

**IN THE HIGH COURT OF JUDICATURE AT MADRAS****RESERVED ON : 17.11.2017****PRONOUNCED ON : 28.11.2017****CORAM****THE HONOURABLE MR. JUSTICE T.RAVINDRAN****S. A.No.353 of 2001**

1. Angamuthu  
2. Kasilingam  
3. Natesan  
4. Rangasamy ... Appellants

Arumugam Padayachi ... Respondent

Vs.

Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 12.07.2000 made in A.S.No.22 of 1999 on the file of the Principal Sub-Judge incharge, Additional Sub-Court, Salem, reversing the judgment and decree dated 16.04.1996 made in O.S.No.558/1990 on the file of the Additional District Munsif Court, Salem.

For Appellants : Mr.K.P.Gopalakrishnan

For Respondent : Mr.S.Jayaraman

**JUDGMENT**

This second appeal is directed against the against the Judgment and decree dated 12.07.2000 made in A.S.No.22 of 1999 on the file of the Principal Sub-Judge incharge, Additional Sub-Court, Salem, reversing the judgment and decree dated 16.04.1996 made in O.S.No.558/1990 on the file of the Additional District Munsif Court, Salem.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for declaration and permanent injunction.

4. The case of the plaintiff, in brief, is that the plaintiff is the owner of the suit property and that, he had purchased the same from Chinnu Padayachi on 29.07.1965 for a sum of Rs.1,500/- and the defendants are the sons of the said Chinnu Padayachi and at the time of sale, the defendants were minors and Chinnu Padayachi had executed the above said sale deed for himself and as the joint family manager of the family consisting of himself and the defendants and the defendants have not questioned the above sale at any point of time, even after attaining majority and from the date of the sale, it is

only the plaintiff, who is in possession and enjoyment of the suit property. The plaintiff had already purchased the share of the brother of Chinnu Padayachi viz, Krishna Padayachi on 25.11.1964, which is situated to the West of the suit property and accordingly, the plaintiff is enjoying the property and there is a thatched shed in the property and the plaintiff is residing in the said house and the defendants were all along very cordial till the death of Chinnu Padayachi and as the house of the defendants 2 & 3 fell down, they had requested to the plaintiff's permission to stay in a portion of the house in the suit property along with the plaintiff. Accordingly, the plaintiff had granted permission to them and they are residing in a portion of the property and taking advantage of the same, the defendants had surreptitiously obtained electricity connection and also obtained patta jointly in their names, despite they having no title to the suit property and thereby, the defendants attempted to interfere with the plaintiff's possession and enjoyment of the suit property by questioning his title to the same and hence, the suit for appropriate relief.

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5. The case of the defendants, in brief, is that the suit is not maintainable either in law or on facts. The sale deed dated 29.07.1965 is only a sham and nominal document executed as a security for the

loan taken by Chinnu Padayachi from the plaintiff for a sum of Rs.1,500/- and however, the plaintiff was not given possession of the property at that point of time and the same had remained in the possession of Chinnu Padayachi and the defendants and it is true that the plaintiff had purchased the share of Krishna Padayachi and in the thatched house situated in the property, it is only Chinnu Padayachi and the defendants, who had been residing continuously and it is false to state that the plaintiff has granted permission to the defendants to reside in a portion of the said thatched house and it is false to state that the defendants surreptitiously obtained electricity connection and patta in respect of the suit property and thereby, denying the title of the plaintiff in respect of the suit property. On the other hand, it is only the defendants, who have title to the suit property, after the death of Chinnu Padayachi and they continued to remain in possession and enjoyment of the suit property as absolute owners thereof and the plaintiff has no title to the suit property and the plaintiff, taking advantage of the sham and nominal document, had filed the suit without any cause of action and hence, the suit is liable to be dismissed. The defendants have also pleaded that they had perfected their title to the suit property by adverse possession.

6. In support of the plaintiff's case, PWs 1 & 2 were examined and Exs.A1 to 13 were marked. On the side of the defendants', DWs1 to 4 were examined and Exs.D1 to 16 were marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to dismiss the suit. On appeal, the first appellate Court, on an appreciation of the materials placed in the matter, was pleased to set aside the judgment and decree of the trial Court and by way of allowing the appeal preferred by the plaintiff, decreed the suit as prayed for by the plaintiff. Aggrieved over the same, the present second appeal has been preferred.

8. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration in this second appeal:

***" (i) Had not the Lower Appellate Court committed an error of law in decreeing the suit, when the materials placed by the defendants show that they are in adverse possession of the property?"***

***(ii) Would not the plea of limitation be available to the defendants, when the plaintiff had failed to prove the permissive possession of the defendants?"***

9. In this matter, it is found that pending the second appeal, the second appellant died and despite the opportunities given, steps had not been taken to bring the LRs on record to continue the second appeal as regards the second appellant. Resultantly, the second appeal has come to be dismissed as regards the second appellant as abated on 14.11.2017 itself. However, the counsel of the appellant proceeded to argue the matter on merits as far as the other appellants are concerned for upholding their defence version.

10. Originally the suit property belonged to Chinnu Padayachi, the father of the defendants. According to the plaintiff, he had purchased the suit property from Chinnu Padayachi on 29.07.1965 for a valid consideration and accordingly, pursuant to the above said sale deed, been enjoying the suit property and it is further stated that the above said sale deed had been executed by Chinnu Padayachi on his behalf and on behalf of the defendants being manager of the joint family and the above said sale deed has been marked as Ex.A1. It is

also not in dispute that the plaintiff has also purchased the share of Chinu Padayachi's brother Krishna Padayachi on 25.11.1964. However, the defendants have raised the plea that the sale deed projected by the plaintiff for claiming title to the suit property marked as Ex.A1 is a sham and nominal document and the same had been executed by Chinnu Padayachi only as a security for the loan obtained by him from the plaintiff and therefore, on the basis of the above said sale deed, the plaintiff cannot claim any valid title to the suit property. Accordingly, it is seen that considering the defence put forth by the defendants to resist the claim of the plaintiff to the suit property on the basis of Ex.A1, as rightly determined by the first appellate Court, the burden is heavy upon the defendants to establish that the sale deed marked as Ex.A1 is a sham and nominal document executed only as a security for the loan transaction entered into between the plaintiff and Chinnu Padayachi. With reference to the same, as rightly found by the first appellate Court as well as the trial Court, it is seen that the evidence of DW4 examined on behalf of the defendants, since he had not testified anything about the issues involved in the matter, accordingly, his evidence has not been considered correctly. Similarly, it is also found that DW2, who had been examined with reference to the mortgage of the suit property by Chinnu Padayachi in the bank,

his evidence also not related to the determination of the issue involved in the matter and hence, his evidence, had not also been taken into consideration by the Courts below correctly. Only DW3 Jayalakshmi speaks about the loan transaction put forth by the defendants, to negative the sale deed marked as Ex.A1. However, as rightly found by the first appellate Court, it is seen that DW3 has admitted that she had not witnessed the alleged loan transaction directly said to have taken place between the plaintiff and Chinnu Padayachi and therefore, rightly discredited her evidence as not acceptable for upholding the plea of loan transaction put forth by the defendants for the sale transaction marked as Ex.A1. That apart, it is seen that the evidence of DW3 also does not lend support to establish that possession of the suit property by the respective parties as agreed to by her, she had not visited the property recently. It is thus found that the evidence of DWs2 to 4, in particular DW3, does not prove the defence version set out by the defendants and hence, we have only the interested evidence of DW1 to establish their defence.

11. It is the case of the plaintiff that the defendants were minors at the time of Ex.A1 sale transaction and when the said fact has not been controverted by the defendants in the written statement, it is

seen that as rightly found by the first appellate Court, DW1 would not have any direct knowledge about the sale transaction marked as Ex.A1 and therefore, it is seen that he may not be a competent witness to speak about Ex.A1 sale transaction, as to whether it had been really executed by Chinnu Padayachi for a valid consideration as put forth by the plaintiff or whether it had been executed in lieu of loan transaction as put forth by the defendants. In such view of the matter, it is seen that no safe reliance could be placed upon the evidence of DW1 for upholding the defence version.

12. DW1 is found to have testified as to facts which had not been pleaded in the written statement and in this connection, it is seen that according to DW1, the loan incurred from the plaintiff had been discharged during 1974 itself. However, when the plea of discharge has not been made out in the written statement and when there is no agreement between the parties that on the discharge of the loan, the plaintiff should reconvey the property to either Chinnu Padayachi or the defendants as the case may be, it is seen that merely on the oral assertion of DW1 without any support from the pleadings as well as materials pointing to the same, his evidence that the loan had been discharged in 1974 and that, the plaintiff had agreed to reconvey the

property to the defendants as such cannot be believed and accepted. The alleged agreement as regards the reconveyance of the suit property by the plaintiff to the defendants is not set out in the written statement and also the plaintiff had not been cross-examined with reference to the same in the matter. The sale transaction Ex.A1 having taken place during 1965, the evidence of DW1 that the plaintiff had agreed to reconvey the property to the defendants during 1974 also cannot be believed and accepted as found by the first appellate Court. Even assuming for the sake of arguments that there is an agreement between the parties to reconvey the property on the discharge of the loan, as to what further steps had been taken by the defendants with reference to the same on the discharge of the loan during 1974 as stated by them, in the course of evidence, there is no material forthcoming. If really, such an agreement had been entered into between the plaintiff and the defendants, as rightly found by the first appellate Court, on the discharge of the loan, even assuming for the sake of arguments that the plaintiff had refused to execute the reconveyance to either Chinnu Padayachi or the defendants as the case may be, they would have taken appropriate legal steps to get reconveyance from the plaintiff immediately. However, as regards the same, it is seen that no steps have been taken by the defendants and

therefore, the plea of reconveyance as spoken to by DW1 in the course of evidence sans pleadings and materials pointing to the same cannot be believed and accepted and therefore, it has been rightly discredited by the first appellate Court. As rightly seen, if the parties had entered into an agreement for reconveyance of the property concerned, necessary recitals to the said effect would have been incorporated in Ex.A1 itself. On the other hand, in the absence of such recitals in Ex.A1, consequently, this would go to show that inasmuch as Ex.A1 had been executed by Chinnu Padayachi for a valid consideration with the intention of transferring the title of the suit property to the plaintiff accordingly, it is seen that they had not incorporated the reconveyance clause in the document and further, as held above, there is no agreement between the parties that on the discharge of the loan, the plaintiff should execute the reconveyance to the defendants. In the light of the above position, it is seen that the defendants have miserably failed to establish that Ex.A1 is a sham and nominal document and executed only in lieu of loan transaction and on the other hand, it is found that the plaintiff has established his title to the suit property and resultantly, it is found that Ex.A1 is a true and valid document and as such binding upon the defendants.

13. It is the case of the plaintiff that he had granted permission to the defendants to reside in a portion of the suit property on their house having been destroyed or falling down and taking advantage of the same, according to the plaintiff, the defendants are attempting to interfere with his lawful possession and enjoyment of the suit property, to which, they are not entitled to, hence, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

14. In this connection, the defendants have taken the plea of adverse possession. The plea of adverse possession, as rightly seen, is found to be inconsistent with the defence version set out by the defendants that Ex.A1 is a sham and nominal transaction. If really, according to the defendants, Ex.A1 is a sham and nominal transaction, the title of the suit property would have remained with them and if that be so, there is no necessity for the defendants to take up the plea of adverse possession. The mere fact that the defendants have taken the plea of adverse possession would only go to show further that the plea of the defendants that Ex.A1 is a sham and nominal transaction is a false version.

15. It is the case of the plaintiff that the defendants, taking advantage of the permission granted by him, surreptitiously had obtained electricity connection and patta in their names illegally, which are not binding upon the plaintiff and hence, the defendants cannot claim any valid title on the basis of the said documents. The materials produced on behalf of the defendants as such, as found by the first appellate Court, do not indicate that the defendants are enjoying the whole of the suit property as such and on the other hand, it is seen that as found by the first appellate Court, Adangal extracts marked as Exs.B1 to 5 do not point out as to in which portion of the suit property, the defendants are in occupation or who are all in occupation of the suit property etc., Therefore, it is found that the above said documents would not be useful to determine the issues involved in the matter. Similarly, Ex.B8 receipts being found to be related to another village and not to the suit village, it is seen that they are also not germane for determining the issues involved in the matter. As regards the plea of adverse possession, it is for the defendants to establish that as when from, their possession had become adverse to the title of the plaintiff. With reference to the above case, the defendants have in the written statement not stated anything as to from when date onwards, they are exercising hostile title to the suit property against the plaintiff and with

reference to the same, there is no clear pleas as well as acceptable evidence on the part of the defendants. Equally, it is seen that for the establishment of the plea of adverse possession, it is for the defendants to place reliable and acceptable materials that they had been enjoying the suit property openly, continuously and uninterruptedly for more than the statutory period exhibiting hostile animus to the title of the plaintiff and to the knowledge of the plaintiff and with reference to the same i.e the above said legal aspects as well as factual aspects, there is no acceptable and reliable material on the part of the defendants. It is seen that on the basis of patta produced on behalf of the defendants, we cannot uphold the plea of adverse possession raised by the defendants. As rightly determined, patta cannot be equated to a document of title and similarly, the payment of kist on the basis of the above said patta by itself would not create absolute ownership on the part of the defendants whereby they have enjoyed the suit property adverse to the interest and title to the plaintiff. At the foremost, they have not established that they had obtained a valid patta in respect of the suit property to the knowledge of the plaintiff and accordingly, paying the kist etc., as the lawful owners of the suit property. Such being the factual possession and when the documents placed on the part of the defendants do not

entitle them to obtain the relief of title to the suit property on the basis of the adverse possession, it is seen that the plea of adverse possession put forth by the defendants has been rightly negated by the first appellate Court. It is also found by the first appellate Court that inasmuch as the sale transaction Ex.A1 had been intended to be a true and valid transaction and not executed in lieu of loan transaction, it is seen that the defendants on attainment of majority also had not taken steps to impugn the same as per law. As rightly contended by the plaintiff's counsel, merely on the failure of the plaintiff to establish the plea of permissive possession, it cannot be held that the defendants have perfected the title to the suit property by adverse possession, particularly when the defendants have failed to establish that the whole of the property described in the suit is in their lawful possession and enjoyment for more than the statutory period and adversely, enjoying the same to the knowledge of the plaintiff openly continuously and when the documents placed on behalf of the defendants cannot be safely relied upon for upholding the plea of adverse possession, as rightly determined by the first appellate Court, it is seen that the plea of adverse possession set out by the defendants has to fail.

16. In the light of the above discussions, it is seen that the first appellate Court has correctly assessed the materials placed on record in the right perspective and come to the conclusion that the defendants have failed to establish the plea of adverse possession raised in the written statement and it is further seen that the first appellate Court has rightly held that the defendants have failed to plea and establish as to when from their permissive possession of a portion of the suit property had turned hostile to the title of the plaintiff and when with reference to the same, there is no pleadings and also no material to sustain the same and also the materials produced do not indicate as to when from they seek to claim adverse title, the plea of adverse possession set out by the defendants cannot be countenanced. On the other hand, when the materials projected by the plaintiff go to show that the defendants, despite having knowledge about the plaintiff's title to the suit property, as they had attempted to interfere with his possession and enjoyment by challenging his title illegally, it is seen that the plaintiff had been necessitated to lay the suit against the defendants for appropriate reliefs.

17. It is thus seen that the substantial questions of law formulated in this second appeal are to be answered against the defendants and in favour of the plaintiff.

18. In conclusion, the second appeal fails and is accordingly, dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

28.11.2017

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Internet : Yes/No

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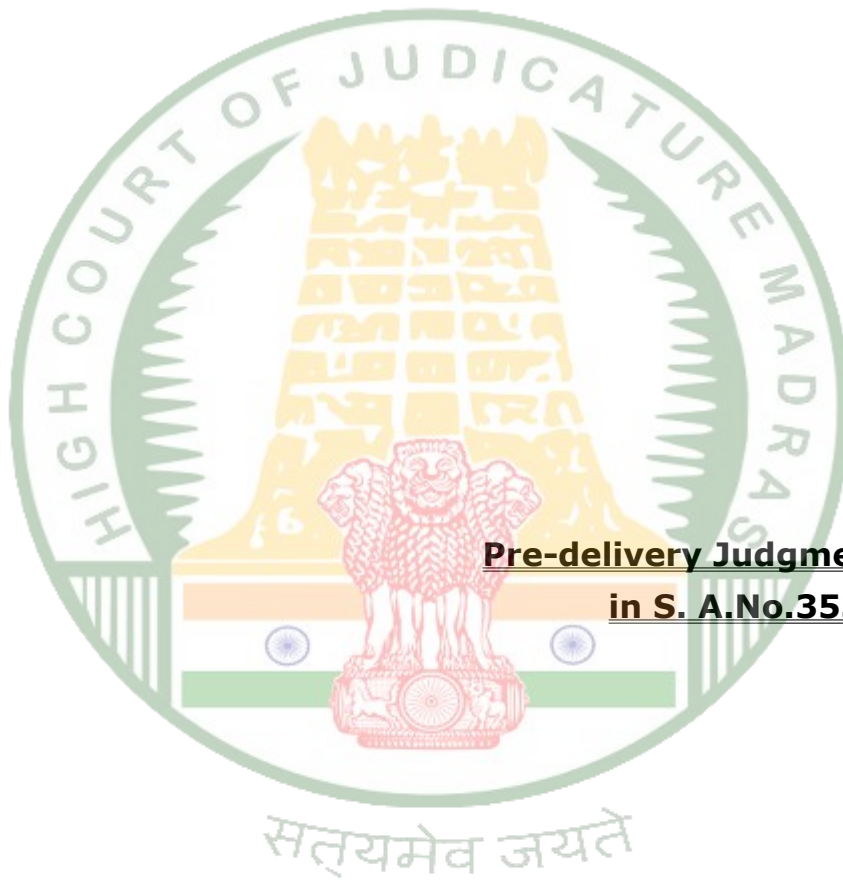
1. The Principal Sub-Judge incharge,  
Additional Sub-Court, Salem.
2. The Additional District Munsif Court, Salem.

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**T.RAVINDRAN,J.**

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**Pre-delivery Judgment made**  
**in S. A.No.353 of 2001**

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**Most respectfully submitted**

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**P.A.to the Hon'ble Judges**

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