

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 05-01-2018

CORAM

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

C.M.S.A.No.7 OF 1998

1.Pushpamary
2.D.W.Mac Donald ... Appellants/R1 & R2/Petitioners

-vs-

1.Grace Nesammal
2.A.Sheik Abdul Khadar ... Respondents/R3 &
Appellant/Respondents

Appeal filed under Order 21 Rule 103 R/w 100 CPC against the judgment and decree, dated 18.12.1997, passed in A.S.No.132 of 1988, on the file of Principal District Judge, Nagapattinam, as against the order and decree, dated 11.10.1988, passed in E.A.No.261 of 1985 in E.P.No.36 of 1985 in O.S.No.110 of 1984, on the file of Subordinate Judge, Nagapattinam.

For appellants : Mrs.D.Asentha Mani
For respondent 2 : Mr.K.Karthick Asath
for M/s.V.Nicholas
For R1 : Exparte

JUDGMENT

This Civil Miscellaneous Second Appeal is directed against the judgment and decree, dated 18.12.1997, passed in A.S.No.132 of 1988, on the file of Principal District Judge, Nagapattinam.

2. Applicants in Execution Application are the appellants before this Court. Originally, the petition property was purchased in the name of Grace Nesammal, first respondent herein, on 18.02.1959. Her husband Mac Donald, second appellant herein, was in continuous possession and he brought up their children in the same house. On 10.02.1983, the said Grace Nesammal entered into a sale agreement with one Sheik Abdul

Khadar, second respondent herein. On the basis of the said agreement, a suit for specific performance was filed in O.S.No.110 of 1984 and the same was decreed ex parte. The second respondent-decree holder has filed the Execution Application and the sale deed was executed in his favour. Thereafter, he proceeded to take delivery of possession and delivery of possession was ordered ex parte. The appellants were directed to hand over deliver of possession to the second respondent. Aggrieved over the said order of delivery of possession, the appellants herein filed an Execution Application vide E.A.No.1 of 1987, for recovery and re-delivery of the property. The execution Court has conducted an elaborate inquiry under Order 21 Rule 99 of C.P.C., and allowed the application, directing re-delivery of possession of the property in favour of the appellants, against which, the second respondent-purchaser preferred an appeal in A.S.No.132 of 1988. The lower appellate Court, having found that Grace Nesammal-first respondent is the true owner, has ordered delivery of possession in favour of the second respondent. Aggrieved over the said order passed by the lower appellate Court, the appellants have preferred this Civil Miscellaneous Second Appeal.

3. Learned counsel appearing for the appellants would submit that the property was purchased in the year 1959 by the second appellant, namely, Mac Donald, in the name of his wife, Grace Nesammal, out of his own funds. For the purpose of purchase of the property, he sold his properties in his native place and purchased the present property in the name of his wife. He also secured a job for his wife and continued to be in possession till the filing of the suit. It is also her contention that in the year 1960, the said Grace Nesammal left the second appellant and lived with another person. The second appellant brought up their children in the same house, as it was purchased by him in the name of his wife and he is the actual owner of the property. After settling his children in life, the second appellant executed the settlement deed in favour of the first appellant, namely, Pushpamary, whom he married in the year 1962. Therefore, the second respondent has no right, title or interest in the property, but the second appellant should be construed as the real owner, and delivery should not have been ordered. According to the learned counsel, even assuming that the second appellant is not the owner in spite of his long and continuous possession, it should be deemed that Grace Nesammal has lost her title and, by length of time, the title is vested with the second appellant. Also, even if the second appellant is not the title holder, both the appellants are entitled to title through adverse possession.

4. Learned counsel for the appellants would further argue that the sale agreement is sham and nominal; the second respondent, in order to get possession of the property by hook or crook, entered into a collusive agreement and secured the decree, by remaining ex parte. According to her, taking over of possession should be by a regular course of law, but the second respondent indulged in avoiding the due course of law and adopted a short cut method by getting the decree for specific performance through collusive agreement and, therefore, the judgment and decree of the lower appellate Court are liable to be set aside.

5. Per contra, learned counsel appearing for the second respondent-purchaser would contend that during the elaborate trial, it is admitted by the second appellant that the first respondent is the title holder and the property belonged to her only. A categorical admission was made even in the chief examination of the second appellant to that effect. Apart from that, the agreement of sale was entered into between first and second respondents and, in so far as the appellants are concerned, they are third parties and they have no connection to the same. According to him, strangers cannot claim the agreement as collusive, as they are not the parties to the same. It is only the parties to the contract, who can agitate the validity of the agreement and, therefore, the question of getting a decree by illegal method is not sustainable in law. Under Order 21 Rule 99 of C.P.C., an objector can object to dispossession only on the ground of his or her right, title and interest over the property, but not otherwise. In the instant case, it is admitted by the appellants that the first respondent is the lawful owner and delivery is sought to be taken by due process of law through the competent court and, therefore, the judgment and decree passed by the lower appellate Court need not be interfered with.

6. Heard the rival contentions.

7. This appeal was filed on the following substantial questions of law :

1. Whether the lower appellate Court erred in law in holding that Ex.A-9 sale deed is not a benami one and reversing the finding of the trial court in this regard without adverting to the several facts relied on by the executing court ?

2. In view of the long, continuous and adverse possession of the suit property by the 1st and 2nd appellants from 1961 onwards, whether the lower appellate Court erred in holding that the appellants have not acquired title by prescription ?

3. Whether the collusive decree for specific performance obtained by the 2nd respondent against the 1st respondent will affect the right, title and interest of the appellants ?

8. From a perusal of the material available before this Court, it can be seen, that originally, the property was purchased in the name of first respondent on 18.02.1959. It is an admitted fact that first respondent was employed as a teacher at the relevant point of time. It is also admitted that Rs.400/- was paid towards partial sale consideration and the remaining sum of Rs.400/- was discharged from and out of the earnings of the first respondent. The evidence of the second appellant would also go to show that he had not taken any steps to get the property transferred in his name till the year 1983. During the cross-examination, the second appellant would depose that he does not remember the marriage, which took place between the first appellant and himself in the Church. Further, the first respondent was in permanent employment as a teacher, but he was only a temporary employee. The lower appellate Court has considered the evidence of the second appellant and found that the transaction was not benami and that the first respondent was the lawful owner of the property.

9. The contention of the appellants is that the assessment of the property was transferred in the name of the son of the first appellant, namely, Jayakumar and the second appellant continued to be the guardian in respect of the said property. There is no evidence to show that the appellants had continued in the property against the interest of the first respondent and the fact of their continuance was within the knowledge of the first respondent. In the absence of any such evidence, it cannot be held that they continued in adverse possession of the property. The lower appellate Court has rightly found that the appellants cannot take two contradictory stands, that, on the one hand, they are title holders and, on the other, they derive title through adverse possession. From the evidence of second appellant, it is also seen that he has executed settlement deed in favour of the first appellant on 08.09.1983, i.e., after execution of the sale agreement. Therefore, it can be stated that the appellants have frantically tried to retain the possession of the property without there being any title and with created documents.

10. Learned counsel appearing for the appellants would rely on a judgment of the Hon'ble Supreme Court in Rame Gowda (dead) by L.Rs. v. M.Varadappa Naidu (dead) by L.Rs., 2004 (1) SCC 769, wherein, it has been held that when a person continued to be in settled possession, he cannot be dispossessed by undue process of law, even by the true owner. In the said judgment,

the Hon'ble Supreme Court has observed as under :

"9. It is the settled possession or effective possession of a person without title which would entitle him to protect his possession even as against the true owner. The concept of settled possession and the right of the possessor to protect his possession against the owner has come to be settled by a catena of decisions. Illustratively, we may refer to *Munshi Ram and Ors. Vs. Delhi Administration* (1968) 2 SCR 455, *Puran Singh and Ors. Vs. The State of Punjab* (1975) 4 SCC 518 and *Ram Rattan and Ors. Vs. State of Uttar Pradesh* (1977) 1 SCC 188. The authorities need not be multiplied. In *Munshi Ram & Ors.'s case* (supra), it was held that no one, including the true owner, has a right to dispossess the trespasser by force if the trespasser is in settled possession of the land and in such a case unless he is evicted in the due course of law, he is entitled to defend his possession even against the rightful owner. But merely stray or even intermittent acts of trespass do not give such a right against the true owner. The possession which a trespasser is entitled to defend against the rightful owner must be settled possession, extending over a sufficiently long period of time and acquiesced to by the true owner. A casual act of possession would not have the effect of interrupting the possession of the rightful owner. The rightful owner may re-enter and re-instate himself provided he does not use more force than is necessary. Such entry will be viewed only as resistance to an intrusion upon his possession which has never been lost. A stray act of trespass, or a possession which has not matured into settled possession, can be obstructed or removed by the true owner even by using necessary force. In *Puran Singh and Ors.'s case* (supra), the Court clarified that it is difficult to lay down any hard and fast rule as to when the possession of a trespasser can mature into settled possession. The 'settled possession' must be (i) effective, (ii) undisturbed, and (iii) to the knowledge of the owner or without any attempt at concealment by the trespasser. The phrase 'settled possession'

does not carry any special charm or magic in it; nor is it a ritualistic formula which can be confined in a strait-jacket. An occupation of the property by a person as an agent or a servant acting at the instance of the owner will not amount to actual physical possession. The court laid down the following tests which may be adopted as a working rule for determining the attributes of 'settled possession' :

i) that the trespasser must be in actual physical possession of the property over a sufficiently long period;

ii) that the possession must be to the knowledge (either express or implied) of the owner or without any attempt at concealment by the trespasser and which contains an element of animus possidendi. The nature of possession of the trespasser would, however, be a matter to be decided on the facts and circumstances of each case;

iii) the process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced to by the true owner; and

iv) that one of the usual tests to determine the quality of settled possession, in the case of cultivable land, would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner has no right to destroy the crop grown by the trespasser and take forcible possession."

11. Now, it is to be seen, whether the appellants are in settled possession and that there is an attempt to throw them away without recourse to regular process of law. As discussed earlier, first respondent is the lawful owner and second respondent has derived title through a suit for specific performance. It is an admitted case that the second appellant continued to be in possession of the petition property as an agent and guardian of the minor ever since it was purchased and it can safely be inferred that they were not in settled possession. Now, the next point is, as to whether they are sought to be dispossessed by undue process of law or not, is to be decided.

12. In the instant case, the very application was filed for delivery of possession in E.P.No.36 of 1985. Against the

delivery ordered by the execution Court, the appellants have preferred an execution application, which resulted in redelivery, and, on appeal, again, delivery was ordered in favour of the decree holder. Therefore, it is obvious that possession is sought to be taken through the Court of law, which is one of regular course of law, and it cannot be construed as by undue process of law. In such circumstances, the contention that delivery of possession of the property is bad for not adopting the regular course of due process of law cannot be sustained.

13. Learned counsel for the appellants would also rely on the judgments in Kanakarathanammal v. Loganatha Mudaliar, AIR 1965 SC 271; Vidyadhar Krishnarao Mungi v. Usman Gani Saheb Konkani, AIR 1974 SC 663; P.Purushotham Reddy v. M/s.Pratap Steels Ltd., AIR 2003 Andhra Pradesh 141; Basappa v. Basamma, AIR 2004 Madras 390; and Rajendrakumar Bhandari v. Poosammal, AIR 1975 Madras 379, in support of her contention that the agreement of sale was not genuine and it was executed with the sole intention to dispossess the appellants. According to her, the agreement of sale was sham and only nominal and that collusive decree has been obtained with the aid of the collusive agreement. She would also submit that once the parties approach the court with unclean hands, they are not entitled to any equitable relief and, therefore, the execution, pursuant to the collusive decree, is not sustainable in law.

14. It is well settled that when there is an agreement between the parties, the validity of the agreement can be questioned only by the parties to the contract. In so far as the appellants are concerned, they are strangers and they cannot question the same. Therefore, the judgments cited by the learned counsel for the appellants, as above, will not help the case of the appellants and they are not applicable to this case. As such, the finding of the lower appellate Court that the first respondent is title holder of the property and the second respondent, who has derived title through a suit for specific performance, is entitled to take delivery of the property. The appellants having no right, title or interest over the property, are bound to deliver possession to the title holder. In such circumstances, this Court finds no merit in this appeal and it is, accordingly, dismissed. No costs. In view of the above discussions, the questions of law are answered against the appellants.

Sd/-

Assistant Registrar(CS V)

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Sub Assistant Registrar

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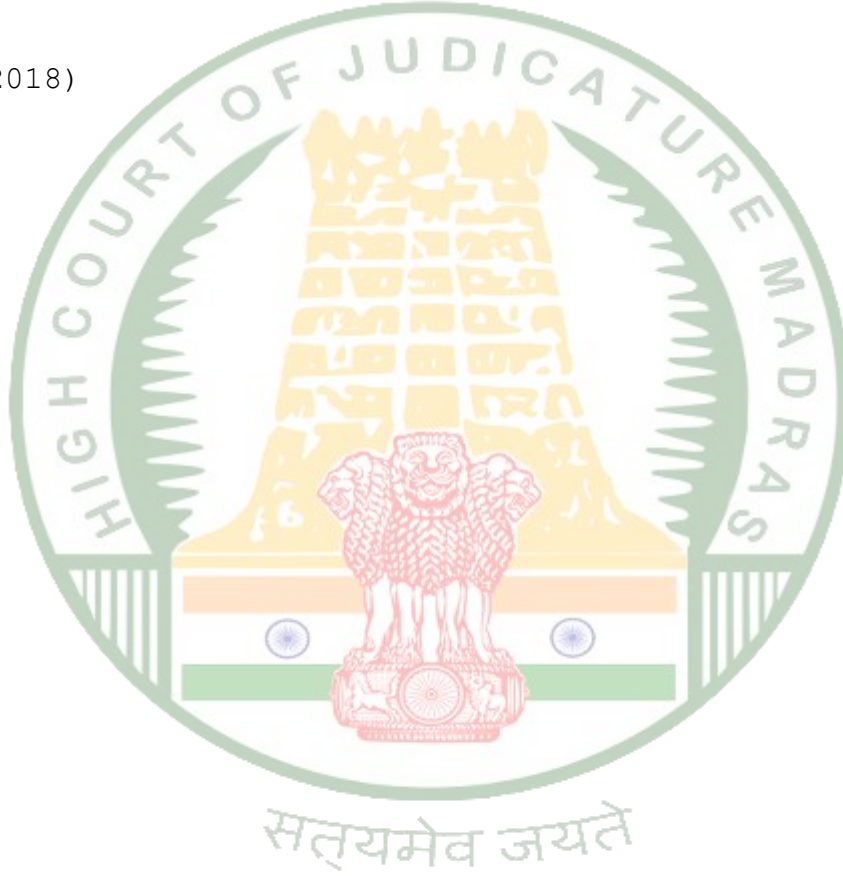
- 1.The Principal District Judge, Nagapattinam.
- 2.The Subordinate Judge, Nagapattinam.

+1cc to Mr.D.A.Senthamani, Advocate SR.No.1244

+1cc to Mr.V.Nicholas, Advocate SR.No.940

C.M.S.A.No.7 OF 1998

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