

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.07.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

S.A.No.152 of 2018
and C.M.P.No.3820 of 2018

1.Manickam

2.Chinnaival @ Panchalai

.. Appellants/defendants

Vs.

Kuber

.. Respondent/Plaintiff

PRAYER: Second Appeal is filed under Section 100 of C.P.C against the judgment and decree dated 30.06.2015 made in A.S.No.37 of 2014, on the file of the Sub Court, Uthangarai, reversing the judgment and decree dated 22.08.2012 made in O.S.No.71 of 2008 on the file of the District Munsif Cum Judicial Magistrate Court, Pochampalli.

For Appellants : Mr.V.R.Shanmuganathan
for Mr.T.Panchatsaram

For Respondent : Mr.N.E.A.Dinesh
for M/s.V.Nicholas

J U D G M E N T

Second Appeal is filed against the judgment and decree dated 30.06.2015 made in A.S.No.37 of 2014, on the file of the Sub Court, Uthangarai, reversing the judgment and decree dated 22.08.2012 made in O.S.No.71 of 2008 on the file of the District Munsif Cum Judicial Magistrate Court, Pochampalli.

2.The appellants are defendants and respondent is the plaintiff in O.S.No.71 of 2008 on the file of the District Munsif Cum Judicial Magistrate Court, Pochampalli. The appellants have preferred this Second Appeal, challenging the reversing judgment and decree of I Appellate Court in A.S.No.37 of 2014. The respondent filed the said suit for declaration of his title and for permanent injunction. According to the respondent, the suit property and other properties belong to one Kuppaiya Prasad and was in his possession and enjoyment. The said Kuppaiya Prasad had four sons and five daughters. His wife is Parvathi Bai. After his death, the properties belonged to Kuppaiya Prasad were orally partitioned 38 years ago, in

Panchayat, in the presence of one Beemaraj, Jaganathan and others. In the said oral partition, the suit property in Survey No.1149/1, measuring an extent of 89 cents agricultural land was allotted to the share of Parvathi Bai, wife of Kuppaiya Prasad. The sons and daughters of Parvathi Bai have no right, title over the suit properties. The patta No.783 was issued to Parvathi Bai and she was in possession and enjoyment of the suit properties for more than 35 years.

2(a).The respondent purchased the suit property by entering into an agreement of sale with Parvathi Bai on 19.08.2005 for a total sale consideration of Rs.1,10,000/- and paid a sum of Rs.50,000/- as advance. The time for payment of balance sale consideration and to execute the sale deed was fixed as three years. Within the time limit of three years, the respondent paid balance sale consideration to Parvathi Bai and she executed and registered the sale deed on the same day. The respondent is in possession and enjoyment of the suit properties from the date of purchase and is cultivating the same. After due inquiry, Tahsildar, Pochampalli, by the order dated 24.08.2008, transferred and issued patta No.2347 in the name of the respondent. Adangal record is in the name of the respondent. The appellants who are husband and wife, approached Parvathi Bai to purchase the suit properties and she refused to sell the properties. The appellants created the sale deed by fabricating the documents in order to illegally acquire the properties and are claiming title to the suit properties. On 14.09.2008, the appellants and their men tried to trespass into the suit properties and the respondent with the help of village people and elders, prevented them. The appellants have money and muscle power and hence, the respondent filed suit for the relief stated above.

3.The first appellant filed written statement and the same was adopted by the second appellant. They denied all the averments contained in the plaint. They contended that they are the lessees of the suit properties for more than 26 years. They also contended that the suit properties and other properties are joint family properties. After the death of Karupaiya Prasad, his wife, Parvathi Bai became kartha of the joint family and she is managing the properties. Their son, Dharmaraj Pandey died in the year 2004, leaving behind his wife, Gayathri Bai and sons, Keshar Pandey and Jeevathkumar Pandey as his legal heirs. On 20.07.2004, the legal heirs of Dharmaraj Pandey and other legal heirs partitioned all the joint family properties by an unregistered partition deed dated 20.07.2004. Half share in the suit property was allotted to the legal heirs of Dharmaraj Pandey and half share in the suit property was allotted to Ganesh Prasad. 53 cents in Survey No.1099/1 and 35 cents in Survey No.1108/2 were allotted to Parvathi Bai. The first appellant purchased the suit property from the legal heirs of

Dharmaraj Pandey and Ganesh Prasad by the sale dated 11.07.2008, registered as Document No.1741 of 2008. The appellants are in possession and enjoyment of the suit property. The respondent, by creating fraudulent documents, claimed title to the suit property. The appellants came to know about the patta issued to the respondent only after the suit was filed by the respondent. The appellants are taking steps to cancel the patta by initiating separate proceedings. The respondent has undervalued the suit property and not paid correct Court fee. Hence the suit filed by the respondent is liable to be dismissed.

4.The appellants filed additional written statement and contended that the amendment sought for by the respondent is already mentioned in the plaint. The Appellate Court has directed the respondent to prove his title by the document. The respondent has introduced a new case by amending that Parvathi Bai got the suit properties 38 years back in oral partition. There is no basis for the same and the same cannot be accepted.

5.Based on the pleadings, the learned Trial Judge framed necessary issues. Before the learned Trial Judge, the respondent examined himself as P.W.1 and four other witnesses were examined as P.Ws.2 to 5 and marked 7 documents as Exs.A1 to A7. The first appellant examined one Manickam as D.W.1, Ganesh Prasad, one of the sons of Kuppaiya Prasad and Parvathi Bai was examined as D.W.2, Parvathi Bai, wife of Kuppaiya Prasad, was examined as D.W.3 and two others were examined as D.Ws.4 and 5 and marked 3 documents as Exs.B1 to B3.

6.The learned Trial Judge considering the pleadings, oral and documentary evidence, dismissed the suit. Against the said judgment and decree dated 22.08.2012 made in O.S.No.71 of 2008, the respondent filed A.S.No.37 of 2014.

7.The learned I Appellate Judge framed necessary points for consideration. The learned I Appellate Judge independently considering the materials on record, judgment of the Trial Court and arguments of the counsel for the parties, allowed the appeal, setting aside the judgment and decree of the learned Trial Judge.

8.Against the said judgment and decree dated 30.06.2015 made in A.S.No.37 of 2014, the appellants have preferred the present Second Appeal.

9.The respondent entered appearance through counsel in the Second Appeal. Both the counsel for the appellants and respondent consented for hearing the Second Appeal for final disposal. The following Substantial Questions of Law are framed:

"(a).Whether the lower Appellate Court is justified in decreeing the suit in the absence of

plaintiff establishing his vendor's title?

(b).Whether the lower Appellate Court is justified in shifting the burden on the appellants when the plaintiff had failed in his duty to establish his case?

(c).Whether the lower Appellate Court is justified in extracting the facts of some other case in its judgment to conclude as against the appellants?"

10.The learned counsel for the appellants contended that the learned I Appellate Judge failed to apply his mind to the facts of the case and considering the facts relating to some other case, allowed the first Appeal. The respondent has not produced any document to show that the suit properties were allotted to the share of Parvathi Bai in oral partition. D.W.3, Parvathi Bai has stated in her evidence that the suit properties are in her possession and has not adduced in her evidence that partition has taken place in her family. The learned I Appellate Judge erroneously shifted the burden of proof on the appellants, when the respondent did not establish and discharge his burden. In support of his contentions, the learned counsel for the appellants relied on the following judgments reported in:

(i)AIR 2014 Supreme Court 937 (Union of India and others V. Vasavi Cooperative Housing Society Ltd., and others):

"10.Shri Vikas Singh, learned Senior counsel appearing for the appellants submitted that G.L.R.445 measuring an area of 7 acres and 51 guntas is classified as B4 and placed under the management of the Defence Estate Officer. Column 7 of the G.L.R. Would indicate that the landlord is the Central Government. Out of 7 acres and 51 guntas, land admeasuring 6 acres has been handed over to Defence Accounts Department for construction of Defence Staff Quarters as per Survey No.445/A, as per the records as early as in 1984. Further, it was pointed out that the appellant had already constructed approximately 300 quarters in 6 acres of land. Learned Senior counsel submitted that since the extent of land mentioned in old Survey No.53 as well as in the settlement and partition deed, do not tally to the extent of land mentioned in Ext. A-3 and burden is heavy on the side of the plaintiff to show and explain as to how the registered family settlement and partition deed did not take place in the disputed land. Learned Senior counsel also submitted that the High Court has committed an error in ignoring the G.L.R. Produced by the defendants, even though there is no burden on the defendants to establish its title in a suit filed by the plaintiff for declaration of title and possession."

(ii) 2011 12 Supreme Court Cases 220 (Rangammal Vs. Kuppuswami and another):

"34. It has been further held by the Supreme Court in State of J & K Vs. Hindustan Forest Co. Wherein it was held that the onus is on the plaintiff to positively establish its case on the basis of the material available and it cannot rely on the weakness or absence of defence to discharge the onus.

35. It was still further held by this Court in Corporation of City of Bangalore V. Zulekha Bi (2008) 11 SCC 306, SCC page 308 that it is for the plaintiff to prove his title to the property. This ratio can clearly be made applicable to the facts of this case for it is the plaintiff who claimed title to the property which was the subject matter of the alleged sale deed of 24.02.1951 for which he had sought partition against his brother and, therefore, it was clearly the plaintiff who should have first of all established his case establishing title of the property to the joint family out of which he was claiming his share. When the plaintiff himself failed to discharge the burden to prove that the sale deed which he executed in favour of his own son and nephew by selling the property of a minor of whom he claimed to be legal guardian without permission of the court, it was clearly fit to be set aside by the High Court which the High Court as also the courts below have miserably failed to discharge.

36. The onus was clearly on the plaintiff to positively establish his case on the basis of material available and could not have been allowed by the High Court to rely on the weakness or absence of defence of the defendant-appellant herein to discharge such onus. The Courts below thus have illegally and erroneously failed not to cast this burden on Respondent 1 - plaintiff by clearly misconstruing the whole case and thus resulted into recording of findings which are wholly perverse and even against the admitted case of the parties."

11. Per contra, the learned counsel for the respondent contended that the respondent has examined P.Ws. 2 and 3, relatives of Kuppaiya Prasad to prove the oral partition. P.Ws. 2 and 3 have categorically stated that they were present at the time of oral partition along with other Panchayatars and deposed that suit properties were allotted to Parvathi Bai. The patta has been issued in the name of Parvathi Bai, who as D.W. 3 has admitted that she is in possession and enjoyment of all the properties of Kuppaiya Prasad, including the suit properties. Parvathi Bai had admitted her thumb impression in Ex. A2, agreement of sale and Ex. A3, sale deed executed in favour of the

respondent. The respondent has examined P.W.4 to prove passing of consideration to Parvathi Bai. After due inquiry, patta was transferred in the name of the respondent, based on his possession and chitta Adangal also proves that he is in possession of the suit properties. The Trial Court, on erroneous consideration, dismissed the suit, whereas the learned I Appellate Judge by properly appreciating the oral and documentary evidence, allowed the appeal and prayed for dismissal of the Second Appeal.

12. Heard the learned counsel for the appellants as well as the respondent and perused the materials available on record.

13. Substantial Questions of Law:

Both the appellants and respondent have admitted that the suit properties belonged to Kuppaiya Prasad along with other properties. They also admitted that Kuppaiya Prasad died, leaving his wife, four sons and five daughters as his legal heirs. According to the respondent, after the death of Kuppaiya Prasad, there was oral partition, 38 years back among the legal heirs and suit properties were allotted to Parvathi Bai. From that date, Parvathi Bai was in possession and enjoyment of the same. From her, the respondent purchased the suit properties by the registered sale deed dated 16.07.2008, marked as Ex.A3. To prove oral partition, the respondent has examined P.Ws.2 and 3, relatives of family, who were present along with other panchayatars.

14. From the materials on record, it is seen that P.Ws.2 and 3 have stated that the suit properties were allotted to Parvathi Bai, but they were unable to state when the oral partition took place and what are all the properties allotted to other legal heirs. From the above witnesses viz., P.Ws.2 and 3, the respondent was unable to furnish particulars of oral partition, especially the properties allotted to other sharers and learned Trial Judge has rightly rejected their evidence and held that respondent failed to prove the oral partition. The respondent contended that from the date of oral partition, the legal heirs of Kuppaiya Prasad are in possession and enjoyment of the properties allotted to them. On the other hand, after death of Kuppaiya Prasad, patta in respect of all the properties were transferred in the name of Parvathi Bai. Parvathi Bai as D.W.3 has deposed that she was in possession and enjoyment of all the properties. In view of the above facts, the findings of the learned Trial Judge that respondent has not proved the oral partition and that Parvathi Bai has become absolute owner of the suit property are correct. The learned I Appellate Judge without considering the claim of the respondent and reasoning given by the learned Trial Judge for rejecting the claim of the respondent, considered the contention of the respondent and held that learned Trial Judge erred in dismissing the suit.

15.From the judgment of the learned I Appellate Judge, it is seen that the learned Judge has extracted the facts of some other case and without applying his mind, has erroneously allowed the appeal, shifting the burden of proof on the appellants. The respondent filed suit for declaration of title and for permanent injunction. The learned Trial Judge has held that Parvathi Bai can sell only her share in all the properties as one of the legal heirs of Kuppaiya Prasad. In such circumstances, the findings of the learned Trial Judge that respondent is not entitled for decree of declaration and for permanent injunction are valid. The learned Trial Judge based on the patta and other revenue records standing in the name of the respondent, decreed the suit. The learned I Appellate Judge failed to see that all the legal heirs of Kuppaiya Prasad were not present, when the patta was transferred in the name of the respondent. The respondent has not proved that he is entitled for the relief sought for in the suit and the learned I Appellate Judge erroneously shifted the burden on the appellants and considering the evidence let in by the respondent, has erroneously allowed the appeal. The judgments relied on by the learned counsel for the appellants are squarely applicable to the facts of case.

16.The judgment of the learned I Appellate Judge dated 30.06.2015 made in A.S.No.37 of 2014 is set aside and the judgment of the learned Trial Judge dated 22.08.2012 made in O.S.No.71 of 2008 is restored.

17.In the result, this Second Appeal is allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

gsa

To

1.The Subordinate Judge, Uthangarai.

2.The District Munsif Cum Judicial Magistrate, Pochampalli.

+1cc to M/s.V.Nicholas, Advocate sr.no.46101

+1cc to M/s.G.Punniyakotti, Advocate sr.no.46307(19/09/2018)

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