

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.07.2015

CORAM

THE HONOURABLE MS. JUSTICE R.MALA

S.A.No.1228 of 2003
and C.M.P.No.10517/2003

Judgment reserved on 23.06.2015	Judgment pronounced on 02.07.2015
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1.Kaliamoorthy
2.Punitha

.. Appellants/Appellants/ Defendants 2 & 3

Vs

1.Jothimani
2.Soodamani
3.Anjammal

..Respondents/Respondents/ Plaintiffs

Prayer: Second appeal filed under Section 100 of CPC against the Judgment and Decree dated 07.02.2003 in A.S.No.58 of 2002 on the file of the Additional Sub Court, Mayiladuthurai, confirming the Judgment and Decree dated 28.03.2002 in O.S.No.470 of 1997 on the file of the Additional District Munsif Court, Mayiladuthurai.

For Appellants : Mr.S.Sounthar

For Respondents : Mr.A.Muthukumar

JUDGMENT

This second appeal arises out of the Judgment and Decree dated 07.02.2003 in A.S.No.58 of 2002 on the file of the Additional Sub Court, Mayiladuthurai, confirming the Judgment and Decree dated 28.03.2002 in O.S.No.470 of 1997 on the file of the Additional District Munsif Court, Mayiladuthurai.

2.The averments made in the plaint are as follows:-

The suit property along with another property was purchased by the father of the plaintiffs, namely, Kanagasabai under a registered sale deed dated 03.06.1951 from one Ramalinga Padayachi and he was in possession and enjoyment of the suit property. The said Kanagasabai died intestate leaving behind the first defendant and his three daughters/the plaintiffs as legal heirs. The plaintiffs and the first defendant are entitled to $\frac{1}{4}$ share each in the suit property. Since the first defendant was the eldest in the

family and the plaintiffs were married and lived in their matrimonial house, patta for the suit property was transferred in the name of the first defendant. In respect of the other property found in the sale deed dated 03.06.1951, the plaintiffs and the first defendant have made amicable arrangements between themselves. The first defendant was in possession and cultivating in the suit property. The first defendant was affected with Paralysis for the last one year and was confined to her house. The second defendant is the husband of the third defendant. The plaintiffs came to know that the defendants 2 and 3 have entered into some arrangement with the first defendant using her physical condition and has entered into possession of the suit property. The plaintiffs issued a notice dated 14.03.1997 to the defendants 2 and 3 through their lawyer demanding possession of the suit property. But even though the defendants 2 and 3 acknowledged the receipt of the notice, neither they comply with the demand nor sent any reply. Hence, the plaintiffs filed a suit for partition and separate possession of $\frac{3}{4}$ share of the suit property. During the pendency of the suit, the first defendant died. Hence, they amended the plaint for directing the defendants 2 and 3 to deliver possession of the suit property to the plaintiff and to pay damages for use and occupation of the suit property from the date of plaint.

3.The gist and essence of written statement filed by the first defendant is as follows:

It is true that the first defendant was affected with Paralysis for the last one year and since, she was not able to talk or to walk, she was confined to her house. The second defendant helped the first defendant by giving money for her medical treatment. At that time, the second defendant using the physical condition of the first defendant, obtained Left Thumb Impression of the first defendant in the blank papers and has encroached upon the suit property. The first defendant has not given any right to enter upon the suit property and due to her health condition, she was not able to take action against the second defendant. The first defendant had $\frac{1}{4}$ share in the suit property and she has no objection for partition of the suit property.

4.The gist and essence of written statement filed by the second defendant, which is being adopted by the third defendant is as follows:

It is submitted that the suit has been filed by the plaintiffs to deprive the valuable right of the second defendant, who is a cultivating tenant and the third defendant, who has purchased the suit property from the first defendant. The second defendant is the cultivating tenant for about 10 years. The third defendant entered into an agreement of sale with the first defendant on 01.07.1996 agreeing to purchase the suit property at the rate of Rs.61/- per kuli and paid Rs.3,000/- as advance to the first defendant. Since the said Kanagasabai, husband of the first defendant, died in the year 1950, as per the Hindu Law, the

plaintiff cannot be the legal heirs of the property left by the deceased Kanagasabai and hence, the first defendant is the full owner of the suit property. Even though the third defendant is ready and willing to complete the sale transaction, the first defendant alone has postponing the same. Hence, the third defendant issued a notice dated 14.03.1997. But the first defendant neither sent any reply nor expressed her willingness to complete the sale transaction and instead of that, she instigated the plaintiffs to file a suit. Hence, he prayed for dismissal of the suit.

5.The gist and essence of additional written statement filed by the first defendant is as follows:

The second defendant continues to be the cultivating tenant in the suit property. The third defendant is entitled to get the sale deed from the plaintiffs since they are the legal heirs of the first defendant, who is since deceased and he is entitled to the benefits under Section 53-A of the Transfer of Property Act.

6.The Learned Trial Judge after considering the averments both in the plaint and written statement and arguments on either side counsel has framed necessary issues and on perusing the oral and documentary evidence viz., P.W.1, D.W.1 to D.W.4 and Exs.A1 to A5 and Exs.B1 to B5, decreed the suit. Aggrieved against the judgment and decree of the trial court, the defendants 2 and 3 preferred an appeal in A.S.No.58 of 2002 on the file of the Additional Sub Court, Mayiladuthurai.

8.The learned First Appellate Court has considered the argument advanced on either side and framed necessary point for consideration and confirmed the Judgment and Decree passed by the Trial Court and dismissed the appeal. Against the Decree and Judgment of the first Appellate Court, the present second appeal has been preferred by the defendants 2 and 3.

9.At the time of admission of the above second appeal, the following substantial questions of law were framed for consideration.

"a)Whether the judgments of the Courts below are set aside in its rejecting Ex.B1, sale agreement, on the ground it was an unregistered document? Whether the sale agreement dated 01.07.1996 is compulsorily registrable document?

b)Whether the Courts below are erred in holding that the respondents are entitled to succeed to the properties of Kanagasabai as his daughters, when the said Kanagasabai died prior to the coming into force of Hindu Succession Act of 1956?

c)Whether the Civil Court has got jurisdiction to decide the question of cultivating tenancy rights of the first appellant when it was specifically

barred under Section 16-A of Tamil Nadu Agricultural Lands Records of Tenancy Right Act?

10. Challenging the concurrent finding of both the Courts below, the learned counsel appearing for the appellants/defendants 2 and 3 would submit that the suit property originally belonged to one Kanagasabai, who purchased the same under Ex.A1 on 03.06.1951, his wife is Sivagami Ammal/the first defendant and they were blessed with the three daughters, namely, the plaintiffs/respondents herein. He would submit that the appellants entered into a sale agreement under Ex.B1 on 01.07.1996 with the first defendant in the name of the third defendant/second appellant and in pursuance to that, possession has been handed over to him. While so, the respondents herein filed a suit for 3/4 share in the property and also for recovery of possession. During the pendency of the suit, the first defendant, namely, Sivagamiammal died. Hence, they amended the prayer for recovery of possession. But the appellants are entitled to protection under Section 53-A of the Transfer of Property Act. To prove the genuinity of Ex.B1/sale agreement, D.W.2 and D.W.3 were examined. The Trial Court has not considered the fact that the appellants are entitled protection under Section 53-A of the Transfer of Property Act. Hence, he pray for setting aside the judgment and decree of both the Courts below. To substantiate his arguments, the learned counsel appearing for the appellant relied upon the following decisions:

1. 2002 (3) SCC 676 (Shrimant Shamrao Suryavanshi and another vs. Pralhad Bhairoba Suryavanshi (Dead) By LRs. and others)
2. 2004 (3) CTC 278 (Mahadeva and others vs. Tanabai)

11. Resisting the same, the learned counsel appearing for the respondents would submit that the appellants are not entitled to protection under Section 53-A of the Transfer of Property Act, since Ex.B1, Sale agreement was not proved to be true and genuine. The alleged attestors, namely, D.W.2 and D.W.3, have given contradictory version in respect of the place of execution of sale agreement, Ex.B1. So, both the Courts below have rightly held that Ex.B1 is a concocted document and it is not true and genuine document. Therefore, once Ex.B1, sale agreement goes, the appellants are not entitled to protection under Section 53-A of the Transfer of Property Act. The second limb of argument of the learned counsel appearing for the respondents is that the second appellant has stated that he was put in possession of the property on the basis of the sale agreement and further the first appellant has pleaded that he is a cultivating tenant. But both the Courts below have rightly negatived the same. Hence, he prayed for dismissal of the appeal. To substantiate his argument, the learned counsel appearing for the respondents relied the decision reported in 2002 (3) LW 211 (Shrimant Shamrao Suryavanshi and another vs. Pralhad Bhairoba Suryavanshi (Dead) By LRs. and others) which is equivalent to 2002 (3) SCC 676.

12.Considered the rival submissions carefully made on both sides and perused the material records and both oral and documentary evidence.

Substantial Question of Law No.(c):

13.The admitted facts are that the suit property has been purchased by late Kanagasabai under Ex.A1 on 03.06.1951, his wife was Sivagamiammal, first defendant and she died during the pendency of the suit. They were blessed with three daughters, namely, the plaintiffs/respondents herein. The respondents got married and settled at their matrimonial home. The first appellant raised a plea that he is in possession of the property as a cultivating tenant. Even though Ex.B3 and B4, Kist receipts have been filed, it is well settled law that payment of kist does not confer any title. If really the first appellant is in possession of the property as a cultivating tenant, he may very well approach the Revenue Court for recording himself as cultivating tenant. But there is no iota of evidence before the Court to show that the first appellant is a cultivating tenant. So, both the Courts below have rightly held that the first appellant is not a cultivating tenant and as per Section 16-A of the Tamil Nadu Agricultural Lands Records of Tenancy Right Act, the Civil Court has no jurisdiction to decide the question of cultivating tenant and only the Revenue Court has jurisdiction. It is appropriate to incorporate Section 16-A of the Tamil Nadu Agricultural Lands Records of Tenancy Right Act, which is as follows:

"16-A.Bar of jurisdiction of Civil Courts:

No Civil Court shall have jurisdiction in respect of any matter which the record officer, the District Collector or other officer or authority empowered by or under this Act has to determine and no injunction shall be granted by any Court in respect of any action taken or to be taken by such officer or authority in pursuance of any power conferred by or under this Act."

As per Section 16-A of the Tamil Nadu Agricultural Lands Records of Tenancy Right Act, the Civil Court has no jurisdiction to decide the question of cultivating tenant and only the Revenue Court has jurisdiction. But the appellant herein has not filed any document to show that his name has been recorded as cultivating tenant by the Competent authority. That factum was rightly considered by both the Courts below. So, I am of the view that the Civil Court has no jurisdiction to decide the question of cultivating tenant. Hence, Substantial Question of Law No.(c) is answered against the appellant.

Substantial Question of Law No.(b):

14.The learned counsel appearing for the appellants submit that Kanagasabai died prior to the Hindu Succession Act, 1956 coming into effect. But, here no scrap of paper has been filed

before the Court to show that Kanagasabai died much prior to 1956. The sale deed, Ex.A1 is dated 03.06.1951. In such circumstances, I am of the view that Substantial Question of Law No.(b) is answered against the appellant.

Substantial Question of Law No.(a):

15.At the time of admission, a substantial question has been raised that Ex.B1 is an unregistered document. Whether the sale agreement is compulsorily registrable document. At the time when Ex.B1, sale agreement has been executed, it need not be compulsorily registered. Section 17 of the Registration Act deals with what are the documents for which registration is compulsory. As per Section 17 of the Registration Act, sale agreement need not be registered. Now only as per Section 17(1A) by amended Act 48/2001 dated 24.09.2001, the sale agreement must be registered if the possession has been given in furtherance of the sale agreement under Section 53-A of the Transfer of Property act. Ex.B1, sale agreement has been alleged to have executed on 01.07.1996 and so, the document does not require registration. Hence, the Substantial Question of Law No.(a) is in favour of the appellant.

16.Now, this Court has to decide whether the appellants are entitled to protection under Section 53-A of the Transfer of Property Act? It is appropriate to incorporate Section 53-A of the Transfer of Property Act:

"53A. Part performance

Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

PROVIDED that nothing in this section shall

affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

17.The learned counsel appearing for the appellants relied upon the decision reported in 2000 (3) SCC 676 (Shrimant Shamrao Suryavanshi and another vs. Pralhad Bhairoba Suryavanshi (Dead) By LRs. and others), wherein it was held that law of limitation does not apply to a plea taken in defence by defendant even though that defence as a claim made by him may not be enforceable in Court being barred by limitation. It is appropriate to incorporate paragraph Nos.5 and 17, which reads as follows:

"5.The first question that arises for consideration is whether the defendant-appellants are entitled to protect their possession of the suit property obtained in pursuance to part performance of agreement for sale even after the suit for specific performance of contract for sale is barred by limitation.

17.We are, therefore, of the opinion that if the conditions enumerated above are complied with, the law of limitation does not come in the way of a defendant taking plea under Section 53-A of the Act to protect his possession of the suit property even though a suit for specific performance of a contract has barred by limitation."

18.He has also relied upon the decision reported in 2004 (3) CTC 278 (Mahadeva and others vs. Tanabai), in which earlier decision has been referred.

19.The learned counsel appearing for the respondents has also relied upon the same decision reported in 2002(3) LW 211 (Shrimant Shamrao Suryavanshi and another vs. Pralhad Bhairoba Suryavanshi (Dead) By LRs. and others), wherein it was specifically mentioned that in what circumstances, the agreement holder is entitled to protection under Section 53-A of the Transfer of Property Act. It is appropriate to incorporate paragraph No.16, which reads as follows:

"16.But there are certain conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under Section 53-A of the Act. The necessary conditions are

1) there must be a contract to transfer for consideration any immovable property;

2) the contract must be in writing, signed by the transferor, or by someone on his behalf;

3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;

4) the transferee must in part performance of

the contract take possession of the property, or of any part thereof;

5) the transferee must have done some act in furtherance of the contract; and

6) the transferee must have performed or be willing to perform his part of the contract."

20.The first ingredient is that there must be contract to transfer for consideration any immovable properties. But as already stated Ex.B1, sale agreement was not proved and the Trial Court has rightly disbelieved the evidence of D.W.2 and D.W.3 because the place of execution of the sale agreement is different. D.W.2, who is alleged to be one of the attessor, in his evidence has stated that Ex.B1 has been executed at Gnanaprakasam's house. But whereas D.W.3, who is alleged to be another attessor, in his evidence has stated that Ex.B1 has been executed at Amudha's house and in his cross examination, he has stated that Ex.B1 has been executed at Amudha Textiles. So, there is a different version and on that basis, the Trial Court has rightly held that Ex.B1 has not been true and genuine document. Hence, the first condition itself has not been proved.

21.Furthermore, condition No.4 is concerned, the transferee must be in part performance of the contract take possession of the property, or of any part thereof. But here, in the written statement filed by the defendants 2 and 3, it was stated that they are in possession and enjoyment of the suit property as a cultivating tenant. In paragraph No.2 of the written statement filed by the defendants 2 and 3, it was specifically mentioned that "the plaintiffs are now being instigated by the first defendant to file the present suit, in order to deprive the valuable right of second defendant one as a cultivating tenant and another the right of third defendant who is the purchaser of the suit property from the first defendant". So, it was specifically mentioned that they are in possession of the suit property as a cultivating tenant. But as already held by this Court, the first appellant/second defendants has not proved that he is a cultivating tenant. In such circumstances, I am of the view that the appellant is not entitled to protection under Section 53-A of the Transfer of Property Act. Hence, as a owner of the property, the respondents are entitled to recovery of possession. So, I do not find any reason for interfering with the judgment and decree passed by both the Courts below and the same are hereby confirmed. The second appeal is liable to be dismissed as devoid of merits and it is hereby dismissed.

22.In fine,

- Second appeal is dismissed with costs.
- The decree and judgment passed by both the Courts below are hereby confirmed.

- Two months time is granted to the appellants/defendants 2 and 3 to deliver the possession of the suit property to the respondents/plaintiffs.
- Consequently, connected civil miscellaneous petition is closed.

Sd/-
Asst.Registrar (CO)

/true copy/

Sub Asst. Registrar

cse

To

- 1.The Additional Subordinate Judge,
Mayiladuthurai.
- 2.The Additional District Munsif Court,
Mayiladuthurai.
- 3.The Record Keeper,
V.R.Section, High Court, Chennai.

1 cc to M/s.A. Muthukumar, Advocate, Sr. 33120

1 cc to M/s.S. Sounthar, Advocate, Sr. 32866

S.A.No.1228 of 2003
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