

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 03.09.2018
DELIVERED ON: 24.09.2018

CORAM:

THE HON'BLE MRS.JUSTICE R. HEMALATHA

S.A.No.98 of 1998

Alamelu Ammal ... Appellant/Defendant

Vs.

Ashok Kumar ... Respondent/Plaintiff

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the decree and judgment dated 09.07.1997 passed by the Principal District Judge, Villupuram in A.S.No.117 of 1995 reversing the decree and judgment dated 14.03.1995 passed by the Additional District Munsif, Villupuram in O.S.No.844 of 1993.

For Appellant : Mr.B.Harikrishnan
Respondents : Mrs.V.Srimathi
for M/s V.Raghavachari

JUDGMENT

The present appellant is the defendant in O.S.No.844 of 1993 on the file of the Additional District Munsif, Villupuram and respondent in A.S.No.117 of 1995 on the file of the Principal District Judge, Villupuram.

2. The respondent/plaintiff filed a suit in O.S.No.844 of 1993 before the Additional District Munsif, Villupuram for declaration of his title to the suit property and for recovery of possession and for past and future mesne profits.

3. Briefly stated the case of the plaintiff in O.S.No.844 of 1993 is as follows. The plaintiff purchased the suit property in Survey number 262 of Kangeyanur Village measuring 54 cents from one Jagadeesan through a registered sale deed dated 09.03.1977 (Ex.A2). When he measured the property a few years back, he found that the defendant had encroached upon his land to the extent measuring 26 cents. Therefore, the plaintiff issued a notice dated 12.08.1991, a copy of which is marked as Ex.A12. The defendant received the said notice and sent a reply dated 28.08.1991 to the defendant, which according to the plaintiff contained false allegations. The specific case of the

plaintiff is that the defendant cannot claim any right over the suit property.

4. The defendant filed a written statement contending that he purchased 54 cents in the suit survey number from one Ganapathy Pandaram s/o Appasamy through a registered sale deed dated 03.05.1974 (Ex.B1) and Ganapathy Pandaram, who is his predecessor in title had purchased 18 cents from Chinnasamy through a sale deed dated 22.02.1960 (Ex.B3) and 27 cents from Meenakshi Ammal w/o Pakkiri Pandaram through a registered sale deed dated 05.05.1960 (Ex.B2) and got the remaining extent of 9 cents in the suit survey number from his ancestors. According to the defendant, he has been in possession and enjoyment of 54 cents by cultivating crops and also by paying kists (Ex.B5 to Ex.B8). It is also his contention that he dealt with the property by mortgaging the same in favour of one Subbaraya Padayachi on 25.04.1985 (Ex.B9). He has therefore, prayed for the dismissal of the suit.

5. The trial court after full contest, dismissed the suit on the following grounds.

- ◆ The plaintiff though in his plaint contended that the defendant had encroached upon his land to an extent of 26 cents five or six years prior to the filing of the suit, did not file the suit immediately.
- ◆ The evidence of Advocate Commissioner clearly shows that one Alamelu Ammal is in possession of the suit property.
- ◆ Though the defendant could not prove his title and possession over the suit property, the plaintiff who has filed the suit for declaration and recovery of possession, should establish his case.
- ◆ Since the plaintiff has not proved that the suit property originally owned by Venkatrama Iyer, the suit filed by the plaintiff is not sustainable. Even assuming Panchavarnam Ammal is entitled to the suit property through Ex.A1, she has settled the said property through a settlement deed (Ex.A3) in favour of her sons Jagadesan and Ambalavanan. Though it is admitted that one of the settlees Ambalavanan is mentally challenged, the other settlee Jagadesan alone had sold the property in favour of the plaintiff without obtaining prior permission from any court of law.
- ◆ Since the vendor of the plaintiff Jagadesan has not been examined, the sale deed Ex.A2 cannot be held to be a valid document.
- ◆ When the defendant claims title in respect of the

entire suit property, the plaintiff has claimed declaration of his title only in respect of 26 cents.

The trial court negatived the claim made by the defendant that he (defendant) has prescribed title by adverse possession and prescription over the suit property.

6. The first appellate court set aside the decree and judgment passed by the learned Additional District Munsif, Villupuram and allowed the appeal. Aggrieved over the same, the present appeal is filed by the appellant/defendant.

7. The first appellate court has observed that Venkatrama Iyer got the suit property by court auction sale, as per Ex.A16 and that Panchavaranam Ammal who purchased the suit property from the said Venkatrama Iyer settled the same in favour of her sons Jagadesan and Ambalavanan. The first appellate court has also opined that though a mistake is committed by Jagadesan in selling the entire property settled in his favour as well as his brother Ambalavanan, without getting prior permission for selling the share of Ambalavanan also, who was mentally challenged, the validity of the sale made by Jagadeesan can only be questioned either by Ambalavanan or his legal heirs and not by the defendants. He has also held that since the plaintiff has proved his title, he is entitled for a declaration and recovery of possession and for past mesne profits at Rs.750/- per year for three years.

8. The plaintiff claims title to the suit property through the sale deed dated 09.03.1977 (Ex.A2). The parent documents namely settlement deed dated 09.02.1977 (Ex.A3) executed by Panchavarnam Ammal in favour of her two sons Jagadesan and Ambalavanan and the sale deed in favour of Panchavarnam Ammal dated 06.04.1957 (Ex.A1) and the court auction sale certificate (Ex.A16) in favour of Venkatraman Iyer, from whom Panchavaranam Ammal purchased the suit property through a sale deed dated 06.04.1957 (Ex.A1) have all been filed.

9. As rightly pointed out by the first appellate court, the validity of the sale (Ex.A2) made by Jagadesan to the plaintiff cannot be questioned by the defendant. Neither Ambalavanan, who is also a setlee in the settlement deed dated 09.02.1977 (Ex.A3) nor his legal heirs had questioned the sale Ex.A2. A perusal of Ex.A1 to Ex.A3 and Ex.A16 proves the title of the plaintiff to the suit property.

10. The defendant contends that the suit property was purchased by him through a registered sale deed dated 03.05.1974. The original sale deed is not filed. It is also relevant to point out that both the courts below have concurrently held that the defendant has not proved his title to the suit property. Both the courts below, in fact, have scrutinised the entire evidence adduced on the side of the defendant and had come to the conclusion that the defendant has not proved his title to the suit property. It is also held that the defendant has not perfected his title by adverse possession and prescription.

11. One Ganapathy Pandaram is the vendor of the defendant. The defendant's contention that Ganapathy Pandaram purchased 45 cents of lands through Ex.B2 and Ex.B3 and the remaining 9 cents is his ancestral property has not been proved by adducing acceptable evidence. The certified copy of sale deed (Ex.B1) shows the extent of land as 54 cents in survey No.262/1A and was purchased by one Alamelu Ammal. The appellant/defendant contends that Ex.B2 and Ex.B3 are the parent documents of Ex.B1 in respect of 45 cents in survey number 262. The defendant has not adduced any evidence to show as to how the vendors in Ex.B2 and Ex.B3 got their respective properties. No revenue records were adduced by the appellant/defendant that he and his predecessors in title were in possession and enjoyment of 54 cents in survey No.262/1A, as claimed by him. An U.D.R. patta was obtained by the defendant during the year 1985 for 26 cents. The patta number is 15. Only for this, patta, kists have been paid by the defendant, as evidenced by Ex.B5 to Ex.B8. However, the patta appears to have been transferred in the name of the plaintiff and this is evident from chitta Ex.A14. It is the case of the respondent/plaintiff that the defendant has encroached upon his lands and when he measured his property during the year 1991, he found the encroachment made by the appellant/defendant to an extent of 26 cents in his property. As already observed, the appellant/defendant seems to have obtained U.D.R. patta only in the year 1985 and therefore, it was transferred in the name of the plaintiff. Therefore, both the courts below are right in holding that the appellant/defendant has neither proved his title through Ex.B1 nor by adverse possession and prescription. In any event, the appellant/defendant claims title to the suit property only by means of Ex.B1 and therefore, he cannot claim adverse possession over the suit property. The alleged mortgage (Ex.B9) was made on 25.04.1985 by the defendant and since it is a simple mortgage, the possession of the property was not handed over to the mortgagee. Therefore, Ex.B9 would not help the appellant/defendant and hence, it cannot be held that the appellant/defendant is entitled to the suit property.

12. Now coming back to the case of the plaintiff, the

plaintiff had adduced acceptable evidence to show that he has title over the suit property. The plaintiff was also able to establish that the defendant had encroached upon his land to the extent of 26 cents. The plaintiff has clearly indicated the encroached portion made by the defendant in his property with specific boundary description. The documentary evidence Ex.A6 to Ex.A14 would also go to show that the respondent/plaintiff has been paying kists right from the date of his purchase on 09.03.1987 and Ex.A14 chitta shows that patta in respect of an area measuring 54 cents in the suit survey number 262/1 was transferred in the name of the plaintiff as patta No.96 in T.R.167/87-88 from patta number 15.

13. Mr.B.Harikrishnan, learned counsel appearing for the appellant would contend that the respondent/plaintiff had somehow managed to change the patta and that he has not also entered into the witness box to prove his contentions. He would further contend that though the plaintiff states in the plaint that the defendant had encroached upon his land 5 to 6 years prior to the filing of the suit, he did not file the suit immediately.

14. In the instant case, the plaintiff has examined his father as Pw1. Pw1 has deposed that he purchased the property in his son's name and therefore, he knows the entire facts of the case. In such circumstances, non examination of the plaintiff would not dis-entitle him to get the relief, as prayed for by him. The specific contention of the respondent/plaintiff is that he found out the encroachment made by the defendant, when he measured the suit property in the year 1991. Thereafter, he had issued notice to the appellant/defendant. The suit is also filed within the period of limitation. As already observed, both the courts below have concurrently held that the appellant/defendant has not prescribed title by adverse possession and prescription and the reason assigned by both the courts below are well founded.

15. The respondent/plaintiff has established his title over the suit property and possession follows title. Since the appellant/defendant had encroached upon the respondent's/plaintiff's property, the plaintiff is entitled for recovery of possession and for past mesne profits. The first appellate court had reasonably calculated the past mesne profits and I do not see any reason to interfere with the findings of the first appellate court. Moreover, the respondent/ plaintiff has not filed any cross appeal. In view of all these reasons stated by me, this appeal is liable to be dismissed.

16. In the result, the second appeal is dismissed. No costs.

s/d-
Assistant Registrar (CS VI)

True Copy

Sub-Assistant Registrar

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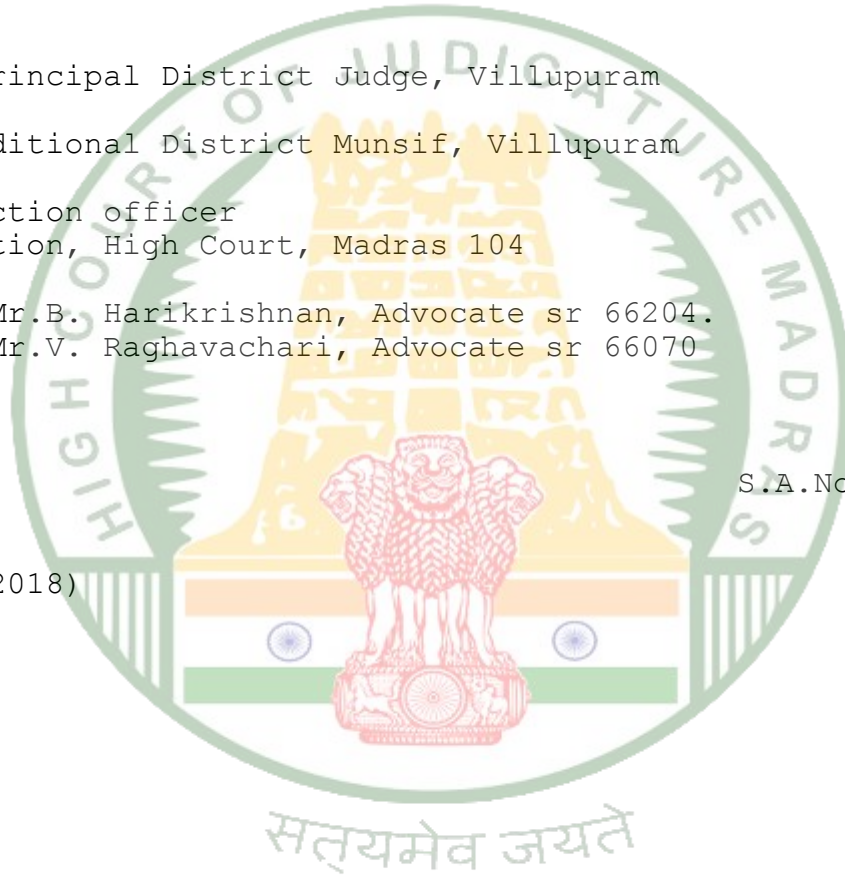
To

1. The Principal District Judge, Villupuram
2. The Additional District Munsif, Villupuram
3. The Section officer
VR Section, High Court, Madras 104

+1 CC to Mr.B. Harikrishnan, Advocate sr 66204.
+1 CC to Mr.V. Raghavachari, Advocate sr 66070

S.A.No.98 of 1998

SR(CO)
SP(31/10/2018)



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