

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :18.01.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.1237 of 1999

Ramasamy @ Ramasamy Kalingarayar ... Appellant/Appellant/
Plaintiff

Vs.

1.Kannammal

2.Narayanasamy

3.Uma

... Respondents/Respondents/
Defendants

Prayer : Second Appeal is filed under Section 100 of the Civil Procedure Code, to set aside the Judgment and Decree of the Principal Subordinate Judge, Mayiladuthurai dated 25.03.1998 made in A.S.No.175 of 1997 confirming the Judgment and Decree of the Principal District Munsif Court, Mayiladuthurai dated 14.10.1997 made in O.S.No.109 of 1996.

For Appellant : Mr.S.Sounthar

For Respondents : No Appearance

J U D G M E N T

The plaintiff and one Muthaiya Padaiyachi are brothers. The first defendant is the wife of the plaintiff's brother, Muthaiya Padaiyachi. Defendants 2 and 3 are the sons of Muthaiya Padaiyachi. The fourth defendant is the wife of the second defendant. Originally, the property belongs to Dharmapuram Adinam. There was a partition dispute in between the plaintiff and his brother Muthaiya Padaiyachi. The plaintiff got lease of the suit schedule property from the Dharmapuram Adinam, for which, in the year 1963, the plaintiff executed the lease deed in favour of Dharmapuram Adinam for Rs.5.50 p.a., Thereafter in the year 1955, the plaintiff constructed the first item of the building in the suit schedule property.

2. The legal body assigned house No.16 and the plaintiff is paying tax to the legal bodies. Besides, on the side of the suit property, the plaintiff planted coconut, tamarind and jack fruit trees. Apart from the above, the plaintiff has spent Rs.250/- to the fourth item of the property for the purpose of cultivation. Accordingly, the plaintiff possess the property after succeeding the case before the Hon'ble Apex Court. The plaintiff requested the defendants to return the property. However, the defendants refused to return the property since the defendants trespassed into the property in the year 1981.

Hence, the cause of action arose. In view of the above, the plaintiff filed a suit for recovery of possession.

3. The defendants filed a written statement and the sum and substance of the written statement are as follows:

The defendants denied the Dharmapuram Adinam lease in favour of the plaintiff. In the year, 1963 he constructed the first item of the property and the plaintiff spent Rs.250/- for cultivation of the fourth item of the property. Originally, the suit schedule property belongs to Dharmapuram Adinam. The plaintiff's father, Rengasamy Kalingarayar enjoyed the property from Dharmapuram Adinam. Thereafter, the plaintiff's father executed the Will. After the will, the defendants enjoyed the property. The enjoyment of the defendants is known to the plaintiff and the allegation with regard to the defendants trespassing into the property in the year 1981 is denied. From the day one, the defendants are enjoying the property and is in occupation of the suit schedule property. The death of Muthaiya Padaiyachi was informed to the plaintiff during the pendency of the case before the Hon'ble Apex Court. Thereafter, the result of the Judgment of the Hon'ble Apex Court was not informed to the defendants and the death of Muthaiya Padaiyachi was known to the plaintiff on 13.04.1986 i.e., only after five years. The Hon'ble Apex Court rendered the decision without impleading this defendants as the legal heirs of the deceased. The plaintiff obtained favourable order as against the dead person. Hence, the order passed against the dead person will not bind on the legal heirs of the defendants since the defendants enjoyed the property from time memorial. Accordingly, they are entitled for adverse possession in the year 1987.

4. In fact, the plaintiff filed a suit against the defendants in O.S.No.454/1987 and the suit was also dismissed on the same ground. Aggrieved against the same, the plaintiff filed the present suit against the defendants in order to grab the property. After elaborate trial, the lower court dismissed the suit as against which the appellant/plaintiff preferred the appeal before the lower court. The lower appellate court confirmed the dismissal order passed by the lower court against which the present second appeal is filed.

5. At the time of admission, the substantial questions of law are framed as follows:

- i) Whether the courts below are erred in rejecting the Supreme Court's Judgment under Ex.A5 overlooking the position of law that appeal to Supreme Court by way of Special Leave is a right created by the Constitution of India and Order 22 of Civil Procedure Code will not be applicable to it?

ii) Whether the Courts below erred in stating that the possession of appellant prior to 1981 is not proved overlooking the findings of High Court in earlier suit that appellant was in possession of the suit property?

6. The lower court as well as the lower appellate court failed to appreciate the documents filed by the appellant/plaintiff with regard to the construction of house and the property tax paid by the plaintiff.

7. Apart from the above, the lower court as well as the lower appellate court have not considered the decree in O.S.No.110/1972 and the same was confirmed by the Hon'ble Apex Court in C.A.No.122/1979. Both the orders were marked as Exs.A4 and A5 respectively. The lower court as well as the lower appellate court failed to consider the injunction granted by the Hon'ble Apex Court as perverse. Accordingly, the plaintiff is entitled to succeed the second appeal.

8. Though no one appeared on behalf of the respondent, this court decided to proceed the case based on the available materials.

9. Perusal of the findings of the lower court as well as the lower appellate court reveals that admittedly the properties belonged to the Dharmapuram Adinam and on perusal of Ex.A2, it is seen that initially the lease was granted in favour of one Rangasamy Kalingarayar and the plaintiff/Ramasamy Kalingarayar and the first defendant's husband, Muthaiya Padaiyachi are sons of the said Rangasamy Kalingarayar. With regard to the suit schedule property, the plaintiff already filed a suit against Muthaiya Padaiyachi before the District Munsif Court, Myladuthurai seeking permanent injunction. Thereafter, the suit was transferred to Sirkazhi District Munsif Court and renumbered as O.S.No.110/1972. The trial court decreed the suit in his favour against which the first respondent's husband filed an appeal before the Subordinate Court, Myladuthurai and the same was dismissed. As against the lower appellate court Judgment, the first respondent's husband filed the second appeal before this court in S.A.No.363/1975. On 27.07.1977, the appeal was allowed and injunction granted by the lower court was dismissed, against which, the plaintiff filed a further appeal before the Hon'ble Apex court in C.A.No.127/1979. The Hon'ble Apex Court allowed the Civil Appeal and set aside the order of this court and restored the order of the lower court on 30.08.1991.

10. On perusal of the lower court findings, the said Muthaiya Padaiyachi died in the year 1986 and the same was informed to the plaintiff during the pendency of the said Civil Appeal before the Hon'ble Apex Court. However, the

appellant/plaintiff did not take any steps to implead the legal heirs of the defendants before the Hon'ble Apex Court as required under Order XXII of CPC.

11. Apart from the above, the respondent/defendant has filed 25 documents in order to prove the title over the property. On perusal of the defendants' documents, it is clear that the documents relates to payment of Electricity Tax and property tax from the year 1972 onwards and on perusal of the entire documents, the lower court as well as the lower appellate court have arrived at a conclusion that the defendants are enjoying the property.

12. Apart from the above factual aspects, the lower court had arrived at a conclusion that since the appellant/plaintiff has not taken any steps to bring the legal heirs of the defendants before the Hon'ble Apex Court, the order of the Hon'ble Apex Court as against the dead person, will not bind on the appellant. Though the lower court has not analysed the Supreme Court Rules, 1996, for better appreciation, the relevant provisions of Order XV Rules 33, 34 and 35 are extracted under as follows:

" 33. Upon the filing of such an application the Registrar of the Court shall, after notice to the parties concerned, determine who in his opinion is the proper person to be substituted or entered on the record in place of, or in addition to the party on record, and the name of such person shall thereupon be substituted or entered on the record.

34. Save as aforesaid the provision of Order XXII of the Code relating to abatement shall apply mutatis mutandis to appeals and proceedings before the Court.

35.(1) Within forty-five days of the service on him of the notice of authentication of the record, the appellant shall lodge in the Court the statement of his case and serve a copy thereof on the respondent. The respondent shall lodge statement of case within thirty-five days thereafter. In appeals where printing of record is dispensed with, the appellant shall file statement of case within 45 days from the date of order dispensing with the printing of appeal record or from the expiry of period granted by the Court for filing additional papers or record, whichever is later and the respondent shall file statement of case within 35 days either from the date on which the period of 30 days from the date of service of notice of lodgment of petition of appeal expires or from the date of service of statement of case of the appellant, whichever is later."

13. Perusal of Order XV Rules 33, 34 and 35 contemplated for bringing on the legal heirs of the deceased on record and Order XV Rules 32 and 33 clearly reveals that there is a procedure and mechanism for substituting legal heirs on record before the Hon'ble Apex Court. Particularly, Rule 34 clearly held application of the provision of Order XXII of the CPC relating to abatement shall apply even before the Hon'ble Apex Court.

14. In view of the above position that the son of appellant/plaintiff not taken any steps to bring the legal heirs of the defendants before the Hon'ble Apex Court is a clear violation of the said Order XV Rule 34 and Order XXII of CPC.

15. In view of the above, the appellant/plaintiff failed to follow the procedure contemplated under Order XXII CPC and Order XV Rule 34 and Supreme Court Rules 1966 and it is a clear violation of the above provisions.

16. Under the above said circumstances, I do not find any error in the orders of the lower court as well as the lower appellate court and therefore, the substantial questions of law are answered against the appellant.

In the result, the second appeal is dismissed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

gv
To

1.The Principal Subordinate Judge,
Mayiladuthurai.

2. The Principal District Munsif Court,
Mayiladuthurai.

3.The Section Officer
VR Section High Court, Madras

+1 cc to Mr.S.Southar Advocate sr 4703

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