NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2066 OF 2012

Balasubramanian & Anr. ....Appellant(s)

Versus

M. Arockiasamy (dead) Through Lrs. .... Respondent(s)

J U D G M E N T

A.S. Bopanna,J.

1. The appellant is before this Court in this appeal, assailing the judgment dated 30.10.2009 passed by the High Court of Madras, Madurai Bench in S.A. No. 1303 of 1994. The appellant herein is the plaintiff in the suit while the respondents are the legal representatives of the deceased first defendant before the Trial Court. For the sake of convenience and clarity the parties will be

referred to in the rank assigned to them before the court of first instance namely, the Court of District Munsif, Palani.

2. The factual matrix in brief is that the plaintiff filed the suit bearing O.S No. 769/1987 seeking the relief of perpetual injunction to restrain the defendants from interfering with the peaceful possession and enjoyment of the plaint schedule property, as claimed by the plaintiff. The defendant No.2 did not respond to the summons issued in the suit and therefore, was placed ex-parte. The defendant No.1 appeared before the trial court and contested the suit. The case of the plaintiff was that the plaint schedule property belonged to the plaintiff who has been enjoying the same for a period of 40 years by paying kist. The property belonging to the defendant No.1 is adjacent to the suit property. The same was sold by the defendant No.1 to one Parvatham Ammal wife of Ponnusamy in the year 1984. The properties were sub-divided after the purchase and were assigned the Survey No.1073/3V, and 1073/3B. The property bearing Survey

No.1073/13A belonged to Parvatham Ammal. The said Smt. Parvatham Ammal alienated the property to one Subban Asari. Hence, it was contended by the plaintiff that the defendant No. 1 has no manner of right over the suit schedule property. The plaintiff alleged that the defendant No.1 approached the plaintiff and demanded to sell the property to him but the plaintiff refused to do so, due to which the defendants attempted to trespass into the suit property. The plaintiff having resisted the same claimed that the suit is filed in that view seeking injunction.

3. The defendant No.1 in order to resist the suit, filed a detailed written statement disputing the right claimed over the suit schedule property by the plaintiff. It was contended that the suit schedule property neither belonged to the plaintiff nor was the plaintiff in possession of the same. On the other hand, it was contended that the defendant was in possession of the property. It was averred that the suit property and certain other properties originally belonged to Ponnimalai

Chetti, the father of Konar Chettiar. He purchased 1/3rd share in Survey No.1073/3 and 1/5th share in Survey No.1073/13. Though only the said extent was purchased, the entire extent was in his possession and enjoyment. The said Konar Chettiar handed over the entire extent to Marimuthu Kudumban son of Sivanandi Kudumban who was the grandfather of defendant No.1. Subsequently, 0.33 cents of land in Survey No.1073/3A was acquired for the formation of Kodaikanal road and the remaining extent of land available in the said Survey Number is only 46 cents. Marimuthu Kudumban disposed 0.35 cents of land in Survey No.1073/13 from out of the extent of 1.76 acre to one Arockiammal i.e., the mother of the defendant No.1 under a sale deed dated 10.08.1937 and delivered the possession. The remaining 1.41 acres of land was also enjoyed by Marimuthu Kudumban. Subsequently, he died leaving behind him the mother of defendant no. 1 namely Arockiammal as the only heir. Arockiammal was thus in possession and enjoyment of 0.79 cents in Survey No.1073/3V and 1.41 acre in Survey No.1072/13A

alongwith the 0.35 cents of land purchased by Arockiammal. The defendant No.1 was enjoying the properties through the guardian since the defendant No.1 was 3 years old when Arockiammal and her husband died.

4. It was further averred that the defendant No.1 sold 0.31 cents of land in survey No.1073/13 from out of 1.76 acres of land to Parvatham Ammal on 24.11.1984. The remaining 1.41 acres of land has been in possession and enjoyment of defendant No.1. After the purchase of land Parvatham Ammal obtained patta for Survey No.1073/13 to the extent of 55 cents and sub-divided in 1073/13A. The Revenue authorities issued patta for the extent of 55 cents and on 19.12.1987 Parvatham Ammal sold 55 cents of land to one Subban Asari. The defendant alleged that Subban Asari in order to grab the suit property is litigating in the instant suit in the name of the plaintiff. The defendant No.1 disputed the payment of kist by the plaintiff which has been done with the ulterior motive for the suit. The defendant No.1 claimed in the

written statement that the defendant No.1 is residing in the thatched house in the suit property and is engaged in agricultural work. The defendant No.1 therefore, sought for dismissal of the suit.

5. Based on the rival pleadings, the trial court framed two issues and an additional issue casting burden on the plaintiff to prove whether the plaintiff was in exclusive possession and enjoyment of the suit property and as to whether the plaintiff is entitled for permanent injunction as prayed for. The plaintiff examined himself as PW1 and relied upon the documents at Exhibit A1 to A16. No other witness was examined on behalf of the plaintiff. The defendant examined two witnesses as DW1 and DW2 and documents at Exhibits B1 to B14 were marked.

6. The learned District Munsif (Trial Court) having taken note of the rival contentions and the evidence tendered by the parties recorded a categorical finding that the plaintiff has failed to prove possession over the suit schedule property and taking note of certain admissions made by the plaintiff during the course of the

cross-examination and the contention put-forth by the defendant, was also of the view that though the claim of the plaintiff is denied by the defendant No.1 the plaintiff has not sought the relief of declaration and in that light the only question relating to possession was answered against the plaintiff. The suit of the plaintiff was accordingly dismissed with costs through its judgment dated 13.04.1993.

7. The plaintiff being aggrieved by the same preferred a Regular First Appeal under Section 96 of the Civil Procedure Code before the District Judge, Dindigul (First Appellate Court) in A.S No.51 of 1993. The learned District Judge framed two points for consideration, essentially to the effect as to whether the plaintiff is entitled to the relief of permanent injunction. While taking note of the evidence tendered by the parties before the trial court, the learned District Judge has placed much reliance on the documents at Exhibit A5 series, namely, the kist receipts and based mainly on the same has arrived at the conclusion that the claim of the

plaintiff that he is in possession of the suit schedule property is to be accepted since he was paying kist in respect of the property.

8. The defendant No.1 therefore, claiming to be aggrieved by the judgment dated 18.03.1994 passed by the learned District Judge in A.S. No.51/1993 preferred the Second Appeal under Section 100 of the Civil Procedure Code before the Madras High Court, Madurai Bench in S.A. No.1303 of 1994. The High court while admitting the Second Appeal had framed a substantial question of law, as to whether the suit without the prayer for declaration is maintainable when especially the title of the plaintiff is disputed. Thereupon having taken note of the rival contentions urged by the parties had arrived at the conclusion that the substantial question of law framed has substance and therefore, set aside the judgment dated 18.03.1984 passed in A.S. No.51/1993 by the learned District Judge Dindigul. The plaintiff therefore, claiming to be aggrieved has filed the instant appeal.

9. In the above background we have heard Mr. Jayanth Muth Raj, learned senior counsel appearing for the plaintiff-appellant, Mr. Sriram P., learned counsel appearing for the respondents and perused the appeal papers.

10. The reference made hereinabove to the rival pleadings would delineate the nature of contentions that were put-forth by the parties in support of the suit and to oppose the same. The manner in which it is dealt by the various fora in the hierarchy will have to rest on the claim that was originally put-forth in the plaint and the manner in which the claim was sought to be established with the evidence tendered, either documentary or oral. The learned senior counsel for the appellant has strenuously contended that the parameter for interference by the High Court in the Second Appeal under Section 100 of the Civil Procedure Code is well established and the High Court cannot travel beyond the same and advert to re-appreciate the evidence on factual aspects. It is contended that though a substantial

question of law was framed by the High Court, the same has not been answered. It is his contention that even otherwise the substantial question of law as framed by the High Court is not sustainable inasmuch as the law is well settled that in a suit for bare injunction the plaintiff need not always seek for declaratory relief and if this aspect of the matter is kept in view there was no other substantial question of law subsisting and the second appeal ought to have been dismissed. He contended that in such event when the lower appellate court which is the last court for appreciation of facts has recorded its finding of fact, the same cannot be interfered by the High Court on re-appreciation of the evidence. In that view it is contended that the judgment passed by the High court is liable to be set aside and the judgment of the lower appellate court is to be restored.

11. The learned counsel for the defendant No.1 however, sought to sustain the judgment passed by the High Court. It is pointed out that the suit was instituted by the plaintiff as far back as in the year 1987 and the

trial court through its judgment dated 13.04.1993 had referred to the entire evidence and arrived at a conclusion that the prayer made in the plaint is liable to be rejected. Though the lower appellate court has set aside the same, the judgment of the lower appellate court would indicate that the evidence has not been properly appreciated and, in such circumstance, the High Court as far back as on 30.10.2009 has set aside the judgment of the lower appellate court and in such event, at this distant point in time it would not be appropriate to set aside the order of the High Court more particularly when the defendant No.1 has been in possession, prior to and subsequent to the suit. The learned counsel therefore, sought for dismissal of this appeal.

12. In the light of the rival contentions, before adverting to the fact situation herein it is to be stated at the outset that on the general principles of law laid down in the decisions referred to by the learned senior counsel for the appellant, there can be no quarrel whatsoever. In the case of ***Gajaraba Bhikhubha Vadher & Ors.***

versus Sumara Umar Amad (dead) thr. Lrs. & Ors. (2020) 11 SCC 114 the fact situation arising therein was referred to and having taken note that five substantial questions of law had been framed, this Court had arrived at the conclusion that such substantial questions of law which arose therein had not been dealt with appropriately since it had not been considered in the light of the contentions. It is in that circumstance, this Court was of the view that the judgment of the High Court is to be set aside and the matter is to be remitted to the High Court. In the case of ***Ramathal versus Maruthathal & Ors. (2018) 18 SCC 303***, the issue considered was as to whether the High Court was wrong in interfering with the question of fact in the Second Appeal. It was a case where both the courts below had arrived at a concurrent finding of fact and both the Courts had disbelieved the evidence of witnesses. In such a case where such concurrent factual finding was rendered by two courts and in such situation, it had been interfered by the High Court in a Second Appeal, this

Court was of the view that the interference was not justified. However, it is appropriate to notice that in the said decision this Court had also indicated that such restraint against interference is not an absolute rule but when there is perversity in findings of the court which are not based on any material or when appreciation of evidence suffers from material irregularity the High Court would be entitled to interfere on a question of fact as well. The decision in the case of ***Ram Daan (dead) through Lrs. versus Urban Improvement Trust. (2014) 8 SCC 902***, is a case, where in a suit for permanent injunction the plaintiff had pleaded possession from the year 1942 and the defendant had admitted the possession of the plaintiff from 1965 though it was contended that they had re-entered the property after being evicted in 1965. It is in that circumstance the case of the plaintiff seeking to protect the possession was accepted and the necessity for seeking declaration did not arise as the defendant did not assert its right of ownership which is not so in the instant case. In the case of ***P. Velayudhan & Ors.***

versus Kurungot Imbichia Moidu's son Ayammad & Ors. (1990) Supp. SCC 9 and in the case of ***Tapas Kumar Samanta versus Sarbani Sen & Anr. (2015) 12 SCC 523***, the decisions are to the effect that in a Second Appeal the High Court would not be justified in interfering with the finding of fact made by the first appellate court since such finding rendered would be based on evidence. On this aspect there can be no doubt that the same is the settled position of law but it would depend on the fact situation and the manner in which the evidence is appreciated in the particular facts. In the case of ***Ramji Rai & Anr. versus Jagdish Mallah (dead) thr. Lrs. & Anr. (2007) 14 SCC 200*** though it is held that there was no need to seek for declaration and suit for possession alone was sustainable, it was held so in the circumstance where injunction was sought in respect of the disputed land which was an area appurtenant to their building in which case possession alone was relevant and restraint sought was against preventing construction of compound wall.

13. In the background of the legal position and on reasserting the position that there is very limited scope for reappreciating the evidence or interfering with the finding of fact rendered by the trial court and the first appellate court in a second appeal under Section 100 of the Civil Procedure Code, it is necessary for us to take note as to whether in the instant facts the High Court has breached the said settled position. To that extent the factual aspects and the evidence tendered by the parties has already been noted above in brief. Further, what is distinct in the present facts of the case is that the finding rendered by the learned Munsif (Trial Court) and by the learned District Judge (First Appellate Court) are divergent. The trial court on taking note of the pleadings and the evidence available before it was of the opinion that the plaintiff has failed to prove exclusive possession and, in such light, held that the entitlement for permanent injunction has not been established. While arriving at such conclusion the trial court had taken note of the right as claimed by the plaintiff and in that

background had arrived at the conclusion that except for the say of plaintiff as PW1 there was no other evidence. On the documentary evidence it was indicated that the kist receipts at Exhibit A5 series would not establish possession merely because the name has been subsequently substituted in the patta records and the kist had been paid.

14. As against such conclusion, the first appellate court in fact has placed heavy reliance solely on the kist receipts which in fact had led the first appellate court to arrive at the conclusion that the continuous payment of kist would indicate that the plaintiff was also in possession of the property. When such divergent findings on fact were available before the High Court in an appeal under Section 100 of the Civil Procedure Code though reappreciation of the evidence was not permissible, except when it is perverse, but it was certainly open for the High Court to take note of the case pleaded, evidence tendered, as also the findings rendered by the two courts which was at variance with each other and one of the

views taken by the courts below was required to be approved.

15. In view of the above, although the counsel for the appellant may be technically correct in his submission that the High Court erred in not clearly answering the question of law framed by it under Section 100, CPC, the High Court was still within its jurisdiction to determine whether the reading of the evidence on record by one of the Courts below was perverse. Question of law for consideration will not arise in abstract but in all cases will emerge from the facts peculiar to that case and there cannot be a strait jacket formula. Therefore, merely because the High Court refers to certain factual aspects in the case to raise and conclude on the question of law, the same does not mean that the factual aspect and evidence has been reappreciated. As already noted, the divergent view of the courts below on the same set of facts was available before the High Court. From the judgment rendered by the trial court, the nature of contentions as noted would disclose that the plaintiff

except contending that the suit schedule property was being enjoyed for the past 40 years by paying kist has not in fact referred to the manner in which such right had accrued so as to suggest or indicate unassailable right to be in physical possession. On the other hand, the defendant while denying the right of the plaintiff to claim the relief had traced the manner in which the property had devolved and the right which is being claimed by the defendant. It was also contended that the defendant No.1 is residing in the thatched house which is on the property. It is in that light the trial court having taken note of the assertions made by the defendant No.1 and lack of evidence by the plaintiff had arrived at the conclusion that the possession of the plaintiff as claimed cannot be accepted and that the plaintiff has not sought for declaration despite the defendant having disputed the claim of the plaintiff.

16. The trial court while answering Issue No.1and Addl. Issue No.1, on adverting to rival contentions and evidence, recorded thus:

> "Though the claim of the plaintiff is denied by the 1st defendant, the plaintiff has not sought the relief of declaration as already adverted. The only question remains to be answered is whether the plaintiff has been enjoyment of suit property and he is entitled to relief of permanent injunction as prayed for".

The trial court, thereafter on assessing the evidence has concluded thus:

> "This Court feels that these documents do not require any consideration. Hence this court could not conclude that the plaintiff is in possession and enjoyment of the suit properties based on the documents marked as exhibits on the side of the plaintiff".

17. One other aspect which is also to be noted is that the plaintiff himself had filed applications before the trial court claiming that the defendant No.1 had trespassed into the suit property and encroached the house after grant of temporary injunction. In another application filed it was contended by the plaintiff that the defendant had trespassed and is residing in the thatched house. Whereas the defendant No.1 in his written statement itself had stated that he is residing in the thatched house

situate in the suit schedule property. The said applications have not been pressed to its logical conclusion nor has any other step been taken to seek restoration of possession by establishing that the possession in fact had been taken by the defendant No.1 subsequent to the interim injunction. Therefore, on all counts the possession of the suit schedule property was also not established.

18. That apart, though the lower appellate court had reversed the judgment of the trial court, this aspect of the matter relating to the grievance of the plaintiff that he had been dispossessed had not been addressed and despite the plaintiff not being in possession the injunction being granted by the lower appellate court would not be justified. On the other hand a perusal of the judgment passed by the learned District Judge and the observations contained therein to the effect that the defendant has not produced any documentary evidence to show that Arockiammal is the only heir of deceased Marimuthu Kudumban and also that defendant No.1

alone is the legal heir of deceased Arockiammal, daughter of Marimuthu Kudumban and the conclusion that there is no clinching proof on behalf of the defendant that he has paid kist to the suit property as also the observation that the defendant has miserably failed to prove his possession over the suit property, on the face of it indicate that the learned District Judge has misdirected himself and proceeded at a tangent by placing the burden on the defendant. Though there was no issue to that effect before the trial court, the learned District Judge with such conclusions has ultimately set aside the well-considered judgment and decree dated 13.04.1993 passed by the trial court in O.S. No.769/1987, which will indicate perversity and material irregularity in misdirecting itself in wrongly expecting the defendant to discharge the burden in a suit for bare injunction and arriving at a wrong conclusion.

19. When the above aspects are kept in view, without making any observations as to the question of law raised in the present appeal, we are of the considered opinion

that it would not be appropriate to interfere with the judgment of the High Court which is in consonance with the fact situation arising in the instant case. In that view, we see no merit in this appeal.

20. The appeal is accordingly dismissed with no order as to costs in this appeal.

21. Pending applications, if any, shall stand disposed of.

.....CJI
(N.V. RAMANA)

.....J.
(A.S. BOPANNA)

.....J.
(HRISHIKESH ROY)

New Delhi,
September 02, 2021