

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.08.2018

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.Nos.255 and 256 of 2009  
and  
M.P.No.1 of 2009

Mahalingam

..Appellant in both the Appeals/  
Plaintiff in O.S.No.441 of 2002  
Defendant in O.S.No.447 of 2002

Vs.

Kathavarayan

..Respondent in both the Appeals/  
Plaintiff in O.S.No.447 of 2002  
Defendant in O.S.No.441 of 2002

PRAYER in S.A.No.255 of 2009 :

Second Appeal filed under Section 100 of C.P.C., against the judgment and decree of the Learned Principal Subordinate Judge, Cuddalore in A.S.No.88 of 2007 dated 29.12.2008 reversing the Judgment and Decree of the Learned Principal District Munsif, Cuddalore in O.S.No.441 of 2002 dated 29.11.2007.

PRAYER S.A.No.256 of 2009:

Second Appeal filed under Section 100 of C.P.C., against the judgment and decree of the Learned Principal Subordinate Judge, Cuddalore in A.S.No.89 of 2007 dated 29.12.2008 reversing the Judgment and Decree of the Learned Principal District Munsif, Cuddalore in O.S.No.447 of 2002 dated 29.11.2007.

For Appellant : Mr.A.K.Kumaraswamy, Senior Counsel  
for Mr.S.Kaithamalai Kumaran

For Respondent : Mrs.Chitra Sampath, Senior Counsel  
for Mr.T.S.Baskaran

J U D G M E N T

The challenge in the above appeals is to the common judgment of the lower appellate Court (Principal Sub-Court) Cuddalore made in A.S.Nos.88 and 89 of 2007. The lower Appellate Court allowed the appeals setting aside the judgments and decrees of

the trial Court made in O.S.Nos.441 of 2002 and 447 of 2002.

2. The suit in O.S.No.441 of 2002 was filed by the appellant herein seeking declaration of title and a permanent injunction restraining the defendant from interfering with his possession and enjoyment of the suit property. According to the plaintiff, the suit property along with larger extent originally belonged to the mother of the plaintiff and the defendant Janakiammal. The said Janakiammal had executed a registered settlement deed dated 15.06.1984 settling different portions of the property in favour of the plaintiff as well as the defendant. Under the said settlement, the suit property measuring about 2020 sq.f was settled on the plaintiff. Claiming to be in possession of the same and complaining that the defendant who is elder brother of the plaintiff is attempting to interfere with his possession, the plaintiff came forward with this suit seeking a decree for permanent injunction as aforesaid.

3. The defendant resisted the suit contending that the plaintiff had not accepted the settlement deed dated 15.06.1984, de horse the said settlement, the defendant continued to be in possession, this plea was raised by the defendant while accepting the title of Janakiammal as well as execution of the settlement deed by her. The defendant would further contend that the plaintiff was living separately from 1975 onwards, since his relationship with Janakiammal was not cordial. In fact according to the defendant, the said Janakiammal wanted to give away entire property to him and it was at his instance the suit property was settled on the plaintiff. It is the further claim of the defendant that the plaintiff refused to accept the settlement deed and never took delivery of the suit property as per the settlement deed. The defendant would also plead that he has been in possession of the property ever since the death of Janakiammal and has perfected title by adverse possession.

4. The defendant in O.S.No.441 of 2002 filed a suit in O.S.No.447 of 2002 as counter blast to the suit in O.S.No.441 of 2002 filed by the appellant. In the plaint in O.S.No.447 of 2002 he would plead that the defendant therein did not take possession of the property and refused to accept the settlement deed and therefore he continued to be in possession of the property, thereby prescribing title by adverse possession. He also sought for a permanent injunction restraining the plaintiff in O.S.No.441 of 2002 from interfering with his alleged possession.

5. The suit in O.S.No.441 of 2002 was for declaration of title and permanent injunction and the suit in O.S.No.447 of 2002 was for injunction restraining the defendant from

interfering with his possession of the property.

6. The plaintiff in O.S.No.441 of 2002 who figured as defendant in O.S.No.447 of 2002 filed a written statement reiterating his stand in the plaint in O.S.No.441 of 2002 and contended that the suit is a counter blast to the earlier suit filed by him. Both the suits were taken up together and disposed of by a common judgment.

7. On the above pleadings the learned trial Judge framed the following issues in O.S.No.441 of 2002:

- "1. Whether the plaintiff is entitled for declaration as prayed for?
2. Whether the plaintiff is entitled for permanent injunction as prayed for?
3. Whether the suit is maintainable?
4. To what other relief? "

The following issues were framed in O.S.No.447 of 2002:

- "1. Whether the plaintiff is entitled for permanent injunction as prayed for?
2. Whether the suit is maintainable?
3. To what other relief? "

8. Upon consideration of the oral and documentary evidence the learned trial Judge concluded that the claim of the defendant in O.S.No.441 of 2002 that the plaintiff in the said suit has not accepted the settlement deed was not established. The learned trial Judge also took note of the documentary evidence in the form of revenue records which would show that Ex.A2 Patta has been issued for the suit property in the name of the plaintiff in O.S.No.441 of 2002 also even as early as on 26.09.1996. In view of the said unimpeachable evidence indicating that the settlement deed was acted upon and the suit property was settled on the plaintiff in O.S.No.441 of 2002 under the said settlement deed, the learned trial Judge concluded that the settlement deed is held to be acted upon and the plaintiff in O.S.No.441 of 2002 would derive titled to the suit property in the said document.

9. Insofar as the other suit in O.S.No.447 of 2002 is concerned, the learned trial Judge dismissed the same holding that the plaintiff therein has not established his possession over the suit property. Aggrieved the defendant in O.S.No.441 of 2002/ plaintiff in O.S.No.447 of 2002 filed two appeals in A.S.Nos.88 and 89 of 2007 before the Sub-Court, Cuddalore. The learned Subordinate Judge on hearing the parties framed the following points for determination in A.S.No.88 of 2007 which arouse out of O.S.No.441 of 2002:

- 1) Whether the respondent/ plaintiff is

entitled for a decree of declaration and issuance of permanent injunction as prayed for?

2) Whether the judgment and decree of the lower Court are erroneous and liable to be set aside?

The following points were framed for determination in A.S.No.89 of 2007 which arose out of O.S.No.447 of 2002:

1) Whether the appellant/ defendants is entitled for a decree for permanent injunction as prayed for?

2) Whether the judgment and decree of the lower Court alone is liable to be set aside?

10. Before the trial Court, the plaintiff in O.S.No.441 of 2007 was examined as PW1 and one Tr.Shankar was examined as PW2. On the side of the defendant in O.S.No.441 of 2002 he was examined as DW1 and DW2 to DW5 were examined. Exs.A1 and A2 were marked on the side of the plaintiff and Exs.B1 to B15 were marked on the side of the defendant. The Advocate Commissioner had filed report and plan the same were marked as Exs.C1 and C2.

11. The lower Appellate Court after re-appreciating the evidence had concluded that the settlement deed dated 15.06.1984 was not acted upon and the plaintiff in O.S.No.441 of 2002/ appellant herein had not taken possession of the property settled on him pursuant to the said settlement deed. Upon the said finding the learned Subordinate Judge set aside the judgments and decrees of the trial Court and allowed both the appeals, thereby the suit filed by the appellant herein, in O.S.No.441 of 2002 was dismissed and the suit filed by the respondent in O.S.No.447 of 2002 was decreed. Aggrieved the plaintiff in O.S.No.441 of 2002 has come forward with these Second Appeals.

12. At the time of admission the following questions of law were framed for determination:

"1. Is the lower appellate Court justified in holding that Ex.A1 Settlement Deed was not accepted by the appellant, overlooking the evidence of PW1 and the mutation of revenue records in the name of the plaintiff?

2. When the plea of adverse possession is not established by the respondent, is the lower appellate Court justified in decreeing the suit for permanent injunction?"

13. I have heard Mr.A.K.Kumaraswamy, learned Senior Counsel

appearing for Mr.S.Kaithamalai Kumaran for the appellant and Mrs.Chitra Sampath, learned Senior Counsel for Mr.T.S.Baskaran, learned counsel appearing for the respondent in both the appeals.

Question No.1:-

14. Mr.A.K.Kumaraswamy, learned Senior Counsel appearing for the appellant would contend that once the execution of the settlement deed is admitted and the revenue record has been mutated on the basis of the settlement deed as evidenced by Ex.A2, the lower Appellate Court was not right in holding that the settlement deed was not acted upon. If the case of the respondent is accepted the entire settlement deed will have to go and parties must have been relegated to a partition suit. He would point out that the lower Appellate Court had split the settlement deed and upheld it insofar as the settlement of the property in favour of the respondent and rejected the claim of the appellant based on the very same document.

15. Mrs.Chitra Sampath, learned Senior Counsel appearing for the respondent would however contend that de hors the settlement deed, the respondent continued to be in possession of the property and the appellant having not accepted the settlement deed and taken possession cannot claim any right under the settlement deed.

16. I have considered the rival submissions. The fact that the property belonged to Janakiammal is not in dispute. The execution of the settlement deed dated 15.06.1984 by Janakiammal is also not disputed. Under the said settlement deed, the suit property shown as 'B' Schedule property is allotted to the appellant herein, pursuant to the same the appellant had applied for mutation of revenue records and Ex.A2 Joint patta has been issued to him as early as on 26.09.1986. The said document would go long way to show that the right of the appellant was recognized by the revenue and it would be a proof of possession of the property.

17. The lower Appellate Court however concluded that the appellant had not established his possession. The lower appellate Court has referred to the evidence of the plaintiff in O.S.No.441 of 2002/ appellant herein wherein he had said that there is no other evidence to show that he is in possession and enjoyment of the suit property except Ex.A2. Ex.A2 patta is a Joint patta given in favour of the appellant and the respondent in 1996. The respondent had not taken any steps to cancel the same for over six years till the suit came to be filed in the year 2002.

18. The lower appellate Court has also pointed out certain

physical features as observed by the Advocate Commissioner to buttress its conclusion that the entire property allotted to the plaintiff and the defendant remain as a single unit. This by itself in my considered opinion cannot afford a ground for partially invalidating the settlement deed dated 15.06.1984. Even assuming that such settlement deed is not there, the parties as sons of the original owner Janakiammal would be entitled to equal shares in the property. Hence, it would be a question of ouster and not a mere adverse possession as found by the lower appellate Court. If the claim of the respondent is taken as one of ouster, I should immediately point out that there is absolutely no evidence to establish ouster.

19. Having admitted the execution of the settlement deed the only plea of the respondent is that the appellant did not accept the settlement deed and therefore it never came into force. On the other hand, it is seen that from Ex.A2 patta that the mutation has been effected pursuant to the said settlement deed.

20. Hence, I am of the considered opinion that the lower appellate Court was not right in concluding that Ex.A1 settlement deed was not acted upon since the plaintiff refused to accept the said settlement deed. Hence, the substantial question of law No.1 is answered in favour of the appellant.

Question No.2:-

21. So far as the second question of law is concerned there is absolutely no evidence to show that the respondent had perfected title by adverse possession. The settlement deed was executed in the year 1984 and the Joint patta was issued in 1996. Therefore, there is an acknowledgment of title of the appellant in the year 1996 by the Revenue to the knowledge of the respondent. It is not shown that the respondent had taken any steps to have the said Joint patta cancelled or set aside. A perusal of the entire evidence on record would point out that the respondent has singularly failed to prove his claim of adverse possession.

22. As already pointed out, in the absence of the settlement deed parties would be co-owners and in that event the plea of the respondent as regard adverse possession can only be that of ouster which requires more stronger proof. In the absence of such evidence, I am unable to accept the findings of the lower appellate Court regarding possession as well as title to the property. Once the plea of adverse possession fails and the title of the appellant is accepted then the principle that in case of vacant land possession will follow title will apply, therefore, the lower Appellate Court was not right in granting permanent injunction against the true owner. Hence, the 2<sup>nd</sup> question of law is answered in favour of the appellant.

23. In fine, the appeals are allowed and the judgments and decrees of the lower appellate Court is set aside. The judgments and decrees of the trial Court will stand restored. However, taking into account the relationship between the parties, I direct the parties to bear their own costs. Consequently, the connected Miscellaneous Petition is also closed.

Sd/-  
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

dsa  
To

1. The Learned Principal Subordinate Judge, Cuddalore.
2. The Learned Principal District Munsif, Cuddalore.

Copy To  
The Section Officer,  
VR Section, High Court,  
Madras-104 (2 Copies)

+2ccS to Mr.S.Kaithamalai Kumaran, Advocate, S.R.No.53486, 53487  
+2ccS to Mr.T.S.Baskaran, Advocate, S.R.No.53669

S.A.Nos.255 and 256 of 2009

PA(Co)  
CS/10/09/18

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