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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON:22.10.2018

PRONOUNCED ON :29.10.2018

CORAM

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM
S.A.No.1429 of 1999

1. Saraswathy Ammal
2. Hariharan
3. Senthilvel
4. Senthilbabu
5. Senthil Rani
6. Senthilprabha

... Appellants/Respondents/
Defendants 12 to 17

Vs.

1. Kandasamy
2. Balashanmugam
3. Rajendran
4. Devarajan
5. Elango
6. Mani
7. Ponnusamy
8. Jayavalli
9. Kanagavalli
10. Sornavalli

... Respondent/Appellant/Plaintiff
... Respondent/Respondent 2/Defendant

... Respondents/Respondents 4 to 7/
Defendants 4 to 7

... Respondents/Respondents 8 to 11/
Defendants

PRAYER:Second Appeal filed under Section 100 of C.P.C, to set aside the judgment and decree passed in A.S.No.189 of 1992 dated 23.03.1999 on the file of the second Additional District Judge, Salem against the Judgment and decree in O.S.No.607 of 1986 dated 16.07.1992 on the file of the Principal District Munsif, Salem.

For Appellants: M/s.S.Selvathirumurugan

For Respondents: M/s.R.G.Narendhiran for R1
R2, R3 & R10 - set exparte
R4 to R6, R8 & R9 - given up
R7 - Dismissed.



JUDGMENT

This Second Appeal has been filed by the legal representatives of the third defendant against the judgment and decree passed by the II Additional District Judge, Salem in A.S.No.189 of 1992 dated 23.03.1999.

2.The first respondent herein has filed a suit in O.S.No.607 of 1986 on the file of the Principal District Munsif, Salem for the relief of permanent injunction restraining the defendants and their men from interfering with his peaceful possession and enjoyment of the suit property. The learned Principal District Munsif by the judgment and decree dated 16.07.1992, has dismissed the said suit with costs. Aggrieved by the same, the first respondent herein has filed an appeal in A.S.No.189 of 1992 on the file of the II Additional Judge, Salem. The learned II Additional District Judge, Salem by the judgment and decree dated 23.03.1999 has partly allowed the said appeal and modified the judgment and decree passed by the trial court and granted permanent injunction restraining the legal representatives of the third defendant and the defendants 4 to 7 from interfering with the plaintiffs' peaceful possession and enjoyment of the suit property. However, he dismissed the suit against the legal representatives of the first defendant and also against the second defendant. He directed the parties to bear their respective costs. Feeling aggrieved, the legal representatives of the third defendant have filed the present second appeal. For the sake of convenience, the parties are referred to as described before the trial court.

3. The averments made in the plaint are, in brief, as follows:

The plaintiff is the owner of the suit property and he purchased the same under a registered sale deed dated 09.09.1983 for a valid consideration of Rs.14,250/ and got possession of the same. Patta was also transferred in the name of the plaintiff and the plaintiff is paying the ground rent. Even in the re-settlement register, the plaintiff's name was entered into. The defendants who have no manner of right or interest in the suit property asked the plaintiff to sell the same for the price which was paid by him. The plaintiff refused for the same. Aggrieved by that, the defendants joined together unlawfully and tried to trespass into the suit property. Hence, the plaintiff has filed the above suit for the relief of permanent injunction.



4. The averments made in the written statement filed by the third defendant and adopted by the defendants 1 and 4 to 7 are, in brief, as follows:

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It is false to state that the plaintiff is the owner of the suit property by way of purchase through the sale deed dated 09.09.1983 and he was put into possession of the same. The vendor of the plaintiff namely Arjunan @ Ponnusamy had no right of any kind in the suit property and he was never in possession of the same. Originally, the suit property belonged to the mother of the first defendant and after her death, the first defendant and his brother Balasubramaniam have partitioned the properties and in the said partition, the suit property was allotted to the share of the first defendant. The plaintiff requested the first defendant to sell the suit property to him and he had refused to sell, the plaintiff has manoeuvred to get the document as if the suit property was sold to him by Arjunan @ Ponnusamy. The said Arjunan @ Ponnusamy had no right over the suit property. So, the said sale deed is invalid in law. The third defendant had purchased the suit property from the first defendant under a registered sale deed dated 17.01.1985 and from that date onwards, he is in possession and enjoyment of the same. The third defendant is paying the house tax. Patta and municipal assessment are all in the name of the third defendant. The description of the property given in the plaint is not correct. The allegation that the defendants joined together and tried to trespass into the suit property is false. Since the third defendant is the absolute owner of the suit property, the question of trespassing into the suit property does not arise. There is no cause of action for the suit and therefore, the defendants 1 and 3 to 7 prayed to dismiss the above suit.

5. The averments made in the written statement filed by the second defendant are, in brief, as follows:

The alleged sale deed executed by Arjunan @ Ponnusamy in favour of the plaintiff dated 09.09.1983 is not valid in law. The said Arjunan @ Ponnusamy is the only son of the first defendant. No partition took place between the first defendant and the said Arjunan @ Ponnusamy in respect of the suit property and other properties at any point of time. The first defendant and the second defendant's father viz., Balasubramaniam had divided the properties under the partition deed dated 31.03.1978. The 'A' schedule property mentioned in the said partition deed was allotted to the share of the first defendant and the 'B' schedule property was allotted to the share of the second defendant's father. In the said partition, the first defendant and the second defendant's father were allotted the land measuring 2,222 sq.ft each. The first



defendant had already sold 1,450 sq.ft in favour of the two persons viz., Shanmugam and Angamuthu under two separate sale deeds. The balance of land measuring about 772 sq.ft was remaining with the first defendant. Hence if any sale deed executed by the first defendant or his son Arjunan @ Ponnusamy for more than 772 sq.ft is not valid and not binding upon the second defendant. The property which was allotted to the second defendant's father under the aforesaid partition deed was in possession of the second defendant's father and after his death, the second defendant is in possession and enjoyment of the same. The boundaries and measurements given in the plaint schedule are not at all correct. The second defendant is unnecessary party to the suit and therefore, he prayed to dismiss the above suit.

6. Based on the aforesaid pleadings, the learned District Munsif has framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1. He also examined three more witnesses as P.W.2 to P.W.4. He has marked Exs.A1 to A6 as exhibits on his side. On the side of the defendants, the first defendant was examined as DW1. The fourth defendant was examined as DW2. One Govindaraj was examined as DW3. Exs.B1 to B41 were marked on the side of the defendants.

7. The learned District Munsif, after considering the materials placed before him found that since the first defendant had acquired the property from her mother, it is a self-acquired property to him and as such, his son Arjunan @ Ponnusamy had no right to execute the sale deed dated 09.09.1983 in favour of the plaintiff. He also found that the plaintiff is not in possession of the suit property and hence, he dismissed the suit with costs. Aggrieved by the same, the plaintiff has filed an appeal in A.S.No.189 of 1992 on the file of the II Additional District Judge, Salem. The learned II Additional District Judge, Salem, found that as per the partition deed dated 31.03.1978, the suit property was allotted to the share of the second defendant's father in which the plaintiff's vendor viz., Arjunan @ Ponnusamy had not right and hence through Ex.A1 sale deed, the plaintiff did not get any right over the suit property. However, he found that the plaintiff is in possession and enjoyment of the suit property. He further found that the defendants 3 to 7 have no right to interfere with the plaintiff's possession and enjoyment of the suit property. Accordingly, he partly allowed the appeal and modified the judgment and decree as stated above. Aggrieved by the same, the legal representatives of the third defendant have preferred the present second appeal.

8. This court at the time of admitting the second appeal has formulated the following substantial questions of law:

"1. Whether the lower appellate court is right



in holding that the first respondent is in possession of suit property on the basis of patta which was cancelled by the Revenue Divisional Officer as per Ex.B27.

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2. Whether the lower appellate court is right in allowing the suit after holding that the first respondent/plaintiff prima facie failed to prove his right over the suit property?

3. Should not the finding of lower appellate court that the plaintiff is in possession of the suit property be vitiated which is only on the basis of averments in the plaint, which should have been proved by positive oral and documentary evidence? "

9. Heard Mr.S.Selvathirumurugan, learned counsel for the appellants and Mr.R.G.Narendhiran, learned counsel for the first respondent.

10.Substantial Questions of Law 1 to 3:-

The learned counsel for the appellants has submitted that the First Appellate Court erred in reversing the well considered judgment of the Trial Court. He further submitted that the First Appellate Court mainly relying upon the patta which was issued in favour of the plaintiff came to the conclusion that the plaintiff is in possession of the suit property. He further submitted that the said patta itself has been cancelled by the Revenue Divisional Officer as per Ex.B.2 and as such, the First Appellate Court should not have relied upon the patta which was issued in favour of the plaintiff. He further submitted that the First Appellate Court failed to consider that as per Ex.B.14 and Ex.B.15, the suit property was assessed for property tax along with buildings and hence, the contention of the plaintiff that the suit property is vacant land has been rightly rejected by the Trial Court. He further submitted that the First Appellate Court after coming to the conclusion that the plaintiff has not purchased the property from the right person, it should not have granted decree for injunction and therefore he prayed to allow the second appeal and set aside the Judgment and decree passed by the First Appellate Court and restore the judgment and decree passed by the Trial Court.



11. Per contra, the learned counsel for the first respondent/plaintiff has submitted that the D.W.1 has categorically admitted in his evidence that the plaintiff is in possession of the suit property and taking into consideration of the said admission and also the evidence of P.W.1 to P.W.4, the First Appellate Court came to the conclusion that the plaintiff is in possession of the suit property and accordingly, it has granted decree. He further submitted that the first appellate court came to the conclusion that the property purchased by the plaintiff belongs to the second defendant and only the second defendant can question the same. He further submitted that the appellants herein who are being legal representatives of the third defendant have no right to question the aforesaid sale and therefore, he prayed to dismiss the second appeal.

12. It is an admitted fact that the suit property and other properties originally belonged to one Unnamalai Ammal by virtue of Ex.B.3- sale deed dated 17.05.1942. The first defendant and his brother Balasubramaniam were the sons of the said Unnamalai Ammal. It is seen from Ex.A.5 dated 31.03.1978 that the first defendant and his brother Balasubramaniam have partitioned 4444 sq.ft of land. As per the said partition deed, 'A' schedule property measuring 2222 sq.ft of land was allotted to the first defendant and 'B' schedule property measuring about 2222 sq.ft of land was allotted to his brother Balasubramaniam. From the description mentioned in the said document, it is clear that 'A' schedule property which was allotted to the first defendant situated on the eastern side and 'B' schedule property which was allotted to his brother Balasubramaniam situated on the western side. The First Appellate Court referring to the plan attached to Ex.A.1 Sale Deed has come to the conclusion that the portion of the property which was allotted to the said Balasubramaniam under Ex.A.5 sold to the plaintiff through Ex.A.1. Ex.A.1 was executed by the first defendant's son viz., Arjunan @ Ponnusami and his son Saha Devan.

13. The Trial Court has held that since the suit property and other properties originally belonged to Unnamalai Ammal and after her death, the said property devolved on her sons viz., Dharma Lingam Pillai (first defendant) and Balasubramaniam and hence the said properties are their self-acquired properties. It is further held that during the life time of the first defendant, his son viz., Arjunan @ Ponnusami and his son Saha Devan cannot claim any right over the said properties and therefore, the purchase made by the plaintiff from the said Arjunan @ Ponnusami and his son Saha Devan will not confer any title to the plaintiff.

14. The First Appellate Court held that the plaintiff has not purchased the property from the proper persons.



According to the First Appellate Court, the property which was purchased by the plaintiff belongs to the first defendant's brother Bala Subramaniam and since the said Bala Subramaniam died, his only son viz., the second defendant alone is entitled to the said property, but the plaintiff had purchased the property under Ex.A1 from the wrong person and hence, the said document will not confer any title to him. However, it has held that the plaintiff has proved his possession of the suit property and hence he is entitled to protect his possession from the appellants herein.

15. It is to be pointed out that the boundaries given in Ex.A.1 sale deed not tallied with the boundaries given in the plan attached to Ex.A.1. In Ex.A1, it is stated that the property sold under the said document situated on the south of Subramaniam Pillai's land, Kichipalayam road and Kalarampatti road, whereas in the plan attached to the said document, the said Kalarampatti road runs on one side and Kichipalayam road runs on another side and that being so, both the roads cannot be shown as boundary on one side in Ex.A1.

16. Further, in the plan attached to Ex.A1, the directions also not mentioned. Further, as per Ex.A.5 Partition Deed executed between the first defendant and his brother K.Balasubramaniam Pillai dated 31.03.1978, the entire properties situated on the south of east-west Kichipalayam-Erumapalayam Road, 'A' schedule property situated on the south of the said road, east of Kalarampatti road and west of Subramaniam's land but in Ex.A.1, it is mentioned that the property sold under the said document is situated on the south of Subramaniam Pillai's land, Kichipalayam Road and Kalarampatti road. The aforesaid description not tallied with the description given in Ex.A.5. Therefore, the finding of the First Appellate Court that the property which was allotted to the second defendant's father namely K.Balasubramaniam under Ex.A.5 alone was sold under Ex.A.1 is not correct. As already pointed out that the boundaries given in the said document and the plan attached to the said document are not all tallied with the description of the property given in Ex.A.5. It appears that the plaintiff had purchased the property under Ex.A.1 without proper description. So, the property which is mentioned in Ex.A.1 cannot be identified.

17. The learned First Appellate Court Judge in his Judgment has observed in Paragraph No.15 that the plaintiff has stated in his plaint as well in his evidence that he is in possession and enjoyment of the suit property by putting up a tiled house. The said finding is also not correct. Admittedly, in Ex.A.1 only vacant site is mentioned. Even assuming that the plaintiff had purchased the suit property under Ex.A.1, as



already stated that he has purchased only vacant site. After such purchase, if he had put up any tiled house, to prove the same, he should have produced documentary evidence. He has not produced any document to show that he had put up any tiled house in the suit property. It is also to be pointed out that in the description of property given in the plaint schedule, only vacant site is mentioned. In the said circumstances, the finding of the First Appellate Court that the plaintiff is in possession and enjoyment of the suit property by putting up a tiled house is totally against the case of the plaintiff.

18. The First Appellate Court Judge also held that D.W.1 has admitted in his cross examination that the plaintiff is in possession and enjoyment of the suit property. The said finding is also not correct. At this juncture, it would be relevant to refer the decision in Boramma vs Krishna Gowda And Others (2000) 3 MLJ 199 SC wherein the Hon'ble Supreme Court in Paragraph No.10 has held as follows:

"10.In our view it will not be a sound rule of appreciation of evidence to pick up an answer from the cross-examination of a witness and draw inference taking it in isolation. The Court must see as to how consistent the testimony of the witness is and as to how that answer fits in with the rest of the evidence and probabilities of the case. From the sentence stated in the cross-examination where the question is also not recorded, we are unable to infer inability of the Respondents in performing their part of the contract after filing of the suit nor can we say that the findings recorded by the trial court, first appellate court and the High Court that the Plaintiffs have been ready and willing to perform their part of the contract have been erroneously arrived at."

From the aforesaid decision, it is clear that it will not be a sound rule of appreciation of evidence to pick up an answer from the cross-examination of a witness and draw inference taking it in isolation. The Court must see as to how consistent the testimony of the witness is and as to how that answer fits in with the rest of the evidence and probabilities of the case.

19. In this case, the first defendant while examining himself as D.W.1 has categorically stated in his chief examination that his son has no right to sell the suit property. He further stated that his son was not in possession of the suit property at any point of time. In his cross-examination, he has stated that the suit property is lying vacant and no one is in possession of the suit property. However, in one place, he has



stated that his son has enjoyed the suit property and after his son, the plaintiff is enjoying the suit property. Relying on the said answer, the first Appellate Court has held that D.W.1 himself admitted in his evidence that the plaintiff is in possession of the suit property. In view of the aforesaid decision of the Hon'ble Supreme Court, the Court should not pick up an answer from the cross-examination of the witness and draw inference taking it in isolation. Further, in this case, the question which was asked during cross-examination not recorded. Only the answer has been recorded. A reading of the entire evidence would show that DW1 has not admitted that his son was in possession of the suit property after his son the plaintiff is in possession of the suit property.

20. The trial court has held that the plaintiff had purchased the property from the persons who had no title. The first appellate court also held that the plaintiff had purchased the property from the persons who had no title. As per Ex. A5, the first defendant alone got title over the suit property. The first defendant had sold 780 sq.ft under Ex.B19 sale deed dated 18.01.1982 in favour of one Varadharajan and his brother. The said Varadharajan and his brother had sold the said property under Ex.B37 dated 19.04.1985 to the fourth defendant. Further the first defendant sold 880 sq.ft under Ex.B18 dated 17.01.1985 to the third defendant. In all the aforesaid documents, it is stated that only vacant sites have been sold. So, the principle that the possession follows title will apply. Therefore, it has to be presumed that the defendants 3 and 4 have been in possession of the properties. Since the third defendant died, his legal representatives viz., appellants herein are deemed to be in possession. Therefore, the findings of the first appellate court are not sustainable and they are liable to set aside. Accordingly the substantial questions of law are answered.

21. In the result, the second appeal is allowed. No costs. The judgment and decree passed by the first appellate court are set aside. The judgment and decree passed by the trial court are restored.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar



To

1. The second Additional District Judge,
Salem.

2. The Principal District Munsif,
Salem.

Copy to

The Section Officer,
V.R. Section,
Madras High Court,
Chennai.

+1cc to Mr.R.G.Narendhiran, Advocate Sr.73816

+1cc to Mr.S.Selvathirumurugan, Advocate Sr.70913

S.A.No.1429 of 1999

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srg 28/12/2018