

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :18.12.2018

Pronounced on :21.12.2018

Coram:

THE HON'BLE DR.JUSTICE G. JAYACHANDRAN

Second Appeal No.1076 of 2004

1.Manu Kounder
2.Kannan
3.Rajakannu
4.Raja

... Appellants/Defendants 1 to 4

/versus/

1.Porapathai
2.Arumugam
3.Ranganatha Udayar
4.Ayyappan

... Respondents 1 & 2/Plaintiffs

... Respondents 3 & 4/5 & 6th Defendant

Second Appeal has been filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 29.01.2004 made in A.S.No.28 of 2003 on the file of the II Additional Subordinate Judge, Villupuram confirming the judgment and decree dated 29.04.2002 made in O.S.No.127 of 2001 on the file of the II Additional District Munsif, Ulundurpet.

For Appellants :Mr.T.Dhanyakumar

For Respondents :Mr.V.Girishkumar for R1 & R2
R3-No appearance
R4-R.Aswini

J U D G M E N T

Defendants 1 to 4 in the suit are the appellants before this Court in this Second Appeal. For the sake of convenience, the parties are described as per their ranking and description in the plaint.

2. Respondents 1 and 2 are the plaintiffs, who have laid the suit for declaration of title and permanent injunction restraining the defendants from interfering with the peaceful possession and enjoyment of the suit property.

3. The Brief averments in the plaint is that the suit property morefully described in the plaint was originally owned by one Pichakarachi ammal @ Chellammal and Chinnaiya Udayar. The said suit property is adjacent to the land in S.Nos.120/1 and 120/2, which is also owned by Pichakarachi ammal @ Chellammal and Chinnaiya Udayar. The father of the plaintiffs one Marimuthu Gounder had purchased the land in S.No.120/2 from Pichakarachi ammal @ Chellammal on 19.12.1959 and got the sale deed registered. The rest of the land in S.No.120/1 was purchased by Marimuthu Gounder from Chinnaiya Udayar on 31.05.1969 and got the sale deed registered. While preparing the sale deeds, due to inadvertence, the suit property, which is lying in S.No.118 measuring to the extent of 0.31.5 ares situated at Thirunarakundram village within the territorial jurisdiction of Thiruvannainallur Sub Registrar, Villupuram District not mentioned.

4. However, after purchasing the entire land owned by Pichakarachi ammal @ Chellammal and Chinnaiya Udayar vide these two sale deeds, the father of the plaintiffs Marimuthu Gounder was in absolute possession and enjoyment of the land including the suit property. He died leaving behind the plaintiffs as his legal heirs. After the death of Marimuthu Gounder, the property is in possession and enjoyment of the plaintiffs and joint patta No.383 has been issued in the name of the plaintiffs. For more than 12 years, they are enjoying the same and paying kists.

5. While so, the first defendant along with the 6th defendant, due to previous enmity, had created documents as if the 6th defendant has sold the suit property to the first defendant. While the 6th defendant has no right or title over the suit property. By creating the false documents, the first defendant along with his sons viz., defendants 2 to 5 have attempted to trespass into the suit property on 25.04.2001. The defendants being powerful with men and money may dispossess the plaintiffs at any time and therefore, declaration and permanent injunction regarding the suit property are prayed for.

6. In the written statement filed by the first defendant and adopted by defendants 2 to 5, it is stated that Marimuthu Gounder has purchased only the property covering S.Nos.120/1 and 120/2 from Pichakarachi ammal @ Chellammal and Chinnaiya Udayar. They never purchased the land in S.No.118. The contention that due to inadvertence, the suit property in S.No.118 has not been mentioned in the sale deed is false. The contention of the plaintiffs that their father Marimuthu Gounder was in possession and enjoyment of the suit property and after his life time, the plaintiffs are in possession and enjoyment of the suit property continuously for more than 12 years, is denied. Contrarily, the plaintiffs have purchased the suit property under S.Nos.120/2 and 120/1 alone and not the property in S.No.118. The suit

property is the ancestral property of the 6th defendant. The father of the 6th defendant Adhimoola Udayar and his brothers by name Ramalingam Udayar, Sundara Udayar, Rathina Udayar, Lakshmana Udayar and Ganapathy Udayar were enjoying the property jointly as an ancestral property. About 75 years the property was divided among themselves by partition. The suit property was allotted to Rathina Udayar, Lakshmana Udayar and Ganapathy Udayar. There was no issues for these three Udayars and they died issueless.

7. Therefore, the entire property got devolved upon the sons of Adhimoola Udayar viz., Chinnaya Udayar and Ranganathan Udayar(6th defendant). Being the elder son, the patta for the property was registered in the name of Chinnaiya Udayar. Through an oral partition, sons of Adhimoola Udayar viz., Chinnaiya Udayar and Ranganathan Udayar (6th defendant) have divided the property among themselves. Chinnaiya Udayar for his needs and necessity has alienated his other properties allotted to him, but he has not alienated the suit property in S.No.118. During his life time, he has not alienated the suit property to anybody. He died issue-less and therefore, the 6th defendant, who is the brother of Chinnaiya Udayar has succeeded the property and enjoying the same.

8. The 6th defendant, later, sold the property to the first defendant. From the date of purchase, the first defendant is in possession and enjoyment of the suit property and paying the tax to the Government. Being in possession and enjoyment for more than 50 years by the first defendant and his pre-decessors in title, the first defendant has prescribed title by adverse possession. The plaintiffs who are having the land adjacent to the suit land, with an intention to grab the suit land, has made a false averment in the plaint as if Pichakarachi ammal @ Chellammal and Chinnaiya Udayar have sold the suit property vide sale deeds of the years 1959 and 1969 and however, omitted to mention the survey number of the suit land by inadvertence.

9. The trial Court based on the pleadings has framed the following issues:

1. Whether the sale deeds dated 19.12.1959 and 31.05.1969 are valid and true?

2. Whether the property in S.No.120/1 was allotted to the father of the 6th defendant through oral partition?

3. Whether the plaintiffs are in possession and enjoyment of the suit property?

4. Whether the plaintiffs are entitled

for the suit relief?

5.To what other relief?

10. Before the trial Court, the plaintiffs have examined two witnesses and marked 6 exhibits. On behalf of the defendants, 3 witnesses were examined and 3 exhibits were marked.

11. The first plaintiff Porapathai Gounder was examined as PW-1. Besides the first plaintiff, one Mannakatti has been examined as PW-2. The sale deed executed by Pichakarachi ammal @ Chellammal in favour of Marimuthu Gounder in respect of S.No.120/1 vide Doc. dated 19.12.1959 is marked as Ex.A1. The sale deed executed by Chinnaiya Udayar and Ramalinga Udayar in favour of Marimuthu Gounder dated 31.05.1969 is marked as Ex.A2. The adangal for fasali from 1384 to 1410 and patta for the fasali from 1393 to 1411 stands in the name of Chinnaiya Udayar and Arumugam is marked as Ex.A3. The tax receipts in the name of the first plaintiff is marked as Exs.A4 and A6. The joint patta in the name of the plaintiffs is marked as Ex.A5. The sale deed executed by Ranganatha Udayar (6th defendant) and others in favour of the first defendant on 17.10.2000 is marked as Ex.B1. The kist receipts in favour of the first defendant are marked as Exs.B2 and B3.

12. The trial Court, after considering the documents relied on by the defendants and the plaintiffs, has held that the plaintiffs have probablised the case in respect of the suit property that their father has purchased the suit property from Pichakarachi ammal @ Chellammal and Chinnaiya Udayar. Though survey number of the suit property is not mentioned in the sale deed Ex.A1 or Ex.A2, possession was given to the plaintiffs. The claim of the defendants that Chinnaiya Udayar died issueless and therefore, the 6th defendant has inherited the share of Chinnaiyar Udayar including the suit property, which was not alienated by Chinnaiya Udayar during his life time was found to be factually incorrect by the trial Court for the reasons that the defendants have not established that Chinnaiya Udayar died issueless. The 6th defendant from whom the first defendant has purchased the suit property is not the legal heir of the Chinnaiya Udayar.

13. Considering the fact that, when the partition among the brothers was effected, in pursuant to that, Chinnaiya Udayar, has alienated some property in favour of the plaintiffs. Subsequently, during the life time of Chinnaiya Udayar, UDR patta was issued in favour of the plaintiffs including the suit property and the same was not objected by Chinnaiya Udayar. This would clearly show that S.No.118 has been inadvertently omitted

in the sale deed executed by Chinnaiya Udayar. Therefore, the alienation of the suit property by the 6th defendant will not confer any title to the first defendant, since the property has already been conveyed and the possession is continuously with the plaintiffs at least for more than 19 years from issuance of UDR patta. The documents relied on by the defendants are of the year 2000 and thereafter. Whereas Ex.A3 which is the adangal for the fasali from 1384 to 1410 and chitta for the fasali from 1393 to 1411 are much earlier to the title document relied on by the first defendant.

14. Aggrieved by the judgment and decree passed in favour of the plaintiffs, the defendants 1 to 5 have preferred A.S.No.28 of 2003. The first appellate Court has framed the following issues for consideration:

- (1) Whether the lower court judgment and decree dated 29.04.2002 in O.S.No.127 of 2001 is liable to be dismissed?
- (2) Whether the appeal can be allowed?

15. After appreciating the evidence and documents, the first appellate Court has confirmed the judgment of the trial Court holding that the suit property had been in possession and enjoyment of Marimuthu Gounder the father of the plaintiffs. After the death of Marimuthu Gounder, the plaintiffs are in possession and enjoyment of the property. The patta No. 383 has been issued in the name of the plaintiffs in respect of the suit property followed by chitta and adangal, which are marked as Exs.A3 and A4. Patta No.383 was issued under UDR survey in favour of the plaintiffs indicates that the plaintiffs are in possession of the property and enjoying the same.

16. While so, the first defendant, who claims title over the property through Ex.B1 sale deed alleged to have been executed by the 6th defendant Ranganatha Udayar, who claims right over the property on the premises that his brother Chinnaiya Udayar died issueless and therefore, he has inherited the property is contrary to the documentary evidence Ex.A2, wherein Chinnaiya Udayar, while alienating his property in S.No.120/1 in favour of the Marimuthu Gounder the father of the plaintiffs has alienated the property along with his son Ramalingam.

17. The trial Court, on appreciating the recital in Ex.A2 and the boundary description, has held that one of the boundary of the property covered in Ex.A2 is shown as Malaiporomboke, which includes land in S.No.118. The contention of the plaintiffs that his father Marimuthu Gounder has purchased the property from Chinnaiya Udayar and his two sons, is found to be true and valid, since the plaintiffs are in possession and enjoyment of the suit property continuously and the same never

objected by Chinnaiya Udayar till his death despite the property included in the patta issued to the plaintiffs under UDR scheme. So, they are entitled for injunction and declaration.

18. The contention of the defendants that Chinnaiya Udayar died issueless and therefore, the suit property came to the hands of the Ranganathan (6th defendant) held to be without any proof. Contrary, Ex.A2 reveals that Chinnaiya Udayar had two sons by name Sathasivam and Ramalingam and Ramalingam was one of the signatory to the sale deed (Ex.A2) executed in favour of the plaintiffs. The first appellate Court has refused to accept the case of the defendants that Chinnaiya Udayar died issueless and as a consequences, the plea of the first defendant that he purchased the property from the 6th defendant, who had no title or right to alienate the property has been held against the defendants.

19. Suffering the concurrent findings by the both Courts below, the defendants 1 to 4 have preferred the present Second appeal. This Court, while admitting the second appeal, has framed the following Substantial Questions of Law for consideration:-

(1) Whether the plaintiffs can claim right and title over the suit property without claiming or seeking relief of rectification of Exs.A1 and A2 as provided under Section 26 of Specific Relief Act?

(2) Whether the plaintiffs have established their right, title and interest over the suit property on the basis of Exs.A1 to A6?

20. The learned counsel appearing for the appellants would forcibly argued that admittedly, the title deeds Exs.A1 and A2 in favour of Marimuthu Gounder do not include the S.No.118, which is the suit property. When the plaintiffs claim that the survey number of the suit property has been omitted inadvertently by the vendor in the sale deed, the remedy available to the plaintiffs is to seek for rectification of the sale deed under Section 26 of the Specific Relief Act. The plaintiffs, without resorting to rectification of the sale deed, cannot seek for declaration. Further, when there is a sale deed [Ex.B1] executed by the 6th defendant in favour of the first defendant, without challenging the validity of the said sale deed, the plaintiffs cannot get declaration regarding the title.

21. Section 26 of the Specific Relief Act reads as follows:-

"S.26. When instrument may be rectified.---(1) When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing (not being the articles of association of a company to which the Companies Act, 1956 (1 of 1956), applies) does not express their real intention, then,---

(a) either party or his representative in interest may institute a suit to have the instrument rectified; or

(b) the plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified; or

(c) a defendant in any such suit as is referred to in clause (b), may, in addition to any other defence open to him, ask for rectification of the instrument.

(2) If, in any suit in which a contract or other instrument, is sought to be rectified under sub-section (1), the Court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the Court may, in its discretion, direct rectification of the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

(3) A contract in writing may first be rectified, and then if the party claiming rectification has so prayed in his pleading and the Court thinks fit, may be specifically enforced.

(4) No relief for the rectification of an instrument shall be granted to any party under this section unless it has been specifically claimed:

Provided that where a party has not claimed any such relief in his pleading, the Court shall, at any stage of the proceedings, allow him to amend the pleading on such terms as may be just for including such claim."

22. From the provisions of this Section, it is clear that an instrument may be rectified for the following reasons:-

(1) error in the instrument on account of fraud of one party; or

(2) where there is no fraud, mistake common to both of them and

(3) the incorrect or imperfect expression of the intention of the parties. While rectifying an instrument, the thing which the court is required to examine is whether on account of fraud or mutual mistake the instrument does not truly express the intention of the parties. At that stage, the Court is not concerned with the validity of the instrument as rectified.

23. The case of the plaintiffs/respondents is that from Pichakarachi @ Chellammal and Chinnaiya Udayar, they have purchased the land in S.Nos.120/2 and 120/1. The boundary shown in the document Ex.A2 executed by Chinnaiya Udayar includes a larger extent which includes S.No.118 and since the date of purchase, they are in possession and enjoyment. Their vendor Chinnaiya Udayar or his legal heirs have not raised any dispute regarding plaintiffs possession and enjoyment of the property in S.No.118. In such circumstances, if the plaintiffs have thought that it is sufficient to establish the continuous possession and enjoyment of the suit property for more than limitation prescribed, a third party cannot take advantage of the omission in the sale deed or error in the sale deed and create document for which, he does not have any right and force the plaintiffs to seek for rectification of the title deed as per Section 26 of the Specific Relief Act.

24. The case of the plaintiffs is that Marimuthu Gounder, after purchasing the property from Chinnaiya Udayar vide Ex.A2, was put in possession and enjoyment of the suit property, the plaintiffs have established the possession and enjoyment through other documentary evidence such as patta, chitta and adangal. To disprove their case, the defendants ought to have placed before the Court a better title than the plaintiffs. But, in this case, the first defendant relies upon Ex.B1, which is the sale deed executed by the 6th defendant, who is the brother of Chinnaiya Udayar. It is claimed by the 6th defendant that he got the property through Chinnaiya Udayar as a legal heir, since Chinnaiya Udayar died issueless. The very claim that Chinnaiya Udayar died issueless is a false and proved to be false by documents executed by Chinnaiya Udayar himself along with his

son Ramalingam (Ex.B1) as early as in the year 1969. Therefore, the documents created by the 6th defendant in the year 2002 is clearly a make believe document. If really the 6th defendant could establish semblance of right over the suit property, then the rectification of deed as per the Section 26 of the Specific Relief Act may be warranted. But, when the third party, who has no title or right over the property, cannot take advantage of the error in the title deed of the plaintiffs and try to encroach upon the land by creating false document. Therefore, the plaintiffs need not necessarily go for rectification of sale deed Exs.A1 and A2 for non-inclusion of S.No.118 in their sale deed in the given facts and circumstances.

25. Since the plaintiffs have established their title and interest over the suit property through the boundaries described in the sale deed Ex.A2 executed by Chinnaiya Udayar and his son Ramalinga Udayar and the patta issued in their favour after UDR survey including the suit property; absence of objection of their vendor for including S.No.118 in the patta probablise the case of the plaintiffs to get the benefit of the decree as prayed for in the plaint.

26. Therefore, this Court finds that there is no error in the judgments of the Courts below and Substantial Questions of law framed by this Court are answered affirmatively in favour of the plaintiffs/respondents.

27. In the result, this Second Appeal is dismissed. The judgment and decree passed in A.S.No.28 of 2003 confirming the judgment and decree passed in O.S.No.127 of 2001 is confirmed. No orders as to costs.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

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To

1.The II Additional Subordinate Judge,
Villupuram.

2.The II Additional District Munsif,
Ulundurpet.

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Copy To

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

+1cc to Mr.T.Dhanya Kumar, Advocate, S.R.No. 89829

S.A.No.1076 of 2004

MP (CO)
GN(13/02/2019)



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