

(2002) 10 MAD CK 0113
In the Madras High Court
Case No : S.A. No. 1902 of 1989

Varadarasu alias Devarasu

APPELLANT

Vs

Malone Veerasamy alias Thanapal, Vanaraja alias
Sambasivam and Ramadas

RESPONDENT

Date of Decision : 09-10-2002

Acts Referred:

Specific Relief Act, 1963 — Section 9

Citation : (2003) 2 LW 152 : (2003) 1 MLJ 294

Hon'ble Judges : K. Sampath, J

Bench : Single Bench

Advocate : Chitra Sampath, for T.R. Rajaraman, for the Appellant; G. Karunakaran, for T.P. Manoharan, for the Respondent

Judgement

K. Sampath, J.—The defendant in O.S.No.572/87 on the file of the First Additional District Munsif, Pondicherry, is the appellant in the second appeal. The respondents filed the suit for a declaration that they are the absolute owners of the B Schedule property, for recovery of possession of the same and for mesne profits past and future, on the following averments:

One Periya Ayee Ammal owned and possessed a lot of properties including the plaint A Schedule property. She died about 80 years prior to the suit, leaving behind five sons Amanan, Muthulingam, Thulukkanam, Arjunan and Subbarayan as her heirs. They enjoyed the entire A Schedule property and 4 other equally measured plots on the west of the A Schedule property as set out in the plaint plan. The five brothers divided the properties into five plots described as A, B, C, D and E in the plaint plan. Amanan was allotted the western most plot marked as A in the plan, the second brother Muthulingam the B marked plot, Thulukkanam C marked, Arjunan D marked and Subbarayan E marked. Since on the west, south and north of the plaint Schedule there was no access to road, a lane was opened in the middle by consent among the sharers from the eastern end of Amanan's plot up to the eastern end of Subbarayan's plot opening at Muthu

Mariamman Koil Street as a common lane for all of them. The lane lies west to east across the plots of all the four younger brothers. Subbarayan died 65 years prior to the suit leaving behind his only son Rangasamy to survive him and inherit the plaint A Schedule property and marked as e area in the plaint plan. He was in enjoyment for over 15 years and died in the year 1924 leaving behind his only son Vadivelu as his sole legal heir. Vadivelu was born in the ancestral house in the A Schedule property itself, lived there and died in 1963. He died leaving behind one Ponnusamy and the first plaintiff. Ponnusamy lived in the suit property ever since his birth. They have enjoyed the property peacefully without any interruption whatsoever. Arjunan, who was the owner of the plaint plan D marked portion, died leaving behind his two sons Jagannathan and Thulukkanam. Jagannathan died leaving behind his two sons Kuppusamy and Ganesan. Kuppusamy died leaving behind his two sons Samikannu alias Balan and Varadharasu alias Devarasu. Varadharasu alias Devarasu is the defendant in the suit. Thulukkanam died leaving behind his two sons Subramanian and Ganapathy. Subramanian died leaving behind his two children Thayarammal and Shanmugham.

2. After the death of defendant's father Kuppusamy about 20 years prior to the suit, the defendant picked up a quarrel with his brother Balan, due to certain disputes arising between them. In 1978 the defendant approached the first plaintiff and his brother Ponnusamy, father of plaintiffs 2 and 3 and requested them to permit him to live in the northern portion of A Schedule property separately demarcated as B Schedule in the plaint plan. Since the defendant happened to be a relative and out of sympathy, the first plaintiff and Ponnusamy permitted the defendant to live in the B Schedule property on condition that he should quit and deliver possession within a period of one year. The defendant has been in permissive occupation of B Schedule property from 1978. Ponnusamy died in 1978 leaving behind his two sons, who are plaintiffs 2 and 3. As undertaken by him, the defendant did not vacate the property within one year from 1978. There was a panchayat held on 6.11.1986 in the presence of Madiyan Arumugham, Desiya and Adhikesan, who are also trustees of Mariamman Temple. The defendant demanded the plaintiffs to sell the B Schedule property to him or else to grant him some more time to vacate the property. The defendant's statement was recorded by the panchayathars on the reverse side of the petition given by the plaintiffs duly signed by them. The plaintiffs want to effect partition of the entire A Schedule property among themselves for their personal occupation and therefore they need the B Schedule property. The plaintiffs' demand on that ground was also rejected by him. A notice dated 23.7.1986 was issued to the defendant revoking the licence granted and calling upon him to quit and deliver vacant possession and also to damages at the rate of Rs.10/- per month from the date of notice till the date of delivery of vacant possession. The defendant sent reply dated 11.8.1986 denying the plaintiffs' contention and taking a false plea that he has been living in the B Schedule property as owner of the same and not on the permission of the plaintiffs. The

heirs of Amanan and Arjunan have instigated the defendants not to vacate the B Schedule property. The plaintiffs sent a notice to them also. They received the notice and sent a reply admitting the plaintiffs' right and further stating that they are not in collusion with the defendants. One of the heirs denied the receipt of the notice.

3. The defendant resisted the suit contending inter alia as follows:

He is the owner of the B Schedule property; the plaintiffs have no right to claim the same; the defendant and his ancestors enjoyed the B Schedule property;

Subbarayan and his successors never enjoyed the property; he had no knowledge of the ownership of the A Schedule property or the genealogy claimed by the plaintiff in the plaint; Arjunan has another son by name Thambiran and two daughters Kuppu and Kanagavalli; the plaintiffs have omitted the above facts in the plaint; the defendant did not pick up quarrel with his brother and seek permission of the plaintiffs to live in the B Schedule property; the allegation regarding panchayat and the pleadings is a product of the plaintiffs' imagination; the defendant is not liable to vacate the property nor is he liable to pay any mesne profits to the plaintiffs.

4. On the above pleadings, the trial Court framed the necessary issues and on the oral and the documentary evidence, rejected the case of the plaintiffs and by judgment and decree dated 5-9-1988 dismissed the suit. The plaintiffs filed appeal in A.S.No.196/88 before the First Additional District Munsif, Pondicherry. The learned Appellate Judge, by judgment and decree dated 13-9-1989 reversed the decision of the trial Court and allowed the appeal and decreed the suit.

5. It is as against that, the present second appeal has been filed. At the time of admission the following substantial questions of law were framed for decision in the second appeal:

"(1) When the plaintiffs had failed to establish the title to the suit property and the alleged division and allotment of the suit property to their branch, is the lower Appellate Court right in granting a decree declaring their title?

(2) Is the lower Appellate Court right in holding that the defendant cannot plead adverse possession against the plaintiffs despite the definite stand of the plaintiffs that there was a partition and allotment of specific property to the sharers?

6. The learned Counsel for the appellant submitted that the lower Appellate Court has grievously erred in reversing the decision of the trial Court, particularly when the plaintiffs have failed to establish the title to the suit property and the division and the allotment set up by them. When the plaintiffs have taken a definite stand that there was a partition and allotment of specific items to the various sharers, the lower Appellate Court was in error in holding that the defendant cannot plead adverse possession. The approach of the lower Appellate Court is clearly erroneous, in that it has cast the burden on the defendant to

prove his case and according to the lower Appellate Court, the defendant not having established his claim, the plaintiffs' case should be accepted. Unless the plaintiffs established their case, they cannot get their title declared for specific portion of the property. The lower Appellate Court clearly erred in overlooking that the documents relied on by the plaintiffs are not referable to the suit property. Strangely the lower Appellate Court finds that the defendant is a Government Servant and he has not produced any document to show that he has declared his ownership of the property to the Government. There was no request made by the plaintiffs to produce the materials before the Court.

7. Per contra, Mr.G. Karunakaran, learned Counsel for the contesting respondent, submitted that the lower Appellate Court has accepted the documents filed on the side of the plaintiffs as proof of his title and possession as also his case of granting permission to the defendant to occupy the suit property as there was dispute between the appellant and his brother. It is a factual finding and no interference is called for. Even otherwise, according to the learned counsel, the plaintiffs have proved their possession on the basis of the various documents and if they are dispossessed, they are entitled to have the property restored to their possession. In support of his contention, the learned Counsel relied on a number of judgments,

8. Let us now have a look at the various documents produced in the case. Ex.A-2 is the copy of the birth certificate of the first plaintiff. It only shows that he was born in the area. Again, Ex.A-3 is the marriage certificate of the first plaintiff. It does not show that he was married in the suit property. Ex.A-4 is the notice issued by Survey and Land Record dated 22.12.1980. It is seen that it was issued on the request of the plaintiffs. Ex.A-5 is a rough sketch in respect of the suit property, which is disputed by the defendant. Ex.A-6 is a request letter by the plaintiffs dated 3-7-1986 to the panchayat. Ex.A-7 is the decision of the panchayat. There is no reference to any permissive possession. On the reverse of Ex.A-6, the alleged panchayathars have signed. None of the panchayathars was examined. This exhibit does not contain the signature of the defendant. When the defendant has denied the panchayat, it is incumbent on the plaintiff to examine the panchayathars in support of his case. Exs.A-8 and A-9 are respectively the lawyer notice and reply notice. Ex.A-10 series are notice with postal acknowledgement to other pangalis dated 24-10-1986. No copy was marked to the defendant. Exs.A-13 to A-17 do not refer to the suit property. Ex.A-18 is a demand notice dated 16-6-1967. It is admitted by the first plaintiff as P.W.1 that it does not relate to the suit property. So is the case with Ex.A-19 demand notice for house tax and assessment dated 10-8-1987. Exs.A-20 and A-21 also do not relate to the suit property. Ex.A-22 is the 16th day ceremony card of Kathavarayan alias Thangavelu, which has nothing to do with the suit property. Ex.A-23 is a series of measurement receipts and having no relevance to the suit property. Ex.A-24 is a Survey Department notice dated 22-12-1980. Ex.A-25 is the proposed patta dated 27-6-1978 for the adjoining property and it relates to S.Nos.134/23 and 134/27 and it does not relate to the suit property.

Ex.A-26 is the proposed manai patta of Thanapal dated 6-6-1988, which is subsequent to the suit property. Exs.A-27 and A-28 are the survey plans produced through P.W.4 and they are not authenticated. Ex.A-29 is the photo copy of the pronote dated 1-7-1985 and it has absolutely no relevance. Ex.A-30 is the petition to the panchayathars dated 10.4.1986.

9. The first plaintiff as P.W.1, says that the panchayat was conducted in the temple and the defendant had also attended the panchayat, that he did not know who wrote Ex.A-7, that several people were present, but none of them had signed, that the defendant had not signed the panchayat, that he did not know that the defendant's hut number was 104-A, that in the several documents produced by him, viz. Exs.A-13, A-14, A-15, A-16 and A-17, no house number or name of the street is given and that in Ex.A-18 house number is given as 2/5, which is in S.No.134/19 and not in S.No.134/24. He made a further crucial admission and changed track. He pleaded that in 1978 the defendant approached the first plaintiff and his brother Ponnusamy and sought permission to stay in the suit property in view of some misunderstanding between him and his brother. However, he had no answer to Ex.B-5, the death certificate relating to his brother Ponnusamy showing the year of death as 1976.

10. P.W.2 has admitted that the house in the suit property had been put up by the defendant about 10 years prior to his giving evidence in 1988, that adjacent to that the first plaintiff and his brother had their own house and that he did not know the number of the house. A suggestion was also made to him that he had filed a suit against the daughter of one Punniyakodi and in that the defendant's brother had deposed against the witness and because of that in the present suit, he was deposing against the defendant. Though he talks about the panchayat, he was not a panchayathar. His evidence does not in any way advance the case of the plaintiff. P.W.3 is the poojari of Muthu Mariamman Temple. He came to know about the panchayat from Madiyan Arumugham, who was related to the first plaintiff as his uncle. He was the Chairman of the Trust Board, that the defendant's brother Swamikkannu was the Treasurer of the Trust, that he used to pay the salary to the witness and since the beginning of the case he did not pay him salary, that was for over five months and that he denied that because he did not pay the salary, he was deposing against the defendant. He had only hear-say knowledge of the panchayat.

11. P.W.4 is the Settlement Revenue Inspector. He had produced the records pursuant to the summons issued in the case. He is not able to explain as to how he did not put the date in Exs.A-26 to A-28, that in the chitta book the originals were there and the Director used to put the date and sign and in the present case, he had omitted to put the date and sign.

12. In this state of evidence, the trial Court, in my view, rightly held against the plaintiffs and dismissed the suit. However, the lower Appellate court has totally misconstrued the documents and gone to the extent of finding fault with the case of the defendant. The lower appellate court has taken into consideration wholly

irrelevant matters. It reasoned that the defendant is a Government Servant and he had not produced any document to show that he had declared the suit property as his property before the Government and because of this, the lower Appellate Court would draw adverse inference that the defendant is not the owner of the property. The lower Appellate Court clearly lost sight of the fact that the plaintiffs had come forward with a specific case of permissive possession by the defendant that this has to be substantiated by acceptable oral and documentary evidence. None of the documents produced on the side of the plaintiffs would show that the suit property belonged to the plaintiffs branch and that in 1978 at the request of the defendant, the first plaintiff and his brother permitted the defendant to occupy the property as a temporary measure in view of some misunderstanding between the defendant and his brother. The lower Appellate Court clearly overlooked the specific case of the plaintiffs that the meeting between the defendant and the first plaintiff and his brother had been pleaded by the plaintiffs, as having taken place in 1978 and this is falsified by the defendant producing the death certificate relating to the first plaintiff's brother showing his year of death as 1976. None of the documents produced on the side of the plaintiffs would show that the plaintiffs were at any time owning the suit property and were in possession and enjoyment. The division set up by the plaintiffs has not been proved. The plaintiffs set up a case of panchayat. The panchayat was disputed by the defendant. No panchayathar was examined. The alleged panchayat document does not contain the signature of the defendant. Some hear-say evidence is let in. The lower Appellate Court chose to accept the evidence of the plaintiffs and as already noted, found fault with the defendant for not proving his case, allowed the appeal, set aside the judgment and decree of the trial Court and decreed the suit.

13. With regard to the various house tax receipts on the first plaintiff's own admission, they do not relate to the suit property. Even Ex.A-24 notice issued by the Survey and Land Records Department does not relate to the suit property. It relates to the property of one Jagannathan, alleged to be the grandfather of the defendant. So far as Exs.A-26, A-27 and A-28 are concerned, we have already noticed that P.W.4 while answering in cross-examination that the date on which those records came into existence had not been mentioned in the register. He also did not say anything about any enquiry conducted before issuing those records. One of the pangalis has been examined as P,W.2 on the side of the plaintiffs, while the defendant has examined another of the pangalis and it is not safe to rely on the evidence of either of them.

14. Realising the difficulty in supporting the case of the plaintiffs on the basis of title, Mr. Karunakaran, learned Counsel for the respondents /plaintiffs sought to sustain the decision of the lower appellate Court on the ground that the decree in favour of the plaintiffs could be maintained on the basis of the plaintiffs' possession. In this connection, the learned Counsel relied on a number of judgments.

15. In Ramkrishna Panda Vs. Arjuno Padhano and Others, it has been held that, "where the entry in the records of rights shows the suit lands in the name of the plaintiff, the onus is on the defendant to prove that the said entry in favour of the plaintiff is not correct."

16. We have already noticed that with regard to the patta alleged to have been issued to the plaintiffs, it has not been shown whether there was any enquiry and the basis on which patta had been issued in favour of the plaintiffs, when admittedly even according to the plaintiffs, the defendant was in possession at the time the alleged patta was issued. Ex.A-4 is a notice issued by Survey and Land Records Department on 22-12-1980 and it is in evidence that it was issued on the request of the plaintiffs. It cannot in any way advance his case.

17. In Somnath Burman Vs. Dr. S.P. Raju and Another, , it has been held that,

"Section 9 of the Specific Relief Act, 1963 is in no way inconsistent with the position that as against a wrong doer, prior possession of the plaintiff, in an action of ejectment, is sufficient title, even if the suit be brought more than six months after the act of dispossession complained of and that the wrong doer cannot successfully resist the suit by showing that the title and right to possession are in a third person. Therefore, a person having possessory title can get a declaration that he was the owner of the land in the suit and an injunction restraining the defendant from interfering with his possession can be granted."

18. For applying Section 9, prior possession must be established. In my view, the prior possession of the plaintiffs has not been established.

19. In Kanthammal Vs. Bysani Sriramulu Chetti and Another, it has been held that,

"the mere fact that the plaintiff is in possession of the suit property will not enable her/him to get an injunction as against the defendant. It is no doubt true that a person in possession can resist the whole world, but the exception is the true owner. A person in possession without any title cannot get any relief against a person who has got a better title."

20. In Daulat Singh and Another Vs. Tulsiram and Another, , it has been held that,

"suit for restoration of possession and permanent injunction can succeed by the plaintiff proving continuous possession prior to dispossession and that it is not necessary to establish title. A trespasser has no right to disturb peaceful possession of long time of any person on any suit property and he cannot reap the benefit of his illegal act."

In that case, the plaintiff was in possession of the suit land continuously for over 30 years and also obtained permission for raising construction on the land from Gram Panchayat. The defendants dispossessed the plaintiff by misusing the privilege of licence given to use the land for few days for the marriage by putting up a temporary shed. It was held that the plaintiffs, on the basis of their long

possession were entitled to the relief of restoration of possession and of permanent injunction to protect their possession against interference of defendants including the construction work and it was not necessary for the plaintiffs to establish their title.

21. This decision would apply to the facts of the present case only if the requirements of prior possession by the plaintiffs are proved. In my view, it has not been done by the plaintiffs in the present case.

22. In *Kammavar Sangam Vs. Mani Janagarajan*, it has been held as follows:

"Plaintiff seeking declaration of title and consequential injunction on the basis of patta issued, which discloses that the plaintiff got the property by devolution of interest - the plaintiff also pleading that he got the suit property from his grandfather by devolution, but not producing any document to prove antecedent title of his grandfather. Reliance on patta cannot be made to prove title as patta which mutates entries cannot convey or extinguish right over property. However, relief for injunction is available to a person claiming on the basis of possessory title. However, it cannot be maintained against persons having better title."

23. Apparently, the learned Counsel would rely on this judgment to advance the case of the plaintiffs that they had produced patta and established devolution of interest and therefore on the basis of their possession, though not on the date of the suit, but prior thereto the plaintiffs should be granted relief. The submission of the learned Counsel presupposes that the plaintiffs have established devolution of interest and that in recognition of their possession, patta was granted. We have already noted that the plaintiffs have not done that.

24. In *Guruvammal and another Vs. Subbiah Naicker and others*, relied on by the learned Counsel, I have held that patta does not constitute a document of title, that the plaintiff in that case would rely on an order of Tahsildar for transfer of patta without producing the material to show as to how the Tahsildar came to such a conclusion and that mutation of entries is done to enable the State to collect revenue from persons who are in possession of property and that it could not be relied on for granting relief.

25. It is also well established that even if the Revenue Authorities decided the question of title, that will not affect the jurisdiction of the Court, which has to decide the question without reference to the decision of the Revenue Authorities. It is the Civil Court Judge to adjudge the question as to whether the person claiming it is the title holder of the land.

26. In *S.A.No.959/97 SUNDARAMBAL VS. V. RAMAIYA PILLAI* decided on 30-6-2000 I had occasion to consider a similar question. In that case, the appellant relied on two documents, respectively the assessment certificate and the Revenue record. The assessment certificate was proved by the Tahsildar examined as P.W.1. It was also admitted that the suit property was Government poramboke. There was also no record produced by the defendant to show his

possession. The appellant's name found a place in the joint patta. I referred to a decision in *Fakirbhai Bhagwandas and Another Vs. Maganlal Haribhai and Another*, which had followed the Privy Council decision in *ISMAIL ARIFF VS. MOHAMED GHOUSE* ILR 20 Cal 834 wherein it was held that,

"lawful possession of land was sufficient evidence of right as owner as against a person who had no title whatever and who was a mere trespasser and that the former could obtain a declaratory decree and an injunction restraining the wrong doer."

In that case, the possession of the plaintiff was recognised and she was given the assessment certificate and the Revenue record. There was no document produced on the side of the respondent in support of his possession. In those circumstances, I held that lawful possession of land was sufficient evidence of right as owner.

27. The present plaintiffs have not proved their prior possession under any lawful right. The issue of documents by the Revenue Department is shrouded in suspicion. There is absolutely nothing to show as to what kind of enquiry was conducted and as to whether the defendant had any notice of the proceeding, in that admittedly, he was in possession on the date of the suit. The documents produced on the side of the plaintiffs in the instant case being only self-serving documents, the lower Appellate Court was in error in placing any reliance on them as supporting the case of the plaintiffs.

28. The finding by the learned Appellate Court is clearly vitiated by application of wrong tests and on the basis of conjectures and assumptions and I have no alternative other than to interfere. Accordingly, the substantial questions of law are answered in favour of the appellant. The second appeal is allowed. The judgment and the decree of the lower Appellate Court are set aside and those of the trial Court dismissing the suit restored. There will, however, be no order as to costs.