

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.07.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

S.A.No.564 of 2017
and C.M.P.No.13931 of 2017

1.Veerasamy
2.Arulmaran
3.Raja

.. Appellants/Defendants

Vs.

Rukmani

.. Respondent/Plaintiff

PRAYER: Second Appeal is filed under Section 100 of C.P.C against the judgment and decree dated 25.02.2016 made in A.S.No.21 of 2013 on the file of the Principal Sub Court, Vridhachalam, confirming the judgment and decree dated 15.10.2012 made in O.S.No.487 of 2006 on the file of the Principal District Munsif Court, Vridhachalam.

For Appellants : Mr.V.Raghavachari
for M/s.Avinash Wadhvani
R.Sripriya

For Respondent : Mr.R.Arundattan
for Mr.C.Munusamy

J U D G M E N T

Second Appeal is filed against the judgment and decree dated 25.02.2016 made in A.S.No.21 of 2013 on the file of the Principal Sub Court, Vridhachalam, confirming the judgment and decree dated 15.10.2012 made in O.S.No.487 of 2006 on the file of the Principal District Munsif Court, Vridhachalam.

2.The appellants are defendants and respondent is the plaintiff in O.S.No.487 of 2006 on the file of the Principal District Munsif Court, Vridhachalam. The respondent filed the said suit for declaration of title, recovery of possession and for mesne profit. The suit was decreed, granting relief of declaration and possession and held that mesne profit is to be decided in the proceedings under Order XX Rule 12 of C.P.C. The appeal A.S.No.21 of 2013 filed by the appellants was dismissed. Against the concurrent findings of the Courts below, the appellants have come out with the present Second Appeal.

The case of the respondent:

3.The suit property and other properties originally belonged to Chellaperumal, father of the respondent and first appellant. The said Chellaperumal, by the deed of settlement dated 19.01.1983, settled the property on his wife, Visalakshi Ammal, mother of the respondent and first appellant. The said Visalakshi Ammal, by the deed of settlement dated 14.03.1996, settled the suit property on the respondent. Apart from the respondent and first appellant, their parents had one more son and two daughters. Their mother Visalakshi Ammal settled separate properties on each of her children, including first appellant for their exclusive possession and enjoyment. The respondent accepted the settlement and she is in possession and enjoyment of the suit property. The settlement came into effect on the same date. The respondent is residing in K.Nallur village, along with her husband. The respondent gave money to her elder brother, the first appellant to pay kist to the suit property on her behalf. The first appellant fraudulently paid the kist in his name. The first appellant on misrepresentation got patta in his name. On coming to know the same, the respondent has taken steps for cancellation of patta and said proceedings are pending. The respondent came to know about the same in Tamil month of "ij", 2004. When the respondent questioned the first appellant, he along with his two sons who are the appellants 2 and 3 trespassed into the suit property. The respondent approached the first appellant directly and also through panchayat for vacating the suit property and hand over the same to the respondent. The first appellant refused to vacate the suit property. Hence the suit was filed.

4.The first appellant filed written statement and the same was adopted by appellants 2 and 3. The appellants denied all the averments made by the respondent in the plaint. According to the appellants, the respondent has to prove all the averments made in the plaint. The alleged settlement deed in favour of the respondent is not valid. The respondent did not comply with the conditions of the settlement deed and Visalakshi Ammal, by the deed of cancellation dated 06.02.2004, canceled the settlement deed dated 14.03.1996 executed in favour of the respondent and on the same day, by the deed of sale, sold the property to the first appellant for proper consideration. The respondent was never in possession and enjoyment of the suit property. She did not take possession. The appellants were in possession and enjoyment of the property as owner of the suit property to the knowledge of the respondent for more than statutory period by cultivating the suit property and have become owner by adverse possession. Only the first appellant was cultivating the land and paying the kist. In view of possession by the appellants, the patta was granted to the first appellant and hence they prayed for dismissal of the suit.

5. Based on the pleadings, necessary issues were framed by the learned Trial Judge. The respondent examined herself as P.W.1 and marked 4 documents as Exs.A1 to A4. On behalf of the appellants, first appellant was examined as D.W.1 and one Chandrasekaran was examined as D.W.2 and 4 documents were marked as Exs.B1 to B4. The learned Trial Judge considering the pleadings, oral and documentary evidence and judgment relied on by the parties, decreed the suit, granting relief of declaration of title and possession and held that mesne profit is to be decided in a separate proceedings under Order XX Rule 12 of C.P.C.

6. Against the said judgment and decree dated 15.10.2012 made in O.S.No.487 of 2006, the appellants filed A.S.No.21 of 2013. The learned I Appellate Judge framed necessary points for consideration. Considering the materials on record and judgment of the Trial Court, the learned I Appellate Judge, dismissed the appeal, confirming the judgment and decree of the Trial Court.

7. Against the concurrent findings of the Courts below, the appellants have preferred the present Second Appeal.

8. The learned counsel for the appellants contended that Courts below failed to see that the respondent did not prove Exs.A1 and A2 by examining attesting witnesses and declaration of title and possession can be granted only when the respondent proves her title. The learned Trial Judge erred in holding that possession follows title when the suit itself is for declaration and possession. The Courts below failed to consider that it is for the respondent to prove that the person who is in possession is not the real owner and Courts below erroneously caused burden on the appellants contrary to Section 110 of the Indian Evidence Act. The Courts below failed to see that respondent was not in possession for more than 12 years and as per Section 5 of the Specific Relief Act (hereinafter, referred to as 'the Act'), she is not entitled to relief of possession. The Courts below failed to see that respondent failed to prove that settlement deed dated 19.01.1983, marked as Ex.A1 and settlement deed dated 14.03.1996, marked as Ex.A2 were acted upon and she took possession on the date of settlement deed and continued to be in possession.

8(a). Both the Courts below did not consider the fact that boundaries mentioned in Ex.A4 will show owner of neighbouring land and will prove who is in possession of the said land. The first appellant did not admit the title and possession of the respondent. The respondent is residing in K.Nallur village and she never came to village where suit property is situated. The Courts below failed to frame necessary issues with regard to title of Visalakshi Ammal, validity of Ex.A2 and with regard to the point that whether the respondent was in possession of the suit property. There is no discussion and finding with

regard to the above issues. The Courts below gave undue influence to the evidence of the respondent as P.W.1 and did not decide the case on pleadings and evidence. The Courts below rendered finding on presumption and assumption. The learned counsel for the appellants admitted the execution of settlement deed by Visalakshi Ammal, but contended that the same was not acted upon. The learned counsel for the appellants further contended that respondent ought to have specifically challenged the sale deed as per the concept of lis- pendent.

8(b).In support of his contention, the learned counsel for the appellant relied on the following judgments:

(i).2010 1 LW 193 (T.G.Ashok Kumar Vs. Govindammal and another):

"32.The learned counsel for D1 cited the decision of the Hon'ble Apex Court reported in 2009 (6) SCC 194 [Sneh Gupta Vs. Devi Sarup and others], an excerpt from it would run thus:

53.There cannot be any doubt that even if an order is void or voidable, the same must be set aside, as has been held by this Court in M.Meenakshi V. Metadin Agarwal (2006) 7 SCC 470 = 2007-2-L.W.481 and Sultan Sadik V. Sanjay Raj subba (2004) 2 SCC 377.

58.If the compromise has been accepted in absence of all the parties, the same would be void. But if the same having resulted in grant of a decree, the decree based on compromise was required to be set aside. The compromise may be void or voidable but it is required to be set aside by filing a suit within the period of limitation (See Mohd. Noorul Hoda V. Bibi Raifunnisa)....."

(ii).2001 2 LW 276 (R.Jamuna Bai Vs. M.A.Anusuya and others):

"13.The next question is assuming without admitting it was a settlement deed, whether there was any acceptance on that date. The legal provisions regarding the gift is very clear. Section 122 of the Transfer of Property Act reads as follows:

"Gift" defined--"Gift" is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee."

Acceptance when to be made.--Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void."

Unless there is acceptance, there can be no gift. In the judgment relied on by the learned counsel for the appellant in 1996 II CTC 150 (cited supra), there is a reference to the decision reported in Venkatasubbamna v. Narayanaswami, (AIR 1954 Mad. 250).

"If there is acceptance of the gift after execution of the deed, even though the registration was postponed to a later date, the gift would become irrevocable. The fact that the deed was executed and registered would not make it irrevocable, if in fact there was no acceptance by the donee, either before registration but after execution or even after registration. What the law requires is acceptance of the gift after its execution though the deed may not be registered. Anterior negotiations or talks about the transfer of property by way of gift would not amount to acceptance of the transfer of the property by gift. Acceptance may be implied but the facts relied on to draw an inference of acceptance must be acts of positive conduct on the part of the donee or persons acting on his behalf and not merely passive acquiescence, such as standing by when the deed was executed or was registered."

This shows that mere standing by when the deed was executed or registered will not be sufficient to prove acceptance. It is true as pointed out by the learned counsel for the appellant that it was extremely probable that Arunachalam was standing beside his father Varadaiya Chetty when Ex-A1 was registered. But that alone will not amount to acceptance. The learned counsel for appellant submitted that the title deeds were with the appellant, so this should prove delivery and acceptance. Even regarding the title deeds in the plaint, the appellant had averred that Varadaiya Chetty had insisted and prevailed upon the plaintiff to give the documents of title relating to the suit property. From this, the learned counsel wanted to draw the conclusion that custody of the title deed would show acceptance. However, in the evidence she has stated that,

இந்த பத்திரங்கள் கதலிலக்கம் 49, கோவிந்தப்பன் நாயக்கன் வீட்டில் எனது தந்தை வைத்திருந்தார். எனது மகன் இறந்த பிறகு எதிர்வாதியிடம் கேட்டேன், அவற்றை அவர் கொடுக்கவில்லை.

Therefore, even with regard to custody of title deeds, the evidence and the pleadings are very

is Arunachalam who ought to have accepted the settlement deed for the settlement deed to come into effect. On the date of the settlement deed, Ajit Kumar's right was still depending upon Arunachalam not having any natural children of his own. If a son or daughter had been born to Arunachalam, then the clause in the settlement in favour of the Ajit Kumar would have no effect. Therefore, what is crucial in this case is acceptance by Arunachalam for the gift deed to come into effect. There is not an iota of evidence to show that Arunachalam had accepted the gift. In the absence of pleadings and other evidence I do not think this Court sitting in second appeal can draw inference merely from the fact that Arunachalam must have stood by at the time of the registration of Ex-A1 and arrive at the conclusion that the deed was accepted. In fact the Trial Court holds as follows;

"No document has been produced on the side of the plaintiff to prove the acceptance of the gift during the life time of the deceased Varadaiya Chetty".

9. Per contra, the learned counsel for the respondent contended that Visalakshi Ammal, mother of the respondent and first appellant became owner of the suit property and other properties as per Settlement deed, Ex.A1 dated 19.01.1983 executed by Chellaperumal, father of the respondent and first appellant and husband of Visalakshi Ammal. The said Visalakshi Ammal was in possession and was dealing with the properties. She has settled different properties on her children, including the first appellant, as per Ex.A4. Similarly, she settled the suit property in favour of the respondent by Ex.A2 and possession was handed over to the respondent on the same day. In view of Exs.A4, B1 and B2, it is not open to the appellants to dispute the title of Visalakshi Ammal and her right to settle the suit property on the respondent as per Ex.A2. The first appellant claims title to the suit property on the Cancellation deed and Sale deed which were marked as Exs.B1 and B2. Once the appellants admitted Ex.B1, the Cancellation deed, they cannot dispute Exs.A1 and A2. As per Ex.A2, possession was handed over to the respondent and she was in possession of the suit property. Believing the first appellant who was her elder brother, she paid kist through him. The first appellant fraudulently got the patta and paid kist in his name. These documents are not binding on the respondent. Visalakshi Ammal has no right to unilaterally cancel the settlement deed and the reason given in the cancellation deed is not a valid one. In view of Ex.B1 is not valid, the first appellant has not derived any title by sale deed marked as Ex.B2.

9(b).The respondent, by acceptable evidence has proved her title and possession till the appellants illegally trespassed in to the suit property and dispossessed her. The first appellant has not stated from which date he is in possession of the suit property as owner to the knowledge of Visalakshi Ammal as well as respondent and has not proved that he is in possession and enjoyment for more than statutory period and prayed for dismissal of the Second Appeal.

10.The Second Appeal was not admitted by this Court and no substantial question of law was framed. Only notice was ordered. The respondent entered appearance through counsel. Both the learned counsel for the appellants and respondent consented for taking up the Second Appeal for hearing and made submissions on merits. Heard the learned counsel for appellants as well as the respondent and perused the materials available on record.

11.From the materials on record, following Substantial Questions of Law arises:

(a).Whether the respondent has proved that the settlement deed, Ex.A2 was acted upon and she was in possession and enjoyment of the suit property from that date?

(b).Whether the first appellant perfected his title by adverse possession?

(c).Whether Visalakshi Ammal has power to cancel the settlement deed, Ex.A2 and execute sale deed marked as Ex.B2 in favour of the first appellant and whether Exs.B1 and B2 are sham and nominal?

(d).Whether the respondent has to establish their title under Section 5 of the Act or recovery of possession under Section 6 of the Act?

Substantial Questions of Law:

12.The respondent has claimed declaration based on settlement deed executed in her favour by her mother Visalakshi Ammal. The respondent has marked Ex.A1, settlement deed dated 19.01.1983, executed by her father Chellaperumal in favour of Visalakshi Ammal. By this settlement deed, the father has settled not only the suit properties, but other properties on his wife, Visalakshi Ammal. The respondent has contended that Visalakshi Ammal settled separate specific properties on her children. By Ex.A2, suit property was settled on the respondent. By Ex.A4, Visalakshi Ammal settled adjoining property to the suit property on the first appellant. The first appellant is not disputing the settlement of Visalakshi Ammal on him by Ex.A4. He is not disputing the averments of the respondent that Visalakshi Ammal settled various properties on her children.

12(a).The first appellant is challenging the settlement deed, Ex.A2 on the ground that settlement deed was not acted

upon, as respondent did not take possession of the suit property on the date of settlement. In the cancellation deed marked as Ex.B1, Visalakshi Ammal has stated that the respondent is not looking after her and therefore, in order to discharge loans, she is canceling the settlement deed, Ex.A2. As per Ex.A2, the suit properties were settled out of love and affection and it has been stated in Ex.A2 that possession had been handed over to the respondent and that Visalakshi Ammal has no right to cancel the said settlement deed.

12(b).From these recitals, it is clear that settlement deed in favour of the respondent is absolute and not on condition. The fact that possession is with respondent from the date of settlement i.e., from 14.03.1996 can be seen from the boundaries mentioned in Ex.A4, settlement deed executed in favour of the first appellant. According to the first appellant, one of the boundaries on the property settled on him is the suit property. According to the first appellant it may show that respondent is owner of the suit property, but that does not prove the possession of the respondent. In view of such stand, it is not open to the first appellant to contend that Visalakshi Ammal has no right to settle the suit property on the respondent. It is not the case of the first appellant or Visalakshi Ammal that respondent got settlement deed executed by Visalakshi Ammal in her favour by misrepresentation, undue influence, coercion or fraud. In the cancellation deed, Visalakshi Ammal has not stated that she executed settlement deed, Ex.A2 by misrepresentation or fraud played by the respondent. In view of the above facts, there is no error in the finding of the Courts below that Ex.A2, settlement deed is valid document and Exs.B1 and B2 are sham documents and are not valid.

13.As far as possession of the respondent is concerned, she has stated that settlement deed, Ex.A2 is acted upon and she took possession on the date of settlement deed. The contention of the first appellant is that he is in possession of the suit property even before Ex.A2, settlement deed executed in favour of the respondent and continued to be in possession even after the settlement deed. Before the settlement deed, Ex.A2, Visalakshi Ammal was owner of the property. If really, the first appellant is in possession of the suit property, Visalakshi Ammal would not have settled the property on the respondent by Ex.A2 in the year 1996 and would not have mentioned as one of the boundaries in the property settled on the first appellant is the property belonging to the respondent in the year 1999. Even otherwise, the person claiming title by adverse possession must specifically state the date from which he is in possession as owner openly and to the knowledge of the real owner.

14.In the present case, the first appellant has made vague allegation that he is in possession of the suit property even before 1996. He has not stated from which year he is in

possession and has not let in any evidence to show that Visalakshi Ammal was aware that first appellant is in possession as owner. No evidence has been let in to prove that he is in possession for more than 12 years. On the other hand, the property was settled on the respondent by Ex.A2 on 14.03.1996 and respondent has alleged that appellants trespassed into the land in the year 2004 and filed suit in the year 2006. The respondent has filed suit within 12 years from the date of settlement, Ex.A2 and therefore, the contention of the first appellant that he perfected the title by adverse possession is without merits.

15.The learned counsel for the appellant contended that the Courts below failed to consider the provision of Sections 5 and 6 of the Act and judgment of the Hon'ble Apex Court with regard to Section 5 of the Act and has granted decree of declaration and possession and failed to note that respondent was not in possession of the suit property for more than statutory period. Sections 5 and 6 of the Act reads as follows:

"Specific relief how given

5. Specific relief is given-

(a) by taking possession of certain property and delivering it to a claimant;

(b) by ordering a party to do the very act which he is under an obligation to do;

(c) by preventing a party from doing that which he is under an obligation not to do;

(d) by determining and declaring the rights of parties otherwise than by an award of compensation; or

(e) by appointing a receiver.

Preventive relief

6. Specific relief granted under clause (c) of section 5 is called preventive relief."

16. Sections 5 and 6 of the Act are general and special provisions dealing with the recovery of specific immovable property. Section 5 is general provision which empowers a person to file suit under provision of C.P.C for recovery of possession. Section 6 is the Special provision which empowers a person to recover possession of an immovable property when he was dispossessed unlawfully. This provision is a summary proceedings. The person dispossesses of immovable property need not prove his title, but has to establish that he was in possession and was dispossessed unlawfully. The time limit for filing such a suit is six months. As per Section 6(4) of the Act, a person is entitled to file a suit to establish his title and recover possession of the suit property. Section 6

(1) of the Act is not a bar for filing such a suit. It is well settled that even after dismissal of the suit for possession, filed under Section 6(1) of the Act, a person is entitled to file a suit under provision of C.P.C and establish his title to recover possession.

17. In the present case, the respondent has not filed suit only for possession. She has filed suit for declaration of title and also possession. In such a case, the time limit for filing the suit under Provisions of C.P.C as provided under Section 59 of the Limitation Act is applicable and time for recovery of possession is 12 years from the date of dispossession. Section 59 of the Limitation Act is extracted hereunder:

"59. To cancel or set aside Three years. When the facts an instrument or entitling the decree or for the plaintiff to have the rescission of a instrument or decree contract. Canceled or set aside or the contract rescinded first become known to him."

18. As far as issue of patta is concerned, the appellants have not let in any evidence to show that patta was issued to them after notice to Visalakshi Ammal and respondent. The learned counsel for the appellants contended that appellants admitted the execution of settlement deed, but said settlement deed is not acted upon. At the same time, the appellants contended that respondent handed over the possession to the first appellant. This clearly shows that settlement is acted upon and respondent was in possession of the suit property. Visalakshi Ammal has no right to cancel irrevocable settlement after the same was accepted by the respondent and acted upon. In view of the same, the sale deed in favour of the first appellant is not valid. The respondent is not a party to both the Cancellation deed as well as the sale deed. Therefore, she can ignore the same and the same is not binding on her. The failure to challenge the cancellation deed and sale deed as null and void will not deprive her the relief of declaration of title. The two judgments relied on by the learned counsel for the appellants do not advance the case of the appellants and are not applicable to the facts of the present case.

19. The contention of the learned counsel for the appellants has no merit as the respondent has filed suit for declaration and possession. The Courts below have considered all the materials in proper perspective and held that respondent is entitled for declaration and possession. The judgments relied on by the learned counsel for the appellants do not advance the case of appellants.

20.In the result, the Second Appeal is dismissed as there is no error of law in the judgment of the Courts below warranting interference by this Court. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

gsa

To

1.The Principal Subordinate Judge, Vridhachalam.

2.The Principal District Munsif, Vridhachalam.

+ 1 cc to Mr. Avinash Wadhvani, Advocate Sr.45052

+ 1 cc to Mr.C. Munusamy, Advocate Sr.44986

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