

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 22.10.2018

PRONOUNCED ON: 26.10.2018

CORAM

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM

S.A.No.1597 of 2001

and

C.M.P.No.16870 of 2001

1.Velayutha Maistry (Died)
2.Meenakshi
3.Muniyammal
4.Shakthivel
5.Govindan
6.Selvi
7.Kathavarayan

...Appellants/ Plaintiffs

(Appellants 2 to 7 brought on record as LR's of the deceased sole appellant vide order of court dated 20.06.2018 made in CMP.No.1219 to 1221/2008 in SA.No.1597/2001)

Vs.

1.Panchatchara Gounder
2.Arumuga Gounder

...Respondents/ Defendants

PRAYER: Second Appeal filed under Section 100 of C.P.C., to set aside the decree and judgment made in A.S.No.98 of 1998, dated 11.01.2000, on the file of the Additional District Judge, Villupuram, reversing the judgment and decree made in O.S.No.518 of 1992, dated 19.02.1998 on the file of Additional District Munsif Court, Thirukoilur.

For Appellants : M/s.S.T.P.Kuilmozhi

For Respondents : for Mr.V.Perumal
Mr.T.Dhanyakumar for R1
: R2 Set exparte

J U D G M E N T

This Second Appeal has been filed by the plaintiff against the judgment and decree passed by the Additional District Judge, Villupuram, in A.S.No.98 of 1998, dated 11.01.2000 reversing the judgment and decree passed by the Additional District Munsif, Thirukoilur in O.S.No.518 of 1992 dated 19.02.1998.

2. The first appellant herein has filed a suit in O.S.No.518 of 1992, on the file of the Additional District Munsif, Thirukoilur, for the relief of declaration and for delivery of possession of the suit 'B' schedule property and also for mesne profits. The learned Additional District Munsif, Thirukoilur, by the judgment dated 19.02.1998 has decreed the said suit as prayed for and directed the first defendant to deliver vacant possession of the said property within a period of three months from the date of decree. In so far as mesne profits is concerned, he has ordered separate enquiry under Order 20 Rule 12 of CPC. Aggrieved by the same, the first respondent herein/ first defendant has filed an appeal in A.S.No.98 of 1998 on the file of the Additional District Judge, Villupuram. The learned Additional District Judge by the judgment dated 11.01.2000 has allowed the said appeal and set aside the judgment and decree passed by the Trial Court and dismissed the suit. Feeling aggrieved, the plaintiff has filed the present second appeal. During pendency of the second appeal, the appellant / plaintiff died and hence, his legal representatives were impleaded as appellant Nos.2 to 7. 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 suit 'B' schedule property forms part of the 'A' schedule property. Originally, the property measuring about 1.12 acres situated in S.No.117/1 of Oduvankuppam Village, belonged to the second defendant. The second defendant for himself and also on behalf of his minor brother Ramalingam had sold the entire extent of the property to one Anjalakshiammal through a registered sale deed dated 14.05.1973. The said Anjalakshiammal had sold 10 cents to the plaintiff under a registered sale deed dated 05.12.1978 and the said property is described as suit 'A' schedule property. The plaintiff, from the date of purchase, has been in possession and enjoyment of the said property by putting thatched house and also enjoying the same by tying the cattles. On the east of suit 'B' schedule property, Oduvankuppam - Melvalai Highway Road is running. In the place belonging to the said Highway Road, the first defendant had put up a tea shop and running the same. Taking advantage of the same, at the instigation of the second defendant, the first defendant had

attempted to encroach the suit 'B' schedule property measuring about one cent on 14.05.1992 and hence, the plaintiff had issued a Lawyer's notice on 27.05.1992. The defendants, after receipt of the said notice had sent a reply notice through their Advocate stating that the second defendant had sold the suit 'B' schedule property orally to the first respondent for a sum of Rs.50/- twenty years ago and from the date of said sale, the first defendant has been running a Tea stall. After sending such a reply notice, the first defendant had trespassed into the suit 'B' schedule property on 15.06.1992 and took possession by force. The defendants are not having any right over the suit 'B' schedule property and hence, the plaintiff has filed the above suit for the aforesaid reliefs.

4. The averments made in the written statement filed by the second defendant and adopted by the first defendant are, in brief, as follows:

The allegations that the property measuring about 1.12 acres situated in S.No.117/1 of Oduvankuppam Village, originally belonged to the second defendant and out of 1.12 acres, the second defendant sold 10 cents under a registered sale deed dated 14.05.1973 in favour of one Anjalatchiammal and the said Anjalatchiammal in turn sold 10 cents to the plaintiff on 05.12.1978 are all true. But, the allegation that the suit 'B' schedule property forms part of the 'A' schedule property and the first defendant had encroached the 'B' schedule property by putting up a Tea stall are all false. The second defendant had divided the above 1.12 acres as plots and sold to several persons and at that time, the suit 'B' schedule property was sold to the first defendant 20 years ago orally for a sum of Rs.50/-. After such purchase, the first defendant has been running a Tea stall in the said property. However, on 10.10.1980, the first defendant got a registered sale deed from the second defendant for one cent and the said property is the suit 'B' schedule property and the same has been in possession and enjoyment of the first defendant for more than 20 years and thereby, the first defendant has perfected title by adverse possession. The second defendant has not sold the 'B' schedule property to the plaintiff. The plaintiff has not purchased the properties including the 'B' schedule property. The plaintiff has put up a fence around his property. In the UDR scheme, patta was granted to the plaintiff for 10 cents. Likewise patta was granted to the first defendant for the suit 'B' schedule property and therefore, the defendants prayed to dismiss the suit.

5. 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 P.W.1 and also examined one Irusa Gounder as P.W.2.

He has marked Ex.A1 to Ex.A6 as exhibits. On the side of the defendants, the defendant Nos.1 and 2 were examined as D.W.1 and D.W.2 respectively and also examined one Soosai as D.W.3. They have marked Ex.B1 to Ex.B3 as exhibits.

6. The learned Additional District Munsif, Thirukoilur after considering the materials placed before him, decreed the suit as prayed for and directed the first defendant to deliver vacant possession of the suit 'B' schedule property within a period of three months from the date of decree. In so far as the mesne profits is concerned, he has ordered separate enquiry under Order 20 Rule 12 of C.P.C. Aggrieved by the same, the first defendant has preferred an appeal in A.S.No.98 of 1998 on the file of the Additional District Judge, Villupuram. The learned Additional District Judge, Villupuram has allowed the said appeal and set-aside the judgment and decree passed by the trial Court and dismissed the suit. Feeling aggrieved, the plaintiff has preferred the present Second Appeal.

7. At the time of admitting this Second Appeal, this Court has formulated the following substantial questions of law:-

"1. Whether the 1st respondent /defendant has perfected title by adverse possession to the suit property when the suit has been filed within 12 years from the date of 1st respondent's purchase?

2. Whether the 1st defendant could claim prescriptive title in the absence of requisite *anionus* when he refers his possession of lawful title under a sale deed dated 10.10.1980?

3. Whether the decree and judgment of lower appellate court is liable to be set aside for misconstruction of evidence available on record?"

8. Heard Ms.S.T.P.Kuil Mozhi, learned counsel for the appellants and Mr.T.Dhanyakumar, learned counsel appearing for the first respondent.

9. Question Nos. 1 to 3:

The learned counsel for the appellants has submitted that in Ex.A1 sale deed dated 14.05.1973, it is clearly stated that the second defendant had sold the entire property situated in R.S.No.170/1 measuring about 1.12 acres with specific boundaries to one Anjalatchiammal. She further submitted that even before execution of Ex.A1 sale deed, if the second defendant had sold the property measuring one cent (suit 'B' schedule property) orally in favour of the first defendant, in the said sale deed, the first defendant's property should have been shown as boundary, but, in the said sale deed on the eastern side, only

Melvalai road has been shown as boundary and therefore, the contention of the defendants that even before the execution of Ex.A1 sale deed, the second defendant had sold one cent land (suit 'B' schedule property) orally to the first defendant is false. She further submitted that after executing Ex.A1 sale deed, the second defendant had no property to sell to the first defendant under Ex.B1 sale deed dated 10.10.1980. She further submitted that the trial Court after taking into consideration of the aforesaid facts has rightly decreed the suit, but, the first Appellate Court has erroneously reversed the well considered judgment of the trial Court and dismissed the plaintiff's suit. She further submitted that even assuming that under Ex.B1, the first defendant had purchased the suit 'B' schedule property from the second defendant, since the suit has been filed within 12 years from that date, the first defendant cannot claim adverse possession. She further submitted that the first defendant claimed right on the basis of the Ex.B1 sale deed as owner and also claimed adverse possession and the said pleas are inconsistent and therefore, she 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.

10. Per contra, the learned counsel for the first respondent / first defendant has submitted that the plaintiff, while examining himself as P.W.1 categorically admitted that even before his purchase under Ex.A2 sale deed, the first defendant was running a Tea stall. He further submitted that the P.W.1 has admitted that the thatched Tea stall is not altered and remained as the same structure as it was in existence before his purchase. He further submitted that the P.W.1 has admitted in his evidence that there are trees in the eastern boundary and on further east, the Tea stall belonging to the first defendant is situated and therefore, it is clear that the first defendant has perfected title by adverse possession. He further submitted that the evidence of D.W.1 to D.W.3 would clearly show that even before execution of Ex.A1 sale deed, the second defendant had sold the suit 'B' schedule property to the first defendant orally for Rs.50/- and confirming the same, a registered sale deed was executed, under Ex.B1 on 10.08.1980. He further submitted that recognizing the first defendant's possession, a patta was also granted in his name in respect of suit 'B' schedule property. He further submitted that the trial Court failed to consider the aforesaid facts, however, the first Appellate Court has properly appreciated the evidence and dismissed the plaintiff's suit and in the said factual findings, this Court cannot interfere and therefore, he prayed to dismiss the Second Appeal.

11. The trial Court has held that the plaintiff has proved

that he has purchased the property including suit 'B' schedule property, but the first defendant failed to prove that he has perfected title by adverse possession. But the first appellate Court has reversed the findings of the trial Court and held that the first defendant had perfected title by adverse possession.

12. It is an admitted fact that, originally the property measuring about 1.12 acres situated in S.No.117/1 of Oduvankuppam Village belonged to the second defendant. It is also an admitted fact that the second defendant for himself and also on behalf of his minor brother Ramalingam had sold the entire extent of the said property to one Anjalatchiammal through a registered sale deed (Ex.A1) dated 14.05.1973. It is also an admitted fact that out of 1.12 acres, the said Anjalatchiammal had sold 10 cents to the plaintiff under a registered sale deed (Ex.A2) dated 05.12.1978 and the said property is described as suit 'A' schedule property.

13. According to the plaintiff, the suit 'B' schedule property forms part of the suit 'A' schedule property. His further case is that on the east of the suit 'B' schedule property in the place belonging to the Highways, the first defendant had put up a Tea stall and running the same. His further case is that taking advantage of the same, at the instigation of the second defendant, the first defendant has encroached the suit 'B' schedule property measuring about one cent.

14. The defendants have stated in the written statement that the second defendant had divided the aforesaid 1.12 acres as plots and sold to different persons as house sites and at that time i.e., before 20 years, he sold the suit 'B' schedule property orally to the first defendant for Rs.50/- and in that place, the first defendant is running a Tea stall and therefore, even prior to the purchase of the suit 'A' schedule property by the plaintiff, the suit 'B' schedule property was sold to the first defendant by the second defendant orally.

15. In Ex.A1, it is not stated that the aforesaid 1.12 acres were divided into house sites and sold to several persons. On the contrary, it is stated that the entire 1.12 acres was sold to the said Anjalatchiammal. Therefore, the contention of the defendants that the second defendant had divided the aforesaid 1.12 acres into house sites and sold to several persons and at that time, he sold the suit 'B' schedule property orally to the first defendant cannot be accepted. Further, if really the second defendant had sold the suit 'B' schedule property to the first defendant even prior to the purchase of the suit 'A' schedule property by the plaintiff, in Ex.A1 itself, the second defendant would have shown the first defendant's Tea stall as

eastern boundary. But, on the contrary in Ex.A1, Oduvankuppam - Melvalai Panchayat road has been shown as eastern boundary. Further more, in the written statement, the defendants have stated that 20 years ago, the second defendant had sold the suit 'B' schedule property orally to the first defendant for Rs.50/- and at that time itself, the possession was also given. He also stated that only as a safety measure on 10.08.1980, the second defendant had executed a registered sale deed in favour of the first defendant in respect of one cent. The said sale deed has been marked as Ex.B1. In the said sale deed, it is not stated that already the said property was sold orally and only in confirmation of the same, the said document has been exhibited. It is also not stated that already possession was given to the first defendant. The aforesaid facts also would lead to an inference that the contention of the defendants that the second defendant had sold the suit 'B' schedule property to the first defendant orally 20 years ago and in pursuance of the said sale, the first defendant was in possession of the suit 'B' schedule property cannot be true.

16. At the same time, the admissions made by the P.W.1 in his evidence also cannot be ignored. The evidence of the PW1 would lead to an inference that he is not sure as to whether the first defendant has encroached his property. He has stated in his evidence that even before his purchase, the first defendant was running a Tea stall in the place belonging to the Highways. Further, he has stated that in the said Tea stall, no structural alternation has been made and it exists in the same position. Further, he has stated that on his land on the eastern boundary, he has planted trees and on further east, the first defendant's house is situated. Further, he has stated that the first defendant's hut is situated in Highways land and also in his land. Further, he has admitted that he has not measured the Highways land. Further, he has admitted that he has not taken any steps for appointment of Advocate Commissioner to measure the properties. All the aforesaid facts would show that the plaintiff is not sure that the first defendant had encroached his land.

17. If the plaintiff is sure that the first defendant had encroached his land, he would have taken steps for appointment of an Advocate Commissioner and measure the properties of both parties. If the Advocate Commissioner is appointed and properties are measured with the help of surveyor with reference to the documents that would throw light whether the first defendant has encroached the plaintiff's property or he encroached the Highways property. But, no such steps has been taken. Under the said circumstances, it is not possible for the Court to come to the conclusion that the first defendant has

encroached the plaintiff's property. Therefore, the judgment and decree passed by the Appellate Court have to be confirmed, though on different grounds. Accordingly, these substantial questions of law are answered.

18. In the result, the second appeal is dismissed. Consequently, connected miscellaneous petition is closed. No Costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

1.The Additional District Judge,
Villupuram.

2.The Additional District Munsif Court,
Thirukoilur.

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

+1cc to Mr.S.T.P.Kuilmozhi, Advocate, S.R.No.73405

S.A.No.1597 of 2001
and
C.M.P.No.16870 of 2001

CNR (CO)
GSP (29/01/2019)

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