

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.10.2016

CORAM

THE HONOURABLE MR. JUSTICE P.KALAIYARASAN

S.A. No.917 of 2007
and M.P.No.1 of 2009

Ashwar Chettiar

... Appellant

vs.

1. Gnana Prakasam
2. Pannerselvam
3. Ashok
4. Balu
5. Pandian

.... Respondents

Second Appeal is preferred under Section 100 of the Code of Civil Procedure against the Judgment and Decree, dated 24.03.2008 made in A.S.No.36 of 2003 on the file of the Subordinate Judge, Ariyalur, confirming the Judgment and Decree, dated 24.01.2003 made in O.S.No.78 of 1986 on the file of the District Munsif court, Jeyankondam.

For Appellant : Mr.M.V.Krishnan,

For Respondents : No appearance for R1
Mr.P.Dinesh Kumar for R2 to R4
R5 - Died

J U D G M E N T

This unsuccessful plaintiff has come forward with this Second Appeal, who has lost in both the Courts below.

2. The plaint averments are as follows :

(i) The plaint schedule Item 1 and 2 properties belong to the plaintiff. Item 1 of the suit property in SF.No.224/7 was purchased by the plaintiff's father, A.T.M.Ramasamy Chettiar. After the life time of his father, the plaintiff has been in possession of the same. The land was vacant till one year prior to the filing of the suit and one year back, the plaintiff planted Eucalyptus and put up fence around the land. Item No.2 of the suit property is a portion of the house. The plaintiff had been in possession of the same by keeping the old goods in it. But one year prior to the filing of the suit, the defendants' father, Murugesan trespassed into the same by

breaking open and threw away the goods kept by the plaintiff and has been in possession. After him, the first defendant is in possession of the same. The plaintiff's father sold Item No.3 of the suit property to the grand mother of the defendants, Kuppammal under sale deed 6253, retaining Item No.2 of the suit property with him. Therefore, the defendants have no right either over the suit property Item No.1 or 2.

(ii) The first defendant and his father damaged southern side fence of Item No.1 of the suit property and it is learnt that defendants and their men will trespass into Item No.1 of the suit property. The plaintiff sent a legal notice on 13.02.1985 and for that the defendants sent a reply with false allegations. Item No.2 and 3 of the suit property are in SF.No.224/8. Both the parties without knowing that the above suit properties have been situated in SF.No.224/8, they have been in possession of their respective properties only as per 4 boundaries. Therefore, the present suit has been filed.

3. The averments in the written statement are as follows :

(i) The plaintiff has come forward with a vexatious suit without disclosing the contents of the reply notice. Item No.1 of the suit property in SF.No.224/7, consists of 15 cents. No document has been filed to show that the said land belongs to the plaintiff's father under any of the sale deed. The entire property belongs to defendants, through pattas in the name of defendants. The defendants have been cultivating eucalyptus in the above land by putting fence around it. The alleged possession by the plaintiff and prior to him, his father is false. The plaint plan is also not correct.

(ii) Item No.2 of the suit property belongs to defendants and plaintiff's father does not have any right over the suit property, after the sale deed, dated 06.02.1953 executed by him. Old SF.No.36/2B has become under several new SF Numbers including 224/7 and 224/8. Originally old SF.No.36/2B, 42 cents belonged to one Kuppa Bakthar. He had two wives. Through first wife, he had 3 sons by name Ramalinga Bakthar, Palani Bakthar and Narayana Bakthar and through second wife, he had Manicka Bakthar, Vaithiyalinga Bakthar and Ramasamy Bakthar. The defendants' father Murugesu Bakthar is none other than the son of the above said Manicka Bakthar. The plaintiff's father sold the property only to Kuppammal, who is the wife of the above said Manicka Bakthar.

(iii) The first wife's son of Kuppa Bakthar got northern half of 7 1/2 cents, out of 15 cents in SF No.224/8 among other properties. The above properties were divided among themselves and Ramalinga Bakthar's 1/3rd share in the said property was purchased by defendants' father from one

Muthukumarasamy on 05.11.1963. The plaintiff's father got another 1/3rd share from Palani Bakthar by showing wrong boundaries. The remaining 1/3rd share of Narayana Bakthar was ultimately sold to Manicka Bakthar, grand father of defendants. The plaintiff sold to Kuppammal, wife of the above said Manicka Bakthar of the share in the property he purchased showing mistaken boundary. Thus, the shares of 3 sons through first wife of Kuppa Bakthar were transferred to Manickam, who is none other than son through the second wife of Kuppa Bakthar and Manickam Bakthar's wife Kuppammal. Thus, they got the entire Item No.1 and 2 of the suit property in SF No.224/7 15 cents; and 224/8 0.12 cents house along with other properties. Thus, the defendants' father and after him defendants have been in possession of the said properties. The plaintiff, having taken advantage of wrong mentioning of the four boundaries in the sale deed has now falsely claimed right over the properties. Further, necessary parties have not been added in the suit. Therefore, the suit is liable to be dismissed.

4. The learned trial Judge framed necessary issues and after analysing both the oral and documentary evidence, dismissed the suit. Against the Judgment and Decree of the dismissal, the plaintiff preferred appeal before the first appellate court. The learned Appellate Judge, by re-appreciating the evidence of both sides, dismissed the Appeal, confirming the Judgment and Decree of the trial Court. Aggrieved by the said Judgment and Decree, the present Second Appeal has been preferred.

5. While admitting this Second Appeal, the following Substantial Questions of Law have been framed :

"1. Whether the lower appellate courts ought to have drawn the presumption of Section 90 of the Indian Evidence Act and held that the plaintiff has proved the contents of Ex.A.4, dated 22.06.1946 and Ex.A.20, dated 09.06.1942, which are more than thirty years old ?

2. Whether the lower appellate court has committed an error of law in not considering the oral and documentary evidence independently ?"

6. The learned counsel appearing for the respondents 2 to 4 cited several Judgments of the Hon'ble Supreme Court and contended that this Court cannot upset the concurrent findings of fact based on oral and documentary evidence, unless the findings are perverse. The respondents has relied on the following Judgments :

1. Kshitish Chandra Bose v. Commissioner of Ranchi, reported in AIR 1981 SC 707

2. Keshar Bai v. Chhunulal, reported in (2014) 11 SCC 438

7. It is clear from the above rulings that the High Court cannot interfere with the conclusions of fact recorded by the lower appellate Court, however erroneous, the said conclusions may appear to be to the High Court, because as the Privy Council observed, however, gross or inexcusable error may seem to be there is no jurisdiction under Section 100 to correct that error.

8. In exercise of jurisdiction under Section 100 CPC, based on oral and documentary evidence, the concurrent findings of fact cannot be upset by High Court, unless findings so recorded, which shows to be perverse.

9. In this case, the plaintiff placed his claim over Item No.1 and 2 of the suit property saying that he sold under Ex.A.19, dated 06.02.1953 to Kuppammal, wife of Manicka Bakthar retaining the property now claimed by him. The defendants contend that entire property of three brothers, i.e., 3 sons born through first wife of Kuppa Bakthar has now come to the hands of the defendants by transfer, after changing several hands. One such share of Palani (S/o. Kuppa Bakthar) through first wife purchased by the plaintiff was sold to Kuppammal, wife of Manicka Bakthar, who is grand mother of defendants under Ex.A.19. Thus, according to the defendants, one of the shares purchased by the plaintiff was sold to the grand mother of the defendants and the plaintiff taking advantage of the mistakenly mentioned eastern boundary claims right over the property.

10. Both the Courts below analysed the documentary evidence of both sides and found that the plaintiff has not established his right over the properties and whereas the defendants through cogent documents, particularly through Ex.B.25, Ex.B.27 and Ex.A.19 established their title over the properties. The mistaken mentioning of the boundary by the plaintiff was also established through the earlier documents.

11. It is pertinent to note that defendants filed the partition deed of the plaintiff's family as Ex.B.32. Ex.B.32 is dated 03.03.1969. The partition among the family members of the plaintiff thus took place much after the sale of the disputed property by plaintiffs father to Kuppammal, grand mother of the defendants, i.e., on 06.02.1953 through Ex.A.19. In the partition deed, there is no whisper about the property now claimed by the plaintiff. Therefore, the claim of the appellant / plaintiff on the basis of the boundaries is not sustainable.

12. The learned counsel appearing for the appellant contends that as per Section 90 of the Indian Evidence Act, the contents of the document, Ex.A.1 and Ex.A.20, which are more than 30 years old are to be presumed as genuine.

13. No doubt the above documents are 30 years old. Presumption under Section 90 of the Indian Evidence Act does not extend to the contents of the document. The presumption relates only to the signature, execution or attestation of a document, i.e., to its genuineness. It does not involve any presumption that its contents are true or that they have been acted upon. The presumption does not apply to the authority of a person to execute a document on behalf of another.

14. As far as contents of the above documents are concerned, both the Courts below analysed not only the documents, Ex.A.4 and Ex.A.20 but also other documents and rightly decided the issues. Therefore, the above contentions of the learned counsel appearing for the appellant is sans merit.

15. Another contention of the learned counsel appearing for the appellant is that the lower appellate court has not appreciated the oral and documentary evidence independently. The lower appellate court by re-appreciating the entire evidence has rightly decided the issues and therefore, the above contention is not sustainable.

16. The learned counsel appearing for the respondents 2 to 4 cited the Judgment of the Hon'ble Supreme Court in Union of India v. Vasavi Co-op. Housing Society Ltd., reported in 2014 (4) CTC 471 and emphasized the following proposition :

"The legal position, therefore, is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. We are of the view that even if the title set up by the defendants is found against, in the absence of establishment of plaintiff's own title, plaintiff must be non-suited."

17. In this case on hand, the plaintiff has not established his claim by producing sufficient cogent documents, whereas the defendants have filed sufficient cogent documents not only to disprove the claim of the plaintiff but also to establish their right over the property. Therefore, as per the above settled proposition of law, the plaintiff is to be non-suited.

18. For the aforesaid reasons, the Substantial Questions of Law are answered against the appellant and in favour of the respondents and accordingly, this Second Appeal is liable to be dismissed.

In fine, this Second Appeal is dismissed with costs, confirming the Judgment and Decree of the first appellate Court, dated 24.03.2008 made in A.S.No.36 of 2003. Consequently, connected miscellaneous petition is closed.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

tsvn

To

1. The Subordinate Judge
Ariyalur.
2. The District Munsif court,
Jeyankondam.

+1 cc to Mr.M.V.Krishnan Advocate sr 57480

+2 ccs to M/s.J.Ramakrishnan Advocate sr 57596

S.A.No.917 of 2007

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