

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.04.2017

CORAM:
THE HON'BLE MR.JUSTICE S.VAIDYANATHAN

Second Appeal No.526 of 2011

M.Ramadoss

... Appellant

Vs.

R.Balasubramaniya Gounder

.. Respondent

Second Appeal filed under Section 100 C.P.C. against the judgment and decree dated 07.12.2010 passed in A.S.No.90 of 2010 by the Principal District Court, Villupuram, confirming the judgment and decree dated 27.08.2009 passed by the District Munsif Court, Villupuram in O.S.No.10 of 2007.

For Appellant : Mr.M.V.Seshachari

For Respondent : Mr.N.Suresh

J U D G M E N T

The plaintiff, who has lost before both the Courts below, is the appellant herein. He has come up with the present Second Appeal challenging the judgment and decree dated 07.12.2010 passed in A.S.No.90 of 2010 by the Principal District Court, Villupuram, confirming the judgment and decree dated 27.08.2009 passed by the District Munsif Court, Villupuram in O.S.No.10 of 2007.

2. According to the appellant/plaintiff, the suit property, measuring an extent of 0.02 cents in S.No.259/8 out of the total extent of 0.08 cents, was originally purchased by his mother Rathinambal under a registered Sale Deed dated 13.11.1945 from one Dhanapakkiyam Ammal of Vanarampalayam, Cuddalore Taluk. The respondent/defendant purchased 0.011/2 cents in the said Survey number under the registered Sale Deed dated 22.11.1973 from his vendors Damodara Gounder and his son Sambanda Gounder. In the Sale Deed of the respondent/defendant, while describing the boundaries for 0.011/2 cents, it has been stated as "west to Rathinambal's land", which refers to the suit property of 0.02 cents. It is the case of the appellant/plaintiff that the respondent/defendant has no right, title or interest over the property of Rathinambal, i.e. 0.02 cents of land in Survey No.259/8, which, she was in absolute possession and enjoyment till her death.

3. It is further stated by the appellant/plaintiff that during the lifetime of Rathinambal, a registered Partition Deed dated 15.07.1976 was executed between Rathinambal, the plaintiff and his brother Paramasivam in respect of their joint properties, under which, the plaintiff and his mother Rathinambal became entitled to 'B' Schedule properties and the suit schedule property was omitted due to inadvertence. Hence, according to the appellant/plaintiff, after the death of his mother Rathinambal, he became the absolute owner of the suit property by survivorship and he is residing in Survey No.259/8 by constructing a thatched house with brick built wall.

4. The grievance of the appellant/plaintiff is that the respondent/defendant is trying to trespass upon the suit property and is attempting to interfere with his peaceful possession and enjoyment of the same. Therefore, on 29.08.2005, the appellant/plaintiff issued a legal notice to the respondent/defendant calling upon him to admit the plaintiff's title to the suit property and desist from interfering with his peaceful possession and enjoyment of the same. But, the said notice was returned. Hence, the plaintiff filed a suit for declaration and permanent injunction in O.S.No.10 of 2007.

5. Denying the plaint averments, the respondent/defendant filed a Written Statement specifically stating that the suit property was never in existence and it did not belong to the alleged vendor of Rathinambal, viz. Dhanabakiyam, who was never in possession and enjoyment of the suit property. According to the respondent/defendant, he had purchased an extent of 0.011/2 cents of land in S.No.259/8 on 22.12.1973 from its rightful owners viz. Damodaran and his son Sambandan under a registered Sale Deed and therefrom, he has been in possession and enjoyment of the same. It is his further case that the eastern boundary as described to his property does not refer to the suit property, which is said to have been purchased by Rathinambal under the Sale Deed dated 13.11.1945, but, it only refers to her site in S.No.259/1 and neither the plaintiff nor his mother Rathinambal was in possession and enjoyment of the suit property. That is the reason why the suit property had not been brought up for partition between the plaintiff, his mother and his brother, which is said to have been taken place on 15.07.1976.

6. According to the respondent/defendant, he alone was in possession and enjoyment of the total extent in S.No.259/8 as the absolute and exclusive owner from 22.12.1973 till 18.10.2004 and in any event, he has prescribed his title to the suit property by adverse possession. He has further stated that he has conveyed the suit property to his grandsons, Vaithiyaraj and Arunkumar by executing a registered Settlement Deed on

18.10.2004 besides delivering possession to them. Therefrom, the respondent/defendant's grandsons are in possession and enjoyment of the suit property.

7. The Trial Court, on a consideration of the entire oral and documentary evidence, dismissed the suit filed by the plaintiff on the ground that the defendant has proved his title and possession of the property in S.No.259/8. Aggrieved by the same, the plaintiff filed an appeal in A.S.No.90 of 2010 and the First Appellate Court, by a judgment and decree dated 07.12.2010, confirmed the finding of the Trial Court. Challenging the same, the plaintiff is before this Court by way of the present Second Appeal.

8. Learned counsel for the appellant contended that the Courts below ought to have seen that the appellant/plaintiff's mother had purchased the suit property for valuable consideration as per the registered Sale Deed dated 13.11.1945, vide Ex.A1. He further contended that the Courts below ought to have seen that in Ex.A2 - Sale Deed, dated 22.11.1973 of the respondent/defendant, the suit property has been described as eastern boundary. It is also his contention that the respondent/defendant is estopped by deed from disputing the title of the appellant/plaintiff to the suit property.

9. On the other hand, learned counsel for the respondent contended that the appellant/plaintiff has failed to prove that his mother Rathinambal's vendor has any right to sell the suit property to his mother and admittedly, no original Sale Deed was filed by the plaintiff. He further contended that the burden is on the plaintiff to establish his case and the defendant took steps to get records and produce Adangal Register to show that there was a re-survey in S.No.259/8, which was divided into three parts and renumbered as S.Nos.321/5, 321/6 and 321/7 and that the plaintiff's property was shown as S.No.321/12, which was originally S.No.259/9. It is also his contention that the appellant/plaintiff has not produced original title documents including patta to show as to how his mother got the suit property. That apart, the plaintiff has not produced any original document including Tax Receipts to prove his possession and enjoyment of the suit property.

10. In reply, learned counsel for the appellant/plaintiff submitted that the Adangal document vide Ex.X3 is not a final one, as could be seen from Ex.X5-Adangal for S.No.259/8, wherein the name of Rathinambal, the plaintiff's mother is shown both in S.Nos.259/8 and 259/9.

11. Heard the learned counsel on either side, gave careful consideration to their submissions and perused the material documents available on record.

12. Following substantial questions of law arise for consideration in this Second Appeal:

(i) Whether the issue of non-joinder of necessary party is to be tried as a preliminary issue and opportunity to be given to the plaintiff to set right the omission?

(ii) Whether Courts below erred in not applying the principle of estoppel by deed when the defendant has specifically shown the suit property as one of his boundaries in Ex.A2?

13. Admittedly, the appellant/plaintiff's mother has purchased 0.02 cents of land under a registered Sale Deed, dated 13.11.1945 marked under Ex.A1 and the same is not disputed by the respondent/defendant. Even in the Sale Deed of the respondent/defendant under Ex.A2, the suit property is shown as one of the boundaries to the defendant's property as “ரத்தினாம்பாளன் மனைக்கு மேற்கு”. Ex.X5 - Adangal extract for S.No.259/8 shows the names of three persons including the appellant/plaintiff's mother, Rathinambal and the respondent/defendant. Though the appellant/plaintiff claims to have enjoyed the suit property continuously, it is omitted to be included in Ex.B1-Partition Deed, dated 15.07.1976.

14. According to the respondent/defendant, neither the appellant/plaintiff nor his mother was in possession and enjoyment of the suit property and that is the reason why the suit property had not been brought up for partition between the plaintiff, his mother and his brother. It is the case of the respondent/defendant that he has conveyed the suit property to his grandsons under a registered Settlement Deed on 18.10.2004, besides delivering possession to them and admittedly, the grandsons of the respondent/defendant are necessary parties to the suit.

15. As regards the issue of non-joinder of necessary parties, this Court is of the view that having contested the matter, nothing prevented the appellant/plaintiff in filing a petition for impleading the grandsons of the respondent/defendant, in the middle of the proceedings. Having not done so, the attitude of the appellant/plaintiff in trying to shift the blame on the respondent/defendant or on the Court by stating that the Trial Court ought to have decided the preliminary issue, is not correct. The first substantial question of law is answered accordingly.

16. It is the contention of the appellant/plaintiff that even though the original Sale Deed has not been produced, he has produced the certified copy of the same marked under Ex.A1. It is true that secondary evidence is admissible and the same cannot be disputed. Even assuming that Ex.A1 is acceptable as a Sale Deed of the year 1945 to the extent of 0.02 cents, admittedly, it cannot be stated that the appellant/plaintiff's mother has purchased the suit property in S.No.259/8, as the records speak otherwise. Thus, from the narration of events by the Trial Court, it is clear that neither the appellant/plaintiff nor his mother Rathinambal was in possession of the property in question, as the property in S.No.259/8 was specifically settled in favour of the grandchildren of the respondent/defendant.

17. In this regard, learned counsel for the appellant/plaintiff has relied on the decision of this Court in the case of Malliga vs. Veerasamy reported in 2013 (1) L.W. 187, wherein, the plaintiff has produced documents to prove her title and on that basis, she has sought recovery of possession. The Court held that the defendants have not established better title to the suit property and hence, they are bound to deliver possession of the same to the plaintiff. For better understanding, relevant portion of the said judgment is extracted hereunder:

"10.7. The relevant question is whether the plaintiff who has purchased the property by virtue of the registered sale deed can be non-suited by defendants 1 to 3, who are illegally occupying the property and against the express request of fourth defendant to vacate the property.

10.8. Once the plaintiff has filed documents to show the title and on that basis seek for recovery of possession, the defendants cannot create confusion and contend that the plaintiff has not proved the identity of property. In fact, this Court also at one point of time felt that whether there should be an order of remand for the purpose of identification of property. But on going through evidence, this Court is satisfied that the identification of property is an issue deliberately raised for the purpose of defeating the claim of the plaintiff. When the defendants have not established better title and contend that apart from the plaintiff there are others who have title over the property, it is for the other rival title holder to question the title of

plaintiff's vendor. It is not open to the defendants, who are the trespassers, to question the title of the plaintiff's vendor / the plaintiff. Therefore, it is the case where the plaintiff is entitled to succeed on the main relief. When the defendants 4 and 5 who are the vendors of the suit property are clear about the plaintiff's title and possession of the suit property, the defendants 1 to 3 who are established to be the trespassers of the suit property cannot contend that plaintiff cannot claim title, when the defendants 1 to 3 have not established better title. It is the misuse of process of law by defendants 1 to 3.

10.9. Since the plaintiff is given the right of recovery of possession, the alternative relief of damage from the fourth defendant does not arise. Defendants 4 and 5 who are the vendors of the plaintiff have supported the title of the plaintiff. In fact, D.W.4 has given evidence. Even according to plaintiff, the trespass was after the purchase of the suit property. Therefore, defendants 4 and 5 cannot be directed to pay damages. Defendants 1 to 3 have failed to establish their defence. The plaintiff is entitled to declaration of title and recovery of possession, therefore, the defendants are bound to deliver possession to the plaintiff."

18. Admittedly, as could be seen from the finding of the First Appellate Court, it is clear that the eastern boundary of the suit property is shown as S.No.259/1 and even assuming that the boundary is shown, that will not give any right to the appellant/plaintiff over the suit property. In this case, the appellant/plaintiff has not produced any patta to the property in question. But, the respondent/defendant has produced third party documents to establish his case. Even though the burden with regard to the relief of declaration and injunction is on the appellant/plaintiff, the respondent/defendant has proved his case by producing requisite revenue records. Hence, I find no reason to interfere with the finding of the Courts below. The second substantial question of law is answered accordingly.

In fine, the Second Appeal is dismissed, confirming the judgment and decree of the First Appellate Court and the Trial Court. No costs.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

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To:

1. The Principal District Court, Villupuram.
2. The District Munsif Court, Villupuram.
3. The Section Officer, V.R. Section, High Court, Madras.

+1 cc to M/s.M.V.Seshachari Advocate sr20318

+1 cc to M/s.N.Suresh Advocate sr 20118

S.A.No.526 of 2011

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