

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date : 07.12.2018

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Second Appeal No.341 of 2012

1. Mr.Kannan
2. Mr.Selvaraj
3. Mr.Kesavan
4. Mr.Arjunan
5. Mr.Karunakaran
- 6.Mr.Jayarakshakan

...Appellants/Defendents 1,2,4, to 7

Vs

1. Mr.Sellaperumal
2. Mr.Kumar
3. Mr.Jayagandhi
4. Mrs.Kalyani
5. Minor Kalaimani
6. Minor Kalaiarasi

Minors 5 & 6 represented by their
mother and guardian Kalyani

... Respondents 2 to 6/Defendents 8,10 to 13

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree dated 29.08.2011 in A.S.No.9 of 2011 on the file of the Principal Subordinate Judge, Tindivanam confirming the judgment and decree made in O.S.No.17 of 2004 dated 06.12.2010 on the file of the District Munsif cum Judicial Magistrate , Vanur.

For Appellants : Mr.J.Prithivi
for Mr.S.Kaithamalai Kumaran
For Respondents : Ms.R.Sripriya
for M/s.V.Raghavachari - R1

No appearance - R2 to R6

JUDGMENT

This second appeal has been filed as against the decree and judgment dated 06.12.2010 in A.S.No.9 of 2011 on the file of the Principal Subordinate Court, Tindivanam confirming the judgment and decree made in O.S.No.17 of 2004 dated 29.08.2011 on the file of the District Munsif cum Judicial Magistrate Court, Vanur.

2. This appeal has been filed against the concurrent findings of the Courts below. The suit has been filed for declaration and permanent injunction against the defendants. It is the case of the plaintiff that the suit property and other properties originally belong to one Adhilakshmiammal by virtue of the sale deed dated 05.01.1935. Thereafter, the said Adhilakshmiammal executed a settlement deed dated 20.08.1979 in favour of the plaintiffs. The plaintiffs are in possession of the properties and the defendants have no right in the suit property. The defendants had made an attempt to trespass into the suit property. However, the same was thwarted by the plaintiffs. Hence, the suit for declaration and also for permanent injunction.

3. It is the contention of the defendants that they are in possession of the suit property even at the time of purchase by Adhilakshmiammal and they were using the suit property as a cow shed and for storing hay. In the above said sale deed, the suit property has been mistakenly included by the vendor of the said Adhilakshmiammal and the said Adhilakshmiammal was instructed by her vendor not to object the defendants possession in the suit property and there is no written agreement in this regard. The defendants are in possession of the suit property for more than 12 years. The plaintiffs had issued legal notice to the defendants on 29.09.2004 which was replied by the defendants.

4. The trial Court framed following necessary issues for consideration in the suit :

1. Whether the sale deed dated 05.01.1935 is valid and true?

2. Whether the settlement deed dated 20.08.1979 is true and valid and acted upon?

3. Whether the plaintiff is entitled for declaration?

4. Whether the plaintiff is entitled for consequential injunction?

5. Whether the suit is bad for non joinder of necessary parties?

6. Whether the suit property belong to the plaintiff?

5. On the side of the plaintiffs, P.W.1 to P.W.3 were examined and Ex.A.1 to Ex.A.16 were marked and on the side of the defendants, D.W.1 to D.W.5 were examined and Ex.B.1 and Ex.B.2 were marked. The trial Court had decreed the suit and the first appellate Court also confirmed the decree and judgment of the trial Court. As against which, the present appeal came to be filed.

6. Notice has been sent to the respondents and the following substantial questions of law have been framed for consideration in the appeal :

i) Whether the Courts below are justified in not advertng to the evidence adduced to prove their long and continuous possess of the suit property?

ii) Whether the Courts below are ignorant of law of limitation in filing a suit for declaration?

7. The learned counsel for the appellant contended that though the suit property stands in the name of the plaintiff, the defendants are in possession of the suit property right from the year 1935 and their possession is known to the plaintiff. Merely because the suit property has been included in the sale deed of the year 1935, it cannot be said that the defendants are not in possession of the suit property. In the notice sent by the plaintiffs, it is alleged that the defendants had encroached upon the suit property and it was replied by the defendants that they are in possession of the property.

8. The suit has been laid much after 12 years, beyond the period of limitation and the suit for declaration has to be filed within three years after the defendants had set up their right in the suit property in their reply notice. Hence, the suit filed for declaration and consequential injunction is not maintainable. Further, the plaintiff himself admitted that he is not in possession of the suit property and the Courts below have not at all considered this aspect. Hence, submitted that the findings of the trial Court as well as the first appellate Court requires interference.

9. Admittedly, there is no dispute with regard to the title of the property. The suit property is 0.5 cents is also not in dispute. It is the contention of the appellants that the suit property was originally purchased

by one Adhilakshmiammal in the year 1935. Thereafter, the same has been settled in favour of the plaintiffs on 20.08.1979. The defendants all of a sudden made an attempt to encroach upon the suit property. Hence, the suit for declaration and permanent injunction.

10. It is the contention of the defendants that the defendants fore father and the plaintiffs fore father are relatives and the defendants are allowed to continue to be in possession of the suit property for many years and even in the year 1935. It is the contention of the defendants that the plaintiff himself issued legal notice Ex.B.1 on 29.09.1992, wherein it has been clearly admitted that the defendants have encroached upon the suit property. The reply sent by the defendants has been marked as Ex.B.2 wherein they have clearly stated that they are in possession of the property for many long years and disputed the claim of the plaintiffs.

11. The trial court and the first appellate Court have failed to consider these aspects. In fact, the trial Court has gone to the extent of saying that there is no pleading with regard to Ex.B.1 and Ex.B.2 in the written statement and additional written statement filed by the defendants and that the finding of the trial Court is factually incorrect. Infact, in the written statement, it is specifically pleaded about the legal notice Ex.P.B.1 and Ex.B.2. The plaintiffs have not denied the issuance of Ex.B.1 to the defendants. Ex.B.1 clearly shows that it is the specific case of the plaintiffs that the defendants had encroached upon the suit property and they have no right to do so. It has been replied by the defendants stating that they are in continuous possession of the suit property for many years. Ex.B1 and Ex.B2 has not been disputed by the plaintiffs. The trial Court has disbelieved Ex.B.1 and Ex.B.2 only on the ground that there is no pleadings with the regard to Ex.B.1 and Ex.B.2, which is factually incorrect. In fact, in the written statement, it has been specifically pleaded about Ex.B.1 and Ex.B.2.

12. It is the case of the plaintiff that as if the defendants had made an attempt to encroach upon the property in the year 2004. But the legal notice sent by the plaintiffs vide Ex.B.1 in year 1992 has been totally suppressed by the plaintiffs. Ex.B.1 is the notice between the parties and the defendants had categorically admitted in their reply that the defendants are in possession of the suit property right from the year 1935. The plaintiffs ought to have filed the suit for declaration within three years from the date when the defendants had exhibited their

independent right over the suit property. When the defendants had set up their independent over the suit property, the plaintiffs ought to have filed a suit for declaration to declare their title in the suit property within three years from the date when the right to sue first accrued to them. When the defendants asserted their independent right in the year 1992, the right to sue accrued to the plaintiffs at that earliest point of time. In that case, the suit ought to have been filed for declaration within three years from the date when right to sue accrued in the year 1992. Therefore, the suit filed for declaration in the year 2004 is certainly barred under Article 58 of the Limitation Act.

13. It is further to be noted that though the defendants assert their possession from the year 1935, Ex.B.1 notice issued by the plaintiff itself clearly indicate that the defendants are in suit property as an encroacher even in the year 1992. Further, in the evidence also P.W.1 has categorically admitted that except the suit property, he is in possession of all the other properties. The same clearly indicate that the plaintiffs are never in possession of the suit property. Therefore, the judgment of the trial Court as well as the first appellate Court is not based on the proper appreciation of the facts of the case.

14. Admittedly, the defendants are in possession of the property as per the admission of the plaintiffs not only in the evidence of P.W.1 but also in the previous legal notice Ex.B.1. These aspects have not at all been considered by the trial Court as well as by the appellate Court. The suit has been filed beyond the period of limitation of three years. Therefore, the judgments of the Courts below are not at all based on appreciation of facts and law and are liable to be interfered.

15. In the result, the Second Appeal is allowed and the judgment and decree passed by the Courts below are set aside. There shall be no order as to costs.

Sd/-

Assistant Registrar (CS)

//True Copy//

Sub Assistant Registrar

vrc

To

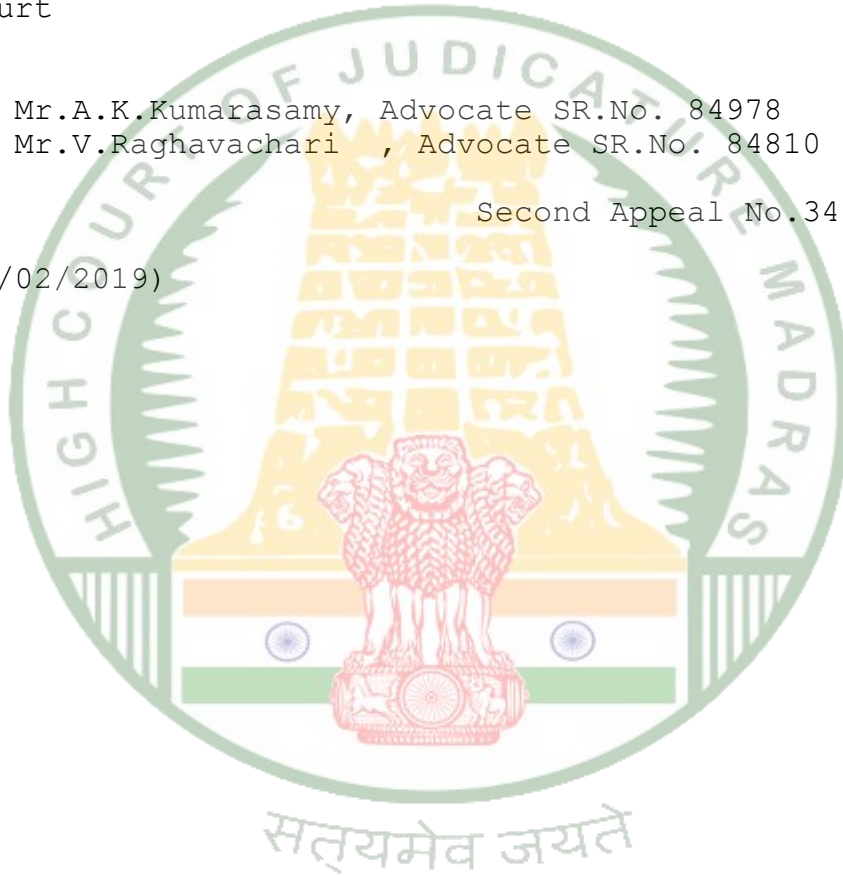
1. The Principal Subordinate Court,
Tindivanam.
2. The District Munsif cum Judicial Magistrate Court,
Vanur.

3. The section officer,
VR Section,
High court
Madras

+1cc to Mr.A.K.Kumarasamy, Advocate SR.No. 84978
+1cc to Mr.V.Raghavachari , Advocate SR.No. 84810

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A.SK(05/02/2019)



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