

(2002) 09 MAD CK 0066
In the Madras High Court
Case No : S.A. No. 1304 of 1989

R. Nallamuthu Gounder

APPELLANT

Vs

V. Natarajan Mudaliar, Pavathal Gounder, R. Sengottaian
Gounder, R. Viswanatha Gounder, K.P. Muthusamy,
Karuppanna Gounder @ Koottapalliyar, C. Rajagopal Gounder,
C. Chandrasekaran, Sellammal @ Rajammal Gounder, Saroja
@ Sarojini, Chidambara Gounder and Ramasami Gounder

RESPONDENT

Date of Decision : 27-09-2002

Acts Referred:

Specific Relief Act, 1963 — Section 34, 42

Tamil Nadu Court Fees and Suits Valuation Act, 1955 — Section 25, 27

Citation : (2003) 1 MLJ 158

Hon'ble Judges : K. Sampath, J

Bench : Single Bench

Advocate : T.V. Ramanujam, for V.K. Nachimuthu, for the Appellant; S.V. Jayaraman, for the Respondent

Final Decision : Dismissed

Judgement

K. Sampath, J.—At the time of admission of the second appeal, the following substantial questions of law were raised for decision:

1. Whether the suit for permanent injunction and mandatory injunction is not maintainable as it is hit by proviso to Section 34 of the Specific Relief

Act, in view of the admission of the plaintiff in his evidence that he is not in possession of the suit property on the date of suit and there is no prayer

for recovery of possession? And

2. Whether the finding of the Courts below that the appellant has not perfected title to the southern portion of the suit property is vitiated in that the

Courts below have misconstrued Exs.B-1, C-1 and the evidence of D.Ws.5, 6 and 7?

2. Mr. T.V. Ramanujam, learned Senior Counsel for the appellant, took me through the pleadings with particular reference to the cause of action,

Court fee and the prayers and submitted that the plaintiff having admitted the possession of the defendants and in particular of the 4th defendant,

who is the appellant in the second appeal, cannot ask for injunction and in as much as he has asked for injunction, in view of Section 34 of the

Specific Relief Act, the suit ought to have been dismissed by the Courts below.

3. Per contra, Mr. S.V. Jayaraman, learned Senior Counsel for the contesting plaintiff/respondent, submitted that the plaintiff has alleged

encroachment by the defendants of the only access way to the property belonging to the plaintiff, that they have put up temporary constructions,

that there is a prayer for mandatory injunction and once this prayer is granted, the other aspect regarding absence of a prayer for recovery of

possession cannot loom large.

4. The learned Senior Counsel Mr. T.V. Ramanujam, though referred to the adverse possession claimed by the defendant, did not pursue that

point. We have therefore to confine ourselves to the question relating to Section 34 of the Specific Relief Act.

5. Before proceeding further, it would be worthwhile to have an idea about the scope of Section 34 of the Specific Relief Act, hereinafter referred

to as the Act. Section 34 of the Act runs as follows:

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny,

his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in

such suit ask for any further relief:

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to

do so.

Explanation: A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not in existence, and for whom, if

in existence, he would be a trustee.

6. The learned Senior Counsel Mr. T.V. Ramanujam relies on the proviso and submits that in as much as the plaintiff being able to seek further

relief than a mere declaration of title having omitted to do so, the suit has to fail. It is in this connection, the learned

2. Kumud Ranjan Banerjee Vs. Manabendra Banerjee,

3. Jemma Vs. Raghu,

4. Abdul Nabi Sahib Vs. Bajan Sahib and Another,

7. The idea behind the proviso to Section 34 as pointed out in several decisions is that a defendant must not be subjected to a multiplicity of

litigations as regards the same property. Therefore, if a plaintiff sues for declaration, he must seek for further relief in the same suit and if he fails to

do so, the suit has to fail. It is also well established that an objection that the further relief should have been asked for should be raised at the

earliest point of time, so that in such an event, it may be open to the plaintiff to ask for necessary amendment to comply with the provisions of

Section 34 of the Act. The plea based on the proviso must be raised at the earliest possible opportunity. Decisions have held that belated objection

about the maintainability of the suit for declaration without the consequential relief of possession, cannot be entertained. The defendant cannot be

allowed to raise the objection for the first time in the Appellate Court.

8. It has been held in Mst. Rukhmabai Vs. Lala Laxminarayan and Others, that,

the plea that the plaintiff asked for a bare declaration though he was in a position to ask for further relief within the meaning of Section 42 (now

Section 34) and hence the suit should have been dismissed in limine should be raised at the earliest point of time, in which event the plaintiff could

ask for necessary amendment to comply with the provisions of Section 42. It is a well settled rule of practice not to dismiss suits automatically but

to allow the plaintiff to make necessary amendment if he seeks to do so.

In that case, the plea was not allowed to be raised in the Supreme Court.

9. In the case before the Supreme Court, in the plaint the cause of action for the relief of declaration was given as the execution of the partition

decree through the Commissioner appointed by the Court. It was contended that the plaintiff should have asked for a permanent injunction

restraining the appellant before the Supreme Court from interfering with his possession. The appellant did not take this plea in the written statement

nor was there any issue in respect thereof, though as many as 12 issues were

raised on the pleadings; nor did the judgment of the learned District Judge disclose that the appellant raised any such plea. For the first time the plea based on Section 42 (present Section 34) was raised before the High Court and even then the argument advanced was that the consequential relief should have been one for partition: the High Court rejected the contention on the ground that the plaintiff being in possession of the joint family property, was not bound to ask for partition if he did not have the intention to separate himself from the other members of the family. The Supreme Court observed as follows:

It is not necessary in this case to express our opinion on the question whether the consequential relief should have been asked for; for, this question should have been raised at the earliest point of time, in which event the plaintiff could have asked for necessary amendment to comply with the provisions of Section 42 of the Specific Relief Act. In the circumstances, we are not justified in allowing the appellant to raise the plea before us." (emphasis mine)

10. In *C. Mohammed Yunus Vs. Syed Unissa and Others*, it has been held as follows:

A suit for declaration with a consequential relief for injunction is not a suit for declaration simpliciter. It is a suit for declaration with further relief.

Whether the further relief claimed in a particular case as consequential upon a declaration is adequate must always depend upon the facts and circumstances of each case." (emphasis again mine)

11. Now we will go to the pleadings of the case and find out whether the suit suffers on account of any want of compliance with the provisions of

Section 34 of the Act. The case of the plaintiff is as follows:

The suit property in T.S.No.276/2(P) in Erode Town was originally owned by Vaiyapuri Mudaliar, the father of the plaintiff and two others. Under

a lay out scheme, the said owners partitioned out the said land into house sites, providing roads and passages for convenient enjoyment. The

several sites were assigned serial numbers. Under a registered partition dated 19-11-1939 among the co-owners, site Nos.17 and 18 among

others were allotted to Vaiyapuri Mudaliar towards his share. On his death, his son the plaintiff became the absolute owner and he was in

possession and enjoyment. He sold away the other sites to various persons,

reserving site No.17 for himself. He sold site No.18 to two persons, who in turn sold the same to the first defendant. In between sites 17 and 18, an east-west passage of 10 feet width was provided. There is a 30 feet north-south road connecting the same with Perundurai Road in the south. In all the roads and passages provided in the scheme, all the purchasers were given only a right of user and specific recitals to that effect have been made in the sale deeds. As such the first defendant has only a right to walk over the pathway. Site No.17 lies immediately to the north of site No.18 and the east to west passage. That is the only access to the suit property. The second defendant is the owner of the land lying to the west of the suit property. He has absolutely no right of any manner in or over the east to west passage. In an attempt to grab the suit passage by either the first defendant or the second defendant or both and connect the same with their respective property, the suit in O.S.No.681/73 came to be filed before the District Munsif's Court, Erode, by the first defendant in the present suit against defendants 4 and 5 and two others for a permanent injunction restraining them from putting up any construction over the pathway. The plaintiff attempted to get himself impleaded and recorded his protest. Immediately, defendants 1 and 2 colluded together and entered into a hasty compromise under the terms of which the passage was divided into two. The first defendant was to have the southern half and the second defendant was to have the northern half. They also put up a gate and an east-west dividing wall and blocked the western end of the passage, where it joins the 30 feet north-south road by enclosing it with a gate by the first defendant and by putting up a big wall by the second defendant. The first defendant has annexed the southern half of the passage to her property, viz. site No.18 and the second defendant annexed the northern half to his land on is north. This has resulted in the blocking of access to the plaintiff's property in site No.17. Taking advantage of the fact that the suit property is vacant and the plaintiff's access to the same was completely and effectively shut down by defendants 1 and 2, defendants 3 to 5 have encroached into the eastern fringe of the suit property and defendants 6 to 8 and 10 to 14 have encroached into the northern fringe of the suit property. The 9th defendant either by himself or at the instance of defendants 6 to 8 and 10 to 14, has put up a temporary shed on the

northern fringe of the suit property and stacked fodder therein. Such acts of trespass on the part of defendants 3 to 14 are unlawful and

unauthorised. They have to be directed to remove the encroachment and leave the suit property intact by means of a prohibitory and mandatory

injunction and the title of the plaintiff to the suit property to be declared.

12. The paragraph relating to Court fee is as follows:

The value of the suit for purpose of Court fee and jurisdiction is as follows:

1. For declaration of title and permanent injunction: value of the suit property - market value is Rs.20,000/-; half the same is Rs.10,000/- and a

Court fee of Rs.750.50 is paid thereof u/s 25(b) of the Tamil Nadu Court Fees Act 14 of 1955.

2. For the relief of mandatory injunction: value of suit property is Rs.400/- and a fixed Court fee of Rs.30.50 each is paid thereof u/s 27 of the

Tamil Nadu Court Fees Act 14 of 1955 for the acts done on the part of defendants 1 and 2, 3 to 5 and 6 to 14.

13. The prayer is as follows:

i) to declare the title of the plaintiff to the suit property.

ii) to restrain the defendants by means of a permanent prohibitory injunction from in any manner trespassing in or over the suit property or any portion thereof.

iii) to direct defendants 1 and 2 by means of a mandatory injunction to remove the obstructions to the plaintiff's passage to his property.

iv) to direct defendants 3 to 5 by a mandatory injunction to remove the encroachment over the eastern fringe and remove the shed in the south eastern portion of the suit property.

v) to direct defendants 6 to 14 by a mandatory injunction to remove the encroachments over the northern fringe of the suit property.

vi) if the defendants fail to comply with the mandatory injunction to direct the plaintiff to carry out the same and recover the cost thereof from the defendants.

Vii) Omitted

14. The description of the suit property is as follows:

nuhL hpo/ nuhL rg;/o. nuhL jhYf;fh. nuhL lt[d;. o.v!;. bek;gh; 276-2. ghh;;l;oy; irl; be. 17=f;F brf;Fge;jp 6 Kjy; 8 gpujpthjpfSf;F brhj;Jf;fSf;Fj;

bjw;F. 2=Mk; gpujpthjp rpjk;gu ft[z;lh; brhj;Jf;Fk; fpHf;F. 3 Kjy; 5 gpujpthjpfSila
brhj;Jf;Fk; nkw;F. fpH nkypy; 10mo re;Jf;Fk; mjd; bjd;

g[wKs;ss irl; be. 18 1= Mk; gpujpthjp ghthj;jhs; brhj;Jf;Fk; tlf;F.

,jd; kj;jpapy; tl[gwk; fpH nkyo 43 bjd;[gwk; fpH nkyo 47. nky;g[wk; bjd;tlyo 74
mo fpH g[wk; bjd;tlyo 73 mo Mfpa ,e;j mst[fSs;s gpshdpy; fz;l

017 vd;w khh;f;fpl;l fhyp epyk; 10mo re;Jk;.

15. We may at this juncture itself notice that the encroachment complained of
relates to the passage between plot Nos.17 and 18 and so far as

plot No.17 itself is concerned, there is no averment of encroachment in plot
No.17. The possession of plot No.17 with the plaintiff is not to be

interfered with. The prayer is to restrain the defendants by means of a
permanent prescription from in any manner trespassing in or over the suit

property or any portion thereof. I do not find anything wanting in this prayer.

16. There is the further prayer for mandatory injunction to remove the
obstructions to the plaintiff's passage to his property in plot No.17 and to

remove the encroachment over the eastern fringe and remove the shed in the
south-eastern portion of the suit property. In my considered view, the

prayer is properly couched and there is absolutely no warrant for invoking the
provisions of Section 34 of the Act and dismissing the suit for want

of further prayer. As rightly pointed out by Mr. S.V. Jayaraman, learned Senior
Counsel for the respondent/plaintiff, if the encroachments and

obstructions are removed, the plaintiff will have free access to his property in
Plot No.17, which remained untrespassed. The objection raised with

regard to want of further relief is totally misconceived. As has been held by the
Supreme Court in MOHAMMAD YUNUS" case already referred

to, whether the further relief claimed in a particular case as consequential upon a
declaration is adequate depends upon the facts and circumstances

of each case. The further relief prayed for in the present suit is adequate and no
exception can be taken to the same.

17. It is now necessary to refer to the written statement of the contesting fourth
defendant to find out whether any objection pertaining to Section

34 of the Act has been raised. We read and reread only to find that no such
objection has been raised in the pleadings nor before the Courts

below. For the first time it is sought to be raised before this Court. It will be rank
injustice to permit the appellant to raise that objection. We have

already noted that the prayer in the plaint is properly framed. Even otherwise, it is not open to the appellant herein to raise any such objection at this belated stage.

18. The written statement also makes a very strange reading: the property on the east of the suit property belongs to defendants 3 to 5 who are father and sons and who are the owners and the property east to the suit property has been lying vacant for 30 years and more prior to the filing of the suit; the fourth defendant therefore occupied the southern portion of the suit property in the year 1961 in which year defendants 3 to 5 purchased the property on the east; the southern portion of the suit property occupied by the fourth defendant measures 36 feet north-south and 44 feet east-west; he strengthened the fence which was in existence on the northern extremity of the plot occupied by him on the eastern side; ever since 1951, the fourth defendant has been in possession and enjoyment of the southern portion of the suit property in his own right openly and to the knowledge of the plaintiff by using it as a cattle yard for dumping cattle fodder and cattle manure; in such state of affairs, the second defendant, who is the father-in-law of the fourth defendant, purchased the site on the immediate west of the plot under the occupation of the fourth defendant in 1971; he did not provide his daughter to marry the fourth defendant in 1966 with any seers; he occupied the site belonging to the second defendant also along with the southern portion of the suit property, which was already in his occupation since 1961; he is in possession and enjoyment in his own right openly and continuously ever since 1961 and has perfected title thereto by adverse possession; the 9 feet broad lane on the south of the portion occupied by the fourth defendant was of no use to anybody except the fourth defendant; the northern portion of the suit property is in the possession and enjoyment of defendants 7, 8 and 10 to 12 for the past three decades or more; the plaintiff has never been in possession and enjoyment of any portion of the suit property and at any rate to the southern portion thereof under the occupation of the fourth defendant; the plaintiff is not entitled to northern portion of the suit property also; as no part of the suit property is in possession and enjoyment of the plaintiff, he is not competent to ask for any injunction either mandatory or prohibitory with regard to the suit property or any property

appertaining thereto; the collusion alleged between defendants 1 and 2 is not correct; the fourth defendant raised constructions even in the year

1973 and the plaintiff has been well aware of the constructions when they were constructed; the allegation that the plaintiff came to know of the

encroachment only in August, 1975 is a self-serving statement made for the purpose of getting over the bar of limitation; the relief of mandatory

injunction should have been valued at more than Rs.5000/- and Court fee paid accordingly; the suit not having been properly valued for Court fee

jurisdiction has to fail.

19. As already pointed out, there is not a whisper about the suit being not maintainable in view of Section 34 of the Act.

20. Ram Saran and Another Vs. Smt. Ganga Devi, relied on by Mr. T.V. Ramanujam is a case where the defendant was in possession of some of

the suit properties and the plaintiff in the suit did not seek possession of those properties, but merely claimed a declaration that he was the owner of

the suit properties. It was held that the suit was not maintainable.

21. The next case relied on, viz., Kumud Ranjan Banerjee Vs. Manabendra Banerjee, is a case where the suit was for declaration of title and

injunction. No further relief of possession was asked for, though the defendant was in possession. It was held that the suit was hit by the proviso to

Section 34. In fact, the decision of the Supreme Court in C. Mohammed Yunus Vs. Syed Unissa and Others, is referred to and distinguished on

facts.

22. In the third decision cited, Jemma Vs. Raghu, it has been held that,

the plaintiff, who was in possession, is not entitled to the relief of injunction without claiming recovery of possession.

23. In Abdul Nabi Sahib Vs. Bajan Sahib and Another, it has been held that when the plaintiff was not in possession of the property, suit for mere

injunction does not lie.

24. None of the decisions relied on by the learned Senior Counsel Mr. T.V. Ramanujam would apply to the facts of the present case as all of them

turn on different sets of facts.

25. The first substantial question of law raised does not really arise for consideration. The appellant is not permitted to raise the objection and even

otherwise, there is no defect in the prayer in the suit. The first substantial question of law is answered accordingly.

26. As regards the other substantial question of law relating to adverse possession, though the learned Counsel did not pursue that, the substantial question of law having been raised, it is necessary to answer that also. The lower Appellate Court has adverted to this question while dealing with points 1 to 3 in paragraph 13 of its judgment.

Admittedly, the plaintiff's father sold site No.18 to 2 persons and from the vendees the first defendant has purchased the same. Ex.A-5 is the sale

deed in favour of the first defendant and Exs.A-3 and A-4 are in favour of the first defendant's vendee. Further the 4th defendant in his evidence

as D.W.5 at page 6 admitted that plot No.17 belongs to the plaintiff's father. Therefore, the title to the suit property to the plaintiff's father is

admitted by the fourth defendant. Apart from that, this suit property has been sold in the Court auction and purchased by the second defendant.

Ex.A-26 is the order passed by the Subordinate Judge, Erode, in E.A.706/72 in E.P.No.112/72 in O.S.No.462/70 filed by the present plaintiff to

set aside the same. The present plaintiff was the judgment debtor and the 2nd defendant was the Court auction purchaser. Ex.A-27 is the "Ela

Isthiyar" in respect of the property sold in the Court auction. The present suit property was brought to sale as item No.2. The sale was held in

1972. So even in 1972, the second defendant admitted that the suit property belongs to the plaintiff. Therefore, there is clear documentary

evidence to prove that the plaintiff and his predecessors in title own the suit property. None of the defendants claims title to the suit property on

any document of title. The 4th defendant claims title to the southern half of the suit property by adverse possession and defendants 6 to 8 and 10 to

12 claim title to the northern half of the suit property by adverse possession. The defendants who claim title to the suit property by adverse

possession must prove that they are in possession of the property adverse to the interest of the plaintiff continuously for a long number of years to

the knowledge of the plaintiff.

Ultimately, the learned District Judge finds that there is no evidence to prove that the defendants had prescribed for title by adverse possession.

Mere fugitive acts like tethering cattle would not amount to adverse possession.

The learned Judge relied on the judgment in ST. ANTHONY'S

CHARITY REPRESENTED BY ITS PRIEST REV.FR.P. MICHAEL VS. V. KRISHNAVENI
AMMAL AIR 1985 Mad 542 wherein it has

been held that ""even the putting a privy and shed for cows on a small piece of
land which is not of any immediate use to the owner, would not be

sufficient to give title to the land by adverse possession.

27. Dealing with the 4th defendant's claim for title, in paragraph 14 the learned
Judge says that there is no acceptable evidence to prove his

possession from 1961. The Commissioner had visited the suit property and filed
his report and plan Exs.C-1 and C-2. The Commissioner noted

the suit property on the southern side as consisting of only asbestos sheet
temporary shed and a water tap and found that there was no permanent

construction in the suit property. According to the 4th defendant, he put up
construction only in the year 1973. Further, even in 1972 the decree

holder claimed that the suit property was only a vacant site. In any event, even
taking that the 4th defendant had put up some temporary shed in the

suit property, it ought to have been only subsequent to 1972. Therefore, there is
no question of the 4th defendant/appellant having prescribed for

title by adverse possession. It will be the height of injustice to countenance the
plea of adverse possession set up by the fourth defendant who had

committed trespass and blocked access to the plaintiff to his property in a
highhanded manner.

28. Consequently, the second substantial question of law is also answered
against the appellant. The second appeal fails and the same is dismissed

with costs fixed at Rs.5000/-.