

(2011) 06 MAD CK 0478

Madras High Court

Case No: S.A. No. 671 of 1987

Muthu and Others

APPELLANT

Vs

M. Durai

RESPONDENT

Date of Decision: June 17, 2011

Hon'ble Judges: R.S. Ramanathan, J

Bench: Single Bench

Advocate: R. Subramanian, for the Appellant; N. Thiagarajan, for the Respondent

Final Decision: Allowed

Judgement

R.S. Ramanathan, J.

The Defendants, who was successful in the trial Court and lost in the First Appellate Court are the Appellants.

2. The Respondent/Plaintiff filed a suit for declaration of title to the suit property and for recovery of possession.

3. The case of the Respondent/Plaintiff is that originally the suit property belonged to one T. Gopalachari and he was in possession and enjoyment of the same and he sold the property to the Plaintiff/Respondent under a registered sale deed, dated 19.08.1978 and the Plaintiff/Respondent also had taken delivery of the property from the vendor. The Defendants are closely related to each other and the Defendants were permitted to occupy the property by the Plaintiff's vendor and at the time of purchase by the Respondent, the property was delivered to him and the land was a vacant site and after the purchase by the Plaintiff, the Defendants started storing hay and manure and that was objected to by the Plaintiff and the Defendants/Appellants started claiming that it was their own property and they have also questioned the title of the Plaintiff/Respondent and therefore, the suit was filed for declaration and for recovery of possession.

4. The Appellants/Defendants contested the suit stating that they are in possession and enjoyment of the suit property for more than the statutory period and they

have also perfected title to the property by adverse possession and the property is in the possession of the Defendants as "Cherinatham" and the Plaintiff or his predecessor never had any title or possession over the same and therefore, the present suit for declaration and recovery of possession is not maintainable.

5. The trial Court dismissed the suit holding that the Plaintiff/Respondent has No. title to the suit property and the Plaintiff's vendor conveyed only an extent of the property excluding, the property in the possession of the Appellants/Defendants and the Defendants were also having title and possession. The First Appellate Court set aside the findings of the trial Court and decreed the suit holding that the Plaintiff proved his title to the suit property and the Defendants/Appellants did not prove adverse possession by stating the period from which they are in possession of the property adverse to the knowledge of the Plaintiffs and allowed the appeal and decreed the suit. Aggrieved by the same, this second appeal was filed by the Defendants and that appeal was allowed by this Court by judgment, dated 16.08.1999 and the Respondent/Plaintiff filed SLP against the said judgment and decree and the Hon"ble Supreme Court granted leave and allowed the Civil Appeal No. 6195 of 2000 and set aside the judgment of this Court, dated 16.02.1999 and remitted the matter to this Court for re-consideration of the 2nd appeal afresh, after formulating proper substantial questions of law arising if any. Therefore, this second appeal has come up for hearing after the remit by the Hon"ble Supreme Court.

6. As directed by the Hon"ble Supreme Court, as per the pleadings and evidence, the following substantial of laws arose for consideration in this second appeal:

01. Whether the Respondent/Plaintiff has proved title to the suit property?

02. Whether the Appellants/Defendants perfected title to the suit property by adverse possession?

7. It is submitted by the Learned Counsel appearing for the Appellants, Mr. R. Subramanian, that the Lower Appellate Court without properly appreciating the evidence of PW2, the vendor of the Plaintiff, erred in holding that the Plaintiff/Respondent has proved his title to the suit property.

8. According to the Learned Counsel appearing for the Appellants, it is specifically admitted by PW2, the vendor of the Plaintiff that he was enjoying the property that is situate west of the ridge and east of the ridge in the occupation of the Defendants and he never enjoyed the property and he conveyed that portion, which was in his enjoyment in favour of the Plaintiff, under a registered sale deed and therefore, what has been conveyed to the Plaintiff was the portion occupied by the vendor of the Plaintiff, which admittedly did not include the suit property and it was in the possession of the Defendants even prior to the purchase of the property by the Plaintiff's vendor and hence, the Lower Appellate Court erred in holding that the Plaintiff has got title to the suit property. He, therefore, submitted that the Plaintiff

is not entitled to declaration and recovery of possession.

9. The Learned Counsel appearing for the Appellants further submitted that the case of the Plaintiff was that his vendor permitted the Defendants to use the property and after his purchase, he got possession of the property from his vendor and thereafter, the Defendants attempted to encroach upon the suit property and questioned the title and despite the pretext, the Defendants squatted on the suit property and therefore, the suit was filed for declaration and injunction and it is admitted by the Plaintiff in the cross examination that the Defendants without getting permission from T. Gopalachari encroached upon his property and T. Gopalachari did not take any action to remove them from the suit property and the Defendants are in enjoyment of the property with the knowledge of the vendor and at the time of sale, the Defendants' encroachment was not removed.

10. PW2, the Plaintiff's vendor has stated that he purchased the suit property that is situate west of the property in the enjoyment of the Defendants and he was enjoying the same and sold the property to the Plaintiff and therefore, having regard to the evidence of PW1 and PW2, it has been made clear that with the knowledge of the Plaintiff and his vendor, the Defendants are in possession and enjoyment of the same and even prior to the purchase of the property by the Plaintiff, the Defendants are in enjoyment of the property for more than 20 years, that was admitted by the Plaintiff's vendor and therefore, the Defendants have perfected title by adverse possession and therefore, the suit filed by the Plaintiff has been rightly dismissed by the trial Court and the judgment and decree of the First Appellate Court is liable to be set aside and the suit has to be dismissed.

11. On the other hand, the Learned Counsel appearing for the Respondent submitted that the title of the suit property cannot be disputed and as per the documents, the Plaintiff purchased an extent of 1.59 acres of land in S. No. 83 and the Commissioner, who surveyed the property also found that the property in the possession of the Defendants/Appellants is also coming in Survey No. 83 and therefore, the Defendants are in the possession of the property belonging to the Plaintiff and once the Plaintiff's title to the suit property is upheld, in the absence of any adverse possession pleaded and proved by the Appellants/Defendants, the Plaintiff is entitled to decree of recovery of possession. He further submitted that though the Appellants/Defendants have stated that they have perfected title by adverse possession, they have not stated that, their possession was to the knowledge of the Plaintiff and his vendor and they have also not stated the period from which, they are in the occupation of the property and when the Defendants are in possession of the property seeking that it is their own property and the property does not belong to the Plaintiff, that possession will not become adverse to that of the Plaintiff and relied upon the judgment reported in [Gopal, Ramachandran and Ramesh minors are represented by their Mother and Natural Guardian, Saroja Vs. Ema Gounder, Patcha Gounder, Duraiswamy Gounder and Ramaswamy Gounder](#), ,

in support of his contention.

12. Heard both sides.

13. It is the specific case of the Respondent/Plaintiff that he purchased an extent of 1.59 acres in Survey No. 83 and out of the said extent, 4 cents was encroached by the Appellants/Defendants and therefore, the suit was filed for declaration and recovery of possession. The Lower Appellate Court on the basis of the Commissioner's report held that the suit property belongs to the Respondent/Plaintiff and the Commissioner has found that the suit property also comes within survey No. 83 and therefore, it must belong to the Plaintiff and the Plaintiff has proved his title. According to me, the findings of the Lower Appellate Court that the Plaintiff has proved the title and that was also confirmed by the report of the Commissioner is not correct. The Commissioner has not stated in his report that Survey No. 83 was measured or Survey No. 83 is having an extent of 1.59 acres only and the entire extent was measured and the suit present property which is in the occupation of the Appellants/Defendants was within the total extent of 1.59 acres in Survey No. 83. In other words, there is No. evidence let in by the Plaintiff to the effect that survey No. 83 was having an extent of 1.59 acres and the entire extent of 1.59 acres was measured by the surveyor and within the area of 1.59 acres, the suit property was found and it was found in the occupation of the Defendants. Therefore, merely because the suit property was found within the survey No. 83, it cannot lead to the presumption that the suit property belongs to the Plaintiff, unless the Plaintiff has proved that Survey No. 83 is having a total extent of 1.59 acres only and that was purchased by him and the entire survey No. 83 was measured and the Defendants property was found within the total extent of 1.59 acres. Admittedly, No. such exercise was done by the surveyor and No. evidence was let in to the effect that Survey No. 83 was having a total extent of 1.59 acres. Therefore, in the absence of such evidence, it cannot be presumed that the suit property belongs to the Plaintiff on the presumption that it is coming within the survey No. 83.

14. Further, PW2 is admittedly the vendor of the Plaintiff and he has deposed that he purchased an extent of 1.59 acres from one Ellumalai and he measured the entire extent and he was enjoying the property, which is situate west of the suit property which is in the possession of the Defendants. He further stated in the cross examination that he was aware about the enjoyment of the suit property by the Defendants and he was never in enjoyment of the trees that are found in the suit property and there is a ridge dividing the Plaintiff's property and the Defendants' property and he purchased the property twenty years back and he never enjoyed the property which is in the possession of the Defendants. Therefore, according to the evidence of PW2, he purchased the property and was in enjoyment of the property, which is situate west of the suit property and that was conveyed to the Plaintiff, under the sale deed Ex.A1. Therefore, from the evidence of PW2, it has been made clear that he sold the property, which was in his possession for more

than 20 years and he was not in possession of the property and he sold only the property which was in his possession. Therefore, PW2 did not convey the property in the possession of the Defendants, which is the suit property and he conveyed the property that is situate west of the property. Therefore, it can be stated that the Plaintiff has No. title to the suit property. Therefore, the Plaintiff has not proved the title of the property, when the Plaintiff has No. title to the suit property and therefore, the first substantial question of law is answered in favour of the Appellants/Defendants.

15. When the Plaintiff/Respondent has No. title to the suit property, he is not entitled to declaration and the suit was rightly dismissed by the Lower Appellate Court. Having regard to the answer given in favour of the Appellants/Defendants in the 1st substantial question of law, there is No. need to answer the 2nd substantial question of law. Nevertheless, having regard to the evidence that was let in, in this case, I am of the opinion that the 2nd substantial question of law is also answered in favour of the Appellants/Defendants.

16. The case of the Plaintiff/Respondent was that the suit property also belonged to his vendor and his vendor was in possession and enjoyment of the suit property and he permitted the Defendants to use the property and at the time of his purchase, he got vacant possession of the suit property. The specific pleading is that the Plaintiff purchased the suit property, under a registered sale deed, dated 19.08.1978 and took delivery of the property from his vendor. It was his further case that the 2nd Defendant was employed under his vendor and with the permission of the Plaintiff's vendor, they were storing hey and manure and at the time of purchase, the vacant possession was given to the Plaintiff and thereafter only, the Defendants started storing hey and manure. But the evidence of PW1 viz., the Plaintiff was different. The land was not measured by his vendors, when the property was sold to him. The Defendants without getting permission from the vendor, encroached upon the property and his vendor did not take any action. After the vendor asked them to remove the encroachment, the Defendants removed the encroachment and after his purchase, they started encroachment upon the property. Therefore, it is admitted by the Plaintiff that without getting permission from his vendor, the Defendants encroached upon the suit property and No. action was taken by his vendor. The Plaintiff's vendor also admitted that he purchased the property and was in enjoyment of the property, which is situate west of the suit property. He also admitted that he never enjoyed the suit property and he purchased the suit property 20 years prior to the date of deposition. Therefore, a combined reading of evidence of PW1 and 2, it has been made clear that the Defendants are in possession and enjoyment of the property knowing fully well that the property belongs to the Plaintiff's vendor and without getting permission from the Plaintiff's vendor they are enjoying the property for more than 20 years.

17. In judgment relied upon by the Learned Counsel appearing for the Appellants also, it was held after relying upon the judgment reported in [T. Anjanappa and Others Vs. Somalingappa and Another](#), :

...The concept of adverse possession contemplates a hostile possession i.e., a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's rights but denies them. The principle of law is firmly established that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of his title to the property claimed. For deciding whether the alleged acts of a person constituted adverse possession, the animus of the person doing those acts is the most crucial factor. Adverse possession is commenced in wrong and is aimed against right. A person is said to hold the property adversely to the real owner when that person in denial of the owner's right excluded him from the enjoyment of his property.

...The High Court has erred in holding that even if the defendants claim adverse possession, they do not have to prove who is the true owner and even if they had believed that the Government was the true owner and not the plaintiffs, the same was inconsequential. Obviously, the requirements of proving adverse possession have not been established. If the defendants are not sure who is the true owner the question of their being in hostile possession and the question of denying title of the true owner do not raise...

Therefore, the Defendants are in possession and enjoyment of the property knowing fully well that the property belonged to the Plaintiff's father and the Plaintiff's vendor also did not take any action to evict them and the Plaintiff and his vendor were aware that the properties belonged to them and despite the same, the Plaintiff's vendor did not take any action to evict them. Hence, the Appellants/Defendants have also perfected title by adverse possession. Therefore, the 2nd substantial question of law is answered in favour of the Appellants/Defendants.

18. In the result, the second appeal is allowed and the judgment and decree of the First Appellate Court is set aside and the judgment and decree of the trial Court is confirmed. No. costs.