

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 17.11.2016

PRONOUNCED ON : 29.11.2016

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.225 of 2011

and

M.P.No.1 of 2011

Kavitha

..

Appellant

Vs.

Ramasamy

...

Respondent

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 22.09.2010 made in A.S.No.25 of 2008 on the file of the II Additional Subordinate Judge of Cuddalore confirming the Judgment and decree dated 21.01.2008 made in O.S.No.72 of 2004 on the file of Additional District Munsif Court, Cuddalore.

For Appellant

: Mr.R.Gururaj

For Respondent

: No appearance

JUDGMENT

The defendant in this second appeal has challenged the judgment and decree dated 22.09.2010 passed in A.S.No.25 of 2008 on the file of the II Additional Subordinate Court, Cuddalore, confirming the judgment and decree dated 21.01.2008 passed in O.S.No.72 of 2004 on the file of the Additional District Munsif Court, Cuddalore.

2. The suit has been laid for declaration and permanent injunction.

3. The second appeal has been admitted and the following substantial questions of law are formulated for consideration in the second appeal.

(i) Are not the findings of the lower courts perverse regarding the factum of appellant's possession, especially when the advocate/commissioner's report has been ignored?

(ii) Were not the lower courts at gross error in failing to see that the respondent had purchased by means of an ante-dated document and from a person having no title?

(iii) Did not the lower courts commit grave error in failing to see that by dealings and attestation, respondent and his vendor are estopped by denying the title of appellant?

(iv) Did not the courts below commit serious error in casting the burden on the wrong person?

4. The plaintiff and the defendant claim title to the suit property under the different sale deeds.

5. The plaintiff's case is that he has purchased the suit property from Devaraj and Uthandi under the sale deed dated 13.02.2003 and the same has been marked as Ex.A7. Per contra, according to the defendant, she has purchased 3 cents including the suit property under the sale deed dated 19.02.2003 executed in her favour by Uthandi and attested by Devaraj and the above sale deed has been marked as Ex.B1. The suit property is situated in Kolakudi Village, R.S.No.107/1A 0.09.5. In this an extent of 1 ½ cents, on the south of the house and garden of the plaintiff, east of lake land, north of vacant site of Devaraj and west of the main road. Therefore, it could

be seen that as per the above said boundary recitals of the suit property, the house and garden of the plaintiff Ramasamy is situated on the north of the suit property. According to the plaintiff, he has purchased the two cents situated to the north of the suit property from Devaraj and Uthandi under the sale deed dated 04.09.1995 and the above said sale deed has been marked as Ex.A4. That the plaintiff has purchased two cents situated on the north of the suit property under Ex.A4 is not in dispute. It could also be seen that the property said to be purchased by the defendant under Ex.B1 is also stated to be situated to the south of the house and site belonging to the plaintiff Ramasamy.

6. From the evidence adduced by the respective parties, it could be seen that the entire extent in Old Survey 405, where the suit property is also situated measuring 0.32 cents was purchased by Thandavaraya Padayachi under the sale deed dated 02.10.1960, it is also not in dispute that out of the above mentioned 0.32 cents, the Government has taken about 0.04 cents for the formation of the road on the eastern side. Therefore, it could be seen that only the remaining 28 cents is owned by Thandavaraya Padayachi. Thandavaraya padaiayachi and uthandi are brothers and it could also be seen that they had become divided and the registered partition

deed effected in between them in respect of their properties dated 15.07.1960 has been marked as Ex.A1. Even the defendant has admitted that Thandavaraya Padayachi and Uthandi had divided their properties under the partition deed dated 15.07.1960. The plaintiff's case is that an extent of 0.28 cents purchased by Thandavaraya padayachi in old Survey No.405 had been subsequently divided amongst his sons orally viz., Sambandham, Devaraj and Pannerselvam and according to the plaintiff's case, the entire extent in old Survey No.405 was allotted to the share of Devaraj. Thus, according to the plaintiff, Devaraj is the owner of the 0.28 cents situated in old survey No.405.

7. Further, according to the plaintiff, the sale deeds marked as Ex.A4 and A7 had also been executed by Devaraj along with Uthandi and it is stated that Uthandi had joined the execution of the above said sale deeds under the mistaken impression that he was also entitled to the share in the property comprised in old Survey No.405. In any event, according to the plaintiff, he had obtained the suit property under the sale deed dated 13.02.2003, Ex.A7 executed by its true owner Devaraj and also, in addition to that executed by Uthandi.

8. Per contra, according to the defendant, Thandavaraya Padayachi and Uthandi had equal share in 0.28 cents comprised in old survey No.405 and it is stated that in the oral partition effected amongst two brothers, Uthandi was allotted northern 11 cents situated to the south of 2 cents purchased by the plaintiff under Ex.A4 and Devaraj Vahaiyara i.e. Thandavaraya Padayachi family got the remaining extent on the southern side. Therefore, according to the defendant, the 11 cents situated to the south of the property purchased by the plaintiff under Ex.A4 belonged to Uthandi. However, as rightly found by the courts below, there is absolutely no iota of evidence produced by the defendant to hold that Uthandi had title to the 11 cents situated immediately to the south of 2 cents purchased by the plaintiff under Ex.A4 in the suit survey Number. Now, according to the defendant, as found earlier, she has purchased 3 cents including the suit property from Uthandi under Ex.B1. When it has not been established by the defendant that Uthandi had title to the suit property as such, as rightly found by the courts below, the sale deed obtained by him from Uthandi in respect of the suit property under Ex.B1 would not convey any title to him in respect of the property purchased thereunder. It is contended that Ex.B1 has been attested by Devaraj, the vendor of the plaintiff. It has not been explained as to how the attestation by itself would tantamount to

conveying the title by Devaraj in favour of the defendant under Ex.B1.

9. As per the case of the plaintiff, prior to Ex.A7, he had entered into agreement of sale to purchase the suit property from Devaraj and Uthandi and the agreement of sale reduced into writing dated 07.10.2002 amongst themselves, has been marked as Ex.A6 and it is further stated that out of the sale consideration fixed at Rs.5,000/- the plaintiff has advanced Rs.3,000/- to the vendors. That apart, the plaintiff has also examined his vendor Devaraj as PW2. PW2 in his evidence also testified that it is he, who is the owner of the property situated to the south of two cents purchased by the plaintiff under Ex.A4 and accordingly, he had alienated the suit property in favour of the plaintiff under Ex.A7 sale deed dated 13.02.2003. Merely because, Uthandi had also joined in the execution of the sale deed along with Devaraj in favour of the plaintiff by itself could not be held to enable the defendant to contend that Uthandi had also title to the suit property as put forth by the defendant.

10. As rightly found by the courts below, in the description of the property purchased by the plaintiff under Ex.A4 in respect of the

undisputed 2 cents, it could be seen that the southern boundary is stated to be belonging to Devaraj and Uthandi. Similarly, in the description of the property found in Exs.A6 and A7, it could be seen that the southern boundary is stated to be belonging to Devaraj and Uththandi. However, it is argued by the defendant counsel that under Ex.B3 one Arockiadoss has purchased an extent of 3 cents and under Ex.B2 one Mariyasusai had purchased 4 cents from Uthandi and their properties are shown in the boundary recitals and similarly, the purchase of 3 cents by the defendant under Ex.B1 from Uthandi has been shown in the boundary recitals in the documents relied upon by him and therefore, the court should held that the defendant is the title holder of the suit property under Ex.B1 and the plaintiff has no title to the suit property. However, the above argument does not merit acceptance. As discussed above, the defendant has failed to establish that Uthandi had title to the suit property or any extent for the matter in the suit survey number. When it is found that title to the entire extent in suit survey numbers had been purchased by Thandavaraya Padayachi under Ex.A2 and even prior to the same, Thandavaraya Padayachi and Uthandi had separated, it does not stand to reason as to how Uthandi thereafter be entitled to claim title to any extent in the suit survey number. No doubt, the plaintiff had also taken the sale deeds executed by Devaraj as well as Uthandi.

Merely because, Uthandi had joined in the execution of the sale deeds in favour of the plaintiff along with Devaraj by itself would not lead to the conclusion, without any proof or to material, that Uthandi had title to the suit property or any extent in the suit survey number.

11. In such circumstances, the documents marked as Exs.B2 and 3 said to have been executed by Uthandi by itself would be sufficient to hold that Uthandi had been allotted the 11 cents situated to the south of the property purchased by the plaintiff under Ex.A4 and that Devaraj had been allotted the southern most 11 cents in the suit survey number. On the other hand, as found earlier, Devaraj in his evidence had deposed that it is he, who is entitled to the suit property.

12. It is the next contention of the defendant counsel that the sale deed in favour of the plaintiff in respect of the suit property under Ex.A7, though stated to have been executed on 13.02.2003 came to be registered subsequent to Ex.B1 and therefore, Ex.A7 would not convey title to the plaintiff in respect of the suit property and on the other hand, it is only the defendant, who has title to the suit property under Ex.B1. The above issue does not require further examination as when it is found that the defendant has failed to

establish that Uthandi had any title to any extent of the property covered in the suit survey number, it is immaterial whether Ex.B1 came to be registered prior to Ex.A7 or whether Ex.A7 came to be registered after Ex.B1. When it is found that the plaintiff has obtained the sale deed from the real owner viz., Devaraj and further, when Uthandi has also joined in the execution of the sale deed along with Devaraj and on the other hand, when the defendant title deed has been executed by only Uthandi on whom, it has not been established that title vests, the defendant sale deed cannot be upheld. As found earlier the attestation of Ex.B1 by Devaraj would not render it a valid document as if executed by a real owner. Therefore, the defendant having failed to establish that he had purchased the extent of 3 cents inclusive of the suit property under Ex.B1 from the real owner, it could be seen that the defendant has no title to the suit property and on the other hand, it could be seen that the plaintiff, as found by the courts below, clearly established that he has title to the suit property and thereby, entitled to the relief sought for.

13. The defendant counsel further contended that the advocate commissioner's report and plan would indicate that it is only the defendant, who is in possession and enjoyment of the suit property and the courts below have failed to take into account the same while

disposing of the suit filed by the plaintiff. A reading of the advocate commissioner's report and plan in toto would go to show that though he has referred to about the name board of the defendant in the suit property, it is found that the said board has been erected recently and therefore, on that basis alone, we cannot hold that the defendant is having legal possession and enjoyment of the suit property as claimed by her. Therefore, the courts below have correctly found that the Commissioner's report and plan pales into insignificance when the parties claim title to the suit property on the basis of the independent title deeds. When as per the evidence adduced on behalf of the plaintiff, it is found that the plaintiff has title to the suit property and when it is equally found that the defendant has not purchased the suit property from the real owner, the courts below have rightly disbelieved the defendant's case and accordingly, granted the reliefs sought for by the plaintiff. Nothing is warranted to interfere in the findings and conclusions of the courts below for upholding the plaintiff's case and rejecting the defendant's case.

14. The counsel for the defendant/appellant placed reliance upon the following decisions ***AIR 1981 Supreme Court 2085 (Ramji Dayawala and Sons (P) Ltd., V. Invest Import), AIR 2000***

Supreme Court 2740 (Uttam Singh Dugal and Co.ltd., V. Union Bank of India and others), AIR 1965 Supreme Court 1506 (Brahma Nand Puri V.Nelci Puri since deceased represented by Mathra Puri and another), 95 L.W.708(DB) (P.Thangavelu V.R.Dhanalakshmi Ammal and other), AIR 1956 Supreme Court 593*(1) (Nagubai Ammal and others V. B.Shama Rao and others), AIR 1955 Supreme Court 481 (Sahu Madho Das and others V. Mukand Ram and another), AIR 1971 Supreme Court 2548 (Dattatraya V.Rangnath Gopalrao Kawathekar (dead) by his legal representatives and others), AIR 1960 Supreme Court 100 (Narayan Bhagwantrao Gosavi Balajiwale V. Gopal Vinayak Gosavi and others) and AIR 1977 Supreme Court 1724 (Thiru John (in C.A.Nos.1895-1896 of 1974) V.Subramhamanyan (In C.A.No.1907 of 1974) V. The Returning Officer and others).

When it is found that the defendant has failed to establish his title to the suit property based upon the title documents on which he relies and when the plaintiff has clearly established his title, it could be seen that the decisions relied upon by the defendant's counsel would not be applicable to the facts and circumstances of the present case at hand. In any event, the principles of law formulated in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of the present case at hand.

In the light of the above discussions, the substantial questions of law formulated in this second appeal are answered against the appellant and in favour of the respondent. Resultantly, the second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

29.11.2016

Index : Yes/No
Internet: Yes/No
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To

1. The II Additional Subordinate Court,
Cuddalore.
2. The Additional District Munsif Court,
Cuddalore.

T.RAVINDRAN,J.

sms

Pre-delivery order in
S. A.No.225 of 2011
and
M.P.No.1 of 2011

29.11.2016