considered findings of the trial Court in the absence of any documentary evidence to prove the possession of the defendants over the suit property? e)Whether the suit for bare injunction without the prayer for declaration is maintainable under Section 38 of the Specific Relief Act? f)Whether the first appellate Court has correctly interpreted the scope and ambit of Section 12 of the Hindu Adoption and Maintenance Act, 1956?" (extracted as such) 5.Heard both. 6.The learned counsel for the plaintiff would pyramid his arguments, which could succinctly and precisely be set out thus: (i)Indubitably and indisputably, Muthugounder had his brother by name Sembu Rakkiagounder. Muthugounder's son was Semba Gounder, who had three sons, namely, (i)Semba Gounder, (ii)Krishnamoorthy(plaintiff) and (iii)Sundaravel. (ii)Muthu Gounder's son Semba

Gounder's wife was Kamakshiammal, who happened to be the daughter of Pachaiaimmal, who was the daughter of the said Sembu Rakkiagounder. (iii)Sembu Rakkiagounder having had no sons, adopted Semba Gounder, son born to the couple Semba Gounder and Kamakshiammal. (iv)Ex.A16-the adoption deed dated 1.9.1946 would exemplify and demonstrate the factum of adoption and also the adoptive father having bequeathed his properties in the said deed in favour of the adopted son-Semba Gounder. (v)Muthugounder's son Semba Gounder, during his life time, after such adoption, referred to supra, got partitioned his share of the property between his remaining two sons, namely, Krishnamurthy(the plaintiff) and Sundaravel, vide Ex.A20-the registered partition deed dated 24.2.1994, without taking any share for himself. However the suit property is not found referred to therein. (vi)In Ex.A21-the unregistered panchayat Partition Muchilika dated 25.10.1994, which emerged between Krishnamoorthy(the plaintiff) and Sundaravel, there is reference to this suit property. (vii)The adopted son, namely, the said Semba Gounder's son, Semba Gounder, cannot claim any right in respect of the properties of his biological father Semba Gounder. (viii)After the death of the said adopted son Semba Gounder, his legal heirs, namely, the defendants unjustifiably laid claim over the suit property and the trial Court taking into consideration the pros and cons of the matter decreed the suit, whereas, the first appellate Court, for no good reason set aside the common judgment and decrees of the trial Court, warranting interference in second appeals. 7.Per contra, in a bid to torpedo and slap down the arguments as put forth and set forth on the side of the plaintiff, the learned counsel for the defendants would advance his arguments, which could tersely and briefly be set out thus: (i)The suit was bad for want of a prayer for declaration. (ii)The suit property would refer to a house measuring seven anganam, but no such property was found identified with the help of an advocate commissioner. (iii)Boundaries found set out in the schedule of the plaints are also misleading. (iv)Both the houses bearing Door Nos.12/44 and 12/44A belong to the defendants and for establishing and proving the same voluminous documents were marked on their side, but the trial Court failed to take note of the same; However, the first appellate Court correctly appreciated those documents and dismissed the original suits, warranting no interference in second appeals.

8. At the outset, I would like to fumigate my mind with the recent decision of the Hon'ble Court reported in 2012 (8) SCC 14.[Union of India v. Ibrahim Uddin and another]; an excerpt from it would run thus: "59. Section 100 CPC provides for a second appeal only on the substantial question of law. Generally, a second appeal does not lie on question of facts or of law. In SBI v. S.N.Goyal (2008) 8 SCC 92.this Court explained the terms "substantial question of law" and observed as under: (SCC p.103, para

13) "13.....The word "substantial" prefixed to 'question of law' does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. 'Substantial questions of law' means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the partiesany question of law which affects the final decision in a case is a substantial question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing on the final outcome, will not be a substantial question of law.....There cannot, therefore, be a straitjacket definition as to when a substantial question of law arises in a case." (emphasis added) 9. In the same precedent, the following decisions are found referred to: (1) AIR 196.SC 331.[Chunilal V. Mehta & Sons Ltd. v. Century Spg. and Mfg. Co. Ltd.] (2) (2011) 1 SCC 67.[Vijay Kumar Talwar v. CIT] (3) AIR 194.PC 1.[Bibhabati Devi v. Kumar Ramendra Narayan Roy] (4) (1949) 17 ITR 26.(Nag) [Suwalal Chhogalal v. CIT] (5) AIR 195.SC 85.[Oriental Investment Co. Ltd. v. CIT] (6) AIR 19.SC 160.[Jagdish Singh v. Natthu Singh] (7) (1996) 5 SCC 35.[Parativa Devi v. T.V.Krishnan] (8) (1998) 6 SCC 42.[Satya Gupta v. Brijesh Kumar] (9) AIR 200.SC 53.[Ragavendra Kumar v. Firm Prem Machinery & Co.] (10) AIR 200.SC 126.[Molar Mal v. Kay Iron Works (P) Ltd.] (11) (2010) 11 SCC 48.[Bharatha Matha v. R.Vijaya Renganathan] (12)(2010) 12 SCC 74.[Dinesh Kumar v. Yusuf Ali] (13)(2002) 3 SCC 63.[Jai Singh v. Shakuntala] (14) (2008) 12 SCC 79.[Kashmir Singh v. Harnam Singh] 10. A mere running of the eye over the above precedents would connote and denote, exemplify and demonstrate that unless there is any substantial question of law is involved, the question of entertaining the second appeal would not arise.

11. Keeping in mind the dictum as found enunciated in the aforesaid precedents of the Supreme Court, I would like to analyse the records as to whether there is any substantial question of law is involved in this case. 12. In this factual matrix I thought fit to formulate the following substantial questions Law: (1) Whether the first appellate Court was justified in placing reliance on Exs.B1 to B10 in giving a finding that the defendants proved their possession over the suit property but not the plaintiff. (2) Whether the first appellate Court ignoring Ex.A8-the copy of the order relating to the transfer of electricity connection and Ex.A9-House tax receipt and also the deposition of D.W.1 was justified in rejecting the prayer of the plaintiff for bare injunction? (3) Whether there is any perversity or illegality in the common judgment and decrees of the first appellate Court? 13. At this juncture, I would like to fumigate my mind with the following decision of the Honourable Apex Court: AIR 200.SC 460.[Rame Gowda (D) by L.Rs. vs. M.Varadappa Naidu (D) by L.Rs and another]. "8. It is thus clear that so far as the Indian Law is concerned the person in peaceful possession is entitled to retain his possession and in order to protect such possession he may even use reasonable force to keep out a trespasser. A rightful owner who has been wrongfully dispossessed of land may retake possession if he can do so peacefully and without the use of unreasonable force. If the trespasser is in settled possession of the property belonging to the rightful owner, the rightful owner shall have to take recourse to law; he cannot take the law in his own hands and evict the trespasser or interfere with his possession. The law will come to the aid of a person in peaceful and settled possession by injunction even a rightful owner from using force or taking law in his own hands and also by restoring him in possession even from the rightful owner (of course subject to the law of limitation). If the latter has dispossessed the prior possessor by use of force. In the absence of proof of better title, possession or prior peaceful settled possession is itself evidence of title. Law presumes the possession to go with the title unless rebutted. The owner of any property may prevent even by using reasonable force a trespasser from an attempted trespass, when it is in the process of being committed, or is of a flimsy character or recurring, intermittent, stray or casual in nature or has just been committed, while the rightful owner did not have enough time to have recourse to law. In the last of the cases, the possession of the trespasser, just entered into would not be called as one

acquiesced to by the true owner.

9. It is the settled possession or effective possession of a person without title which would entitle him to protect his possession even as against the true owner. The concept of settled possession and the right of the possessor to protect his possession against the owner has come to be settled by a catena of decisions " (emphasis supplied) 14. A mere running of the eye over the said decision would exemplify and demonstrate that in all cases the Court cannot insist upon the plaintiff to seek for declaration of title. The plaintiff who is in established possession of a property can seek for injunction so as to protect his possession without praying for declaration. 15. The learned counsel for the defendants would vehemently argue that in the wake of the serious title dispute raised by the defendants in the written statement, the trial Court was not justified in decreeing the suits even though the plaintiff did not seek for any declaration of his title. 16. Incidentally, in an injunction suit, the prima facie title has to be gone into. Regarding the genealogy as found set out by the learned counsel for the plaintiff, there is no objection from the side of the defendants. 17. It is a common or garden principle of law that after adoption, the adopted son would lose all his rights and connections in his biological parents house and he cannot also claim any property right over his biological parents' properties. However, he could only be treated as the legal heir of his adoptive father. 18. Certain excerpts from Ex.A16-the adoption deed dated 1.9.1946 could rightly and fruitfully be extracted hereunder: VERNACULAR (TAMIL) PORTION DELETED 19 The learned counsel for the defendants would place reliance on the above excerpts and submit that the defendants are entitled to both the houses bearing Door Nos.12/44 and 12/44A; Whereas, the learned counsel for the plaintiff, by inviting the attention of this Court to the boundaries found set out in the schedules of the complaints, would narrate that the boundaries as found set out in Ex.A16-the adoption deed do not tally with the boundaries as found set out herein. 20. I would like to point out that so far neither of the parties have taken steps to file any suit for declaration. The entire reading of the complaints as well as the written statements would indicate and exemplify that the plaintiff approached the Court seeking bare injunction so as to protect his possession in respect of the house bearing Door No.12/44 and not the one bearing Door No.12/44A. Exs.B2 to B10, the pendente lite documents would all

refer to the house bearing Door No.12/44A. As such, the first appellate Court was not justified in concentrating on those exhibits in up setting the common judgment and decrees passed by the trial Court. 21.However, the learned counsel for the plaintiff, by referring to Ex.A8, dated nil.4.1996-the transfer order of electricity connection in the name of P.S.Krishnamoorthy and Ex.A9-House tax receipt dated 21.7.1995, which emerged anterior to the filing of the suits, would put forth and set forth his contentions to the effect that the house bearing Door No.12/44 had been in possession and enjoyment of the plaintiff. 22.At this juncture, I recollect and call up the following maxim: 'In re dubia magis infitatio quam affirmatio intelligenda' In a doubtful matter, the negation is to be understood rather than the affirmation. When evidence is lacking and is sketchy and patchy, only the negative could be presumed and not the affirmative. 23.A thumbnail sketch of the evidence available on record would portray that here, on the one hand the plaintiff could produce some evidence relating to the house bearing Door No.12/44, whereas, the defendants could not produce any shard or shred, molecular or miniscule, jot or pint of evidence to show up and point up that the defendants have been in possession and enjoyment of the house bearing Door No.12/44. However, the evidence adduced by the defendants are all relating to the house bearing Door No.12/44A over which the plaintiff has no claim. 24.Regarding the boundaries are concerned, there is no consistency between the boundaries as found set out in the plaints and the boundaries found set out in Ex.A16-the adoption deed. 25.The contention on the side of the defendants that there is nothing to indicate that the house bearing Door No.12/44 is measuring seven anganam, I would like to dispel such apprehension in the mind of the defendants by indicating that this Court in this case is not particular about the exact measurement of the house bearing Door No.12/44. But it has to be find out from the available evidence as to whether the plaintiff was in possession and enjoyment of the house bearing Door No.12/44. If there is evidence to that effect, as a sequela the plaintiff must be held to be one entitled to injunction till he is dispossessed in accordance with law. 26.Scarcely could it be stated that there is an embargo for the defendants to initiate fresh proceedings to highlight that they happened to be the owners of certain plots of land and houses including the suit house herein and that the plaintiff occupies it unauthorisedly etc. and that they can seek for delivery of possession on that

ground. 27. So far these suits are concerned, in order to disambiguate the ambiguity, if any, I would like to point out that now this Court is only concerned with the prayer of the plaintiff to protect his established possession of the suit house. With that in mind, if the matter is viewed, it is crystal clear that the balance of convenience and the weightage of evidence are in favour of the plaintiff rather than in favour of the defendants. In such a case, the first appellate Court was not justified in interfering with the trial Court's judgment and decrees. 28. If at all the defendants had been in possession and enjoyment of the suit house bearing Door No.12/44, then there must be at least some semblance of evidence in their favour. But the defendants have not chosen to produce any, however, they would like to lay claim over the suit property. 29. Incidentally I would like to point out that in the written statement in paragraph No.6 the defendants would admit that the house bearing Door No.12/44 is situated in S.No.755/11. It is also the contention of the defendants that both the houses are situated in the same survey number, for which, they would also place reliance on the patta obtained by them as contained in Exs.B1 and B2, for which the learned counsel for the plaintiff, by inviting the attention of this Court to Ex.B9, would highlight and spotlight that the plaintiff took steps to get such patta issued in the name of the defendants cancelled, for which, the Revenue Divisional Officer passed the order, as evidenced by Ex.B9, that inasmuch as the matter is pending before the Court, after the outcome in the Court proceedings, the plaintiff could revive his application. As such, the defendants cannot blindly rely upon the patta issued pendente lite in their favour. 30. Not to put too fine a point on it, I am of the considered view that at present, the Court is not concerned with the absolute title of either of the parties over the suit property, inasmuch as these are the suits for bare injunctions and evidence would display and connote that as on the date of filing of the suit, the plaintiff had been in possession and enjoyment of the suit property. Granting of injunction, to protect the plaintiff's possession, to the effect that the plaintiff should not be dispossessed otherwise than in accordance with law, would be just and proper. 31. On balance, the substantial questions of law are answered as under: Substantial Question of Law No.(1) is decided to the effect that the first appellate Court was not justified in placing reliance on Exs.B1 to B10 the pendente lite documents in giving a finding that the defendants proved their possession over the suit property and not the

plaintiff. Substantial Question of Law No.(2) is decided to the effect that the first appellate Court was not justified in rejecting the prayer of the plaintiff for bare injunction, ignoring Exs.A8 and A9 and also the deposition of D.W.1. Substantial Question of Law No.(3) is decided to the effect that there is illegality in the common judgment and decrees of the first appellate Court. 32.Accordingly, the common judgment and decrees of the first appellate Court are set aside and the original suits are decreed to the aforesaid extent indicated in this judgment. The second appeals are disposed of accordingly. However, there is no order as to costs. Msk To 1. The Sub Court, Bhavani.

2. The First Additional District Munsif Court, Bhavani

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