



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 03.06.2015

CORAM :

**THE HONOURABLE MR.JUSTICE P.R.SHIVAKUMAR**

WEB COPY

Second Appeal (MD) No.329 of 2015

1.Veerammal (deceased)

2.Subramanian

(The 2<sup>nd</sup> appellant for himself and as  
rep. of the other residents of A.Kovilpatti,  
hamlet of Attapatti Village, Melur Taluk,,  
Madurai District) ..Appellant/2<sup>nd</sup> Respondent  
/2<sup>nd</sup> Defendant

3.Kalanchiam

4.Mani

5.Jeyaraman

6.Panchu

(Appellants 3 to 6 Lrs of deceased 2<sup>nd</sup>  
appellant)

... Appellants 3 to 6/Lrs of the  
Deceased 1<sup>st</sup> Respondent/1<sup>st</sup> Defendant

Vs.

1.Dharmalingam

2.Alagesan ... Respondents/Appellants/Plaintiffs  
(cause title accepted vide  
order dated 30.04.2015 made in  
M.P.No.1 of 2014 in S.A.SR.No.21507/2014)

Second Appeal is filed under Section 100 C.P.C against the judgment and decree in A.S.No.103 of 2010, dated 09.10.2012 on the file of the Subordinate Judge, at Melur Camp, reversing the judgment and decree made in O.S.No.28 of 2008, dated 06.04.2010 on the file of the District Munsif Court, Melur.

For Appellants

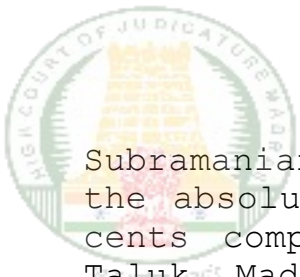
: Mr.S.Jothimani

### JUDGMENT

This Second Appeal arises out of a judgment and decree of the learned Subordinate Judge, Melur (Camp) dated 09.10.2012 made in A.S.No.103 of 2010. The said Appeal arose from the judgment and decree of the learned District Munsif, Melur dated 06.04.2010 made in O.S.No.28 of 2008.

<https://hcservices.ecourts.gov.in/hcservices/>

2.The respondents in the Second Appeal filed the above said suit against deceased Veerammal (First Defendant) and



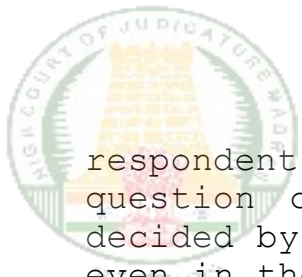
Subramanian (Second Defendant) for a declaration that they were the absolute owners of the suit property, namely an extent of 15 cents comprised in Survey No.392/5 at Attapatti Village, Melur Taluk, Madurai District and for injunction. The suit was resisted by the defendants contending that though the said property came to be purchased in the name of Odunkan, the father of the respondents herein/plaintiffs, it was the purchase made on behalf of the village and that hence the respondents herein/plaintiffs were not entitled to the relief of declaration.

3.The learned trial Judge, after trial, by a judgment and decree dated 06.04.2010, dismissed the suit holding that the respondents herein/plaintiffs were not able to prove their title and possession and they could not rely on the loopholes in the defence case of the defendants to get the reliefs sought for. On appeal, the learned lower Appellate Judge reversed the said finding and granted the decree for both the reliefs, namely declaration and injunction as prayed for. It is as against the said decree of the learned lower Appellate Court dated 09.10.2012, the present Second Appeal has been filed on various grounds set out in the memorandum of grounds of appeal.

4.Today, the matter has come up for admission. The arguments advanced by Mr.S.Jothimani, learned counsel for the appellants are heard. The copies of judgments and decrees of the Courts below and the other copies of the records produced in the form of typed set of papers are also perused.

5.An appeal from an appellate decree of a Court subordinate to the High Court shall lie to the High Court under Section 100 of the Code of Civil Procedure, 1908, if the High Court is satisfied that the appeal involves a substantial question of law. The party filing the second appeal shall precisely formulate the substantial question/s of law/s and incorporate the same with a specific heading in the memorandum of grounds of second appeal. At the time of admission, if the High Court is of the view that the appeal involves a substantial question of law, the appeal shall be admitted and the High Court shall formulate the substantial question/s of law, on which the appeal is admitted. The mere fact that a few questions are formulated as substantial questions of law at the time of admission of the second appeal will not debar the appellant altogether from raising any additional substantial question of law. But such a right is circumscribed by the requirement that such additional questions shall be raised only with the leave of the High Court.

6.It is also clear from the provisions found in Section 100 C.P.C. that after admission of the second appeal identifying the questions to be the substantial questions of law involved in the second appeal, at the time of hearing of the appeal, the



respondent/s may contend that such a question is not a substantial question of law or that such a question has not been wrongly decided by the Court below. The respondent/s also can contend that even in the event of the answer to the question being in favour of the appellant, he/she shall not be entitled to the reliefs sought for as the decree of the lower appellate Court can be sustained on other grounds, thereby making the question not a substantial question of law involved in the particular appeal.

7. In this case, five questions have been projected by the appellants as substantial questions of law involved in this Second Appeal. They are as follows:-

*"(i) Whether the sale deed alone is valid that the possession is in the hands of the village people for village benefit more than statutory period of 12 years according to law?*

*(ii) Whether the adverse possession is in favour of the appellant If the suit property is in the hands of the village people for village benefit more than 12 years according to law?*

*(iii) Whether the appellant is entitle to get adverse possession, even is not claiming alternative remedy in his written statement?*

*(iv) Whether burden of proof is lies on the appellant/defendant, if denied the plaint averment?*

*(v) Whether the dictum laid down in 2000 (3) LW page 793 is relevant to the appellant/defendant or not?"*

**(The exact questions as formulated and incorporated in the memorandum of grounds of Second Appeal without any correction of mistakes found therein have been reproduced above)**

8. Before dealing with the abstract questions projected as the substantial questions of law involved in the Second Appeal, a brief narration of the circumstances leading to the filing of the Second Appeal may be helpful to understand the context in which the said questions were sought to be projected as substantial questions of law involved in the second appeal.

9. The suit property, namely 15 cents of land comprised in Survey No.392/5 at Attapatti Village, Melur Taluk, Madurai District was purchased under a sale deed dated 12.09.1950 and the original sale deed has been produced as Ex.A.1. The purchaser as per said sale deed was one Odunkan. It is not in dispute that the said Odunkan was the father of the respondents herein/plaintiffs. Contending that in the re-survey a mistake crept-in and patta in respect of the said property came to be issued in the name of Krishnan, S/o.Sundaram, instead of Odunkan S/o.Sundaram; that steps were taken to rectify the defect and in fact the said defect came to be rectified after the death of Odunkan by getting patta



in the name of respondents/plaintiffs; that from the date of purchase Odunkan and after his death the respondents herein/plaintiffs were in possession and enjoyment of the suit property and that before filing of the suit the appellants herein/defendants made an attempt to cause disturbances to such peaceful possession and enjoyment, the respondents herein/plaintiffs approached the trial Court with the suit for the relief of declaration of title and consequential injunction.

10.It is pertinent to point out that the first defendant Veerammal was arrayed as a party defendant in her individual capacity, whereas the second defendant Subramanian was arrayed as representing himself and the other residents of A.Kovilpatty village, hamlet of Attapatty village. The suit was resisted contending that the suit property came to be purchased by the village public with the common fund in the name of one of its Karai ambalams, namely Odunkan and that right from the date of purchase, the property was treated as common property of the villagers.

11.The learned trial Judge, no doubt came to a conclusion that the defendants, who claim the property to be the common property of the villagers having purchased it with their common fund in the name of Odunkan, had not produced sufficient evidence to prove their contention and rendered a finding that the respondents herein/plaintiffs had not proved their possession and that in respect of proof of possession, they could not rely on the loopholes in the case of the defendants. Based on the said finding alone, the learned trial Judge chose to non suit the respondents herein/plaintiffs for the reliefs sought for in the plaint.

12.The learned lower Appellate Judge, relying on Ex.A.1-sale deed, held that the respondents herein/plaintiffs were successful in establishing their case that the property was purchased by Odunkan and it was his separate property. In fact, it is an admitted fact that there is no indication in the recitals of Ex.A.1 that the consideration did not pass from the personal funds of Odunkan or that consideration was provided from the common fund of the village. It is also an admitted fact that there is no recital that Odunkan was described as a Karai ambalam of A.Kovilpatty village to raise an inference that he was in the position of a trustee for the villagers. On the other hand, even after the purchase, kist for the property came to be paid by Odunkan and thereafter by the respondents herein/plaintiffs. Ex.A.17 is the copy of the patta issued in the name of Krishnan S/o.Sundaram in respect of the suit property. There is no explanation whatsoever, on the part of the appellants as to how patta came to be issued in the name of Krishnan S/o.Sundaram. There is also absence of explanation as to why the property had



not been classified in the re-survey as a community land.

13. In fact, contending that patta was wrongly issued in the name of Krishnan S/o. Sundaram instead of Odungan S/o. Sundaram, an application came to be made to the District Collector for rectification of the defect. Such an application was submitted in the year 2003 itself. Further application was submitted by the first respondent herein/first plaintiff to the District Collector in the year 2005. The first appellant/first defendant who was none other than the wife of the above said Krishnan executed a release deed stating no objection for transferring patta issued in the name of her husband to the real owners as claimed by the respondents herein/plaintiffs.

14. All the above said documents were properly appraised by the learned lower appellate Judge to arrive at a conclusion that the suit property was the property purchased by Odunkan for himself and that the possession and enjoyment of the property were also with the Odunkan till his life time and after his death with the respondents herein/plaintiffs. Though the defendants have chosen to produce 21 documents, Ex.B4 is the patta erroneously issued in the name of Krishnan which according to the respondents herein/plaintiffs came to be rectified. There is no other document to show that the suit property was enjoyed by the villagers in common as a property owned by the village community. In the absence of documents to prove the enjoyment, the property being a vacant land not subjected to cultivation, the principle "possession follows title" shall be applied. Applying the said principle, the learned lower Appellate Judge has chosen to hold that the respondents herein/ plaintiffs were not entitled to the relief of injunction also.

15. Upon considering the judgments of the Courts below and other materials produced in the form of typed set of papers, this Court does not find any scope for interference with the factual finding of the lower Appellate Court that the property purchased under Ex.A1 was not the one produced by the residents of the village for their common use and on the other hand, it was a purchase made by Odunkan for himself and that the property was in the possession of Odunkan from the date of purchase and it continued to be in the possession of the respondents herein/plaintiffs after the death of Odunkan till the date of filing of the suit. The said findings cannot be termed either defective or infirm, much less perverse. Only in case of perversity of a finding of fact, the question relating to the correctness of that finding shall get elevated to the level of a substantial question of law. As this Court does not find any perversity in the finding of the lower Appellate Court, the challenge made to the finding as if it is perverse has got to be discountenanced.



16. Learned counsel appearing for the appellants herein/defendants relies on the singular fact that in a partition that took place between the respondents herein/plaintiffs, the other properties of the family alone were divided and the suit property was left out. Pointing out the same, learned counsel contends that it would give rise to an inference that the suit property was not included in the partition because it was the property belonging to the village community. The contention cannot be countenanced for the simple reason that the very fact that the properties which were made the subject matter of the partition of the year 1980 should have been the properties of the joint family of which Odunkan and his sons were coparceners, whereas the suit property was a self-acquisition of Odunkan as it had been purchased by him under Ex.A.1-sale deed. Even otherwise, there is no prohibition in law for the parties to a partition keeping some of the properties in common without division. Hence, the mere fact that the suit property was not made one of the subject matters of the earlier partition of the year 1980 cannot be successfully projected as a circumstance warranting an inference in favour of the contention of the defendants and against the contentions of the plaintiffs. The very contention of the appellants/defendants is very dangerous and acceptance of such contention will make the purchase made by any individual in his hands susceptible to challenge by a group of people creating self-serving documents as if there was a society and the purchase was made using the funds of the society in the name of such individual.

17. Turning back to the questions formulated by the appellants herein/defendants as substantial questions of law, this Court has got no hesitation to hold that none of the questions formulated and incorporated in the grounds of Second Appeal as questions 1 to 4 can be accepted as a substantial question of law involved in the Second Appeal. The first three questions are based on the assumption that the villagers had perfected title by adverse possession. There is no plea made in the written statement and necessary particulars constituting adverse possession have not been furnished. There is nothing to show from which date the property came to be possessed by the villagers adverse to the real owner, namely Odunkan and after his death the respondents herein/plaintiffs. Moreover, there is absolutely no plea or evidence to show the presence of the necessary animus to hold the property adverse to the real owner. When the purchaser under Ex.A.1 and his successors namely, the respondents/plaintiffs, are not claimed to be totally excluded from the enjoyment of the property, there shall be no question of exclusive possession by the defendants which would amount to adverse possession. Hence, the questions are liable to be rejected as they are not the questions involved in the second appeal and even if it is assumed



that such questions arise in the second appeal they are to be answered in the negative holding that no adverse possession has been either pleaded or proved by the appellants herein.

18.The question projected as fourth substantial question of law is on the assumption that the burden of proof was wrongly cast on the appellants herein/defendants. In fact it is not so. The initial burden of proving title and possession was cast on the respondents herein/plaintiffs and it was held that they had adduced evidence sufficient to discharge the initial burden and cause the shifting the burden of proof of their defence theory on the appellants herein/defendants. The learned lower Appellate Judge held that the appellants herein/defendants did not discharge the burden of proof which stood cast on them on the discharge of the initial burden cast on the respondents herein/plaintiffs. Hence, the fourth question also deserves rejection as not one that actually arises for consideration in the second appeal.

19.The judgment reported in **2000 (3) L.W 793 (S.Madasamy Thevar Vs.A.M.Arjuna Raja)** simply states that the plaintiff who comes to the Court, has to prove his case and he shall succeed or fail based on the strength of his own case and that he cannot get a decree in his favour pointing out the weaknesses or loopholes in the defence case of the defendants. The foregoing discussions will make it clear that the learned lower Appellate Judge granted a decree in favour of the respondents herein/plaintiff not on the basis that there are weaknesses and loopholes in the defence case of the defendants and on the other hand, the learned lower Appellate Judge granted a decree in favour of the respondents herein/plaintiffs based on the finding that they established their title by unimpeachable documentary evidence and also proved their possession by sufficient evidence, which were enough to discharge their burden and cast the burden of proof of the defence theory on the appellants herein/defendants. Therefore, the fifth question projected as substantial question of law also does not arise for consideration in the second appeal.

20.For all the reasons stated above, this Court comes to the conclusion that there is no merit in the second appeal and the same deserves to be dismissed at the threshold.

21.In the result, the Second Appeal is dismissed. No costs. M.P(MD)No.1 of 2015 is closed.

Sd/-

Assistant Registrar(AE)

/True Copy/



To

1.The Subordiante Judge, Melur Camp.

2.The District Munsif, Melur.

Copy To:

The Section Officer,

VR Section,

Madurai Bench of Madras High Court, Madurai

+1cc to MR.S.Jothimani, Advocate Sr.No.28061

sms

AA/20.07.2015/ 8p- 5c/

Second Appeal (MD) No.329 of 2015  
03.06.2015