

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.11.2016
PRONOUNCED ON : 19.01.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.219 of 2011
and
M.P.No.1 of 2011

1.Shakeenabee
2.Shamsudeen
3.Sharbudeen

... Appellants/
defendants 1,2 & 4

Vs.

1.Allabakshi
2.Hayathbee
3.Kamarunnisa
4.Abdul Sathhar

..Respondents 1 to 4/
Plaintiffs 1 to 4

(for himself and as power of Attorney
Agent to the respondents 1 to 3)

5.Basheer ... 5 th Respondent/3rd Defendant

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree of the II Additional Subordinate Judge, Villupuram, dated 16.12.2010 made in A.S.No.60 of 2009 confirming the judgment and decree of the Principal District Munsif, Tirukovilur dated 02.04.2009 made in O.S.No.163 of 2006.

For Appellants : Mr.R.Balakrishnan

For Respondents : Mr.S.Parthasarathy
for R1 to R4 Senior Counsel
for M/s.J.Ramakrishnan

JUDGMENT

The defendants 1, 2 and 4 in this second appeal have impugned the judgment and decree dated 16.12.2010 made in A.S.No.60 of 2009 on the file of the Second Additional Sub Court, Villupuram, confirming the judgment and decree dated 02.04.2009 made in O.S.No.163 of 2006 on the file of the Principal District Munsif Court, Tirukovilur.

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

" (i) Whether the courts below are correct in disbelieving Ex.B4, when under Section 54 of Transfer of Property Act, 1882, transfer by sale in the case of tangible immovable property of a value less than one hundred Rupees such transfer may be made either by Registered instrument or by delivery of property, which is proved by getting patta?

(ii) Whether the courts below are correct in decreeing the suit with specified items within the specified boundaries, when the plaintiffs themselves trace the same, through Ex.A3 & A4 and the power of attorney deed, where only undivided shares alone are mentioned.?

(iii) Whether the Lower Appellate Court below is correct after allowing the petition filed under Order 41 Rule 27 of CPC in I.A.No.432/2010 marked, and relied Ex.A29, without following the procedure contemplated under Order 41 Rule 27, and 28 of CPC as held by this Hon'ble Court in 2013 - 4-L.W.405, 2015-3-L.W.209."

3. The suit has been laid by the plaintiffs for declaration, possession and mesne profits.

4. The case of the plaintiffs, in brief, is as follows:

The first Item of the suit properties belonged to one Krishna Reddiar and he sold the same and some other properties to one Poongol ammal W/o.Gurusamy Reddiar under the sale deed dated 09.09.1945. The second item of the suit properties belonged to one Kesava Reddiar and on succession, the same devolved on Poongol ammal and the third item of the suit properties originally belonged to Poongol ammal and she has been in possession and enjoyment of the same. One Abdul Salaam Sahib, the brother of the 4th plaintiff, had purchased the suit properties, (i.e.) items 1 to 3 from Poongol ammal under the sale deed dated 15.04.1955 and he has been in possession and enjoyment of the same. Though there was no mention about the boundaries in the above said sale deed and the properties were described as undivided shares, Abdul Salam Sahib had been in possession and enjoyment of the suit properties as described in the plaint and no objection was put forth by the other sharers

in the suit survey numbers to the absolute possession and enjoyment of the suit properties by Abdul Salam Sahib. After the demise of Abdul Salam Sahib, his legal heirs have been enjoying the suit properties and they sold the suit properties to one Jaithoonbi, the mother of plaintiffs 1 to 3 and the wife of the fourth plaintiff under the sale deed dated 15.03.1985 and pursuant to the same, the suit properties were in possession and enjoyment of Jaithoonbi and she had been paying kist and obtained patta and enjoying the suit properties absolutely. Jaithoonbi died intestate on 06.10.2001 and the plaintiffs are her legal heirs. One Mohamed Musa Saibu, the junior paternal uncle of D1 purchased the property in the suit survey numbers, where, the second item of the suit properties is situated, to an extent of 0.18 cents and some other properties from Kesava Reddiar. He also purchased the property in the survey numbers, where, items 1 and 2, of the suit properties are located, along with some other properties from Narayana Reddiar vagaiyara on 19.11.1953, but in all the sale deeds purchased by Mohamed Musa Saibu, no mention of boundaries had been given. The first defendant had purchased 0.09 cents and 0.08 cents in the suit survey numbers as common undivided share and therein also, there was no mention about the four boundaries. The first defendant had created a sale deed dated 16.07.1992 from Abdul Sathar Saibu Vagaiyara without valid consideration by mentioning more extent. It appears that without giving notice to Jaithoonbi, the first defendant had illegally obtained patta in her name for items 2 and 3 of the suit properties. The first defendant had no right to get patta mutated in her name for the suit properties, which belonged to the plaintiffs. The plaintiffs issued a legal notice dated 24.08.2005 and despite the same, the defendants illegally trespassed into the suit properties by force and the first defendant gave a reply dated 23.01.2006 containing false allegations. The plea of oral sale put up in the reply notice are all false. The defendants have no valid title over the suit properties and hence, the suit.

5. The case of the defendants, in brief, is as follows;

After denying all the claims put forth in the plaint, according to the defendants, Jaithoonbi never enjoyed the suit properties at any point of time by obtaining patta and paying kist etc., The allegation of trespass into the suit properties by the defendants is false. The first item of the suit properties within specific boundaries of an extent of 0.38 cents and other properties belonged to Krishna reddiar under the sale deed dated 25.09.1942. The said Krishna Reddiar sold 0.38 cents of the first item of the suit properties to one Poongovil ammal on 09.09.1948. Poongovil ammal enjoyed the suit properties and orally sold the same to Mohamed Musa Saibu in the first week of Thai month, 1953, for a sale consideration of Rs.50/- and he obtained the possession of the first item of the suit properties. Further, Mohamed Musa Saibu purchased 0.38 cents in

the suit first item survey number from Poongovil ammal in the year 1953 under the sale deed. Thus, 0.76 cents in the survey number, the first item of the suit properties belonged to Mohamed Musa Saibu and he had also obtained patta in his name and had been enjoying the same. The total extent of 0.54 cents in the second item of the suit properties belonged to one Kesava reddiar and after his death, devolved on his children son viz., Narasa reddiar and daughter Parvathy ammal. They partitioned the same and 0.18 cents in the above said suit second item fell to the share of Narsa Reddiar and 0.36 cents fell to the share of Parvathy ammal. Narsa Reddiar sold his share to Mohamed Musa Saibu through a registered sale deed dated 03.11.1953. Parvathy ammal sold her share to Mohamed Musa Saibu orally in Masi month, 1953 for a sale consideration of Rs.30/- and delivered the possession. The total extent of third item survey Number 0.47 cents, belonged to Arunachalla Reddiar and his son Babu reddiar. Under the partition effected between them, Arunachalla reddiar got 0.24 cents and he sold the same to one Thirumal reddiar. Thirumal reddiar enjoyed the property and after his death, his son Narayana reddiar sold the same to Mohammed Musa Saibu under the registered sale deed dated 19.11.1953. The 0.23 cents in the third item within specific boundaries belonged to Babu reddiar and after his death, Parvathy ammal was enjoying the same and she sold the same to Mohamed Musa Saibu orally in the first week of Masi month 1953 for a sale consideration of Rs.35/-. Thus, items 1 to 3 of the suit properties belonged to Mohamed Musa Saibu and he had been in possession and enjoyment of the same by paying kist and getting patta and after his death, his legal heirs were in possession and enjoyment of the suit properties. The first defendant purchased 1/6th share from Mohamed Musa Saibu Vagaiyara under the sale deed dated 23.07.1980. Similarly, the first defendant purchased another 1/6th share from Navapjohn under the sale deed dated 23.07.1980 and under the settlement deed dated 23.07.1980, the first defendant obtained another 1/6th share from Navapjohn and the first defendant purchased 4/6th share from Abdul Sathar under the sale deed dated 16.07.1992. Thus, the suit properties and other extents belonged to the first defendant and she has been in possession and enjoyment of the same by paying kist, patta etc., Further, the defendants have also prescribed title to the suit properties by their continuous possession and enjoyment of the same over and above the statutory period and there is no cause of action for the suit and the suit is liable to be dismissed.

6. In support of the plaintiffs' case, PWs1 to 7 were examined and Exs.A1 to 28 were marked. On the side of the defendants, DWs1 to 3 were examined and Exs.B1 to 24 were marked. Further, Exs.X1 to X26 were marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties, the trial court was pleased

to decree the suit as prayed for. The defendants 1 ,2 and 4 preferred the first appeal and the first appellate court also confirmed the judgment and decree of the trial court and dismissed the appeal preferred by the defendants 1, 2 and 4. Now the defendants 1, 2 and 4 have preferred the second appeal, challenging the same.

8. According to the plaintiffs, the first item of the suit properties, which originally belonged to one Krishna Reddiar, was purchased by Poongol ammal under the sale deed dated 09.09.1945, which has been marked as Ex.A2 and the second item of the suit properties originally belonged to Kesava Reddiar and on succession, devolved on Poongol ammal and the third item of the suit properties originally belonged to Poongol ammal. Further, the case of the plaintiffs is that the 4th plaintiff's brother one Abdul Salaam Saib purchased the suit properties from Poongol ammal under the sale deed dated 15.04.1955, which has been marked as Ex.A3. It is stated that even though the properties are described in the sale deeds as undivided shares and kept in common, according to the plaintiffs, Abdul Salaam Saib had obtained the suit properties under the sale deed dated 15.04.1955 and been enjoying the same without any interference by the other co-sharers. Further, the case of the plaintiffs is that after the demise of Abdul Salaam Saib, his legal heirs sold the suit properties to Jaithoonbi under the sale deed dated 15.03.1985, which has been marked as Ex.A4. Now, according to the plaintiffs, they being the legal heirs of Jaithoonbi have title to the suit properties and been enjoying the same and without any authority of law, despite protests by the plaintiffs, the defendants have illegally trespassed into the suit properties, hence the plaintiffs have been constrained to lay the suit for the reliefs seeking declaration, possession and mesne profits.

9. To the above case of the plaintiffs, the main defence put forth by the defendants is that the suit properties, in particular, have been purchased by Mohamed Musa Saibu through oral sales and based upon the oral sale, Mohamed Musa Saibu had been in possession and enjoyment of the suit properties. Therefore, the plea of oral sales has been projected by the defendants to resist the case of the plaintiffs, who had claimed title to the suit properties on the basis of title deeds as referred to above.

10. The Courts below have disbelieved the oral sales projected by the defendants on the part of Mohamed Musa Saibu. As regards the oral sale effected in respect of the first item of the suit properties, it has been found by the Courts below that during the same point of time, when it has been alleged that Mohamed Musa Saibu had purchased the same extent from

Poongovil ammal under the sale deed, it does not stand to reason, how, for the same extent, an oral sale could have been effected in favour of Mohamed Musa Saibu. Similarly, as regards the second item of the suit properties, when it is pleaded by the defendants that Mohamed Musa Saibu had purchased 0.18cents from Narasa Reddiar for a sale consideration of Rs.400/-, it is highly unbelievable that he would have purchased a larger extent at the same point of time by oral sale from Parvathy ammal. As regards the third item of the suit properties, it was also found by the Courts below that when at the same point of time, Mohamed Musa Saibu, is said to have purchased the same extent under the sale deed dated 19.11.1953, the plea projected that Parvathy ammal had sold the same extent to Mohamed Musa Saibu under the oral sale for Rs.35/- cannot be believed and accepted. Therefore, it could be seen that the Courts below have disbelieved the oral sale pleas put forth by the defendants as against the documents of title projected by the plaintiffs.

11. The defendants have also not established that pursuant to the alleged plea of oral sales to Mohamed Musa Saibu and thereafter, the defendants as such have been enjoying the suit properties as full owners thereof. As rightly found by the Courts below, both the plaintiffs and the defendants have marked various revenue records in support of their case. However, the title of the properties of the respective parties cannot be determined on the basis of the revenue records. It could be seen that the lower appellate court has taken into consideration with reference to the same, various authorities of Apex Court and High Courts and no exception could be taken to the above approach of the lower appellate court.

12. The defendants have also taken a plea that under the oral sales, they and their predecessor in title had been in possession and enjoyment of the suit properties continuously and uninterruptedly for a long time beyond the statutory period to the knowledge of one and all and thus, they had also perfected the title to the suit properties by way of adverse possession. Impliedly, it could be seen that the defendants have admitted the title of the plaintiffs over the suit properties. On that footing only, it could be seen that they have also taken the plea of adverse possession. But the said case has not been established by the defendants with acceptable oral and documentary evidence. The defendants have miserably failed to prove that they have been in possession and enjoyment of the suit properties continuously exhibiting hostile attitude to the knowledge of others including the plaintiffs and beyond the statutory period and thereby, they have perfected title by way of adverse possession. The findings of the courts below that the defendants have failed to establish the title on the plea of adverse possession has not been pointed to be erroneous in law or on facts. Such being the position, as could be seen from the

decision of the Apex court reported in 2016 (5) CTC 862 (Syeda Rahimunnisa V. Malan Bi by L.Rs.and ors), the plea of adverse possession rejected by the courts below not shown to be erroneous in law would not constitute a substantial question of law and the same would only constitute the question of fact. Therefore, it could be seen that the second appeal could not be entertained on the plea of adverse possession sought to be projected by the defendants.

13. Two points are mainly canvassed by the counsel for the appellants for sustaining the second appeal.

Firstly, according to the counsel for the appellants, the Courts below have erred in disbelieving the oral sales pleaded by the defendants. However, as discussed above and as could be seen from the reasoning and the approach of courts below, it is found that they have on a correct appreciation of the evidence adduced in the matter rightly disbelieved the oral sale pleas projected by the defendants and nothing could be faulted in their approach as regards the same, and in this second appeal also, nothing has been focused to show that the Courts below misdirected themselves in negating the oral sale pleas made by the defendants.

Secondly, the counsel for the appellants contended that the lower appellate court has without following the procedure and without affording an opportunity to the appellants to adduce oral and documentary evidence has erroneously admitted an additional document in support of the plaintiffs' case marked as Ex.A29 and on the above ground alone, the second appeal deserves acceptance. It is stated that the lower appellate court on admitting the additional documents marked as Ex.A29 should have enabled the parties to adduce evidence with reference to the same

14. On an application filed by the plaintiffs before the lower appellate court claiming that only recently, the plaintiffs came to know that the second defendant had executed a mortgage deed in favour of the bank by mortgaging certain extent in the suit survey numbers, wherein, it has been admitted that the suit properties are the properties of Jainthoonbi and therefore, they sought for the reception of the said mortgage deed as an additional evidence. No doubt, resistance made by the appellants, to the above request of the plaintiffs. However, the lower appellate court has correctly found that the mortgage deed executed by the second defendant would not have come to the knowledge of the plaintiffs during the course of trial and therefore, accepting the case of the plaintiffs allowed the reception of the additional evidence and marked it as Ex.A29. Inasmuch as the same is a mortgage deed executed by the second defendant, it could be seen that the lower appellate court has rightly marked the document straightaway as no oral evidence is

required for the same. It is not the case of the appellants that the second defendant had not executed the said mortgage deed in favour of the bank. Such being the position, the plea now put forth that the lower appellate court has erred in law in admitting the additional document without affording an opportunity to the appellants to adduce evidence with reference to the same as such cannot be accepted. The lower appellate court on acceptable reasonings had entertained the request of the plaintiffs, had marked as Ex.A29 and therefore, to contend that the appellants had been precluded to adduce oral evidence and therefore, the second appeal on that score alone should be entertained as such cannot be countenanced.

15. In view of the above facts, I do not find that the lower appellate court has erred in violating the principles of law enunciated under Order 41 Rule 27 & 28 CPC and therefore, it could be seen that there is no warrant to interfere with the above decision of the lower appellate court in marking the additional document. In such circumstances, as rightly argued by the respondents' counsel, the decisions relied upon by the appellants' counsel reported in 2015-3-LW-209 (Kaliyammal Vs. Ganapathi) and 2013-4-L.W.405 (Jayamoorthy Vs. Palani & Others) would not be applicable to the facts and circumstances of the present case.

16. The lower appellate court has also rightly appreciated the above additional evidence and found that the second defendant had admitted that the suit properties belonged to Jaithoonbi in the recitals of the schedule of properties given in the mortgage deed Ex.A29 and on that ground also, it has upheld the case of the plaintiffs. Therefore, it could be seen that the lower appellate court has not accepted the case of the plaintiffs based upon Ex.A29 alone. On the other hand, in addition to the evidence already adduced on behalf of the plaintiffs and also accepting the case of the plaintiffs, it could be seen that the lower appellate court also placed reliance and drew support on the additional document Ex.A29 and disposed of the first appeal against the appellants. Therefore, the plea put forth by the appellants' counsel, that the reception of the additional document cannot be accepted is negated and accordingly, the substantial question of law framed on the above point is answered against the appellants and in favour of the respondents. The courts below have found that the defendants have no right, title and possession over the suit properties. The courts below have disbelieved the reliance placed on the revenue records in support of the case of the respective parties. Further, the plea of adverse possession put forth by the defendants have also been negated. Therefore, the courts below have found that the plaintiffs have title to the suit properties and enjoying the same and inasmuch as the defendants without any authority of law had trespassed into the

suit properties held that the plaintiffs are entitled to obtain the reliefs sought for in the suit. Therefore, the other substantial questions of law formulated in this second appeal are answered against the appellants and in favour of the respondents.

17. The counsel for the respondents placed reliance on the decision reported in (2004) 1 SCC 769 (Rame Gowda (D) by Lrs Vs. M.Varadappa Naidu (D) by Lrs and Anr.) The principles of law enunciated in the above decision is taken into consideration and followed, as applicable to the facts and circumstances of the case on hand.

In conclusion, the second appeal fails and consequently the second appeal is dismissed. No costs. Hence, the connected miscellaneous petition is closed.

s/d-
Assistant Registrar(CS-IV)

//True Copy//

Sub-Assistant Registrar

To

1. The II Additional Subordiante Judge, Villupuram.
 2. The Principal District Munsif, Tirukovilur.
- +1 CC to Mr. J. Ramakrishnan, Advocate , sr 4165
+1 CC to Mr. R. Balakrishnan, Advocate sr 3611

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Judgment in
S. A.No.219 of 2011
and
M.P.No.1 of 2011

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