

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 19.12.2016

Pronounced on : 05.01.2017

CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

S.A.No.1148 of 2003

1.Chinnasamy (Deceased) ...1st Appellant/2nd Defendant
2.C.Devendran
3.Arunachalam ... 2nd and 3rd Appellants

* Appellants 2 and 3 brought on record as legal heirs of the deceased sole appellant vide order of Court dated 14.03.2016 made in CMP Nos.1231 and 1232 of 2011 in SA No.1148 of 2003.

Versus

1. Dhanabagiam @ Seethalakshmi ...1st respondent/2nd Plaintiff
2. Lalitha
3. Manoharan
4. Parameswari
5. Jagadeesan
6. Minor Usha
7. Minor Jayanthi
(Minor Respondents 6 and 7 represented by guardian 1st respondent)
8. Rani Chinnamani
9. Sowbagiyam ... Respondents 2 to 9/Plaintiffs 4 to 11
10. V. Muthannan, ... 10th Respondent/13th Plaintiff
11. V. Chennan ... 11th Respondent/15th Plaintiff
12. V. Boopathi ... 12th Respondent/17th Plaintiff
13. Gowrammal
14. Nagendiran
15. Visalakshi
16. Renuka
17. Kalyaniammal
18. K.A. Sankaran
19. K.A. Prema
20. A. Sundaram
21. A. Shanmugam
22. A. Lalitha
23. A. Padmini
24. A. Kamakshi
25. A. Kirubakaran
26. M.P. Chandrappa Maniagar

27.C.Padmanabhan
28.C.Vaidhagi
29.C.Kowsalya
30.C.Prabakaran
31.C.Kavitha @ Jayasudha ...Respondents 13 to 31/Plaintiffs
18 to 36
32.Lala @ Thirupathi Gounder ...32nd Respondent/3rd Defentant
33.Dhanakoti
34.Rangammal
35.Karungammal ...Respondents 33 to 35/Defendants 5 to 7
36.Anthari Gounder
37.Venkatarama Gounder
38.Ponnugan
39.Veerappan
40.Karathai @ Kokaran
41.Ellappan
42.Karian
43.G.Kannan
44.Chinnasami
45.Govindan
46.Kannan ...Respondents 36 to 46/Defendants 10 to 20
47.Vedi
48.Raji ...Respondents 47 & 48/Defendants 22 & 23
49.Kariyan
50.Villali ...Respondents 49 & 50/Defendants 24 & 25
51.Kaveri
52.Alraju
53.Sevathan
54.Chinnasamy ...Respondents 51 to 54/Defendants 27 to 30
55.Mariappan
56.Pachiappan ...Respondents 55 & 56/Defendants 32nd & 33rd
57.Periathambi
58.Govindan
59.Subramani
60.Raman
61.Chinna Arjuna
62.Peria Arjunan
63.Chettiappan
64.Velmurugan ...Respondents 57 to 64/Defendants 37 to 44
65.Chinnammal
66.Vediammal ...Respondents 65 & 66/Defendants 46 & 47
67.Rangappan @ Koothaiyan
68.Lakhmi
69.Chinnasamy
70.Minor Thirupathi @ Chinnasamy
71.Minor Mangammal
(Minor respondents 70 & 71, rep by guardian R60)
72.Raman
73.Muthu ...Respondents 67 to 73/Defendants 51 to 57
74.Chinnapillai

75.Venkatachalam
76.Chinnathambi
77.Chinnakolandai
78.Chinnaraj
79.Mani

80.K.Viswanathan

81.Menaka ...Respondents 74 to 81/Defendants 59 to 66

82.K.Ramalingam

83.Rajamani

84.Madhu ...Respondents 82 to 84/Defendants 68 to 70

85.Chinnappappa

86.Sali

87.Madhaiyan

88.Chinnathai

89.Murugathammal @ Dhanalakshmiammal

90.T.S.Ajoy.

91.T.S.Sridhar

92.Kuppu @ Usha ...Respondents 85 to 92/Defendants 71 to 78

93.C.Venkatesan

94.C.Sivanandam

95.Saraswathi .. Respondents

*RR93 to 95 brought on record as legal heirs of the deceased sole appellant vide Order of Court dated 14.03.2016 made in CMP Nos.1231 & 1232 of 2011 in S.A.No.1148 of 2003.

PRAYER : Second Appeal filed under Section 100 of Civil Procedure Code against the Judgment and decree of the learned III Additional District Judge of Dharmapuri at Krishnagiri dated 30.04.2002 in A.S.No.23 of 1998 confirming the Judgment and Decree of the learned Subordinate Judge of Krishnagiri dated 22.04.1997 in O.S.No.261 of 1977.

For Appellants : Mr.V.Nicholas

For Respondents: Mr.T.Rajasekaran for RR2 to 9,11,13 to 22,26 to 31
for Mr.T.Arulselvam

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Mr.K.A.Ramakrishnan for R12

Mr.K.Srinivasan,
Senior Counsel

for Mr.A.Muthuraman for R24

Mr.B.Gnana Vinodhan for R93

RR1 & 10 died

R32 to 92 Given up

R23 & 25-No appearance

R94 & 95-Not ready in notice

J U D G M E N T

The suit is for declaration, possession, mesne profit past and future. The second defendant is the appellant herein. He has filed this appeal aggrieved by the concurrent findings of the Court below.

2. The brief facts of the case is as follows :-

a. The suit was filed by one Nagaraja Manikkar and the legal heirs of Andiappa Manikkar. They were arrayed as plaintiffs 1 to 9 respectively against T.S.Subbaraya Manikkar and 9 others. Pending suit, the first appeal and the second appeal, many of the original contesting parties died and their legal heirs are arrayed as parties to the lis.

b. The suit properties originally belonged to one Chennanna Manikkar and Thirthagiri Manikkar. They both constitute Hindu Undivided Family (HUF) and they were enjoying the property jointly from 1913. Chennanna Manikkar died leaving behind his wife and two daughters. One of his daughter died in 1926 and his wife died in the year 1935. The sole heir of Chennanna Manikkar was his daughter Kalyaniammal, who lived till 1959.

c. Thirthagiri Manikkar, who was the brother of Chennanna Manikkar, died in the year 1939, leaving behind his wife Thangamuthuammal and his daughter Savithriammal. Thangamuthuammal executed a settlement deed in favour of Kalyaniammal on 05.10.1939, with limited interest for life upon Kalyaniammal and after her demise, the property absolutely vested with the legal heirs of Thirthagiri Manikkar.

d. On the death of Kalyaniammal on 27.04.1959, the property reverted back to Thangamuthuammal and Savithriammal, they being the legal heirs of Thirthagiri Manikkar. While so, one Andiyappa Manikkar claimed right over the property through a gift deed alleged to have been executed by Kalyaniammal and interfered with the possession of the suit properties. Therefore, Thangamuthuammal and Savithriammal jointly filed O.S.No.27 of 1959 before the Salem Munsif Court in respect of properties situated at Thaiyur village. After instituting the suit, Thangamuthuammal died on 17.11.1959 leaving behind her only daughter Savithriammal as her sole legal representative. In respect of the other properties shown in the suit schedule, Savithriammal filed a suit against Andiappa Manikkar before the Sub Court, Salem, which was numbered as O.S.No.26 of 1961. Both the suits were later transferred to Krishnagiri District Court and renumbered as O.S.Nos.09 of 1965 and 10 of 1965.

e. Pending the above said suits, Savithriammal died. There were 4 Interlocutory applications taken out by four different persons to get themselves impleaded as legal heirs of Savithriammal, in which, the Court declared Nagaraja Manikkar as the legal heir of Savithriammal in I.A.No.31 of 1967 by Order dated 07.04.1969. The said Nagaraj Manikkar is the first plaintiff in this suit.

f. In the above suits, Subbraya Manikkar the first defendant in the present suit filed an application to come on record as legatee under a Will alleged to have been executed by Savithriammal. The Trial Court permitted him to watch the proceedings, but declined his request to contest as a party. Under these circumstances, the contesting parties Nagaraja Manikkar and legal heirs of Andiyappa Manikkar in O.S.No.09 of 1965 and 10 of 1965 arrived at a settlement and obtained a compromise decree dated 30.09.1970. The properties, which are the subject matter of the present appeal, are same as that of the properties in O.S.No.09 of 1965 and 10 of 1965.

The suit in the present appeal filed for recovery of possession by Nagaraja Manikkar and others from the defendants, who are either tenants under the first defendant or trespassers.

g. The defendants contested the suit on the ground that he is entitled for the suit property as legatee of Savithriammal under her Will dated 21.12.1966. He is the son of Savithriammal's maternal uncle and he is in absolute possession and enjoyment of the entire suit property for more than 12 years and neither Thangamuthuammal nor her daughter Savithriammal were in possession and enjoyment of the suit property.

3. The sum and substance of the written statements and additional written statement filed by the defendants is that Thirthagiri Manikkar and Chennanna Manikkar are brothers, but the property was not in enjoyment as Hindu joint family. It is not their ancestral property. The properties were acquired by them on their own efforts. On the demise of Thirthagiri Manikkar on 05.10.1938, his property devolved upon his wife Thangamuthuammal. Thangamuthuammal settled her husband's properties to Kalyaniammal for life and to be vested absolutely with her husband's legal heirs. The said Kalyaniammal, pre-deceased Thangamuthuammal. Therefore Thangamuthuammal and Savithriammal, being the heirs of Thirthagiri Manikkar, the property reverted back to Thangamuthuammal and her daughter Savithriammal. During her lifetime, Thangamuthuammal sold some of her properties to Chinnasamy Gounder (second defendant), Govinda Gounder (9th defendant) Anderi (10th defendant)

Venkataraman (11th defendant) and Raja Gounder Lala (a) Tirupathi Gounder (3rd defendant). Before execution and registration of the sale deeds, Thangamuthuammal died. Therefore, her daughter Savithriammal promised to execute the sale deeds in their favour, but before she could register the sale deeds in respect of the five items sold to the above said persons Savithriammal also died. For the rest of the suit properties, Savithriammal executed a Will in his favour (1st defendant) and therefore, the suit to declare the Will and five sale deeds as true and valid in O.S.Nos.95 and 96 of 1967 and 140 and 141 of 1972 and 88 of 1969, have been filed. The trial Court dismissed all the suits through a common judgment and decree dated 26.12.1977. Aggrieved by that, appeals were preferred and were pending before this Court. In the said circumstances, the compromise decree entered into between Nagaraja Manikkar and others will not bind the first defendant. Defendants 2,3 and 9 claimed right over the respective suit properties based on the alleged sale agreement executed by Savithriammal on behalf of her mother Thangamuthuammal.

4. Based on the above pleadings, the Trial Court totally framed 19 issues, examined PW1 to PW5, DW1 to DW22, marked Ex.A1 to A32, Ex.B1 to B104 and Ex.C1. After considering the respective pleadings of the parties and the evidence let in by them, the trial Court held that in the earlier suit O.S.No.88 of 1968 filed by the first defendant, the Court has already held that the Will alleged to have been executed by Savithriammal in favour of the first defendant, is forged and not valid. Therefore, the possession whatsoever the first defendant claims, is not a valid possession. Similarly, insofar as the alleged sale agreement relied by defendants 2,3,9 and 10 are concerned, the earlier suits filed by the respective defendants for declaring the said sale deeds as valid had been dismissed by the Courts and the dispute has reached finality.

5. In respect of the sale deed alleged to be executed in favour of the appellant in respect of the first item of the suit property, the trial Court has referred the said sale deed, which is marked as Ex.B6 and has pointed out the alleged sale deed Ex.B6 is dated 21.06.1966, whereas the executor Savithriammal died within four days on 26.06.1966 after prolonged illness and hospitalisation. When the requests of the second defendant/ appellant herein to register the document before Sub Registrar Kaveripattinam, was declined, he filed a suit in O.S.No.95 of 1967. The Court has held that the said sale agreement is a fraudulent document. Therefore, the suit filed by the appellant herein was dismissed. The appeal filed before this Court in A.S.No.332 of 1975 was also dismissed, as seen from the Ex.A.11. Having found that the second defendant possession is based on fraudulent document, the trial Court has

held that defendants cannot claim right over the property based on the fraudulent document and the possession whatsoever claimed by the defendants is not lawful possession and hence, no right of protection could be given to them.

6. Aggrieved by the said finding, the second defendant has preferred an appeal in A.S.No.23/1998. The appellate Court has confirmed the Judgment and decree of the trial Court holding that the sale deed relied by the appellant is a fraudulent document. No right would flow through the document and the possession obtained through the document is not a lawful possession. The plea of the appellant is that he has perfected the title by prescription for more than 12 years, held to be incorrect. The alleged sale agreement was of the year 1966, whereas the dispute regarding execution of document has been agitated before the Court as early as 1967 and present suit is filed on 07.07.1975, thus the plea of the appellant held unsustainable and rejected.

7. Under the above said circumstances, the present Second Appeal is preferred.

8. At the time of admission, the following substantial questions of law were formulated in this Second Appeal:-

- i) When the question of adverse possession was not raised and decided in the earlier proceedings and it is being raised for the first time in the present suit, whether the courts below are correct in holding that the decision in the earlier proceedings would operate and res-judicata for the present suit including the question of adverse possession?
- ii) When the subject matter in the earlier suit is different from the subject matter in the present suit and that when the second defendant disputes the title of the plaintiffs and asserts title in himself, whether the suit filed by the plaintiff for possession without seeking the relief of declaration is maintainable in law?

9. The learned counsel for the appellant submitted that the earlier suit filed by the second defendant will not operate as res-judicata. Even otherwise, admittedly, the appellant is in possession of the property from 1966 and therefore, he has perfected the title by adverse possession. However, inspite of the settled possession the Courts below have miserably failed to take note of the admitted fact of the possession with the second defendant. The learned counsel for the appellant further submitted that when the plaintiffs admit that they are not in possession of the property, they should have sought for

declaration and possession in the suit and without seeking relief of declaration, suit is not maintainable in law. In support of the above submissions, the learned counsel for the appellant relied on the following judgments :-

i) (Kuppanna Pannadi V. Rajammal) reported in 2006 - 4 - MLJ 1001

"11. The defendant, no doubt claimed title to the suit property by oral sale. The absence of proof regarding the oral sale as if it would lead to the presumption that there must be a tenancy is not based upon legal principle. But unfortunately, the first appellate Court set aside the finding of the trial Court in this regard and presumed without evidence, that the defendant's possession is that of tenancy, which is liable to be erased. In this view of the matter, it is to be held that the defendant is occupying the property not as tenant, whereas his occupation should be in some other capacity.

12. Admittedly, even before the date of filing of the suit for more than 12 years, continuously the defendant is in possession and enjoyment of the same. Therefore, it is to be seen on the basis of the admitted possession whether that possession is adverse to the real owner, whether that possession had the effect of extinguishing the title of the plaintiffs or in other words, whether that possession vested absolute title with the defendant, on the basis of adverse possession, though its origin is illegal, but because of recognising the long possession, leading to title also."

ii) (Chairman & Managing Trustee Krishnaswamy Educational trust V. C.V.Rajeswari Ammal (Deceased) & others reported in 2013 - 3 - L.W. 381

"61. Therefore, if the original transfer was void, then the alienee or the Donee in this case would have been in adverse possession from the date of transfer, which in the instant case is 06.01.1985, the date on which according to the defendant, the plaintiff is without lawful title. This decision fully supports our conclusion that the date from which the plaintiff is in possession adverse to the interest of the defendants is 06.01.1985.

62. Useful reference may be made to the decision of the Division Bench of this Court in (Karnam) Kandaswamy Pillay Vs.Chinnabha & Ors., [AIR 1981 Madras 82]. The Division Bench held that an unregistered sale cannot be set up as a transaction

having effect of itself to transfer any interest in property; but it is permissible to consider it, as showing the nature of transferees subsequent possession. That being established it would after the expiry of 12 years ripen into a full title."

10. Per contra, the learned counsel for the respondents submitted that the alleged sale documents are fake and fraudulent documents created by the first defendant in connivance with the second defendant to grab the property of the deceased Savithriammal. This has been clearly proved and established in the earlier proceedings initiated by the appellant herein. Ex.B6, sale deed was held to be a fake and fraudulent document by the civil Court. This decision which has reached finality as per Ex. A11. This Court, in the earlier appeal preferred by this appellant, has clearly rejected the claim of the defendants in respect of the suit property. While so, the possession of the appellant is not a lawful possession, but fraudulent possession, which will not confer any right of possession adverse to the true owner of the property. Even according to the appellant, the alleged sale agreement is dated 21.12.1966 and the suit for declaration in O.S.No.95 of 1967 filed by the appellant will clearly show that there is no animus possession over the property to confer the title by prescription. Therefore the plea of the appellant and the judgments cited by them have no consequence for the defendants case.

11. This Court, after giving consideration to the rival claims and on perusing the judgment of the Courts below, could not find any substantial ground to interfere with the findings of Courts below. The appellant is admittedly a third party purchaser of the suit property from the deceased Savithriammal. The unregistered sale deed relied by the appellant, is dated 21.12.1966, whereas the executor of the sale deed Savithriammal died on 26.12.1966. Even assuming that the appellant was in possession as early as 1959 through oral sale agreement, the limitation for adverse possession cannot be reckoned from that period, but only from the date of the alleged sale agreement. If the date of agreement is reckoned as starting point of limitation, the present suit filed on 22.07.1975 is well within a period of limitation of 12 years. Therefore, looking at from any angle, the plea of adverse possession is not in favour of the appellant.

12. Insofar as the plea of res-judicata is concerned, this Court has no second opinion that the appellant has lost his claim of title over the property based on Ex.B6, sale deed, since competent civil Court has already heard and decided the issue against the appellant and it has reached the finality.

13. Therefore, this Court find no merits in this appeal. Hence, the Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petitions if any, are closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

vsi2
To :

1. III Additional District Judge,
Dharmapuri at Krishnagiri.
2. The Subordinate Judge,
Krishnagiri.

Copy to

The Section Officer,
VR Section,
High Court, Madras.

+lcc to Mr.V.Nicholas, Advocate Sr.1082
+lcc to M/S.Arulselvam, Advocate Sr.1828

S.A.No.1148 of 2003

srg 2/2/2017

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