

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 13.01.2015

Coram:

THE HONOURABLE Ms. JUSTICE K.B.K.VASUKI

S.A.No.1423 of 2010
and MP.No.1 of 2010

S.Mahalingam

... Appellant/2nd Defendant

vs.

Samidurai

.. Respondent/Plaintiff

Second Appeal is filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 20.9.2010 made in AS.No.30 of 2007 on the file of the Sub Court, Chidambaram, reversing the judgment and decree dated 15.12.2005 made in O.S.No.501 of 2000 on the file of the District Munsif Court cum Judicial Magistrate, Kattumannarkoil.

For Appellant : Mr.R.Murali
For Respondent : Mr.M.Sivavarthan

JUDGMENT

The second defendant is the appellant herein.

2.The suit arising out of which is the present second appeal, is filed by the respondent herein against two defendants by names Selvarasu and Mahalingam, for the relief of permanent injunction restraining the defendants from in any way interfering with the plaintiff's peaceful possession and enjoyment of the suit property. The plaintiff claiming himself to be the owner, in possession and enjoyment of the suit property on the strength of Ex.A1 Exchange deed dated 23.4.1998 executed between the plaintiff and the first defendant, sought for the above stated suit relief.

3.The suit was contested not by the first defendant Selvarasu, but by the second defendant, who is the appellant herein. The suit relief was resisted by the second defendant by denying the title claimed by the plaintiff and his possession and enjoyment of the suit property. The defence so raised was by setting up title in himself on the strength of Ex.B1 unregistered sale deed dated 27.6.1992 and Ex.B2 sale agreement dated 5.4.1997 purportedly executed between the first defendant and his brother on one hand and the second defendant on other hand in respect of the suit property.

4. During trial, the plaintiff examined himself and his witness as PW1 and PW2 and the second defendant and his witnesses were examined as DW1 to DW3. The plaintiff in addition to Ex.A1 Exchange deed, also produced Ex.A2 kist receipt dated 24.2.2001 and Ex.A3 computerised patta dated 18.10.2004 in support of his claim as made in the plaint. The defendants in addition to Exs.B1 and B2, also produced the exchange of notices between the second defendant on one hand and the first defendant and his brother on other hand and acknowledgment of the same and copy of the complaints lodged by the second defendant as Exs.B3 to B11 documents.

5. The trial court, on the basis of the oral and documentary evidence adduced before the same, dismissed the suit by disbelieving the plaintiff's case regarding his possession and enjoyment of the suit property and by accepting the defendants' claim. Aggrieved against the same, the plaintiff preferred an appeal AS.No.30/2007. The Lower Appellate Court reversed the findings of the trial court and allowed the appeal by granting the suit relief, by placing reliance on Exs.A2 kist receipt and A3 computerised patta, which are obtained much after the institution of the suit and by casting the burden on the defendants to prove their case. Hence, this Second Appeal by the second defendant before this Court.

6. The second appeal is admitted on the following substantial questions of law:

1. Whether the judgment of the Lower Appellate Court is right in holding that the plaintiff is in possession of the suit property under Exs.A2 and A3 which are created during pendency of the suit?

2. Whether the consequential relief of bare injunction can be claimed without seeking the declaratory relief, when the title itself is in dispute and the suit can be maintained?

3. Whether the discretionary relief of bare injunction can be granted against the owner of the property who obtained title over the suit property through a sale for valuable sale consideration prior to the plaintiff?

4. Whether the appellant/second defendant is entitled to have protection under Section 53A of the Transfer of Property Act, 1882 based on the sale deed dated 27.6.1992 executed by the first defendant and his brother in favour of the appellant/second defendant?

7. Heard the rival submissions made on both sides and perused the records.

8. The fact that the suit property originally belonged to the first defendant is not denied. The dispute is now between the plaintiff and the second defendant and their claim is based on two different documents. Both the plaintiff and the

contesting defendant claim title and possession in respect of the suit property. While according to the plaintiff, he acquired title and has been in possession and enjoyment of the property on the strength of Ex.A1 Exchange deed dated 23.4.1998, the second defendant claims the suit property on the strength of Ex.B1 unregistered sale deed dated 27.6.1992. Though Ex.B1 unregistered sale deed is earlier in point of time than Ex.A1 exchange deed, the contesting defendant cannot be permitted to raise any claim for title, coupled with possession and to deny the plaintiff's title on the strength of such unregistered sale deed. However, the plaintiff did not seek any declaratory relief for title and sought for only the relief of permanent injunction based on title which is denied by the contesting defendant based on his title.

9. In spite of the same, the trial court has gone into the title dispute in detail and rendered a specific finding as if the title to the suit property is vested upon the second defendant on the strength of the sale deed executed in his favour. The trial court in the same breadth arrived at the conclusion that the plaintiff has not come forward with any clear cut case either regarding the nature of the title deed relied on by her or nature of the relief sought for by her. The trial court based on such findings, dismissed the suit. Whereas, the lower appellate court reversed the judgment and decree of the trial court by deciding both the issues on title and possession in favour of the plaintiff. Here again, the lower appellate court has gone in detail into the title dispute in the light of the documents relied on by both sides and decided the same against the second defendant. The lower appellate court on the basis of Ex.A1 Exchange deed, Ex.A2 kist receipt and Ex.A3 patta, found the plaintiff to be in possession and enjoyment of the suit property and decreed the suit as prayed for.

10. In my considered view, both the courts below, without seeking any relief for declaration of title, ought not to have gone into the complicated issue of title in the suit for bare injunction. In this regard, it is useful to refer the principles laid down by the Hon'ble Supreme Court in the decision reported in 2009-2-LW.546 (Anathula Sudhakar v. P.Buchi Reddy (Dead) by Lrs and others), wherein, it is held in para 17 as follows:

17. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under :

(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is

sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in Annaimuthu Thevar (supra)]. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case".

It may be true that the Apex Court has in the decision cited above categorically laid down that the suit for bare injunction without declaratory relief, will be maintainable where the issue relating to title is clear and simple and the same can be gone into incidentally in the suit for bare injunction. But when the issue of denial of title involved is complicated one the Courts below ought to have as laid down by the Apex Court directed the

plaintiff to go for comprehensive suit for declaration of title and for other consequential relief in respect of the suit property and the failure to do so is certainly against the principles laid down in the Apex Court decision cited supra and the course adopted by the courts below cannot be hence legally sustained. The 2nd substantial question of law is accordingly answered, in the light of the judgment of the Apex Court cited supra.

11.As far as the substantial questions of law 3 and 4 are concerned, the contesting defendant has challenged the injunction relief granted in favour of the plaintiff by setting up title upon himself and by claiming protection under section 53A of the Transfer of Property Act on the strength of Ex.B1 unregistered sale deed dated 27.6.1992. The claim for title on the strength of unregistered sale deed, by ignoring the registered Exchange deed in favour of the plaintiff, in my considered view, is legally unsustainable. The second defendant can at the best independently seek compulsory registration of Ex.B1 sale deed dated 27.6.1992 or for execution of Ex.B2 sale agreement dated 5.4.1997 against the proposed vendor, as such, the second defendant's claim for title cannot be entertained herein.

12.The second defendant has for the first time before this court raised a plea regarding protection under section 53A of the Transfer of Property Act on the strength Exs.B1 sale deed and B2 sale agreement. It is contended before this court that the first defendant and his brother, having executed unregistered sale deed and sale agreement with the second defendant and parted with possession, are bound to execute the sale deed in his favour by applying the principle of part performance of the contract. By contending so, the second defendant has sought to deny the right, title and interest claimed by the plaintiff on the strength of Ex.A1 registered exchange deed. First of all, the second defendant being only agreement holder, cannot claim to have acquired any title to become absolute owner of the property on the strength of unregistered sale deed and sale agreement. The right claimed by the second defendant is only the benefit under Section 53A of the Transfer of Property Act. Such claim, in view of the law laid down by the Hon'ble Supreme Court in the decision reported in (1999) 7 SCC 303 (Ram Kumar Agarwal and another v. Thawar Das (dead) through L.Rs) cannot be permitted to be agitated for the first time at the second appeal stage. Though the second defendant throughout has claimed absolute title over the property on the strength of unregistered Exs.B1 and B2 sale deed and sale agreement, he has nowhere raised any plea regarding his readiness and willingness to perform his part of the agreement. The Hon'ble Apex Court in para 8 of the same decision, negatived the plea under section 53A of the Transfer of Property Act, on the ground that the same was urged for the first time at the second appeal stage and on the other ground that the party failed to prove his willingness to perform his part of the

contract and held that no protection to his possession could have been claimed by referring to Section 53A of the Transfer of Property Act. By applying the same view to the facts of the present case, the substantial questions of law 3 and 4 are to be decided against the contesting defendant.

13.As far as the first substantial question of law, relating to the findings of the lower appellate court regarding the plaintiff's possession and enjoyment of the suit property, is concerned, the plaintiff in support of his claim for title, solely relied on Ex.A1 exchange deed dated 23.4.1998. However, it is nowhere stated in his plaint that he after exchange of property, has been paying kist and obtained patta. The only document produced along with the plaint is Ex.A1 Exchange deed. Whereas, the plaintiff during trial produced two additional documents viz., Ex.A2 kist receipt dated 23.4.2001 for fasli 2000 and A3 patta dated 18.10.2004. The trial court did not take into consideration Exs.A2 and A3 documents, but the lower appellate court placing strong reliance on Exs.A2 and A3 accepted the case of the plaintiff and decreed the suit in his favour. The lower appellate court, while doing so, failed to consider the relevant point of time at which Exs.A2 and A3 were obtained and produced before the trial court. The plaintiff has not come forward with any explanation as to why no kist was paid for the period between 1998 and 2000 and patta was obtained before 2004, that too, one week prior to his being entered into the witness box. The lower appellate court, without appreciating the above aspects, simply accepted Ex.A2 kist receipt and Ex.A3 patta as material proof to show his possession. It is found by the lower appellate court that Ex.A2 kist receipt refers to the plaintiff's possession of the suit property. The finding so rendered by the lower appellate court on the basis of these documents, which came into existence during trial, cannot be in my considered view, allowed to sustain and the same is hence perverse and the judgment passed based on such finding, warrants interference by this Court.

14.Excluding Exs.A2 and A3, other oral and documentary evidence produced on the side of the plaintiff to prove his title and possession are (i)oral evidence of the plaintiff and one Balakrishnan, who is the brother of the first defendant as PW1 and PW2 and (ii)Ex.A1 exchange deed. It is true that the plaintiff and his witness as PW1 and PW2 would depose about the execution of Ex.A1 and the possession handed over to the plaintiff on the strength of the same. Ex.A1 exchange deed did not speak about the factum of possession being handed over to the plaintiff on the same day. It is also pertinent to mention at this juncture that while the transaction effected under Ex.A1 is the exchange of properties belonging to the plaintiff and the first defendant, the plaintiff constantly refers to the same as sale transaction. The document says that the plaintiff and the first defendant under Ex.A1 exchanged A and B schedule properties belonging to the first defendant and plaintiff respectively and consideration was paid only by the first

defendant to the plaintiff for taking B schedule property belonging to the plaintiff, no sale consideration was paid in respect of A property by the plaintiff. The plaintiff throughout stated that the transaction effected between the parties was sale transaction and he purchased the property from the first defendant for sale consideration of Rs.40,404/-, such claim is contrary to the recitals contained in the document.

15.Regarding the possession, the plaint is silent in respect of the date on which possession was taken over by the plaintiff. The plaintiff as PW1 in the witness box stated that he took over the possession on the next day of execution of Ex.A1 Exchange deed. Whereas, PW2 who is the brother of first defendant would say that the plaintiff was put in possession of the property on the same day of Ex.A1. Except two documents which were produced during trial, no other document prior to the institution of the suit, is produced to prove the plaintiff's possession and enjoyment of the property since the date of Exchange deed. As a matter of fact, the plaintiff as PW1 has not come forward with definite case regarding his possession. The plaintiff is not even aware of the boundaries of the suit property. He would further say that the property is lying as dry land for nearly 5 years. Though he would say that he has been paying kist after exchange deed, he has not produced kist receipt for the earlier period before the court.

16.On the other hand, PW2 who is one of the witnesses to Ex.A1, would in the course of his cross examination, categorically admit that after the execution of Ex.A1, panchayat was held in respect of the issue relating to execution of sale deed by the first defendant and in pursuance of Exs.B1 and B2, enquiry was conducted before the police officials in connection with the complaint given by the second defendant. Whereas, the second defendant as DW1 in the witness box, throughout stated that he purchased the property on the strength of Ex.B1 unregistered sale deed and has been put in possession of the property on the same day and the first defendant and his brother, after receiving full sale consideration, refused to come for registration and the same compelled the second defendant to issue lawyer notice and convene panchayat and lodge the police complaint and enquiry was conducted etc. The very reading of the oral evidence of PW1, PW2 and DW1 would to considerable extent support the second defendant's claim regarding the execution of sale deed, panchayat and enquiry held and what was transpired in the panchayat and police enquiry. PW2 categorically admitted the execution of the document, but denied handing over possession. Whereas, the first defendant has in Ex.B5 reply notice admitted the handing over possession in respect of one of the properties covered under Ex.B1.

17.Thus, the combined appreciation of the entire facts and evidence available herein would only reveal that excluding Exs.A2 and A3, the plaintiff has not proved his actual possession and enjoyment of the suit property either from the date of execution of Ex.A1 exchange deed or any other date

thereafter or from the date of institution of the suit. Whereas the second defendant's claim for possession and enjoyment of the property in question in pursuance of Ex.B1, on the strength of available evidence is probablised. Though the plaintiff's claim for title on the strength of Ex.A1 registered exchange deed can be accepted, the same is of no help to prove his actual possession in support of the relief for permanent injunction sought for in the suit. As the suit is only for bare injunction and as the actual possession of the suit property is the basis for such relief, the plaintiff having failed to prove the same, cannot succeed in the suit. As the burden is on the plaintiff to prove the actual possession to grant the suit relief for permanent injunction, the failure of the contesting defendant, if any, to prove his title, is in no way helpful to the plaintiff. The plaintiff, having failed to establish his case, is hence dis-entitled to the suit relief and the first substantial question of law is accordingly answered against the plaintiff. Accordingly, the judgment and decree of the lower appellate court is liable to be set aside and the judgment and decree of the trial court stands restored.

18.In the result, the second appeal is allowed by setting aside the judgment and decree of the lower appellate court and by restoring the judgment and decree of the trial court. No costs. Consequently, connected miscellaneous petition is closed.

sd/
ASSISTANT REGISTRAR (CS-II)

/TRUE COPY/

SUB-ASSISTANT REGISTRAR

rk

To

- 1.The Sub Court, Chidambaram.
- 2.The District Munsif Court-cum-Judicial Magistrate,
Kattumannarkoil.

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The Section Officer, VR Section,
High Court, Madras

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