

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 09.02.2016

CORAM

THE HONOURABLE MR.JUSTICE T.MATHIVANAN

S.A.No.980 of 2004

and

C.M.P.Nos.7279 and 16348 of 2004

1. Sundaram  
2. Sambandan  
3. Thirunavukkarasu  
4. Saroja  
5. Jayalakshmi ... Appellants/Plaintiffs

Versus

R.Balasubramanian ... Respondent/Defendant

Prayer: Appeal filed under Section 100 C.P.C., praying to set aside the Judgment and Decree dated 22.07.2003 passed in A.S.No.75 of 1999 by the learned Additional District Judge, Fast Track Court No.II, Kancheepuram confirming the Judgment and Decree dated 29.4.1999 passed in O.S.No.1088 of 1996 by the learned Additional District Munsif, Kancheepuram.

For Appellants :M/s.S.V.Devasanthi

For Respondent :Mr.V.Ayyadurai

JUDGMENT

This Memorandum of Second Appeal has been directed against the Judgment and Decree dated 22.7.2003 and made in the Appeal in A.S.No.75 of 1999 on the file of the learned Additional District Judge (Fast Track Court No.II), Kancheepuram, confirming the Judgment and Decree dated 29.4.1989 and made in the Suit in O.S.No.1088 of 1996 on the file of the learned Additional District Munsif, Kancheepuram.

2. The appellants herein are the plaintiffs in the suit. The plaintiffs 2 to 4 are the sons of the first plaintiff. The plaintiffs 5 and 6 were impleaded as the legal heirs of the first plaintiff vide order dated 3.6.2002 passed in I.A.No.165 of 2002. The respondent is the defendant.

3. The case of the plaintiffs is that, originally, the suit property was belonged to one Subbaraya Udayar, son of

Pachaiyappa Udayar. Thereafter, the property was subjected to several transactions. One Valliammanl, wife of Muthumani Udayar had executed a Streedhana Deed on 11.11.1916 and thereby bequeathed the property in favour of her daughter, Poongavanammal. Subsequently, the said Poongavanammal had borrowed a sum of Rs.100/- from Nathapettai Co-operative Society after creating a mortgage on 20.6.1923 in respect of the property. Since Poongavanmmal had not discharged the mortgage debt, the property was brought into auction by Nathapettai Co-operative Society. In the said auction, one Nagalingam Mudaliar had participated and purchased the said property as evidenced from the delivery receipt dated 22.2.1927. Therefore, Nagalingam Mudaliar had become the owner of the property.

4. According to the plaintiffs, Poongavanammal had created a mortgage in respect of the property measuring 21 feet x 60 feet. But, while executing delivery receipts in favour of Nagalingam, Nathapettai Co-operative Society had wrongly included the property specified under plaint schedule in addition to the above said extent. It is also the case of the plaintiffs that insofar as the property specified in the plaint is concerned, they have been in possession and enjoyment barring the site measuring 21 feet X 60 feet.

5. The plaintiffs have contended further that on 20.03.1932, the said Nagalingam Mudaliar had sold the property to one Visalakshiammal who is none other than the maternal grand mother of the respondent/defendant. One Ramu Udayar is the son of Visalakshiammal and the respondent/defendant is the son of Ramu Udayar. The plaintiffs have stated that the respondent/defendant has been in possession and enjoyment of the property measuring 21 feet X 60 feet alone and the remaining extent of the property has been in their possession.

6. It is also the further case of the plaintiffs that at the time of natham survey, the Special Tahsilar of Natham Survey had issued a joint patta in the name of the plaintiffs as well as the respondent/defendant on 21.10.1995 vide Patta No.84. The plaintiffs have also stated that apart from the plaint schedule property, they are also owning the property lying south of the suit property for which also separate house site patta was issued to the plaintiffs under Patta No.160 on 27.3.1995.

7. That after issuance of joint patta under Patta No.84, the respondent/defendant had lodged an objection on 10.6.1996 and after due enquiry, the Tahsildar of Natham Survey had cancelled the Joint Patta on 17.6.1996 and issued an individual patta in favour of the respondent/defendant under Form No.VII. Though 30 days was prescribed for filing appeal, the plaintiffs had not filed their appeal within the said period before the

appropriate authority. They have contended that on the strength of the order passed by the Special Tahsildar of Natham Survey at Kancheepuram District on 17.6.1996, the respondent/defendant had been making arrangement to interfere with the plaintiffs' possession and enjoyment. Under these circumstances, they came forward with the above suit against the respondent/defendant seeking the relief of permanent injunction.

8. The case of the respondent/defendant is that the joint patta was granted originally on 21.10.1995 and it was subsequently cancelled by the Tahsildar of Natham Survey after due enquiry and thereafter, no appeal was preferred by the plaintiffs against the order dated 17.6.1996. The respondent/defendant has also contended that the plaintiffs were not in possession of the suit property and if at all anything, the remedy was only against the order passed by the Tahsildar of Natham Survey. He has further contended that he and his predecessors had/has been in possession and enjoyment of the property continuously for more than 60 years as per the measurement and title possessed by the Muthyalpettai Society and that the suit is filed without any title and possession.

9. It is also the case of respondent/defendant that in the year 1927, the property was purchased from Muthyalpettai Society which is lying on the rear side portion of their house and the measurement of their property is "21 feet North - South and East - West 48 feet towards street situated on North of Plaintiffs and after 48<sup>th</sup> feet, the site of the respondent/defendant gets broadened and this particular portion measures 39 feet in breadth North - South and 147 feet East - West. It is also his specific contention that the suit itself is hopelessly barred by limitation and the Tahsildar had rightly rejected the claim of the plaintiffs for patta in respect of the suit property and that he has been in possession and enjoyment of the broadened portion which is lying on the backyard of his house.

10. The Trial Court based on the pleadings of the parties to the suit had formulated the following two issues:-

- (i) Whether the plaintiffs were entitled to get the decree as prayed for?
- (ii) To what relief they were entitled to?

11. The fourth plaintiff, in order to substantiate their case, had examined himself as PW.1, besides him, two more witnesses were examined in support of their case. During the course of their examination, 28 documents were exhibited. On the other hand, the respondent/defendant had examined himself as DW.1 and besides his evidence, one more witness was examined as DW.2. During the course of their examination, 23 documents

were exhibited. On meticulous analysis of the evidence, both oral and documentary, the Trial Court, after elaborate discussion, had dismissed the suit with a finding that the plaintiffs had miserably failed to prove their possession in respect of their suit property. The First Appellate Court had also endorsed the finding of the Trial Court.

12. With reference to the concurrent findings given by the courts below, this Court would like to have reference to the decision of the Apex Court in *Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar and others* (AIR 1999 SC 2213).

13. In this case, it has been specifically observed by a Division Bench of the Apex Court that the second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under this Section. The substantial question of law has to be distinguished from a substantial question of fact.

14. While speaking on behalf of the Division Bench, the Hon'ble Mr. Justice R.P.Sethi, in paragraph No.4 has observed as under:-

"4. It has been noticed time and again that without insisting for the statement of such substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Courts have been issuing notices and generally deciding the second appeals without adhering to the procedure prescribed under Section 100, Code of Civil Procedure. It has further been found in a number of cases that no efforts are made to distinguish; between a question of law and a substantial question of law. In exercise of the powers under this Section the findings of fact of the 1st appellate court are found to have been disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the Section must be strictly fulfilled

before a second appeal can be maintained and no court has the power to add to or enlarge those grounds. The second appeal : cannot be decided on merely equitable grounds. The concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under this Section. The substantial question of law has to be distinguished from a substantial question of fact This Court in Sir Chunilal V. Mehta and Sons Ltd. v. Century Spinning and Manufacturing Co. Ltd, AIR (1962) SC 1314 held that :-

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views, If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

15. In the light of the principles laid down in the decision of the Apex Court cited supra, this Court is of the view that this Second Appeal cannot be decided on merely equitable grounds as observed by the Apex Court. The concurrent findings on facts, however, erroneous cannot be interfered with by the High Court in exercise of power under this Section.

16. On perusal of the written statement filed by the respondent/defendant, this Court is able to understand that an important pleading with regard to the maintainability of the

suit, the ground of limitation was taken out by the respondent/defendant. However, the Courts below had lost the sight upon this vital point. Because, the issue with regard to the limitation ought to have been formulated by the Trial Court. Nevertheless, the Trial Court had failed or omitted to frame this issue at the initial stage. It is revealed from the averments of the plaint that Muthyalpettai Society had executed a sale deed in favour of Nagalingam Mudaliar as early as on 2.10.1928. After his purchase, he had executed the sale deed in respect of the very same property in favour of one Valliammal on 20.3.1932 as it is seen from Exs.B1 and B2. Visalakshiammal is none other than the maternal grand mother of the respondent/defendant and after her demise, he has been in possession and enjoyment of the suit property. As per the case of the appellants/plaintiffs, Muthyalpettai Society had executed a sale deed in respect of the suit property in favour of Nagalingam Mudaliar on 2.10.1928. What the plaintiffs would contend is that in the sale deed by mistake the Muthyalpettai Society had wrongly included the plaint schedule property also in addition to the actual extent which was intended to be sold, and according to them, the sale deed is valid only in respect of 21 feet X 60 feet and no more than that, and therefore, they have filed the suit for preventing the respondent/defendant from disturbing his possession in respect of the suit property.

17. As has been found by the both the Courts below, the appellants/plaintiffs have miserably failed to prove their possession in respect of the plaint schedule property. Further, the suit itself has not been filed by them within the prescribed period 3 years. At the first instance, this Court would say that the suit itself is barred by limitation. Secondly, as argued on behalf of the respondent/defendant, the joint patta issued under Patta No.84 both in the names of the plaintiffs/appellants as well as in the name of the defendant/respondent was subsequently cancelled on 17.6.1996. Though 30 days time was given for preferring the appeal before the appropriate authority, the plaintiffs have admitted that they have not preferred any appeal. The respondent/defendant had also contended that no appeal was preferred by the plaintiffs against the order dated 17.6.1996 passed by the concerned Tahsildar. The respondent/defendant has categorically contended by producing acceptable and legal documents to show that the plaintiffs are not in possession in respect of the suit property and even as on the date of filing of the suit, they were not in possession and their claim of possession is merely an imaginary one.

18. In view of the above discussion, based on the concurrent findings of the Courts below, this Court is of the confirmed view that the Judgment and Decree of the Courts below do not require the interference of this Court.

19. In the result, the Second Appeal is dismissed confirming the concurrent findings of the Courts below. Considering the nature of the suit, there would not be any order as to costs. Connected Miscellaneous Petitions are closed.

Sd/-  
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

- 1.The Additional District Judge,  
Fast Track Court - II,  
Kancheepuram.
2. The Additional District Munsif,  
Kancheepuram.
3. The Section Officer,  
VR Section,  
High Court Madras.

+1cc to Mr.S.V.Devasanthi, Advocate, S.R.No.8445  
+1cc to Mr.V.Ayyadurai, Advocate, S.R.No.8262

S.A.No.980 of 2004  
and  
C.M.P.Nos.7279 and 16348 of 2004

tej (CO)  
srg(11/03/2016)

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