

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :08.02.2017

Pronounced on :10.02.2017

CORAM

THE HON'BLE DR. JUSTICE G. JAYACHANDRAN

SECOND APPEAL No.717 of 1993

1.Ponnammal

2.Minor Veerammal

3.Minor Alayee

4.Minor Banu

5.Minor Unnamed child

6.Munichi

(Minors 2 to 5 rep.by their mother
and guardian first appellant)

.. Appellants

/vs/

1.Athimoolam (died)

2.Murugesan

3.Danalakshmi

4.Marimuthammal

5.Ayyasamy (died)

6.Ayyammal

7.Minor Balamurugan

8.Minor Sakthivel

9.Minor Subramanian

(Respondents 7 to 9 rep.by their
mother and guardian Pattathal)

10.Naduppaiyan

11.Poongavanam

12.Unnamalai

13.Aalammal

14.Rajendran

15.Senthil

16.Padma

17.Anjali

18.Kanchana

(RR 11 to 13 are brought on
record as LRS of the deceased 1st
respondent and RR14 to 18 are brought
on record as LRS of the deceased 5th respondent
vide Order of Court dated 20.02.2008
made in C.M.P.Nos.6811 to 6813 of 2004
and C.M.P.Nos.11077 to 11079 of 2004
in S.A.No.717 of 1993).

.. Respondents

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the decree and judgment dated 11.08.1992 in A.S.No.128 of 1989 on the file of the Sub Court, Vridhachalam, reversing the decree and judgment dated 25.10.1989 in O.S.No.124 of 1985 on the file of the District Munsif Court, Kallakurichi.

For Appellants :Mr.A.Nilaphar for
Mr.R.Subramanian
For Respondents :Mr.R.Mohan for R2,3,6 to 9 and 13 to 15
R1 and R5 Died. R-10-given up
R11, 12, 16 to 18 -No appearance

J U D G M E N T

The suit for partition in O.S.No.124 of 1985 was dismissed by the trial Court. The first appellate Court reversed the trial Court judgment. The second appeal is filed against the first appellate Court judgement by the legal representatives of the deceased 4th defendant.

2. For the sake of convenience, the parties are described as per their rank and status shown in the original suit.

3. The litigative history of the suit property bearing S.No.141/5 measuring to an extent of 0.72 ½ cents in 1.45 acres in Karadichithoor village, Kallakurichi Taluk, goes as below:-

In respect of the suit property, one Nadupaiyan, S/o Mottaiyan filed

a suit against one Pallakattan and Chinnammal for declaration of his title and for permanent injunction in O.S.No.737 of 1968 on the file of District Munsif Court, Kallakurichi. The trial Court dismissed the suit on 20.03.1971. On appeal by Nadupaiyan in A.S.No.164/1971, the Subordiante Court reversed the trial Court judgment and allowed the suit on 21.08.1974. The certified copy of the judgment in A.S.No.164//1971 is marked as Ex A-2 in this suit. Further, second appeal in S.A.No. 2146/1974 filed by the aggrieved defendants was dismissed by the High Court on 18.03.1977 and confirmed the first appellate court judgment. In the result, a decree to the effect that the said Nadupaiyan, S/o Mottiayan was declared as entitled to the suit property and passed injunction against the defendants from interfering his enjoyment.

4. On 25.03.1978 Nadupaiyan and one Kuthan entered upon an agreement of sale in respect of the suit property for a sale consideration of Rs.4,500/-. As per the recital of this agreement, which is marked as Ex.B1, On receipt of an advance of Rs.500/- the possession was handed over to Kuthan on the same day. Since Nadupaiyan refused and failed to complete the contract, O.S.No.626 of 1978 was filed by Kuthan for

specific performance and it was decreed. On appeal in A.S.No.161 of 1983, the first appellate Court confirmed the decree of specific performance. Pursuant to the decree, sale deed in favour of Kuthan was executed on 17.09.1986. The said Kuthan got delivery of the suit property through court on 5.11.1986. These facts are found in Exs.B-3 to B-5.

5. While so, O.S.No.124 of 1985, which is the subject matter of the present appeal was filed against Nadupaiyan and others by two sons, daughter and wife of Mottaiyan claiming share in the suit property alleging that the suit property is the self acquired property of Mottaiyan. After his demise, he has to be inherited by his 7 of this legal heirs, who are his wife (4th plaintiff), four sons (1st and 2nd plaintiffs and 1st and 2nd defendants) and 2 daughters (3rd plaintiff and 3rd defendant). The first defendant taking advantage of their absence in the suit village had entered into an agreement of sale with on Kuthan (the 4th defendant) and also allowed to suffer a decree of specific performance. Neither the sale nor the judgement in O.S.No.626/1978 will bind them, since they have 4/7 shares in the suit property and the alienation by Nadupaiyan is without any right or title over the property.

6. In this suit, Nadupaiyan the first defendant remained *exparte*. Defendants 5 to 7, who are the minor sons of Nadupaiyan represented by their mother and natural guardian filed written statement supporting the averments in the plaint. The 4th defendant, who is the purchaser of the suit property from the first defendant contested the suit on the ground that, Nadupaiyan is the absolute owner of the property and he agreed to sell it to him vide, agreement dated 25.03.1978. The said agreement was executed by virtue of Court decree and pursuant to the Court decree he is in possession and enjoyment of the property. In order to deprive the 4th defendant right in the property, this collusive suit is filed by the plaintiffs who are the brothers, sister and mother of his vendor Nadupaiyan.

7. The trial court held that, in the earlier suit O.S.No.737/1968, the Court has declared title only in favour of Nadupaiyan and not in favour of Mottiayan. So, the property is the absolute property of Nadupaiyan and it is not the self acquired property of Mottiayan as claimed by the plaintiff. So the agreement entered between Nadupaiyan and Kuthan is valid. The title has passed to Kuthan by the sale deed executed pursuant to the

specific performance decree and it binds the plaintiffs. Further, the plaintiffs though aware of the earlier suits never got impleaded to stake claim over the property. Atleast after the declaration decree granted exclusively in favour of the first defendant in O.S. 737/1968, these plaintiffs should have claimed their right in the property and proved it. Since the plaintiffs have not claimed title within the statutory period of limitation, their right if any has extinguished. Hence, the suit was dismissed.

8. On appeal, the lower appellate court referring Ex A-2, the judgement in A.S.No.164/1971 filed against O.S.No.737/1968 held that, the said suit was filed by Nadupaiyan not as Manager of the property but as joint owner of the property along with his father Mottaiyan. So, it is the property of Mottaiyan in which Nadupaiyan can restrict only to his 1/7th share and not more than that. Since in the sale agreement he entered for the entire property, the agreement as well as the decree of specific performance will not bind the 6/7 portion of the other co-sharers.

9. The appellant, who is the 4th defendant in the suit, has raised

the following Substantial Questions of Law in this second appeal for the Court to decide:-

(1) Whether the lower appellate Court is right in granting shares to defendants 5 to 7 notwithstanding the fact that the first defendant has sold the property in favour of 4th defendant?

(2) Whether the lower appellate Court is right in reversing the findings of the trial Court on the question of adverse possession in the facts and circumstances of the case?

10. Heard, the learned counsel appearing for the appellants and the respondents. In this appeal, Ex.A-2 and Ex.A-4 the judgment in A.S.No.164/1971 against O.S.No.737/1968 and the suit register extract of O.S.No.737/1968 are the key documents, which holds the answer to the substantial question of law formulated.

11. As stated out in the eariler part of this judgment, the suit in O.S. No.737/1968 was filed by Nadupaiyan for declaration of title and injunction. His contention in that suit was, the suit property originally owned by one Chinnasamy Reddiar. His father Mottaiyan was working as

"Pannaiyal" under the said Chinnasamy Reddiar, who conveyed the suit property to his father Mottaiyan for a sale consideration of Rs.90/- paid in cash and kind. (80/- rupees in cash and a heifer and sheep as kind). It was an oral sale Since then, the possession is with them. In additiona, he has also perfected the title by adverse possession by his continuous enjoyment. While so, the wife of Chinnasamy has created a sham and nominal conveyance in favour of Pallakattan. Based on the sham document, Pallakattan is disturbing his peaceful possession and enjoyment.

12. In the said suit, the lower appellate Court considered Ex.A-12- unregistered sale receipt, dated 3.05.1950 as the sheet anchor of the case. It rejected the document as proof of conveyance but, relied upon it for a collateral purpose for proof of possession. Ultimately, held that the plaintiff(Nadupaiyan) had proved possession and enjoyment adverse to the true owner hence, entitled to declaration of possessory title and injunction.

13. Thus, it is evidently proved that, the declaration is only in favour

of Nadupaiyan. While so, in this suit, while reversing the well considered judgment of the trial court, the lower appellate court has first, failed to take note of the fact that the first defendant Nadupaiyan contested the specific performance suit against this appellant but failed. He also refused to execute the sale deed pursuant to the decree, hence the court has executed the sale and delivered possession. The suit for partition, which is subject matter of this appeal, has been filed, only after the trial court allowed the suit for specific performance in O.S.No.626/1978. Secondly, Nadupaiyan has conveniently remained *exparte* in this suit and contesting the suit through his siblings by proxy.

14. It is patently clear from the pleadings and the cause title of O.S.No.737/1968, it was Nadupaiyan as plaintiff contested and proved his continuous possession and enjoyment of suit property and got a decree of declaration in his favour in his personal capacity and not as the representative of Mottaiyan family. Further, it is obvious, only the person who proves his actual possession is entitled for the declaration of adverse possession. Just because, the Court has referred the name of Mottaiyan (not a party to the proceedings) to trace, how the property came into

possession of the plaintiff, that will not enure any right to Mottaiyan or his other legal heirs, unless the Court while granting the declaration decree has expressly stated so. The Courts in the later proceedings cannot supplant its interpretation, which is not found in the earlier decree, which reached finality after the dismissal of the Second Appeal by the High Court.

15. In the above contest, it is also pertinent to point that the plaintiffs in this suit admit that they are not living in the suit village. They have migrated to Valparai and Bangalore long back. Since it is admitted that they never been in physical possession of the suit property, they can have no right to share the possessory right conferred on Nadupaiyan through a Court decree.

16. The appellants have clearly established that they have purchased the property from the first defendant, who had an absolute right by virtue of Court decree and their purchase has been vouched by the subsequent decree passed in specific performance suit. In spite of the proven facts, the lower appellate Court has erred in granting 4/7 shares to

the plaintiffs without any proper appreciation of the decision of the Courts in the earlier proceedings. Thus, the lower appellate Court has erred in reversing the finding of the trial Court. Therefore, the substantial questions of law are answered as above.

17. For the above said reasons, ***the Second Appeal is allowed.***

No order as to costs.

10.02.2017

Index:Yes/No

Index:Yes/No

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To

1.The Sub Court, Virudhachalam.

2.District Munsif Court, Kallakurichi.

Dr.G.Jayachandran, J.

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Judgment made
in S.A.No.717 of 1993

10.02.2017