

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.02.2017

PRONOUNCED ON : 14.02.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.732 of 2011

Rajmohan

...
Vs.

Appellant

1.Venkatachala Padayaachi (Deceased)

2.Dandapani Padayaachi

3.Alamelu Ammal (Deceased)

4.Tamizh Vendan

5.Jyothi

6.Kaveri

7.Tamizharasi

8.Sivanandhi

9.Vasuki

10.Thiruchopparanayaki

11. Ilavarasi

...

Respondents

(Respondents 3 to 11 are
legal representatives of the
1st Respondent)

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 01.07.1997 made in A.S.No.84 of 1994 on the file of the Sub Court, Cuddalore, confirming the judgment and decree dated 12.01.1994 made in O.S.No.774 of 1992 on the file of the Principal District Munsif Court, Cuddalore.

For Appellant : Mr.N.Damodaran

For Respondents : Mrs.R.Meenal
No.2 & 4 to 11

JUDGMENT

Challenge in this second appeal is made by the plaintiff against the judgment and decree dated 01.07.1997 made in A.S.No.84 of 1994 on the file of the Sub Court, Cuddalore, confirming the judgment and decree dated 12.01.1994 made in O.S.No.774 of 1992 on the file of the Principal District Munsif Court, Cuddalore.

2. The second appeal has been admitted and the following substantial question of law is formulated for consideration in this second appeal.

"Whether the judgment and decree of the courts below in dismissing the suit laid by the plaintiff are based upon the perverse findings and misdirected against the evidence on record?"

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

4. It is found that originally the suit property belonged to the first defendant. According to the plaintiff, the first defendant had sold

the suit property, when he was a minor on 27.10.1996 for a sum of Rs.2,000/- and pursuant to the above said sale deed, the minor plaintiff, represented by his father, had taken the possession of the suit property and it is also the case of the plaintiff that on the same day, i.e. 27.10.1976, an agreement of reconveyance had been entered into between the plaintiff represented by his father and the first defendant, on the footing that if the first defendant pays Rs.2,000/- within 5 years from 27.10.1976, the property should be reconveyed to the first defendant.

5. Further, it is pleaded that time is the essence of the above said agreement of reconveyance. However, the first defendant did not pay the amount within the above said period of 5 years and thereby, lost his right to repurchase the property. Thus, according to the plaintiff, he is the owner of the suit property. It is stated that the second defendant had unlawfully entered into the suit property without any right and therefore, the plaintiff issued a notice to the defendants 1 & 2 calling upon them to surrender the possession of the suit property and only the first defendant responded to the said notice by issuing a reply containing false and untenable allegations and hence, the suit.

6. The defence taken by the defendants is that the first defendant had borrowed money from the plaintiff's father and in consideration of the same, as a security, the plaintiff's father had taken a nominal sale deed from the first defendant in respect of the suit property for the amount received and therefore, no pucca sale conveyance had been made to the plaintiff and only to safeguard his interest, the first defendant had taken the agreement of reconveyance and thus, it is stated that the plaintiff has no title to the suit property.

7. It is further pleaded that the plaintiff had not been put in possession of the suit property pursuant to the sale deed dated 27.10.1976 and the plaintiff never enjoyed the suit property. It is also the case of the defendants that the first defendant had paid the sum of Rs.2,000/- with interest to the plaintiff's father and discharged the loan and inasmuch as further expenditure would be incurred by taking a sale deed again the same was avoided and the first defendant has sold the suit property to the second defendant and the second defendant is the owner of the suit property. Further, it is also pleaded by the defendants that by their long and continuous possession, they have also prescribed title to the suit property by way of adverse possession. Thus, according to them, the suit is liable to be dismissed.

8. As seen from the evidence adduced in the matter and also the contentions made by both parties, it is found that the first defendant was the owner of the suit property. Now, according to the plaintiff, the first defendant had sold the suit property to him under Ex.A1 sale deed. The execution of Ex.A1 sale deed, as such, is not disputed.

9. Per contra, according to the defendants, the first defendant had borrowed a sum of Rs.2,000/- from the plaintiff's father and as a security to the above said borrowal, at the instance of the plaintiff's father, the sale deed marked as Ex.A1 has come to be executed nominally in favour of the plaintiff and therefore, it is pleaded that no title, as such, had passed on to the plaintiff in respect of the suit property under Ex.A1. The execution of Ex.A1 had come to be admitted by the defendants and they would only contend that the same had been nominally executed for the loan obtained as a security, as rightly put forth by the plaintiff's counsel, hence, the burden is only upon the defendants to establish that Ex.A1 sale transaction is a nominal one executed as a security for the loan obtained by the first defendant from the plaintiff's father. However, no material as such whatsoever has been placed by the defendants to hold that Ex.A1 had been nominally executed in favour of the plaintiff. If the above plea of

the defendants is true, it has not been explained as to why on the same date, an agreement of reconveyance had been entered into between the plaintiff and the first defendant. Inasmuch as the first defendant had conveyed his title in respect of the suit property to the plaintiff under Ex.A1, it could be seen that the parties have, on the same day, entered into an agreement of reconveyance on certain condition. The condition is, in case, the first defendant pays the amount of Rs.2,000/- within a period of 5 years, the plaintiff should reconvey the suit property purchased under Ex.A1 to the first defendant. The agreement of reconveyance marked as Ex.A2 has not been controverted. Therefore, the factum of the parties entering into an agreement of reconveyance marked as Ex.A2 would by itself go to show that the plea put forth by the defendants that Ex.A1 is nominally executed in favour of the plaintiff as a security for the loan obtained by the first defendant from the plaintiff's father is a false one.

10. As rightly put forth by the plaintiff's counsel, the first defendant having admitted the execution of the sale deed and also having admitted the agreement of reconveyance marked as Ex.A2, cannot be believed and also permitted to adduce evidence contrary to the recitals in Exs.A1 and A2 as provided under Section 92 of the

Indian Evidence Act that Ex.A1 sale is a nominal one executed only as a security in respect of the loan transaction. The recitals found in Exs.A1 and 2 do not vouchsafe the plea of the defendants.

11. The main plea put forth by the defendants is that pursuant to the sale deed Ex.A1, the plaintiff had not been in possession of the suit property. It is contended that even thereafter, it is only the first defendant and after the suit property had been alienated by the first defendant to the second defendant under Exs.B1 & 2, it is the second defendant, who had been in possession and enjoyment of the suit property and thus, according to the defendants, they had perfected their title to the suit property by way of adverse possession.

12. Before advertng to the case of the defendants on the plea of adverse possession, it is to be noted that the defendants have also taken a plea that the first defendant had repaid the amount of Rs.2,000/- borrowed as loan with interest to the plaintiff's father. If that be so and if according to the defendants' case, Ex.A1 has been executed only as a security in respect of the suit loan transaction, at least on the discharge of the loan amount, the first defendant would have endeavoured to get a legal conveyance again from the plaintiff in

respect of the suit property. However, no such effort has been taken by the first defendant.

13. On the other hand, it is only pleaded that inasmuch as the loan amount had been discharged and the possession had also been not handed over, as the plaintiff's father represented that further expenditure would be incurred for executing another sale deed again in favour of the second defendant, which could be avoided, believing that assurance, according to the defendants, no sale deed had been taken again from the plaintiff on the discharge of the loan amount. The above defence, as rightly contended by the plaintiff's case, is far-fetched and unbelievable. Having admitted the conveyance of the suit property under Ex.A1 and also failing to establish that Ex.A1 is only a nominal transaction brought about only as a security document and when the defence is also found to be quite inconsistent to the reconveyance agreement marked as Ex.A2, if really, the first defendant had discharged the loan amount, thereafter, the endeavour of the first defendant would be only to get back the sale conveyance of the suit property in his favour from the plaintiff. However, the plea now put forth that as the plaintiff's father represented that expenditure would be incurred, if sale deed is again executed, believing the same,

no conveyance had been taken thereafter, as such cannot be accepted in any manner.

14. This false defence of the defendants itself would go to show that their plea that Ex.A1 sale transaction is a nominal one, is nothing but a blatant lie. Further, there is no material produced by the defendants that the alleged loan taken by the first defendant from the plaintiff's father has been discharged. Even that has not been established. Further, it is also not established by the defendants that within a period of 5 years stipulated under Ex.A2, the loan amount had been discharged. If really within the said time limit, the loan amount had been discharged as agreed to between the parties, pursuant to Ex.A2, the first defendant would have endeavoured to get the reconveyance of the suit property again from the plaintiff. But, there is no material placed by the defendants to show that he had received any loan from the plaintiff's father and that thereafter, he had discharged the sum with interest and the act of the first defendant in not again getting back the conveyance of the suit property from the plaintiff, all these would only go to indicate or point that inasmuch as Ex.A1 is a pucaa sale transaction, the first defendant, thereafter, did not endeavor or made any attempt to get back the conveyance of the

suit property again from the plaintiff. On the other hand, it is found that in the written statement, the defendants have taken a plea that the agreement of reconveyance has been taken by the first defendant with a view to safeguard his interest. If that be so, the normal conduct that would have been expected of from the first defendant is to again get back the reconveyance of the suit property on the discharge of the loan amount. Therefore, it is found that inconsistent pleas have been put forth by the defendants to resist the plaintiff's case.

15. Now coming to the plea of adverse possession set out by the defendants, according to them, it is only the first defendant and thereafter, the second defendant, who had continuously been in possession and enjoyment of the suit property and thus, they have prescribed their title to the suit property by adverse possession. It is also contended by the defendants that the plea of the plaintiff that the second defendant had intruded into the suit property unlawfully during 1986 is a false one and if that be show, the plaintiff would have preferred the suit much earlier immediately on the alleged trespass and on the other and, the plaintiff has come forward with the case only during the year 1992 and therefore, according to them, this act of the

plaintiff itself would go to show that it is only the defendants, who had been all along in possession and enjoyment of the suit property and also perfected their title by adverse possession.

16. As adverted to above, when the defendants have failed to establish that Ex.A1 is a nominal transaction, it is clear that the plaintiff has title to the suit property under Ex.A1. It is only based upon Ex.A1, the plaintiff has sought the reliefs claimed in the suit. Therefore, it could be seen that the suit laid by the plaintiff is based upon the title. Under such circumstances, it is not necessary, on the part of the plaintiff, to prove that he was in possession and enjoyment of the suit property for a period of 12 years, prior to the institution of the suit. On the other hand, it is for the defendants to establish that their possession had been adverse for the requisite period of 12 years as contemplated under Article 65 and Section 27 of the Limitation Act. In this connection, the plaintiff's counsel strongly relied upon the decisions reported in ***AIR 1976 MADRAS 124(1) (Bhagavathy Pillai and another Vs. Savarimuthu and another)***, the judgement of the Supreme Court dated 22.08.2006 in appeal (Civil) No.3594 of 2006 (T.Anjanappa and Ors Vs. Somalingappa and Anr), AIR 1995 Supreme Court 895

(Annasaheb Bapusaheb Patil and others Vs. Balwant alias Balasaheb Babusaheb Patil (dead) by Lrs. And heirs etc., In AIR 1976 MADRAS 124(1) (Bhagavathy Pillai and another Vs. Savarimuthu and another), as regards the suit for possession based on title and the plea of adverse possession set out by the defendants and in such circumstances, the burden of proof lies only on the defendants, who claim the right over the suit property by way of adverse possession, the proposition of law is explained and enunciated as follows:-

" (A) Limitation Act (36 of 1963), Art.65 and S.27 – Adverse possession – Suit for possession based on title – Burden of proof is on the defendant who claims the right to property by way of adverse possession.

Art.65 relates to suits for possession based on title. In such a case period of limitation is 12 years when the possession of the defendant became adverse to the plaintiff. If in a suit falling under Art.65, the defendant wants to defeat rights of the plaintiff, he has to establish his adverse possession for a period of 12 years which has the effect of

extinguishing the title of the owner by operation of S.27 of the Act. If he fails to do so then the plaintiff cannot be non-suited merely because he was not able to prove possession within 12 years.

In the case of a suit for possession based on title the plaintiff has no longer to prove that he was in possession of the property for a period of 12 years. It is for the defendant to establish that his possession has been adverse for the requisite period of 12 years. In the instant case as the defendants have not established their case of adverse possession, the plaintiffs having proved title to the property are entitled to the possession thereof, so long as the defence has not established the plea of adverse possession."

17. Therefore, it could be seen that as per Article 65 of the Limitation Act, the period of limitation is 12 years, when the possession of the defendant became adverse possession to the plaintiff. In case, the defendant failed to establish their plea of adverse possession, it could be seen that the plaintiff's suit on the basis of title cannot be rejected.

18. The plaintiff has marked two kist receipts as Exs.A7 & 8 to establish his possession. Ex.A8 is dated 05.06.1976 and Ex.A7 is dated 15.01.1991. The Courts below have not accepted those documents on the footing that there is no reference about patta number, survey number etc. The defendants, for their plea of adverse possession, have marked the documents Ex.B3 to B7, which are Chitta and Adangal and Exs.B8 to B31 being the kist receipts. On the basis of the above said documents i.e. Exs.B3 to 31, the defendants want to court upheld their plea of adverse possession. At the foremost, it is found that the defendants have not filed any patta in respect of the suit property, particularly, no patta has been issued in favour of the defendants in respect of the suit property after Ex.A1. The defendants have marked certain chitta and Adangal records, it has not been established by the defendants that the entries made therein are based upon true position. Hence, those documents can not be accepted.

19. In such view of the matter, it is for the defendants to examine author of the said documents to prove their authenticity. However, the defendants have not cared to examine the authors and

the defendants have not established that the entries made in Chitta and Adangal are entered based upon proper verification by adducing acceptable evidence. On the mere production of the said documents alone, we cannot safely conclude that those documents reflect the true picture. Further, no document has been filed by the defendants to show that they had been in possession and enjoyment of the suit property showing hostile attitude to the knowledge of the plaintiff openly, continuously and thereby paying kist receipt and cultivating the said property etc. When the documents produced by the defendants are not shown to be issued or entered to the knowledge of the plaintiff, who is the owner of the suit property and when the author of the said documents has also not been established, no safe credence could be attached to the same to uphold the plea of adverse possession. The kist receipts marked as Exs.B8 to 31 are not shown to be pertaining to the suit property. As adverted to earlier, the defendants have not placed patta document, only on the establishment of the patta in respect of the suit property, we can co-relate whether the kist receipts produced by the defendants pertain to the suit property. Further, most of the kist receipts are found to be not in the name of the first defendant or the second defendant. Now, according to the defendants, the suit property had been alienated to

the second defendant during 1982 to 86. Even thereafter, most the kist receipts stand only in the name of the first defendant and his sons. Therefore, it could be seen that when, according to the defendants, the first defendant had sold the property to the second defendant under Exs.B1 and 2, it does not stand to reason as to how come even thereafter the first defendant and his sons are paying kist in respect of the suit property. This would only go to show that based upon the kist receipts alone, we cannot safely conclude that the suit property is in the possession and enjoyment of the defendants, particularly, for upholding their plea of adverse possession. Equally, it is found that even the chitta and adangal records marked as Exs.B3 to B7 also would not establish the plea of adverse possession set out by the defendants as already adverted to the entries contain therein are not established to be entered to the knowledge of the plaintiff. The essential ingredient for the concept of the adverse possession being hostile possession, the defendants having taken the said plea must show by clear and unequivocal evidence that their possession was hostile to the plaintiff and amounted to denial of his title to the property claimed. In other words, for deciding whether the alleged acts of a person constituted adverse possession, the animus of the persons doing those acts is the crucial factor. Therefore, when the documents

produced on the side of the defendants are not shown to be coming into existence to the knowledge of the plaintiff and also the author of the said documents not being examined and further, when the documents, by themselves as discussed above, are found even issued in the name of the persons, who are not having title after Exs.B1 and 2, even assuming the defendants' case as regards Ex.B1 and B2 is true, it could be seen that based upon Exs.B3 to 31, we cannot accept the plea of adverse possession put forth by the defendants. Therefore, as rightly contended by the plaintiff's counsel, the defendants have miserably failed to establish their plea of adverse possession.

20. The courts below have erred in holding that the Ex.A1 is nominal transaction and that the defendants have prescribed their title to the suit property by adverse possession. The courts below have also erred in rejecting the plaintiff's case on the footing that he had not come to the court at the earliest point of time forgetting the principles of law adumbrated under Article 65 of the Limitation Act. In such view of the matter, it is evident that the judgment and decrees of the courts below in rejecting the plaintiff's case are misdirected against the evidence on record and also based upon perverse findings and conclusions. In such view of the matter, the judgment and decree of

the courts below cannot be sustained in the eyes of law. Accordingly, the substantial questions of law formulated in the second appeal is answered in favour of the plaintiff and against the defendants.

In conclusion, the judgment and decree of the courts below are set aside and the suit laid by the plaintiff is decreed as prayed for. As regards the claim of future mesne profits, the matter is relegated to a separate proceeding under Order 20 Rule 12 CPC. Time, for handing over the possession, is two months. Accordingly, the second appeal is allowed. No costs.

Index : Yes/No
Internet: Yes/No
sms

14.02.2017

To

1. The Sub Court, Cuddalore.
2. The Principal District Munsif Court, Cuddalore.

T.RAVINDRAN,J.

sms

Pre-delivery Judgment in
S. A.No.732 of 2011

14.02.2017

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