

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.07.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

S.A.No.372 of 2018
and C.M.P.No.10403 of 2018

Rajammal

.. Appellant

Vs.

1.Balammal
2.Rudrappan
3.Elangovan
4.S.Chandra

.. Respondents

PRAYER:

Second Appeal is filed under Section 100 of C.P.C against the judgment and decree dated 17.11.2017 made in A.S.No.29 of 2010 on the file of the Sub Court, Tambaram, confirming the judgment and decree dated 30.03.2010 made in O.S.No.301 of 2005 on the file of the District Munsif Court, Tambaram.

For Appellant : Mr.V.Chandrasekaran

For Respondent : Mr.S.C.Jayaraman
Senior Counsel
for Mr.D.Jagadeesan

J U D G M E N T

Second Appeal is filed against the judgment and decree dated 17.11.2017 made in A.S.No.29 of 2010 on the file of the Sub Court, Tambaram, confirming the judgment and decree dated 30.03.2010 made in O.S.No.301 of 2005 on the file of the District Munsif Court, Tambaram.

2.The appellant is the plaintiff and respondents are the defendants in O.S.No.301 of 2005 on the file of the District Munsif Court, Tambaram. The plaintiff who lost in both the Courts below has come out with the present Second Appeal. Appellant filed the said suit for permanent injunction restraining the respondents from alienating the suit property and interfering with the peaceful possession of the appellant. According to the appellant, she is the absolute owner of the suit property. The suit property belonged to her grandmother,

Bakiyammal and after her death, the appellant's mother Mangammal inherited the same. After the death of her mother, the appellant inherited the suit property and she became absolute owner. She is in possession and enjoyment of the suit property. The 1st respondent is owner of adjoining land. The respondents 2 to 4 claim to have purchased portion of the suit property from the 1st respondent. They claim that appellant sold portion of the suit property to the 1st respondent. On 28.11.2005, one Raja inquired with the appellant for sale of the suit property and referred 1st respondent. The appellant is far away from the suit property. The respondents, taking advantage of the same, are trying to sell the suit property. The appellant has no intention to sell the property. She is in possession and enjoyment of the property. With the above averments, the appellant has filed the suit.

3.The 2nd respondent filed written statement and the same was adopted by the respondents 3 and 4. The respondents 2 to 4 denied all the averments made in the plaint. According to the respondents 2 to 4, appellant sold the suit property to the 1st respondent by the sale deed dated 28.03.1975, bearing document No.1343 of 1975. After purchase, the 1st respondent formed an unapproved layout. The 2nd respondent purchased Plot No.27 measuring an extent of 3480 sq.ft in Survey No.289/1A for valuable consideration of Rs.2,25,000; 3rd respondent purchased Plot No.28, measuring an extent of 3720 sq.ft in Survey No.289/1A for valuable consideration and 4th respondent purchased Plot No.20 in Survey No.289/1A. The respondents 2 to 4 filed O.S.Nos.32 to 34 of 2007 against the appellant and her three daughters for permanent injunction. The present suit is filed only to grab the property in the absence of real owners.

4.In the suit, an Advocate Commissioner was appointed. After inspection, he filed report and sketch, which were marked as Exs.C1 and C2. The appellant, not being satisfied with the report, filed another application for appointment of an Advocate Commissioner. The Advocate Commissioner was appointed in the said application and he inspected the suit property and filed report which were marked as Exs.C3 and C4. The learned Trial Judge considered both the reports. In the first Advocate Commissioner's report, Plot Nos.20, 27 and 28 were mentioned. In the second Advocate Commissioner's report, without any division as Plot, he has given rough sketch.

5.The 1st respondent remained exparte. All the four suits filed by the appellant and respondents 2 to 4 were tried together. Based on the above pleadings, the learned Trial Judge framed necessary issues and re-cast the issues on 30.03.2010 and evidence was recorded in O.S.No.301 of 2005. The appellant examined himself as P.W.1 and marked 7 documents as Exs.A1 to A7. Two witnesses were examined on behalf of the respondents and

18 documents were marked as Exs.B1 to B18. The Advocate Commissioners' two reports and sketches were marked as Exs.C1 to C4.

6.The learned Trial Judge considering the pleadings, oral and documentary evidence, dismissed the suit O.S.No.301 of 2005, filed by the appellant and decreed other three suits O.S.Nos.32 to 34 of 2007 filed by the respondents 2 to 4. The learned Trial Judge rejected both the reports of the Advocate Commissioners, stating that both the parties have failed to examine the Advocate Commissioners to prove the genuineness of their reports. Against the said judgment and decree dated 30.03.2010, the appellant filed A.S.No.29 of 2010.

7.In the appeal, the appellant filed I.A.No.136 of 2014 to file additional documents, I.A.No.81 of 2016 to implead the respondents 5 to 7 as proposed respondents 5 to 7 therein and I.A.No.82 of 2016 to reopen the appeal. Third parties filed I.A.No.105 of 2016 under Order I Rule 10 of C.P.C to add 14 persons as parties in the appeal and one Boopathi filed I.A.No.71 of 2017 under Order XLI Rule 27(b) of C.P.C to receive the documents which were filed along with the petition and permit him to mark those documents.

8.The learned I Appellate Judge framed necessary points for consideration to decide the first appeal. The learned I Appellate Judge considering the affidavits and counter affidavits filed in support of the above applications, dismissed all the I.A.Nos.136/2014, 81/2016, 82/2016, 105/2016 and 71/2017. Considering the materials on record, judgment of the Trial Court and arguments of the counsel for the parties, dismissed the appeal, holding that the appellant has not proved her possession of the suit property.

9.Against the said judgment and decree dated 17.11.2017 made in A.S.No.29 of 2010, the appellant has come out with the present Second Appeal.

10.The learned counsel for the appellant contended that the Courts below failed to consider the oral and documentary evidence properly and failed to appreciate the facts of the case. The Courts below erred in not accepting the Commissioner's report. The appellant has produced document to show her title and possession. These documents are not disputed by the respondents. The respondents are relying on Ex.B1, sale deed dated 28.03.1975, alleged to have been executed by the appellant in favour of one Balammal. The appellant has denied the execution of said sale deed and the burden is on the respondents to prove the genuineness of the said sale deed. Mere possession of the sale deed in favour of the respondents will not prove

their possession. The only point for consideration in all the suits including the suit in the appeal is, whether the respondents were in possession of the suit property at the time of filing of the suit. The appellant has produced document to show that she is in possession and enjoyment of the suit property. The respondents have not filed original sale deeds, Exs.B1 and B2. They have filed only certified copies of the documents. They have not given any reason for not producing the original sale deeds. Exs.B1 and B2 are inadmissible in evidence. The respondents have failed to prove the handwriting and signature as contemplated under Section 67 of the Indian Evidence Act. The Courts below failed to see that the respondents 2 to 4 are claiming to be in possession only in respect of the certain portion of the suit property.

11.The learned Senior Counsel appearing for the caveators submitted that the appellant sold the property in the year 1975 itself and handed over the possession of the property to Balammal, the 1st respondent herein. The 1st respondent formed an unapproved layout and respondents 2 to 4 have purchased plots with specific boundaries. The respondents have produced documents to show that they are the owners of respective plots and they are in possession and enjoyment of their plots. The appellant has failed to prove both her ownership as well as her possession.

12.By common judgment, the suits O.S.No.301 of 2005 filed by the appellant and O.S.Nos.32 to 34 of 2007 filed the respondents 2 to 4 were decreed, granting permanent injunction against the appellant. The suit filed by the appellant for permanent injunction was dismissed by the same common judgment. The appellant has filed only one appeal, challenging the dismissal of the suit filed by her. The judgment and decree passed in the suits filed by the respondents 2 to 4 have become final and they operate as res-judicata. The first appeal as well as Second Appeal filed by appellant is not maintainable.

13.Heard the learned counsel for the appellant as well as the learned Senior Counsel for the respondents and perused the materials available on record.

14.The appellant has filed suit for permanent injunction against the respondent. She traced her title from her grandmother and has stated that after death of grandmother and her mother, she became absolute owner of the suit property and is in possession and enjoyment of the suit property. On the other hand, the respondents have claimed that the appellant

purchased the suit property by the deed of sale dated 28.03.1975, Ex.B1 and already sold the suit property to the first respondent in the year 1975 itself. The first respondent formed unapproved lay out and from first respondent, the respondents 2 to 4 have purchased respective plots mentioned by them and they are in possession and enjoyment of the same.

15.From the materials available on record, it is seen that the appellant has produced kist receipts standing in the name of her grandmother. She has produced Ex.A7, kist receipt for the year 2001-2009. These kist receipts produced by the appellant are of the years 2005, 2008 and 2009, paid for the years 2001-2009. She has paid just before filing of the suit and pending suit and Ex.A2 dated 17.04.1974, kist receipt is in the name of her mother Mangammal paid in the year 1964-1973. The appellant has not produced any kist receipt paid in between the periods, 1974-2000. The learned Trial Judge has considered Ex.A2 and found that there is no signature of the authority found in the said receipt and the same is in pencil. The appellant has not taken any steps to prove the genuineness of Ex.A2. The appellant is claiming title through her grandmother and she has not produced any document to show how her mother got the property. The appellant produced Ex.A6, enjoyment certificate issued by the Village Administrative Officer to her, which was counter signed by the Tahsildar. The said certificate is dated 03.11.2009, after filing of the suit. All the records stand in the name of her grandmother. She has not taken any steps to get her name mutated in the Revenue records. The Courts below have considered these documents as well as the documents produced by the respondents in proper perspective and held that appellant has not proved her possession.

15(a).As far as the Advocate Commissioner's reports are concerned, there are two reports. From the records, it is seen that 2nd Advocate Commissioner was appointed and the report of the 1st Advocate Commissioner was not scrapped. Both the reports and sketches were marked as Exs.C1 to C4. Both the appellant and respondents have not taken any steps to examine Advocate Commissioners to prove their report. The report of the Advocate Commissioners is only to assist the Court in coming to a correct conclusion and Court can either accept or reject the Commissioner's report in the facts and circumstances of the case. The learned Trial Judge rejected both the reports filed by the Advocate Commissioner by giving valid reasons. The Second Appeal is liable to be dismissed as there is no Substantial Questions of Law arose for consideration by this Court.

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

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

gsa

To

- 1.The Subordinate Judge, Tambaram.
- 2.The District Munsif, Tambaram.

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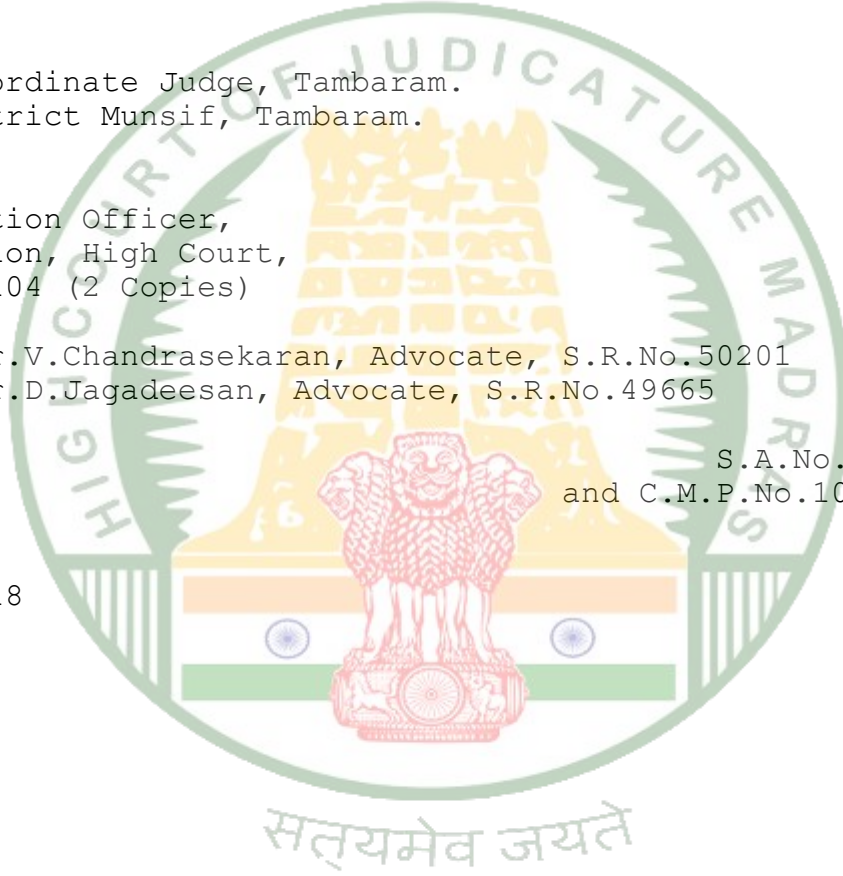
The Section Officer,
VR Section, High Court,
Madras-104 (2 Copies)

+1cc to Mr.V.Chandrasekaran, Advocate, S.R.No.50201

+1cc to Mr.D.Jagadeesan, Advocate, S.R.No.49665

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RJI (CO)
CS/07/09/18



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