

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On:24.11.2016  
Pronounced On:02.12.2016

CORAM

THE HON'BLE DR.JUSTICE G.JAYACHANDRAN

S.A.No.1055 of 2008  
and  
M.P.No.1 of 2008

V.Ekambaram

..Appellant/Respondent/  
Defendant

/vs/

1.V.Anand Ram  
2.Vasudevan

..Respondents/Appellants  
Plaintiffs

Prayer: Second Appeal is filed under Section 100 of Code of Civil Procedure against the judgment and Decree of the learned Subordinate Judge, Vellore dated 24.03.2008 in A.S.No.42 of 2006 reversing the judgment and decree of the learned Additional District Munsif, Vellore dated 02.03.2005 in O.S.No.1394 of 1993.

For Appellant :Mr.T.M.Hariharan

For Respondents:Mr.T.R.Rajaraman

JUDGEMENT

The defendant in the suit is the appellant herein. The suit filed for declaration of the absolute right and title over the suit property and consequential injunction. Further, to declare the alleged right, title and interest of the defendant in the suit property, even if there were to be any, got extinguished in law and permanent injunction restraining the defendant from interfering the peaceful possession. The trial court dismissed the suit. On appeal, the trial court judgment was set aside. Suit was allowed. Aggrieved by the reversal judgment, the present appeal is filed.

2. Background of the case:

The suit property was purchased by one Venkatareddy. He died about 16 years prior to filing of the suit in the year 1995. The said Venkatareddy had two wives. Through his first

wife he had one son by name Umapathy and through the second wife he had two sons and one daughter namely, Ekambaram, Devan and Saroja. On 17.10.1980, Umapathy and Devan has sold the property to Chinnammal and her minor grand son Anand Ram. They are none other than mother -in- law and brother-in-law's son of Umapathy.

3. The suit was initially filed by Chinnammal and Anand Ram, later Vasudevan the brother-in-law of Umapathy got impleaded as plaintiff and arrayed as 3<sup>rd</sup> plaintiff in the suit. In the suit it was pleaded that Venkatareddy out of love and affection towards his eldest son Umapathy, during his life time transferred patta in the name of Umapathy and allowed him to enjoy the suit land as his own. The said Venkatareddy died leaving undischarged debts. To clear the debts the property was sold to the plaintiffs by Umapathy and Devan. While so, when the first plaintiff being the sister of Venkatareddy sought share in the shridana property of her mother Muniammal, the first defendant Ekambaram got angry and entered upon the suit property and destroyed the mango trees on 1.10.1993.

4. The case of the defendant in the written statement was, he and his brother Devan were serving in the Army. After the death of their father Vekatareddy, his elder brother Umapathy was taking care of the family property. His father was affluent and not a debtor while he died. There was no right or necessity for Umapathy to alienate the joint family property. The property is enjoyed jointly by the 3 sons of Venkareddy. The plaintiffs never been in possession of the property, being co-sharer of the joint family property, the averment that his right and title got extinguished in law is not sustainable.

5. Before the trial court the third plaintiff who got impleaded at the later stage mounted the witness box and deposed as PW-1. In support of the plaintiffs case four more witnesses were examined. 57 exhibits were marked through them in 'A' series. On behalf of the defendant was examined as DW-1. Five exhibits were marked in 'B' series. The Advocate commissioner report and sketch were marked as Ex C-1 and C-2.

6. The Trial court dismissed the suit on the ground that the suit property is not the separate property of Umapathy. The patta, chitta and kist receipts, which are in the name of the plaintiffs and relied by them are only from 1987 and not from the date of alleged purchase in the year 1980. Thus, the claim of possession from the date of purchase through Ex A-5 is not proved. Under Ex A-5 it is the first and second plaintiffs, who are the purchasers of the suit property. However, under UDR scheme the patta Ex 29 and Ex 30 is issued in the name of the third plaintiff, who even according to other plaintiffs not the title holder. Having laid the suit

claiming title based on sale deed Ex A-5, the plaintiffs cannot claim adverse possession.

7. On appeal, the first appellate court reversed the trial court judgment and allowed the suit on the ground that, the defendant admits his knowledge about the execution of Ex A-5 but failed to challenge it and no explanation given by the defendant for not challenging the sale deed executed in favour of the plaintiffs. The defendant admits in the cross examination about his knowledge that the patta has been issued in the name of the third plaintiff. In spite of knowing that he has not explained why he has not taken steps to cancel it. The defendant admits the possession with plaintiffs, he does not know the reason for planting mango trees in the suit property. He admits only his brother who was administering the property know the reason. Therefore the defendant claim of joint possession and enjoyment is not believable.

8. The first appellate court referring the partition deed Ex A 52 dated 10.2.1999 between all the brothers in respect of the properties of Venkatareddy concluded that the recital in Ex A-52 say after this deed nothing remains to be divided among the brother. The suit property which is the subject matter of the present dispute is not mentioned. No explanation given by the defendant for not including the suit property or for excluding the suit property in the partition deed Ex A-52. Therefore, plaintiffs have proved their title and possession since the date of Ex A-5.

9. Substantial Question of law formulated in the second appeal:

1. Whether the Appellate Court has not erred in placing the burden of proof on the defendant?
2. Whether the Appellate Court has not erred in decreeing the suit without even considering whether the plea of ouster and adverse possession is made out, especially when the trial Court has specifically held against the plaintiffs on that score?
3. Whether the appellant is a co-owner, whether the suit for declaration and injunction against him is maintainable and is not the remedy of the respondents is to sue for partition?

10. The learned counsel for the appellant submitted that, the first appellate court while reversing the well considered judgment of the trial court miserably failed to apply the law of evidence, regarding burden of proof. While the specific case of the plaintiffs that their vendor Umapathy had patta and it was his absolute property given to him by his father Venkatareddy, no evidence available to substantiate it. The plaintiffs later harped on the plea that, Umapathy as manager of the joint family and his brother Devan jointly sold the

property to discharge the debts of their father Venkatareddy. Out of total sale consideration of Rs. 25,000/-, mentioned in the recital of the sale deed Ex A-5, debt around Rs 14,500/- mentioned and balance Rs 10,500/- received by cash for the development and to met out the expenses of the joint family. The debts mentioned are either discharged long before execution of Ex A-5 or debts which stood in the personal name of Umapathy. While admitting that the property is joint family property, the lower appellate court ought to have dismissed the suit for the failure of the plaintiffs to prove their case. Contrarily, pointing out the lapse of the defendant for not challenging the sale deed Ex A-5 and patta Ex A-29 and 30 in favour of third plaintiff, the lower appellant has allowed the appeal.

11. Per contra, the learned counsel for the respondent submitted that, the conduct of the defendant was rightly taken note by the lower appellate court and has allowed the appeal. The defendant admits he came to know about Ex A-5 but did not questioned. He admits that the possession is with the plaintiffs. He admits that he used to visit the suit village regularly. The defendant for 13 years never objected the possession of the plaintiffs. Therefore, in Ex A-5, though the two sons of Venkatareddy have signed, on oral consent of the defendant who was in service at that time, the sale deed was executed. The sale consideration was utilised to clear the family debts and met out the joint family expenses. Further, in partition deed Ex A 52, consciously the suit property was not included, nor it was specifically excluded by stating reasons. The partition between the sons of Venkatareddy through Ex A-52 is full and final. Nothing left for division after Ex A-52. Even in the partition suit filed later by one Saroja the daughter of Venkatareddy, the suit property is not included and the defendant did not question about its exclusion. This shows his acquiescence to the sale deed Ex.A5. Therefore, there is no substantial question of law available for this court to interfere under Section 100 CPC.

12. Whereas, the learned counsel appearing for the appellant further submitted that the plaintiffs have claimed their right and title through the sale deed dated 17.11.1980. Since then they are in possession within the knowledge of the first defendant which has to be treated as settled continuous possession thereby, the right of the first defendant, if at all available got extinguished. The plaint as well as the sale deed describes Umapathy, as absolute owner of the suit property as well as the manager of the joint family property. If he is the absolute owner of the suit property, as claimed by him, he should have produced documents how and when his father gave the property to him. It is specifically pleaded by the plaintiffs that his father transferred the property to him and the patta was also assigned to him. However, no documents produced to that effect and no ocular evidence available in support of this contention. Therefore, as held

by both the Courts and also admitted by the parties it is only the joint family property and not absolute property of Umapathy.

13. The sale by one co-owner on behalf of other co-owners, without any express consent, will not bind the co-owner, who is not a party to the alienation. Only to circumvent this legal hurdle the plaintiffs have taken a plea of extinguishment of right. This plea has no basis. The valuable right over the immovable property cannot get extinguished just because there is a sale transaction behind his back and revenue documents obtained fraudulently. One cannot lose sight of the fact that the appellant was serving in the Army during the execution of Ex.A5. Till the death of his father Venkatareddy, the property was managed by his father and thereafter, his brother Umapathy as elder member of the family was administering the property. Umapathy also on record admits that he is the manager of the joint family property. While so, even for discharging the so called debts of Venkatareddy, he should have obtained consent from the appellant for alienating the property, which is conspicuously absent.

14. Furthermore, though the recital of Ex.A5 appears as if the sale consideration was utilised to discharge the debts and for the joint family expenditures, the documents relied by the plaintiffs does not tally with the entire sale consideration of Rs.25,000/-. If the alienee is a bona fide purchaser, he should have ensured that the sale consideration is really for discharge of joint family debt as well as for the purpose of joint family expenditure or atleast he should have obtained consent from the co-sharers for the sale of the joint family property. Very strangely in this case, after the sale of property in the year 1980, only in the year 1987 patta has been changed in the name of the third plaintiff. When this suit was filed on 11.10.1993, the third plaintiff was not even a party to the suit, he got himself impleaded by virtue of an amendment petition taken out in I.A.No.1041 of 2002 dated 17.06.2003 almost 10 years after laying the suit. This fact cannot be ignored because at the time of filing the suit, neither of the two plaintiffs had patta in their favour though had a sale deed which is only a sham and nominal in the eye of this Court. The revenue officials assigned patta in favour of the third plaintiff in the year 1987 under UDR Scheme when he did not have any title over the property. This has forced the third plaintiff to get himself impleaded in this suit belatedly after 10 years and he alone has mounted the witness box to substantiate the plea of declaration and injunction. While, the trial Court rightly dismissed the suit, the lower appellate Court has shifted the burden on the defendant to prove that he was in possession for more than 12 years. The law which has changed after the new Limitation Act, 1963 under Article 64 and 65.

15. In the decision of the Hon'ble Full Bench of Punjab and Harayana High Court in Manohar Lan and Another v. Dewan Chand and others reported in (1985)2 P&J p.224, paragraph No.4 reads as follows:

"4. .... According to paragraph 269 of the Hindu Law by Mulla which is a book of unquestioned authority since more than half a century, where a member of Hindu family, governed by Mistakshara law sells or mortgages the joint Hindu family property or any part thereof without the consent of the coparcenor. The alienation is liable to be set aside wholly unless it was for legal necessity and it does not pass the share even of the alienating co-parcenor....."

16. In the decision of the Hon'ble Supreme Court in City Municipal Council Bhalki, by its Chief Officer v. Gurappa (dead) by legal representatives and another reported in (2016) 2 Supreme Court Cases 200, paragraph No.31 reads as follows:

"31. It is a settled position of law that in a suit for declaration of title and possession, the onus is upon the plaitniff to prove his title. Further, not only is the onus on the plaintiff, he must prove his title independently, and a decree in his favour cannot be awarded for the only reason that the defendant has not been able to prove his title....."

17. In the decision of the Hon'ble Supreme Court in Gurdwara Sahib v. Gram Panchayat Village Sirthala and another reported in (2014)1 Supreme Court Cases 669, paragraph No.8 reads as follows:

"8. There cannot be any quarrel to this extent that the judgments of the Courts below are correct and without aby blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can use this adverse possession as a shield/defence."

18. To say the least, the first appellate Court has totally failed to apply the law of evidence regarding burden of proof and as perversly allowed the appeal by over looking

the law and evidence relevant to the case. Hence, this Second Appeal is allowed and the judgment and decree of the first appellate Court in A.S.No.42 of 2006 dated 24.03.2008 is set aside and the judgment and decree of the trial Court in O.S.No.1394 of 1993 dated 02.03.2005 is restored. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-  
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

- 1.The Subordiante Judge, Vellore.
- 2.The Additional District Munsif, Vellore.

+ 1 cc to Mr.T.M. Hariharan, Advocate SR.71379

S.A.No.1055 of 2008 and  
M.P.No.1 of 2008

GJ(CO)  
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