

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 26.02.2015

Coram:

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

S.A.No.171 of 2008
and MP.No.1 of 2008

1.Kolanchi
2.Amaravathi
3.Kalyani Ammal
4.Selvi

.. Appellants/Defendants 3 to 6 /
Respondents

vs.

A.Kuppusamy ... Respondent/Plaintiff/Appellant

Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 1.10.2004 in AS.No.107 of 2003 on the file of the Additional Subordinate Judge, Virudhachalam reversing the judgment and decree dated 23.4.2003 in O.S.No.997 of 1984 on the file of the Principal District Munsif Court, Vridhachalam.

For Appellants : Mr.D.Sivakumaran
For Respondent : Mr.V.Anand

JUDGMENT

The defendants 3 to 6 in the suit, who are the respondents in the first appeal, are the appellants before this court. The suit is filed by the respondent/plaintiff for declaring the plaintiff's title in respect of the suit property and for permanent injunction restraining the defendants from interfering with the plaintiff's peaceful possession and enjoyment of the suit property and for alternative relief of recovery of possession and mesne profits.

2.The suit relief is sought for in respect of 3 items. While suit items 1 and 2 are landed properties measuring an extent of 1.67 acres in R.S.no.50/7 and an extent of 0.68 cents in R.S.no.50/8 in P.Kothanur Village, Kallakurichi Taluk, Chidambaram District, suit item 3 is cattle shed in the same village measuring east west 13 feet and north south 16 feet within the four boundaries mentioned in the suit schedule. The plaintiff claim title to the suit property on the basis of Ex.A3 sale deed dated 27.4.1963 executed by one Ramalinga Pathar, who purchased the suit property through court auction in OS.No.381/49 on the file of the District Munsif court, Kallakurichi vide Ex.A1 auction certificate issued by the court concerned dated 27.8.1960 and who took delivery of the same through court of law under Ex.A2 delivery receipt dated 27.4.1961.

3.According to the plaintiff, the suit items 1 and 2 originally belong to one Kaliathudaiyar, who had two sons by names Kailasa Udaiyar and Chellaperumal Udaiyar and both the sons partitioned the property orally among themselves and suit items 1 and

2 were allotted to Chellaperumal Udaiyar and the same had been in his possession and enjoyment. One Ramalinga Pathar filed O.S.No.381 of 1949 before the District Munsif court, Kallakurichi against Chellaperumal Udaiyar for declaration and for recovery of possession and mense profits and the suit was decreed in favour of Ramalinga Pathar and the decree holder brought the suit items 1 and 2 for auction for recovery of mense profits and Ramalinga Pathar purchased the property through court auction and took delivery of the property through court of law and had been in possession and enjoyment of the same and the same was thereafter sold to the plaintiff under Ex.A3 sale deed and the plaintiff since the date of purchase in his favour, has been in possession and enjoyment of the same.

4.Insofar as the suit item 3 is concerned, it is the plaintiff's case that the same originally belonged to Murugappa Udaiyar, father of Pattathammal and Samiammal, who were the respective wives of Kailasa Udaiyar and Chellaperumal Udaiyar and the father sold the same to their daughters under Ex.A5 sale deed and the daughters partitioned the same orally and the suit item 3 was allotted to the share of Samiammal, who settled the same in favour of the plaintiff and his brother Narayanasamy Udaiyar under Ex.A6 and in the partition between the plaintiff and Narayanasamy Udaiyar, the suit item 3 was allotted to the plaintiff.

5.The suit relief is resisted on the side of the defendants by denying the title of Chellaperumal Udaiyar in respect of suit items 1 and 2 and by denying the title of Samiammal in respect of suit item 3. According to the first defendant, after the death of Kaliathu Udaiyar, their sons Kailasa Udaiyar and Chellaperumal Udaiyar partitioned the properties orally among themselves. The first defendant Pattathammal who was the wife of Kailasa Udaiyar, was not aware of the decree obtained in the earlier suit and the court auction proceedings. It is the further case of the first defendant that no actual delivery of property was effected and delivery effected was only paper delivery and neither Chellaperumal Udaiyar nor Ramalinga pathar had been at any point of time in possession and enjoyment of the property. The patta was transferred in favour of the plaintiff in respect of suit items 1 and 2 at the instance of the plaintiff. It is also the case of the first defendant that the suit items 1 and 2 along with other item were settled in the name of the second defendant by the first defendant Pattathammal under Ex.A10 settlement deed and before and after the settlement deed, first defendant Pattathammal and thereafter the second defendant Periyasamy had been in possession and enjoyment of the same and Samiammal had no right to execute the settlement deed in favour of the plaintiff.

6.The trial court, on the basis of the oral and documentary evidence adduced before the same, arrived at the conclusion that the suit items 1 and 2 were allotted to Kailasa Udaiyar by way of partition among the brothers and neither Kailasa Udaiyar nor his wife Pattathammal was aware of the execution proceedings, in which the suit items 1 and 2 were brought for auction and the court auction sale was not binding on either Kailasa Udiyar or Pattathammal and neither the auction purchaser nor his vendor had been at any point of time in possession and enjoyment of suit items 1 and 2. The trial court has insofar as suit item 3 is concerned, found that there was

partition among Pattathammal and Samiammal and the allotment of suit item 3 to Samiammal by way of such partition was not proved and suit item 3 was not in possession of the plaintiff on the strength of Ex.A6 settlement deed, the execution of which was duly proved and the second defendant Periyasamy had been in possession and enjoyment of the same under Ex.B7 settlement deed, though the execution of the same was not proved. The trial court based on such findings, dismissed the suit. Aggrieved against the same, the plaintiff preferred AS.107/2003.

7. During the pendency of the appeal, the defendants 1 and 2 died and their legal heirs were brought on record as the defendants 3 to 6. The lower appellate court held that if the defendants were in possession of the suit properties, they would have objected to the sale of the suit properties in court auction and they would have taken proceedings to set aside Ex.A1 sale certificate and Ex.A2 delivery of possession receipt and since they have not done so, the court auction and the delivery of possession through court and subsequent execution of sale deed by Ramalinga Pathar in favour of the plaintiff are all valid. The lower appellate court further held that insofar as suit item 3 is concerned, the same was duly settled by Samiammal in respect of her share and valid title was conveyed to the plaintiff under Ex.A6 settlement deed. The lower appellate court, after having found that when the plaintiff is the lawful owner of the suit properties and the defendants are the trespassers into the suit properties, the defendants are liable to pay mesne profits from the year 1984, when the suit was instituted and fixed the mesne profits at Rs.1000/- p.a. from the year 1984 till delivery of possession. Hence, this second appeal by the defendants 3 to 6, who are the legal heirs of the deceased defendants 1 and 2.

8. This Court, while admitting this second appeal, framed the following substantial questions of law, for its determination in this second appeal:

(a) When the plaintiff has abandoned his claim in respect of the 1st and 2nd items of the suit properties and restricted the first appeal only in respect of the 3rd item alone, is the lower appellate court correct in law in taking upon itself to decide the matter in respect of all the three items of the suit properties, even though in the description of properties of first appeal grounds, item Nos.1 and 2 have been specifically left out?

(b) Is the lower appellate court correct in granting a decree for declaration and the alternative relief of possession on the basis of Exs.A1 and A2, namely sale certificate and delivery receipt without considering the fact that the same cannot operate against the defendants and their predecessors when the defendants and the predecessors are not parties to the execution proceedings?

(c) In the absence of any pleadings that the defendants have trespassed into the suit property during the pendency of the suit or any particular date and in the absence of any pleadings about the quantum of mesne profits that is to be fixed, is the lower appellate court correct in law in granting the decree for delivery of possession and also

mesne profits which is absolutely contrary to the judgment of the Hon'ble Supreme Court reported in 2000 SAR (Civil) at page no.266?

9. During the course of argument, the following additional substantial question of law is framed by this Court:

Whether the finding of the lower appellate court in granting a decree for declaration and recovery of possession in respect of item no.3 on the basis of Ex.A6 settlement deed without duly considering Ex.A10 (Ex.B7) settlement deed executed by Pattathammal in favour of the second defendant is perverse?

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

11. Though the first substantial question of law framed by this court proceeds to say that the plaintiff abandoned his claim in respect of suit items 1 and 2 and restricted his claim only in respect of suit item 3 before the lower appellate court, the same is, on the basis of the available records, not found to be true. The unsuccessful plaintiff before the trial court, filed the appeal suit in respect of all suit items 1 to 3 and the first substantial question of law is hence rejected.

12. As far as the suit items 1 to 3 are concerned, the plaintiff claimed title to the same on different basis. While the claim for suit items 1 and 2 is on the basis of Ex.A1 court auction certificate and Ex.A2 delivery receipt in favour of the vendor of the plaintiff, the suit item 3 is based on Ex.A6 settlement deed. As such, this court is inclined to deal with the plaintiff's claim in respect of suit items 1 and 2 and suit item 3 independently.

13. Insofar as suit items 1 and 2 are concerned, the same originally belong to Kaliathu Udaiyar and thereafter his sons Kailasa Udaiyar and Chellaperumal Udaiyar. While according to the plaintiff, the suit items 1 and 2 are allotted to Chellaperumal Udaiyar through oral partition, according to the defendants 1 and 2, the same are orally partitioned between the brothers. One Ramalinga Pathar, who is the vendor of the plaintiff, got title to the suit items 1 and 2 through court auction sale in O.S.No.381/49. The defendants 1 and 2 sought to ignore the court auction sale in favour of the plaintiff's vendor mainly on the ground that neither Kailasa Udaiyar nor his wife Pattathammal was parties to the execution proceedings in OS.381/49. As rightly pointed out by the learned counsel for the respondent/plaintiff, the contention so raised on the side of the appellants/defendants 3 to 6 is liable to be negatived on the basis of Ex.B27 certified copy of the suit extract relating to O.S.381/49, which is filed for declaration and recovery of possession and for mesne profits in respect of different properties. O.S.No.381/49 is originally filed by the plaintiff's vendor by name Ramalinga Pathar against Chellaperumal Udaiyar and other three defendants namely (i) Alamellammal (ii) Kailasa Udaiyar and (iii) Kaliyatha Udaiyar. Pages 1 to 4 of Ex.B27 contains the particulars of the name of the parties, nature of the claim, description of the properties, date of judgment, nature of the result and particulars of execution proceedings. The reading of the same reveals that Kailasa Udaiyar, who is the brother of Chellaperumal Udaiyar was arrayed as the third defendant and during pendency of the suit, he died and his wife by name

Pattathammal was impleaded as the fifth defendant. As per the suit averment, the 3rd defendant Kailasa Udaiyar was claiming some right in the property in question and the fifth defendant Pattathammal who was the legal heir of the 3rd defendant, is in enjoyment of the estate of the third defendant. The suit is decreed in favour of the plaintiff therein and by directing the defendants 1, 2, 4 and 5 to put the plaintiff in possession of the suit properties and to pay the suit costs or past mesne profits that occurred prior to the institution of the suit i.e., 15.11.1949 and future mesne profits to the plaintiff and by directing the first defendant to render account of the mesne profits. The reading of sl.no.11 at pages 5 to 7 of Ex.B27 regarding the particulars about execution would reveal that the possession of the properties covered in O.S.381 of 1949 was delivered to the decree holder on 09.10.1951 in EP.No.683/1951 and execution petition filed for sale of immovable properties attached before judgment but EP was closed and the attachment was continued.

14. The careful appreciation of the contents in Ex.B27 would falsify the claim of the plaintiff that neither Kailasa Udaiyar nor Pattathammal was aware of the suit proceedings or execution proceedings and court sale auction was not binding on them. On other hand, they were made as parties to the suit proceedings and the decree was passed against them and the properties were attached before judgment and the properties were brought for sale in execution proceedings, as such, neither the deceased third defendant therein nor Pattathammal, who was the fifth defendant therein can be allowed to deny any knowledge about the same. As the properties were already attached during pendency of the suit, the question of denying any knowledge about the same does not arise. In that event, the defendants cannot be permitted to say that the court auction sale in respect of suit items 1 and 2 in the execution proceedings in favour of Ramalinga Pattar is not binding on them. The very fact that the properties were brought for sale in court auction for realisation of the decree amount due from Chellaperumal Udaiyar that too in the presence of and with the knowledge of the first defendant herein i.e., Pattathammal would probablise the plaintiff's theory that the properties were allotted to Chellaperumal Udaiyar and the same were duly brought for auction for execution of money decree against them. The first defendant Pattathammal as the fifth defendant therein did not take any steps to claim any independent right over the properties in question and to set aside the attachment before judgment and to set aside the court auction sale, as such, the same would render the defendants' plea that the properties were allotted to Chellaperumal Udaiyar and the court auction sale was not binding either on Kailasa Udaiyar or Pattathammal is factually and legally unsustainable.

15. Even otherwise the failure on the part of the first defendant Pattathammal to make any claim would render the court auction sale hit by Section 52 of Transfer of Property Act. In that event, the settlement executed by Pattathammal in respect of suit items 1 and 2 in favour of the second defendant is hit by section 52 of the Transfer of Property Act. As rightly argued by the learned counsel for the respondent/plaintiff, the first defendant did not in her written statement specifically raise any plea of ignorance of the earlier suit and the execution proceedings. The plaintiff's vendor, having been a bonafide purchaser for valuable consideration of suit

items 1 and 2 through court auction sale, is entitled to protection under law.

16. As far as suit item 3 is concerned, the same is admittedly belonging to the father of Pattathammal and Samiammal. Their father under Ex.A5 sale deed dated 1.2.1943 sold suit item 3 and other items in favour of Pattathammal and Samiammal. What was sold under Ex.A5 is east west 52 feet and north south 16 feet within 4 boundaries mentioned therein. While Pattathammal under Ex.A10 dated 13.7.1957 settled a portion of the same in favour of the second defendant Periyasamy Udaiyar and other sister Samiammal under Ex.A6 dated 20.8.1959 settled other portion of the same in favour of the plaintiff and his brother DW4 Narayanasamy. The measurement of the property covered in Ex.A10 settlement deed is east west 25 feet and north south 10 feet, which is half of the property sold under Ex.A5. Whereas, the subject matter of the property in Ex.A6 settlement deed is east west 26 feet and north south 16 feet. Thus, the extent covered under both the documents would probablise the theory that Pattathammal and Samiammal settled different portions in favour of the second defendant and the plaintiff and Narayasamy under two different documents respectively, which inturn would probablise the plaintiff's theory that the property purchased by Pattathammal and Samiammal from their father Murugappa Udaiyar under Ex.A5 was subsequently partitioned between them and the property settled under Ex.A6 in favour of the plaintiff was the share allotted to Samiammal and the property settled under Ex.A10 in favour of the second defendant was the share allotted to Pattathammal. Having regard to the extent covered under Exs.A6 and A10, the rival claim made by the parties in respect of suit item 3 is liable to be negatived. The claim of the plaintiff having been based on Ex.A6 settlement deed executed by Samiammal, has to be necessarily upheld. The lower appellate court has after due appreciation of entire facts and oral and documentary evidence available herein, rightly upheld the title of the plaintiff in respect of suit items 1 and 2 and suit item 3 and this court finds no reason to interfere with the same.

17.Regarding possession, the same having been found in the hands of the defendants the suit was decreed for alternative relief of recovery of possession in respect of the suit items and the defendants 3 to 6 have not made out any valid ground much less legal ground to interfere with the well considered judgment of the lower appellate court in this regard. Therefore, other substantial questions of law and additional substantial question of law are accordingly answered in favour of the respondent/plaintiff.

18.In the result, the Second Appeal is dismissed. Consequently connected miscellaneous petition is closed. No costs.

Sd/-
Deputy Registrar

True Copy

To

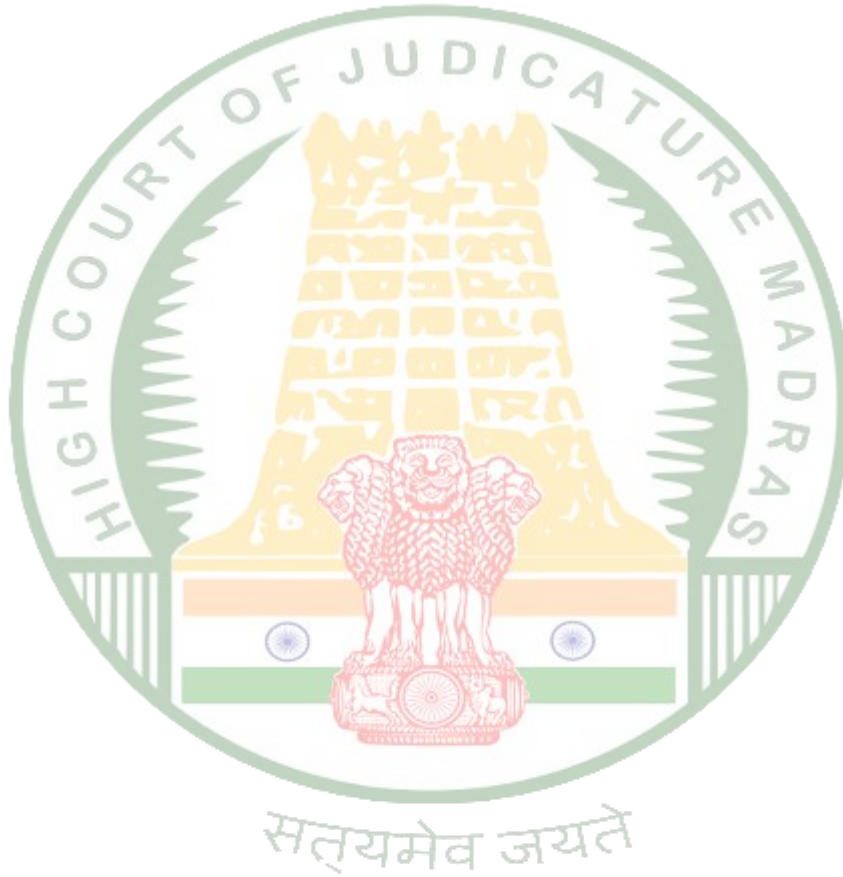
1.The Additional Subordinate Judge, Virudhachalam.

2.The Principal District Munsif Court, Vridhachalam.

+1 cc to Mr.D.Shivakumara, Advocate,SR.11005.

Ug(co)
krd 18/6

S.A.No.171 of 2008



WEB COPY