

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 08.09.2017	Delivered on: 27.09.2018
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CORAM:

THE HONOURABLE MR.JUSTICE S.BASKARAN

S. A. No.1213 of 2006

and M.P.No.1 of 2006

1. Saraswathi
2. Indirani
3. Kasthuri

...Appellants/Defendants

..Versus..

Balasubramanian

...Respondent/Plaintiff

PRAYER: Second Appeal filed under Section 100 of CPC against the Judgment and decree dated 24-01-2006 passed by the First Appellate Court in A.S.No.29 of 2005 on the file of Subordinate Court, Chidambaram, reversing the trial court Decree and Judgment dated 25-02-2005 passed by the District Munsif cum Judicial Magistrate Court, Parangipet, in O.S.No.6 of 2003.

For Appellant :: M/s. R.Sunil Kumar

For Respondent :: M/s. P.R.Thiruneelakandan

JUDGMENT

The Defendants are the Appellants in this Second Appeal. The Plaintiff filed a Suit before the District Munsif Court, Parangipet in O.S.No.6 of 2003 praying for permanent injunction or alternatively recovery of possession and after full trial, the suit was dismissed by the trial court without cost, against which the plaintiff preferred First Appeal in A.S.No.29 of 2005 on the file of Subordinate Judge of Chidambaram and the learned Subordinate Judge allowed the appeal on 24.01.2006 by setting-aside the trial court Decree and Judgment dated 25-02-2005 and decreed the suit for permanent injunction restraining the defendants from interfering with the possession and enjoyment of the suit properties by the Plaintiff in any manner. Aggrieved over the Judgment and Decree of the first appellate court, the appellants/defendants herein preferred this Second Appeal seeking to set aside the judgment and decree of the lower appellate court and to dismiss the suit by allowing the Second Appeal.

For the sake of the convenience the parties hereinafter will be referred to as per their status in the plaint.

2. Plaintiff's case in brief :

The suit property originally belonged to the father of the plaintiff namely Thangavelu Asari and he got the property in the Family partition entered with his brothers Uthandi and Arumugam. Ever since Partition, he was in possession and enjoyment. Patta for the property was in the name of the plaintiff's father Thangavelu. He was also paying land tax. After the death of Thangavelu his three sons namely the plaintiff herein as well as the two others viz., Palani and Ganapathy took possession and were in enjoyment of the suit properties. The plaintiff was employed in different places outside the native village from the year 1956 and his brother Palani was also living away from the suit village. The other brother Ganapathy continued to live in the suit village and he was looking after the properties of joint family consisting of plaintiff, Palani and himself. He was paying some income to his brothers. Subsequently the plaintiff and his brothers divided the properties by means of a registered partition deed. The Plaintiff was allotted the suit properties in the partition and each of the brothers took possession of the respective shares. The plaintiff got the patta for the suit properties transferred in his name and he has been paying land tax for this property in his own right. The defendants are the grand daughters of Plaintiff uncle one Uthandi through his first wife's son deceased Kuppusamy. The plaintiff came to know only a few days before the suit from an anonymous envelop which contained a copy of the decree in O.S.No.410 of 1987 that the defendants had filed a suit for partition and separate possession of suit properties and other properties as if the property belonged to their grand father Uthandi. A perusal of the said decree disclosed that the plaintiff and his brother Palani were not parties. Obviously the defendants ought to have sent the decree copy without disclosing their identify. The plaintiff on enquiry came to know that the defendants and the plaintiff's brothers had colluded together to bring about that document with an ulterior motive to deprive the plaintiff of his legitimate rights in the property. The decree is invalid besides being an unenforceable one. The defendants are planning to take delivery of the suit properties to the detriment of the plaintiff interest. If the defendants executed the decree, the plaintiff will suffer irreparable loss and damage. (After filing of the written statement by the defendants, the plaint was amended seeking alternative relief of recovery of possession) The defendants have contended in their written statement that they had taken delivery of the properties in execution of the decree in O.S.No.410 of 1987 even before the filing of this suit which is false. The properties are still in possession of the plaintiff. However to avoid technical defects the plaintiff is

alternatively seeking the relief of recovery of possession of the suit properties, if it is proved that the defendants have taken actual delivery of the suit properties through court. Thus, the Plaintiff seeks to allow the suit.

3. The case of the Defendants in brief:

The suit properties and some other properties originally belonged to Uthandi Asari who is the paternal grandfather of these defendants. Uthandi Asari left behind five sons including the father of these defendants. The defendants as legal heirs of Kuppusamy son of Uthani are in possession and enjoyment of the properties. When their paternal uncle failed to divide the properties they filed the suit for partition in O.S.No.410 of 1987 before District Munsiff Court, Chidambaram. The persons who claimed themselves to be purchasers and mortgagees were also sued as defendants 5 to 10 in that suit. Ganapathi who is the brother of the plaintiff was also sued and he knowing fully well he had no rights in the suit property remained exparte. That suit in O.S.No.410 of 1987 was decreed on 15-02-1994 declaring one fifth share for these defendants in the said suit properties. In pursuance of the preliminary decree the defendants herein filed a petition for passing final decree wherein advocate commissioner was appointed and he submitted a report and final decree was passed on 30-04-2001. No appeal was preferred against preliminary decree as well as final decree. These defendants filed a petition for delivery of properties in E.P.No.4 of 2001. Notice was issued to the respondents in the execution proceedings. Through court these defendants took delivery of the properties allotted to them. Since then they have been in possession and enjoyment of the properties personally cultivating them, they have also got patta transferred to them. The plaintiff does not have any right title or possession of the suit properties at any point of time. The plaintiff was also present when these defendants took delivery of the properties. The suit as framed by the plaintiff is not legally maintainable. The defendant denied all other allegations in the plaint which are not specifically admitted and sought for dismissal of the suit.

4. The trial court has framed the following issues and additional issues:-

- 1).Whether the plaintiff is entitled to the relief sought for,
- 2).What relief?

Additional issues

- 1).Whether the plaintiff is entitled to the relief of recovery of possession,
- 2).Whether the decree in O.S.No.410/87 was obtained by fraud and it is not binding on the plaintiff and
- 3)Whether the partition deed dated 22-07-1993 is a collusive document.

5. On the side of the plaintiff, 2 witnesses were examined as P.W.1 and 2 and exhibits A1 to A18 was marked. On the side of the defendants 2 witnesses were examined as D.W.1 and D.W.2 and Exhibits B1 and B2 was marked. After considering the material on record, the Trial court dismissed the suit without cost.

6. Aggrieved over the same the plaintiff preferred appeal in A.S.No.29 of 2005 on the file of the Sub-Ordinate Judge, Chidambaram and the first appellate court after considering the material on record raised the following points for consideration:

1. Whether the suit properties were allotted to Thangavel Asari in the partition or whether the suit properties belonged to Thandi Asari.
2. Whether the plaintiff is in possession of the suit properties.
3. Whether the defendants have taken possession of the suit properties in the court proceedings.
4. Whether the decree in O.S.No.410/87 is binding on the plaintiff.
5. Whether the plaintiff is entitled to permanent injunction to restrain the defendants from interfering with his possession of the suit properties or in the alternative to recover possession from the defendants.
6. To what relief is the plaintiff entitled?

7. The First Appellate Court on appreciation of the materials placed on record, was pleased to allow the first appeal preferred by the Plaintiff, by its judgment, dated 24.01.2006 made in A.S.No.29 of 2005 holding all the points raised by the appellant/Plaintiff in favour of the plaintiffs in the first appeal and set aside the judgment and decree dated 25.02.2005 made in O.S.No.6 of 2003 by the Trial Court.

8. Aggrieved over the same the defendants herein preferred this second appeal.

9. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:-

1. Whether the suit for injunction restraining the defendants from executing a decree lawfully passed in their favour was not maintainable in view of the statutory bar contained in Sec 41 of the Specific Relief Act?

2. Whether the plaintiff had not failed to establish a plaintiff that the suit property belonged to his father, Thangavelu and in the absence of such proof, the plaintiff's suit for injunction itself was not maintainable?

3. Whether the judgment of the Sub Court was not perverse in failing to advert to the admissions of the plaintiff regarding his non-enjoyment and the non-examination of his

brother, Ganapathi, who was alleged to be in management of the property on his behalf?

10. The learned counsel for the Appellants/Defendants argued that the contention of the plaintiff is that the suit properties belonged to the plaintiff's father and that in subsequent partition after his death the properties are allotted to the plaintiff, but he has not proved the same and he himself has clearly admitted that he has not enjoyed the suit properties and he has not examined his brother as witness and so he has not proved the possession of the suit property and DW-2 has categorically stated that the suit property was delivered to the defendants in execution of decree in O.S.No.410 of 1987 and the defendants are in enjoyment of properties delivered through court as the decree in O.S.No.410 of 1987 was executed through court and in view of the statutory bar contained under section 41 of the Specific Relief Act, the suit for injunction against the defendants is not maintainable. The plaintiff has not proved the title, possession and enjoyment of the suit properties and in fact the suit properties were the properties of Uthandi Asari the grand father of the defendants, after his demise his five sons inherited the same and the defendants herein who are the daughter of deceased Kuppusamy one of the son of Uthandi inherited the same through their father and they filed a suit for partition and separate possession against the joint owners. In which purchasers and mortgagees were impleaded as defendants 6 to 10 and the brother of the plaintiff one Ganapathy was one of the party to the suit and he remained ex-parte and preliminary decree whereby the suit properties were allotted in favour of this defendants and after passing of Final decree execution proceedings was initiated and delivery was effected infavour of the defendant herein and the defendants are in exclusive possession and enjoyment of the suit properties as absolute owner and the first appellate court without considering the material on record and without appreciating the oral and documentary evidence came to erroneous conclusion and decreed the suit. Hence the appellant contends that the first appellate court Judgment and Decree is liable to be set-aside and the judgment and decree of the trial court is to be restored and appeal may be allowed.

11. Whereas the learned counsel for the plaintiff would submit that available material on record oral and documentary evidence clearly established that the plaintiff's father Thangavel Asari is the owner of the suit properties and Thangave Asari's brother who got properties by way of partition sold the same along with his sons of whom Kuppusamy, the father of the defendants was also party to the document and the first appellate court has correctly appreciated the evidence and the defendants herein who have no right in the suit properties

earlier filed a collusive suit in O.S.No.410 of 1987 in which the plaintiff was not party to the suit and obtained a decree without the knowledge of the plaintiff and created document as if they took delivery of possession from court. In fact the delivery was said to have been taken from the person ie the legal heirs of Uthandi Asari who have no right at all in the properties and they are not in possession of the same and so the alleged delivery was only a paper delivery and no actual possession was taken and no document is produced by the defendants that they are in possession and enjoyment of the suit properties after delivery of possession was effected. In these circumstances, the plaintiff claims that he alone is in possession and enjoyment of the suit properties and though he was employed at various places, he was managing the suit properties through his brother and the suit properties are dry land. It is contended that the possession follows title and the plaintiff is in enjoyment of the suit properties and the defendants never enjoyed the suit properties at any point of time. It is also pointed out that non examination of his brother by the plaintiff will not affect the case of the plaintiff and even DW-2, the village menial during his cross examination clearly admitted that the plaintiff is in possession and enjoyment of the suit properties and the first appellate court Judgment and Decree is well sustainable and the Second Appeal may be dismissed.

12. Point No.1 to 3

The admitted facts are that the plaintiff, Palani and Ganapathy are the sons of the Thangavel Asari whose brothers are Uthandi and Arumugam. The defendants are the grand daughters of Uthandi Asari through his son Kuppusamy. Uthandi Asari, Thangavel Asari and one Arumugam are brothers. Uthandi son Kuppusamy is survived by five sons including the father of the defendants Kuppusamy.

13. The trial court rejected Ex.A12 to A17 on the ground that they are not supported by the pleading. The first appellate court relying upon the decision reported in AIR 1987 SC 1242 Ram Sarup Guptha(dead)by LRs..Vs..Bishun Narain Inter College and considering the case of the plaintiff that the suit properties were allotted to the plaintiff's father and the defendants' case that the suit properties was allotted to their grand father and the defendants denied the fact that the suit properties were allotted to the father of the plaintiff and in this circumstances by producing these documents the plaintiff seeks to prove the facts stated in the plaint and it is not necessary for a party to the suit to plead the documents with which he seeks to prove the facts which is pleaded and so it cannot be said that the evidence contained in Ex.A12 to A17 is not admissible and found these documents are admissible in evidence and they merit the consideration of the court.

14. As per Ex.A12 Uthandi Asari sold the North-Western Corner of the property comprised in S.No.102/7 to Balakrishna Reddy. This property is described in the deed as being bounded on the South by Arumuga Asari property, East by his own land. Further under Ex.A14 Uthadi Asari sold the North-Eastern Corner of the property comprised in S.No.102/7 to one Kaliugathatchi. This property is described in the sale deed as being bounded on the West by Balakrishna Reddy property and the Ex.A14 came into existence after Ex.A12 sale deed. Further under Ex.A15 sale deed, the property earlier purchased under Ex.A14 sale deed was sold to one Vadivel Asari. Under Ex.A16 sale deed Arumuga Asari sold the middle portion of S.No.102/7A, measuring 71 cents to Thangavel Asari. The said Balakrishna Reddy who purchased under Ex.A12 sold the same under Ex.A13 to Murugesha Asari and that it is very clear that the property South of the properties sold to Murugesha Asari and Vadivel Asari was sold to Thangavel Asari by Arumuga Asari under Ex.A16. It is described as bounded on the South by the property of Arumuga Asari. Under EX.A17 sale deed Arumuga Asari sold Southern portion of survey number 102/7A to the father of the plaintiff. In the sale deed the property has been described as bounded on the West by the property of the Thangavel Asari. So description of the property in the above said sale deeds it confirmed Ex.A18 sketch and so the sketch filed by the plaintiff is correct. Ex.A12 to Ex.A17 are certified copies, they are the documents of the year 1933, 1947, 1935, 1946, 1947 and 1955 that is well prior to the suit and it cannot be excepted that the original of these documents would be available with the plaintiff. From the above documents the plaintiff has established that the suit properties were acquired by his father. The plaintiff has produced Ex.A3 to A11 tax receipts, but he has not produced patta to show that tax receipts are related to the suit properties. Though he has not produced any relevant revenue records to show that plaintiff is in possession, it cannot be said the plaintiff is not in possession of the suit property since he has establish title over the suit property and in the absence of title of the defendants predecessors over the suit properties, the possession follows title will be applicable to the claim of the plaintiff. That itself is sufficient to show that the plaintiff's father was in possession in the suit properties, subsequently his children are in possession of the suit properties and after partition under Ex.A1 the suit Survey number properties were allotted to the plaintiff, while his brothers are allotted some other properties and not the suit survey number properties. In the said circumstances, it is clear that the plaintiff and his brother Ganapathy are having title and possession over the suit properties.

15. The defendants who claimed title over the suit properties through their grandfather Uthandi Asari has not established title of the Uthandi Asari after the execution of sale deed Ex.A12 and A14. One of the boundaries mentioned in Ex.A12 as the property of Uthandi Asari was also sold by him Under Ex.A14 and the defendants have not established that Uthandi Asari was having remaining properties in the same survey number. In the absence of any property in the suit survey number the defendants have filed a suit for partition in O.S.No.410 of 1987 and got a preliminary decree and final decree, but they have not produced the copy of the preliminary decree or final decree. The defendants have produced only report of the commissioner as Ex.B1 and delivery receipt as Ex.B2. In the said Advocate Commissioner's report, it is stated that a plan was drawn, but the above said plan has not been enclosed with Ex.B1. Hence Ex.B1 is the part of the document, what is the property allotted under final decree cannot be ascertained since the defendants have not produced the copy of the final decree. Even in delivery receipt Ex.B2 an extent of 148 cents in survey number 102/7 12 and 0.07 cents in S.No.102/7A3 was said to have been delivered to the defendants herein. Survey Number 102/7A2 is missing. Whether it can be taken as typing mistake as 7 12 instead of 7A2, it cannot be taken since copy of the final decree has not been produced. In the absence of the same whether the defendants herein have taken possession of S.No.102/7A2 property is in question. The suit properties survey numbers are mentioned as 102/7A2, 102/7A4 and 102/9. But as per Ex.B2 102/7 12 and 102/7A3 properties has been taken possession and so the Ex.B2 does not reveal any of the suit properties have taken possession by the defendants in the previous suit.

16. Further, O.S.No.410 of 1987 was filed against the person who were not having any title over the properties except the brother of the plaintiff Ganapathy who was 10th defendant in the above O.S.No.410 of 1987 and as per the contention of the defendants 5 to 10th defendants in O.S.No.410 of 1987 were impleaded as purchaser and mortgagee. Even though the brother of the plaintiff was one of the party in the earlier suit, the plaintiff and his another brother Palani was not parties in that suit. At the time of filing of the suit O.S.No.410 of 1987 there was no partition between the plaintiff and his brothers. Only after filing of O.S.No.410 of 1987 for partition under Ex.A1 was taken place in the year 1993. As plaintiff was party to the suit in O.S.No.410 of 1987 even though his brother Ganapathy was party the finding of the suit in O.S.No.410 of 1987 will not bind the plaintiff and further the defendant themselves have no right at all in the suit against the persons who also were not having any right and so whatever be the decision in the earlier suit O.S.No.410 of 1987 will not bind the plaintiff.

17. Now it is to be seen whether the defendants have taken possession of the suit properties as per Ex.B2. As discussed earlier the defendants' predecessors are not having title after the execution of A12 and A14 and so taking delivery through court under ExB2 in respect of suit properties cannot be believed. Further though the defendants have stated that the plaintiff was also present no signature has been obtained from the plaintiff in Ex.B2 and thus the claim about presence of the plaintiff at the time of taking delivery cannot be believed. Further as per the evidence DW-2 the village menial who was said to be present at the time of delivery, the owner of the adjacent land did not sign on the delivery receipt, but other villagers signed. However, during his cross examination D.W.2 deposed that from 1982 onwards the plaintiff (Balasubramanian) was enjoying the suit properties and presently also he is enjoying the properties and the defendants have not produced any revenue records to show that they are in possession of the suit properties. From the above, it is very clear that the defendants have not taken any possession of the suit properties and they are not enjoying the suit properties and in respect of suit properties as rightly contended by the counsel for the plaintiff as per Ex.D.2, only paper delivery was effected and in reality, delivery was not effected.

18. From the foregoing discussion, it is apparent that the defendants' predecessors have no title after execution of EX.A12 and A14 in respect of suit survey number properties and the defendants have not produced any evidence to show that the remaining properties in the suit survey numbers was their grandfather's properties and as the suit filed in O.S.No.410 of 1987 was not against the true owner and the plaintiff was not party to the suit, there is no statutory bar to the suit as contained in Sec 41 of Specific Relief Act. The Plaintiff has established that the properties belonged to his father and though he was employed he was out of station, but the same was enjoyed through his brother it cannot be said that the plaintiff has not enjoyed that the suit properties and as the Principle that possession follows title is applicable, the suit itself is maintainable and the non examination of the brother of plaintiff one Ganapathy will not amount to admitting that the suit properties were not managed by the brother of plaintiff on his behalf. As such in view of the above said discussion, the judgment of first appellate court cannot be said to be perverse and this court find no infirmity or irregularity in the said Judgment. Accordingly, the questions of law formulated are answered against the appellant.

19. In the light of the above discussion and considering all the materials available on record, it is apparent that the First Appellate Court has properly appreciated all the materials available on record and allowed the First Appeal. The First

Appellate Court has given cogent and valid reason for reversing the judgment and decree passed by the trial court and there is no error apparent in the conclusion of the court below. In view of the same, all the substantial questions of law are answered against the appellants/defendants. For the reasons stated above, this appeal cannot be entertained and the same has to fail. The Point is answered accordingly.

20. In the result, the Second Appeal is dismissed. The Judgment and decree passed in A.S.No.29 of 2005 dated 24.01.2006 on the file of Subordinate Court, Chidambaram, is confirmed. No cost. Consequently, connected M.P is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

1.The District Munsif,
Cum Judicial Magistrate,
Parangipet.

2.The Subordinate Judge, Chidambaram.

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

Judgment in
S. A. No.1213 of 2006

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