

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.01.2015

Coram:

THE HONOURABLE MS.JUSTICE K.B.K.VASUKI

S.A.No.1008 of 1995

1.K.Ganapathy(deceased)
2.P.Narayanan
3.Santhanalakshmi
3.Minor Kirthiga
rep.by mother next guardian
Santhanalakshmi Appellants/Defenants

Appellants 3 and 4 brought on
record as legal representatives
of the first appellant vide order
of the Court dated 24.03.2007
made in C.M.P.No.1043 &
1044 of 2007

vs.

1.M.Abdul Majeed(Died)
2.Saithani Begam(Died)
3.Abdul Ajis Respondents/Plaintiff

RR2 and 3 brought on record
as LRs of the deceased sole
respondent vide order of Court
dated 29.4.2014 made in C.M.P.
No.8081 of 1999 in S.A.No.1008
of 1995 and R3 recorded as LR
of the deceased R2 vide order
dated 3.2.2006 in S.A.No.1008/95

Second Appeal preferred against the judgment and decree dated
23.02.1995 passed by the Subordinate Judge, Nagapattinam, in
A.S.No.40 of 1993 reversing the judgment and decree dated 23.06.1992
passed by the District Munsif, Nannilam in O.S.No.68 of 1992.

For Appellants : Mr.S.Sounthar

For Respondents : Mr.A.Muthukumar for R3

JUDGMENT

The defendants are the appellants herein. The second appeal is filed against the judgment made in A.S.No.40 of 1993, reversing the judgment made in O.S.No.68 of 1992. During the pendency of the appeal, the first appellant died and his LRs are impleaded as appellants 3 and 4. The sole respondent-plaintiff died and his LRs are impleaded as respondents 2 and 3.

2. The suit was filed for the relief of bare injunction in respect of the land measuring 47 cents in R.S.No.56, situated in Thiruvallaputhur Vattam, Mayiladuthurai Taluk. The suit property admittedly belongs to Sri.Rathinapureeswaraswamy Devasthanam, Thiruvallaputhur. The second defendant was the cultivating tenant. The plaintiff, namely, Abdul Majeed has come forward with the present suit claiming to be in possession of the property on the strength of Ex.A2-the document of surrender of tenancy, allegedly executed by the second defendant in favour of the plaintiff's son, by name, Abdul Ajis.

3. It is the case of the plaintiff that the second defendant, under Ex.A2, written by the first defendant and signed by the second defendant, surrendered the tenancy rights in favour of the plaintiff's son and thereafter, the plaintiff, who has been looking after the affairs of his son, has been in possession and enjoyment of the suit property by raising various trees and by realising the fruits of the same and the said possession is now sought to be interfered with by the defendants.

4. It is contested by the second defendant, who opposed the relief by denying the execution of Ex.A2 and by denying the possession of the plaintiff.

5. The plaintiff and the second defendant have also adduced oral and documentary evidence before the trial Court in support of their rival contentions.

6. The trial Court, though found that Ex.A2 was written by the first defendant, arrived at a conclusion that the plaintiff failed to prove the signature of the second defendant in Ex.A2 and failed to prove his possession of the suit property. The trial Court dismissed the suit based on such findings. Aggrieved against the same, the plaintiff preferred A.S.No.40 of 1993. The lower appellate Court reversed the findings of the trial Court on the basis of the finding that Ex.A2 was written by the first defendant and signed by the second defendant and the evidence on the plaintiff side witnesses do prove the plaintiff's possession and enjoyment of the suit property. Aggrieved against the same, the present second appeal is preferred by defendants 1 and 2 before this Court.

7. The second appeal was admitted on the following substantial questions of law:

"(i) Whether the lower appellate Court has erred in accepting the surrender of tenancy on the basis of Ex.A2, which is an un-registered instrument?

(ii) Whether the grant of injunction is correct in the absence of proof of possession?"

8. This Court, on hearing both sides, framed the following additional Substantial Question of Law:

Whether the finding of the lower appellate Court regarding the execution of Ex.A2- the document of surrender of tenancy is based on proper evidence and supported by documents?

9. Heard the learned counsel on both sides and perused the records.

10. As already stated, the ownership of the suit property vests with the temple. The second defendant was admittedly the cultivating tenant under the temple. The plaintiff claims tenancy right only under the second defendant on the strength of Ex.A2-the document of surrender of tenancy right. As far as Ex.A2 is concerned, the same is stated to be executed in the name of the plaintiff's son by name, Abdul Ajis. Though the suit relief is based on the said document and the same is marked through P.W.1. P.W.1 disowns any knowledge about the execution of the document or payment of any consideration under the same. It is his categorical statement in the witness box that he had no direct knowledge about the execution of Ex.A2 and the payment of Rs.1,400/- by his son and the persons, who had direct knowledge about the same are the defendants, his son and one Kunju. However, neither the son of the plaintiff nor the other person by name, Kunju, are brought into the witness box as plaintiff side witness. The other witnesses examined on the side of plaintiff, namely, P.W.2 and P.W.3 have not deposed anything about the execution of Ex.A2.

11. As far as the defendants are concerned, the defendants 1 and 2 as D.W.1 and D.W.2 stoutly denied the execution of Ex.A2. The first defendant, who is said to be the writer of the document has categorically denied that the document is not written by him. Likewise, the second defendant had stoutly denied his signature in Ex.A2. While the trial Court found that Ex.A2 is written by the first defendant and the signature of second defendant is not proved, the lower appellate Court has found that the same is written by the first defendant and signed by the second defendant. Both the trial Court and the lower appellate Court have found so on the basis of

comparison of the signature in the documents, which are, according to the plaintiff written by the first defendant.

12. The entire reading of the discussion held by the trial Court as well as the lower appellate Court would reveal that they did not duly appreciate the evidence of D.W.1 and D.W.2 in this regard. Both the trial Court as well as the lower appellate Court have not assigned any reason as to how the evidence of D.W.1 regarding the denial of writing of the document cannot be believed. As a matter of fact, some writings were obtained in the course of cross-examination of D.W.1 and the same is marked as Ex.C1. Absolutely there is no comparison of the writings of Ex.A2 and Ex.C1 by both the Courts below to arrive at the conclusion that the writings in both the documents are one and the same. Further, both the Courts below have relied on the writings of Ex.A5 and Ex.A6, which are said to be executed by the first defendant to P.W.4-Syed Kadhar.

13. As already referred to D.W.1, in the course of his cross-examination, has stoutly denied that he did not write the recitals in Ex.A2 and when that being so, the findings arrived at by the trial Court and the lower appellate Court that the document was written by the first defendant is based on no evidence or overlooking the evidence of D.W.1 and is hence perverse in nature.

14. As far as the signature of the second defendant is concerned, the trial Court has rightly held that the plaintiff has not proved the signature of the second defendant in Ex.A2. The second defendant, as D.W.2, has not admitted his signature in Ex.A2. There is absolutely no other admitted signature of the second defendant for comparison by the Court to arrive at a conclusive finding that Ex.A2 was signed by the second defendant.

15. As rightly argued by the learned counsel for the appellants, the trial Court ought to have rejected the document in view of the denial of any direct knowledge by the plaintiff about the same and it ought not to have, by overlooking the evidence of D.W.1, compared the documents and rendered a finding as stated above. Such a course adopted by the Court below, in my considered view, is legally untenable.

16. As far as the possession is concerned, the trial Court disbelieved the plaintiff's case, whereas the lower appellate Court accepted the plaintiff's case mainly on the basis of its finding regarding execution of Ex.A2 and on the basis of oral evidence of P.Ws 2 to 4. It may be true that P.Ws.2 to 4 do speak about the plaintiff's possession and enjoyment of the suit property, whereas, the evidence of plaintiff as P.W.1 would not support his own case. The evidence of P.W.1 in the course of his cross-examination would expose his lack of knowledge about the nature of the suit and the physical features of the same.

17. Above all, P.W.1 has specifically admitted that four months prior to the institution of the suit, the first defendant has cut all the trees in the suit property. Had it been true that the plaintiff had been in possession of the property and the first defendant encroached upon the same and cut the trees, there would have been police complaint to that effect. No such police complaint is lodged in this regard till date. It is not explained as to how the first defendant entered the suit property and cut the trees, when the property was in possession of the plaintiff.

18. As far as the oral evidence of P.W.2 is concerned, the lower appellate Court has erred in placing any reliance on the same, in the absence of documentary evidence to prove the possession of the plaintiff. It is relevant to mention, at this juncture, that what is said to be transferred in the name of the plaintiff's son is the cultivating tenancy right. Considering the nature of the property, which is agricultural land, the best evidence to be produced for proving the plaintiff's possession and enjoyment is the Revenue records, such as chitta and adangal, whereas the plaintiff has not produced any such record in this case. Even otherwise when Ex.A2 shows that the possession was handed over to Abdul Ajis, who is the plaintiff's son, the period during which the plaintiff father came to be in possession of the property is not explained either in the plaint or in the witness box by the plaintiff. Further when Ex.A2 is in favour of Abdul Ajis, the lower appellate Court, before deciding the issue relating to possession, failed to consider the evidence of P.W.1 and placed undue reliance on the oral evidence of P.W.2, which is not supported by any other Revenue records and the finding so rendered by the lower appellate Court, without duly considering the evidence of P.W.1 is factually and legally unsustainable and warrants interference by this Court.

19. The lower appellate Court, without proper evidence, reversed the findings of the trial Court and the judgment and decree granted in favour of the plaintiff based on such finding is hence legally unsustainable. In the absence of sufficient evidence to prove the actual possession of the property, the plaintiff is disentitled to get any relief and the relief granted by the lower appellate Court is hence, liable to be set aside. The substantial questions of law are hence answered against the plaintiff.

20. In the result, the second appeal is allowed by setting aside the judgment and decree of the lower appellate Court. No costs.
msk

s/d-

Deputy Registrar(J)

True Copy

Sub-Assistant Registrar

To

1.The Subordinate Judge, Nagapattinam

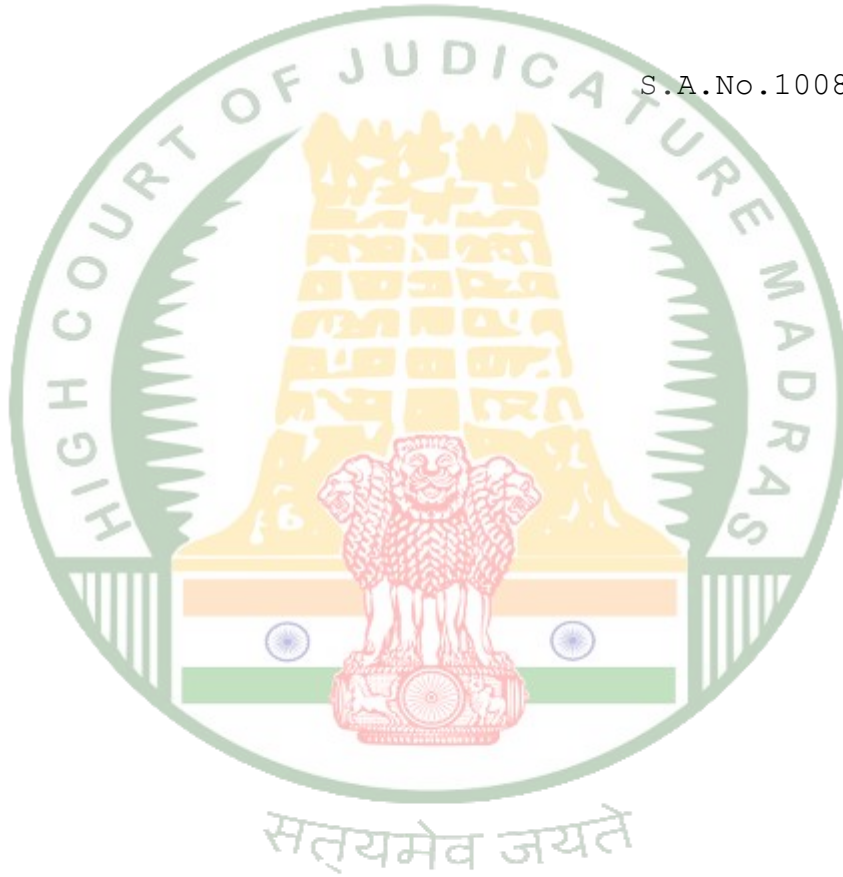
2.The District Munsif, Nannilam

+ 1 cc to Mr.S.Sounthar, Advocate SR 5081

+ 1 cc to Mr.A.Muthukumar, Advocate SR 5070

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