

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.10.2016
PRONOUNCED ON : 04.11.2016

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN
S.A.No.246 of 2011
&
M.P.No.1 of 2011

1.Dakshinamurthy Padayachi
2.Perumal Padayachi
3.Velu Padayachi ... Appellants/Appellants/Defendants

Vs.

Vadivelu Padayachi ... Respondent/Respondent/Plaintiff

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 19.11.2010 passed in A.S.No.30 of 2010 on the file of the Sub Court, Panruti confirming the judgment and decree dated 21.06.2010 passed in O.S.No.133 of 1999 before the District Munsiff Court, Panruti.

For Appellants : M/s.R.Meenal
For Respondent : Mr.R.Selva Kumar

J U D G M E N T

Challenge in this Second appeal is made by the defendants against the judgment and decree dated 19.11.2010 passed in A.S.No.30 of 2010 on the file of the Sub Court, Panruti, confirming the judgment and decree dated 21.06.2010 passed in O.S.No.133 of 1999 before the District Munsiff Court, Panruti.

2.Suit for declaration, permanent injunction, possession and for mandatory injunction.

3.The averments in the plaint are briefly stated as follows:

The suit property originally belonged to Sambasiva Padayachi, the father of the defendants 1 to 3 and he for himself and as guardian of his minor sons, executed a Sale Deed in favour of the plaintiff in respect of the suit property on 11.09.1975 for a valid consideration of Rs.300/-. Since the date of the above Sale Deed, the plaintiff is in possession and enjoyment of the suit property by paying kist etc and the plaintiff has also prescribed title to the suit property by adverse possession. The plaintiff has put up fence on all the sides and on the western side of the suit

property there is pattai and the plaintiff resides in the house. To the south of the suit property, is the property of Kuppusami, cousin of Sambasivam, plaintiff's vendor. The Survey number for the above property on the south side is Old S.No.166/4 measuring about 0.09. The suit property is in Old S.No.166/3, 0.12. When the Sale Deed dated 11.09.75 was executed, by mistake, S.No.166/4 has been written. Sambasivam is entitled to Old S.No.166/3 and not to S.No.166/4. As per the boundaries given in the Sale Deed, the property conveyed is only in S.No.166/3. S.No.166/4 has different boundaries. There are trees on the western fence of the suit property. While the plaintiff proceeded to cut the trees for the personal use, the defendants obstructed to the same stating that it is situated in Old S.No.166/4. Then on the measurement of the property by the Village Administrative Officer, the plaintiff came to know that the Survey Number of the property conveyed to him is in S.No.166/3. The defendants after institution of the suit, unlawfully trespassed upon the southern portion of the suit property to an extent of acre 0.07 and put up a thatched house and the third defendant is residing there. The remaining 0.05 is in possession and enjoyment of the plaintiff. Hence, the suit.

4.The averments contained in the written statement are briefly stated as follows:

The defendants denied all the allegations contained in the plaint and according to them, the extent of the suit property situated in Old S.No.166/3(New S.No.116/9) measures acres 0.12 and the same was the ancestral property of Sambasivam. The above said extent of acre 0.12 was within the specified boundaries. In order to discharge the loan amount, Sambasivam had executed the Sale Deed dated 11.09.75 without going through the records and it was executed in favour of the plaintiff, as a sham and nominal document to be given as security and within a few days of the execution, the exact mistake in the Sale Deed was found and Sambasivam discharged the promissory note and as no amount was received for the execution of the Sale Deed dated 11.09.1975, the said Sale Deed is not valid as there is no property at all as mentioned in the above said Sale Deed and therefore, it is false to state that though the survey number is wrongly mentioned in the said Sale Deed the boundary pertain to S.No.166/3. It is false to state that the plaintiff has prescribed title to the suit property by adverse possession. The extent of property in the suit survey Number acres 0.12 was enjoyed by Sambasivam and after his death by the defendants without any interruption. In the above said extent acre 0.12, the southern acre 0.07 is being enjoyed by the third defendant by constructing a house therein and by fencing the acre 0.07 on all four sides, with access, on the western side. The remaining acre 0.05 situate on the northern side is being enjoyed by the first defendant and the other defendants. hence, it is false to state that the plaintiff had put up a

house construction in the suit property and also fenced the property and the patta for the suit property has been falsely obtained by the plaintiff and it is not binding upon the defendants. The Patta for the suit property was all along standing in the name of Sambasivam, the father of the defendants. It is false to state that the trees in the suit property was raised and enjoyed by the plaintiff. Hence there is no cause of action for the suit and the suit is liable to be dismissed.

5.The averments in the additional written statement are in brief as follows:

What was intended to be sold under the Sale Deed dated 11.09.75 is only acre 0.05 and taking advantage of the mistake, the plaintiff attempted to grab the entire property in the suit Survey Number. In the remaining extent acre 0.07, the defendants are in possession and enjoyment. It is false to state that the defendants have trespassed upon the suit property to the extent of 0.07. The defendants have prescribed title by adverse possession also. Hence the suit is liable to be dismissed.

6. In support of the plaintiff's case, PW1 to 3 were examined and Ex.A1 and 7 were marked. On the side of the defendants, DW1 was examined and Ex.B1 to 16 were marked. Ex.C1 and 2 were also marked. On a consideration of the oral and documentary evidence adduced by the respective parties, the trial Court was pleased to decree the suit in favour of the plaintiff in respect of the 'B' schedule property only and dismissed the suit in other respects. The first Appellate Court has also confirmed the judgment and decree of the trial Court. Aggrieve over the same, the present Appeal has been laid by the defendants.

7. The plaintiff claims title to the suit property under the Sale Deed dated 11.09.1975, executed by one Sambasivam. Sambasivam is the father of the defendants 1 to 3. According to the plaintiff, pursuant to the above said Sale Deed, he has been in possession and enjoyment of the suit property. The further case of the plaintiff is that recently he came to know that the property contained in the above mentioned Sale Deed, Ex.A1 has not been properly described and instead of S.No.166/3, it has been mentioned as S.No.166/4, which Survey Number according to the plaintiff pertains to the property situate on the southern side of the suit property, which belonged to one Kuppusamy, who is the cousin of Sambasivam, plaintiff's vendor. However, the further case of the plaintiff is that on the basis of the boundaries found in Ex.A1, which are claimed to be correct, the property comprised under Ex.A1 is situate only in S.No.166/3 and therefore according to the plaintiff, he had purchased the extent of acre 0.12 in S.No.166/3 and in as much as the defendants have attempted to interfere with his possession and enjoyment and

also after the institution of the suit, the defendants have also encroached to the extent 0.07 of the suit property, he has been forced to seek necessary reliefs against the defendants.

8. The defendants in their written statement as well as in the course of evidence have admitted that their father Sambasivam had executed the Sale Deed marked as Ex.A1 in favour of the plaintiff. However, according to the defendants in as much as the property described in the above mentioned Sale Deed is not correctly given and as per the description of the property found in Ex.A1, there is no property on ground, according to them, the plaintiff cannot claim any title or interest over the suit property as alleged by him. Therefore, according to the defendants, Ex.A1 is a sham and nominal document and no title could be claimed by the plaintiff in the suit property, based upon the said document.

As rightly found by the Courts below if really Ex.A1 is a sham and nominal document as putforth by the defendants and if no property whatsoever has been conveyed under the document to the plaintiff as now contended by the defendants, taking advantage of the wrong description of the property found in the said Sale Deed, nothing prevented either the defendants father Sambasivam or subsequently the defendants from challenging the said document. However, till this point of time, the defendants have not impugned Ex.A1 in the manner known to law. Therefore, the contention of the defendants that no property whatsoever has been conveyed under Ex.A1 to the plaintiff and that it is only a sham and nominal document cannot be accepted in any manner more particularly to buttress their case.

9. That apart as rightly found by the Courts below, it is not the case of the defendants that Ex.A1, Sale Deed has been obtained by the plaintiff from Sambasivam fraudulently. On appreciation of the evidence adduced by the parties concerned, the Courts below have found that even the plaintiff has admitted that the description of the property that has been conveyed under Ex.A1 has not been correctly mentioned. Now, according to the plaintiff he has been conveyed the entire 'A' schedule property under Ex.A1. The 'A' schedule property is described as dry Old S.No.166/3 acres 0.12 situate within specified boundaries. On the other hand even as per the admitted case of the plaintiff the correct Survey Number and extent has not been given in Ex.A1. Further, the plaintiff examined himself as PW1, has also admitted that under Ex.A1 though it has been mentioned as 12 cents in S.No.166/3 in as much as the property conveyed has been mentioned to be situated and bounded within the specified boundaries could be seen that the plaintiff would be entitled only to get the extent within the specific boundaries as mentioned in Ex.A1. In other words, it could be seen that within the specific boundaries, the plaintiff was only

conveyed the 'B' schedule property and not the entire extent of 12 cents as put forth by the plaintiff in the plaint.

10. That apart, the defendants have also admitted that the 'B' schedule property is in the possession and enjoyment of the plaintiff. Further, the plaintiff examined as PW1, has also admitted that the 'C' schedule property measuring to an extent of 7 cents is in the possession and enjoyment of the defendants and therefore as rightly found by the Courts below in the suit Survey Number, the northern side 5 cents is in the possession and enjoyment of the plaintiff, whereas the portion of the land on the southern side is in the possession and enjoyment of the defendants.

11. In addition to that, in this case, the property was inspected and measured by the Advocate Commissioner and he has also submitted his report and plan marked as Ex.C1 & 2. A perusal of Ex.C1 & 2 would also go to show that an extent of 5 cents in Old S.No.166/3 corresponding to new S.No.116/9, 0.02 ares is in the possession and enjoyment of the plaintiff and the 7 cents in Old S.No.166/3 i.e., 0.02.5 ares on the southern side is in the possession and enjoyment of the defendants. Therefore, even on the basis of the Commissioner's report and plan it could be seen that the plaintiff is in possession and the enjoyment of the 'B' schedule property. The defendants are in possession and enjoyment of the 'C' schedule property.

12. However, it is argued by the learned counsel for the plaintiff that considering the boundary recitals found in Ex.A1, the Court should hold that under Ex.A1, the plaintiff had purchased 12 cents in the suit Survey Number and accordingly grant suitable reliefs to the plaintiff. However, when the plaintiff himself has admitted that the property covered under Ex.A1 has not been properly described both Survey Number wise and the extent wise and as discussed above the plaintiff is found to be in possession of only 5 cents within the boundaries as found in Ex.A1, when the defendants are found to be in possession of 7 cents described in the 'C' schedule property, it could be seen that what was intended to be conveyed under Ex.A1 by Sambasivam in favour of the plaintiff is only 5 cents described as the 'B' schedule property and not the entire extent of 12 cents as put forth by the plaintiff in the plaint. To hold that the plaintiff has title and is in possession and enjoyment of the entire extent of 12 cents in the suit survey Number as rightly found by the Courts below, no material is forth coming on the side of the plaintiff. It could therefore be seen that as found by the courts below, the plaintiff at the most could be granted the reliefs sought for by him only in respect of 5 cents described as the 'B' schedule property and not more than that.

13. It is argued by the learned counsel for the defendants that despite the conveyance under Ex.A1 in as much as the same is only a sham and nominal document and the 'A' schedule property is claimed to be conveyed to the plaintiff by Sambasivam, even after the sale as the entire property in possession and enjoyment of the defendants, the Court should have held that the defendants have otherwise prescribed title to the entire suit property by adverse possession on account of their continuous uninterrupted hostile enjoyment of the property to the knowledge of the plaintiff. Even with reference to the plea of adverse possession set out by the defendants, as rightly found by the Court below, as no acceptable and reliable evidence has been putforth, therefore, it can be seen that the Courts below have also rightly negated the plea of adverse possession projected by the defendants.

14. In all it could be seen that the Courts below have in the correct perspective of the case and proper reasoning has found that only the 'B' schedule property has been conveyed to the plaintiff under Ex.A1 and the plaintiff being found to be in possession and enjoyment of the 'B' schedule property only and that the plaintiff cannot claim any more extent in the suit schedule property and accordingly it could be seen that the judgment and decree of the trial Court granting the reliefs to the plaintiff in respect of the 'B' schedule property does not call for any interference.

15. At the end, I found that there is no substantial question of law involved in the Appeal. Accordingly, the Second appeal is dismissed. No costs. Consequently connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

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To

1.The Sub Judge,
Panruti.

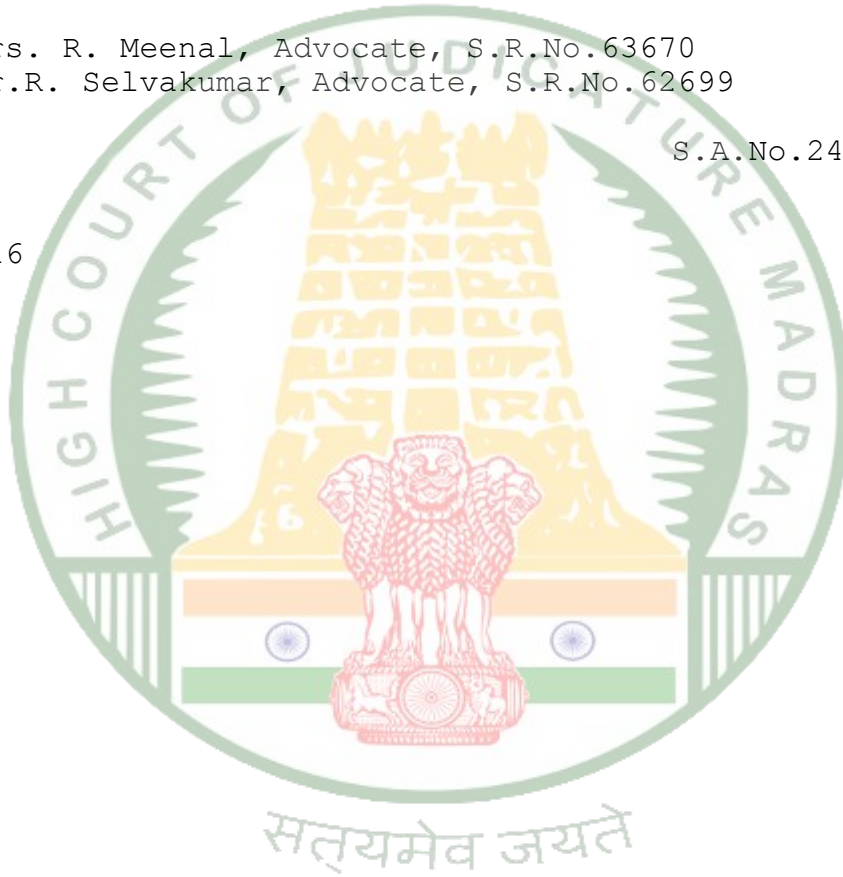
2.The District Munsif,
Panruti

+1cc to Mrs. R. Meenal, Advocate, S.R.No.63670

+1cc to Mr.R. Selvakumar, Advocate, S.R.No.62699

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