

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 27.07.2018
JUDGMENT PRONOUNCED ON : 20 .08.2018

CORAM

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.600 of 2008
and
M.P.No.1 of 2008

1.S.Mani
2.S.Saraswathi Ammal ..Appellants/defendants

Vs.

1.D.Dhanajayan (Deceased)
2.Meenakshi
3.Ravi
4.Manjula
5.Anandhan
6.Susheela
7.Anbalagan

[Respondents 2 to 7 brought on record as legal representatives of the deceased sole respondent vide order of the Court dated 07.06.2018 made in M.P.No.1 of 2013 in S.A.No.600 of 2008]

..Respondents /LRS. Plaintiff

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree made in A.S.No.52 of 2006 dated 20.12.2007 on the file of the Additional Subordinate Judge, Tiruvannamalai, confirming the judgment and decree made in O.S.No.55 of 2002 dated 25.04.2006 on the file of the District Munsif Court, Tiruvannamalai Town and District.

For Appellants : Mr.S.V.Jayaraman, Senior Counsel
for Mr.R.Karthikeyan

For Respondents: Mr.S.Parthasarathy, Senior Counsel
for Mr.K.A.Vimal Kumar

J U D G M E N T

1. The appellants challenge the judgment and decree of the lower appellate Court viz., Additional Sub-Court, Tiruvannamalai dated 20.12.2007 made in A.S.No.52 of 2006, whereby, the appeal filed by the appellants was dismissed confirming the judgment and decree of the trial Court viz., Principal District Munsif

Court, Tiruvannamalai dated 25.04.2006 in O.S.No.55 of 2002.

2. The suit in O.S.No.55 of 2002 was filed by the respondent seeking a declaration of his title to the suit property and for a permanent injunction restraining the defendants from interfering with his possession. The suit property is a vacant land measuring 8 feet East to West and 75 feet North to South bearing Door No.106, Bazar Street, Vettavalam Village, Tiruvannamalai District. According to the plaintiff, the suit property originally belonged to his grandfather Sabapathi Achari, who died leaving behind five sons and two daughters viz., Dakshinamurthy Achari, Sivagnana Achari, Kannan Achari, Raja Achari and Jeyaraman Achari. A larger extent of property measuring 24 feet East to West and 75 feet North to South belonged to the grandfather of the plaintiff viz., Sabapathi Achari along with other land and properties in Kattukuppam Village in Pondicherry Union Territory.

3. According to the plaintiff, the said Sabapathi Achari even during his life time effected an oral partition and in the said partition the suit property was divided into three shares measuring 8 feet East to West and 75 feet North to South. The Eastern most portion was allotted to Dakshinamurthy Achari, father of the plaintiff, while the middle portion was allotted to Sivgnana Achari and western most portion was allotted to Kannan Achari. The other two sons viz., Raja Achari and Jeyaraman Achari were allotted landed property in Kattukuppam Village, Pondicherry and hence they were not given any share in the suit property at Vettavalam Village. It is also the claim of the plaintiff that Sivgnana Achari purchased the 1/3rd share that was allotted to Kannan Achari and hence Sivgnana Achari became entitled to 16 feet East to West x 75 feet North to south and the remaining 8 feet East to West x 75 feet North to South belonged to the plaintiff's father.

4. The plaintiff would further plead that Sivgnana Achari wanted the plaintiff's father to convey his 1/3rd share also to him and since the plaintiff's father refused to comply with the said demand, the Sivgnana Achari was not in good terms with the plaintiffs' family. The plaintiff's father viz., Dakshinamurthy Achari died in the year 1961 and grandfather Sabapathi Achari died in the year 1963. After the death of the father of the plaintiff, the share that he had was allotted to the plaintiff in a partition that took place between the heirs of the Dakshinamurthy Achari. It is also claimed that Sivgnana Achari had mortgaged the entire property to one Dakshinamurthy Udayar under the deed of mortgage dated 17.05.1966 and upon coming to know about such mortgage, the plaintiff had objected to the same and after a panchayat the mortgagee viz., Dakshinamurthy Udayar handed over possession to the plaintiff as evidenced by Ex.A2. It is also the claim of the plaintiff that Sivgnana Achari viz.,

the predecessor in title of the defendants had signed the said document as a witness. Therefore according to the plaintiff, the defendants cannot deny his title to the extent of 8 feet East to West and 75 feet North to South viz., the suit property.

5. The suit was resisted by the defendants denying the claim of the plaintiff regarding the oral partition. The defendants would contend that even during his life time Sabapathy Achari had sold the entire extent of the property measuring 24 feet East to West and 75 feet North to South to Sivgnana Achari who is the father of the 1st defendant and husband of the 2nd defendant. According to the defendants, right from the date of execution of the said sale deed on 15.04.1953, the said Sivgnana Achari was in possession and enjoyment of the said property as his absolute property. The claim of the plaintiff that a portion of the property was allotted to his father in the oral partition and that another portion was allotted to Kannan Achari and the late Sivgnana Achari had purchased the share of Kannan Achari were all denied by the defendants.

6. The defendants would also point out that, while it is claimed that the partition took place in 1954 or 1955 the properties subject matter of the suit along with larger extent was alienated by the father even as early as in 1953, that too for legal necessity that is for filing a suit for maintenance against the brothers-in-law of the widowed daughter of Sabapathy Achari. Therefore, according to the defendants Sabapathy Achari did not have any title to the property on the date when the alleged partition is said to have taken place. The defendants would also contend that Sivgnana Achari and his heirs have been in continuous possession of the property right through and have been enjoying the same by letting it out to various others. The claim of the plaintiff that he had discharged the usufructuary mortgage created by Sivgnana Achari under Ex.A2 was also denied by the defendants contending that he had no locus standi to discharge the mortgage. It is also the contention of the defendants that the plaintiff was permitted to reside in the suit property for some time during the year 1972 and the said act of the plaintiff in discharging the mortgage by itself would not confer title on him.

7. On the above pleadings, the learned Principal District Munsif, Tiruvannamalai framed the following issues:

1. Whether the suit property was allotted to the plaintiff's father in the oral partition held in the year 1954?

2. Whether the sale deed dated 15.04.1953 is true and valid?

3. Whether the plaintiff's possession is a permissive one?

4. Whether the delivery of possession by the plaintiff in the year 1988 as alleged in the written statement is true?

5. Whether the plaintiff is in possession and enjoyment of the suit property?

6. Whether the plaintiff is entitled to the suit property?

7. Whether the plaintiff is entitled to the relief of permanent injunction?

8. To what relief?

8. At trial, PW1 and PW2 were examined on the side of the plaintiff and Exs.A1 to A11 were marked. On the side of the defendants the 1st defendant was examined as DW1 and one Ravi was examined as DW2 and Exs.B1 to B22 were marked.

9. The learned trial Judge on appreciation of the oral and documentary evidence held that the sale deed dated 15.04.1953 is not true and valid and also concluded that the defendants having pleaded permissive possession have not proved that the plaintiff had delivered possession to them in 1988 as alleged by them in the written statement. The learned trial Judge also concluded that the partition of the year 1954 is true and valid. On the aforesaid findings the learned trial Judge decreed the suit as prayed for. Aggrieved, the defendants filed an appeal in A.S.No.52 of 2006 on the file of the Sub-Court, Tiruvannamalai.

10. An application in I.A.No.43 of 2007 was also filed by the appellants seeking permission to produce the mortgage deed dated 21.01.1964 as well as the encumbrance certificate for the property from 01.01.1952 to 31.01.1967. The said application was resisted by the plaintiffs contending that the application has been filed only with an intention to delay the disposal of the appeal and that non-production of the documents before the trial Court has not been explained properly. The learned Sub-Ordinate Judge framed two points for consideration in the appeal, they are as follows:-

1. Whether the documents filed along with the I.A.No.43 of 2007 deserves to be received as additional documents?

2. Whether the appeal deserves to be allowed?

11. The learned Appellate Judge concluded that the plaintiff had not satisfactorily explained the non-production of the documents, which are sought to be produced now, before the trial Court. He also further found that the requirements of order 41, Rule 27 of the Code of Civil Procedure have not been satisfied by the plaintiff/ appellants herein. On the aforesaid findings, the learned appellate Judge dismissed the application seeking permission to produce additional evidence.

12. The learned Subordinate Judge also found that Ex.A1 which is original mortgage executed by Sivgnana Achari dated 17.05.1966 in respect of the entirety of the property and the endorsement in the documents marked as Ex.A2 dated 20.03.1972 would show that Sivgnana Achari had wrongly mortgaged the share of Dhananjeyan and hence the mortgage was discharged by receiving amount from Dhananjeyan and the property was handed over to Dhananjeyan. The learned Subordinate Judge also took note of the fact that Sivgnana Achari himself had attested the said documents. On the strength of the above documents, the learned subordinate Judge concluded that the partition said to have taken place in the year 1954 is true and valid.

13. The learned subordinate Judge also found that the defendants have not come forward to produce the plaint in O.S.No.817 of 1984 which was admittedly filed by them and from the written statement it is seen that the defendants have filed the suit for declaration and recovery of possession. Another suit in O.S.No.627 of 1990 filed by the defendants seeking declaration of title was withdrawn by them on the ground that there was some defect in the boundary recitals of the property with liberty to file a fresh suit. But the defendants have not come forward to file a fresh suit. Pointing out to the claim made by the present defendants as plaintiffs in O.S.No.627 of 1990 that though the plaintiff was in permissive possession and he agreed to pay rents and to vacate the property and hand over possession to the defendants.

14. According to the defendants, the plaintiff had vacated and handed over possession on 18.04.1990 and thereafter a memo was filed before the Court in O.S.No.817 of 1984 on 19.04.1990 seeking to withdraw the said suit. The learned subordinate Judge also held that the previous litigation would bar the defendants from setting up title in the suit property. The learned subordinate Judge surprisingly held that since the plaintiff had denied the title of the defendants in 1977 itself and the suit filed by the defendants in O.S.No.817 of 1984 having been disposed of as settled out of Court and the suit filed by the defendants seeking declaration of possession and injunction was not pressed by the defendant themselves, their defence in the present suit would be barred by limitation. On the said findings, the learned subordinate Judge agreed with the

conclusions of the learned District Munsif and dismissed the appeal. Aggrieved the defendants have come forward with this Second Appeal.

15. Notice of admission was ordered by this Court on 25.04.2008 and when the matter came up after service the respondents had also entered appearance, I had framed the following questions of law for determination in this Second Appeal.:

1. Whether the Courts below were right in sustaining the plaintiffs' claim of title to the property under partition in the year 1954 in the teeth of the sale deed dated 15.04.1953 having been executed in favour of the plaintiff's father by his grandfather?

2. Whether the withdrawal of the earlier suit in O.S.No.627 of 1990 with liberty and non filing of subsequent suit would bar the defendants from setting up title in the present suit?

16. Notice of framing of the questions of law was also given to the respective counsel and Mr.S.V.Jayaraman, learned Senior Counsel for the appellants and Mr.S.Parthasarathy, learned Senior Counsel for the respondents addressed arguments on the questions of law framed.

Question No.1:-

17. The claim of the plaintiff was based on an alleged oral partition said to have taken place during the year 1954 or 1955. It is the trite position of law that the plaintiff should stand a fall on his own case and on his own pleadings. He cannot rely upon the weakness of the defendants case. The only proof that is available for the said oral partition is the oral evidence of PW1 and PW2. From the documents produced on either side, there is nothing to show that there was any document at least evidencing the oral partition claimed by the plaintiff. The only evidence that is available in support of the plaintiff's case is the mortgage deed dated 17.05.1966 which is produced as Ex.A1 and endorsement made therein dated 20.03.1972. Except the above two documents there is no other evidence worth mentioning on the side of the plaintiff to establish his claim of oral partition.

18. On the other hand, the defendants have produced the certified copy of the sale deed dated 15.04.1953 executed by Sabapathy Achari in favour of Sivgnana Achari. The plaintiff had not whispered anything about this document in the plaint, in fact this document has been referred to by the defendants in the plaint in O.S.No.627 of 1990 filed by them against the plaintiff

which was later withdrawn with liberty to file a separate suit. Therefore, the present plaintiff who was defendant in O.S.No.627 of 1990 was aware of the fact that the defendants are claiming title under the sale deed dated 15.04.1953 produced as Ex.B1. However, the plaintiff chose not to disclose the said document in the present plaint. Even after the filing of the written statement by the defendants claiming title under the sale deed dated 15.04.1953 marked as Ex.B1, the plaintiff did not choose to file a reply statement or any further pleading disputing the validity of the said document dated 15.04.1953 or denying execution of the said document by Sabapathy Achari viz., his grandfather.

19. The trial Court framed an issue viz., issue No.2 as to the validity of the said sale deed and the trial Court had chosen to dispose of the issues 1 to 3 together. But in the entire discussion, the validity of the said sale deed was not gone into. All that is stated by the trial Court regarding Ex.B1 viz., sale deed dated 15.04.1953 is as follows:

"All though the defendant has filed Ex.B1 a valid sale deed in favour of Sivgnana Achari dated 15.04.1953, the subsequent documents under Exs.A1 and A2 go to strengthen the case of the plaintiff"

Except this stray sentence, I do not find any discussion whatsoever on the validity of the sale deed dated 15.04.1953. The lower appellate Court which is a final Court of facts and which is bound to re-appreciate the entire evidence on record had only framed the following point for determination:

"Whether the appeal deserves to be allowed?".

20. This in my considered opinion, amounts to dereliction of duty on the part of the lower appellate Court. Order 41 Rule 31 of the Code of Civil Procedure mandates that the lower Appellate Court as a final Court of facts is bound to frame proper points for determination and consider the entire evidence on record before it disposes of an appeal filed under Section 96 of the Code of Civil Procedure. The above point for determination does not satisfy the requirements of the Order 41 Rule 31 of the Code of Civil Procedure. I also find that the lower appellate Court had not rendered the finding on the validity or otherwise of Ex.B1 sale deed. The lower appellate Court had not even discussed the effect of Ex.B1 sale deed dated 15.04.1953. The lower appellate Court has only blamed the defendants for the filing of earlier proceedings and not prosecuting them and therefore concluded that the plaintiff is entitled to a decree.

21. The lower appellate Court has only taken note of Exs.A1

and A2 which were mortgage deeds and the endorsements. Admittedly, neither the defendants nor their predecessor Sivgnana Achari were party to Ex.A2. Though it is claimed that Sivagnana Achari had attested Ex.A2, there is no evidence to show that Sivagnana Achari had attested Ex.A2 with the knowledge of the contents so as to involve the principles of estoppel by attestation. In order to invoke the principle of law viz., estoppel by attestation, it should be brought home by concrete evidence that the attesor who attested the document was aware of the contents of the document. Unless it is shown that the attesor was aware of the contents of the document the principle of estoppel by attestation cannot be applied.

22. This court had in Kannappan vs Pargunan and Others reported in 2000 (2) CTC 219 had after analyzing the law relating to estoppel by attestation had concluded that mere attestation of the document will not confer any title on the plaintiff. This Court has also made it clear that mere attestation of a document without knowing the contents will not amount to estoppel. This Court had re-emphasized the above position of law relating to estoppel by attestation.

23. On going through the judgments of both the Courts below, I am of the considered opinion that both the Courts had mis-directed themselves and had proceeded to dispose of the suit as if it is a suit for declaration and recovery of possession filed by the defendants/ appellants and not as a suit for declaration and injunction filed by the plaintiff/ respondents. The fact that both the Courts below have not bestowed their attention to the validity and the effect of Ex.B1 viz., the sale deed dated 15.04.1953 would show that their approach was totally mis-directed.

24. The Ex.B1 is a registered sale deed executed by the grandfather of the plaintiff in favour of the father of the defendants. Once the said sale deed is a registered document and a certified copy of the same has been produced from the proper custody there is a statutory presumption regarding its validity. Therefore, there should be unimpeachable oral or documentary evidence available on record in order to invalidate the said document. Ex.A1 is a mortgage deed executed by Sivgnana Achari in favour of one Dakshinamurthy Udayar, the production of that document with certain endorsements by the plaintiff alone cannot have the effect of invalidating, the sale under Ex.B1 deed 15.04.1953. Neither the defendants nor their predecessor in interest were parties to Ex.A2. The principle of estoppel by attestation cannot also be applied. Though, the plaintiff has named several panchayatdars who were said to be present at the time when Ex.A2 came into existence, he has not chosen to examine any one of them, a totally un-connected person has been examined as PW2.

25. I am therefore of the considered opinion that, both the Courts below have proceeded on a wrong premise that the Ex.A2 would have the effect of nullifying Ex.B1. Ex.B1 being a registered document of the year 1953 and a certified copy of the same has been produced in evidence. The plaintiff who was aware of execution of the said document had not chosen to question its validity either at the time of filing the original plaint or by way of subsequent pleadings after the defendants filed their written statement resting their title on the said document. I am therefore of the considered opinion that the findings of both the Courts below insofar as it relates to validity of the sale deed dated 15.04.1953 are perverse and the same are liable to set aside. In view of the above, question of law No.1 is answered in favour of the appellants and against the respondents to the effect that the Courts below ought not to have declared the title of the plaintiff de hors Ex.B1 dated 15.04.1953.

Question No.2:-

26. Admittedly, the defendants herein had filed a suit in O.S.No.814 of 1984 seeking the relief of declaration and recovery of possession against the plaintiff in O.S.No.55 of 2002. However, the said suit was not disposed of on merits, it was dismissed as settled out of Court. Subsequently, the present defendants/ appellants had chosen to file a suit in O.S.No.627 of 1990 seeking declaration and permanent injunction against the plaintiff in O.S.No.55 of 2002, that suit was withdrawn with liberty to file a fresh suit on 22.07.1998. Of course, the defendants have not chosen to file a fresh suit. However, the plaintiff who was the defendant in O.S.No.627 of 1990 had come forward with the present suit for declaration of his title and for a consequential injunction.

27. If that be so, it is for him to prove his title inasmuch as the earlier suits were not disposed of on merits and there was no decision on the title claimed either by the plaintiff or by the defendants in the said suits. Even assuming the withdrawal of the suits by the appellants herein would only bar another suit on the same cause of action, at no stretch of imagination can it be said that the appellants herein would be prevented from defending an action by the plaintiff who was the defendant in an earlier suit filed by the appellants herein, in view of the withdrawal of the earlier suits filed by them. Unfortunately, both the Courts below particularly lower appellate Court had blamed the appellants for withdrawing their earlier suits and even concluded that such withdrawal would confer title on the respondents herein. It is in my considered opinion cannot be said to be the correct position of law.

28. In order to contend that the suit is barred by the principles of res judicata there should be a complete trial and

finding should have been rendered on the merits of the case based on limitation. In certain circumstances it can be said that the suit is barred by law, such bar cannot be readily inferred, it should be shown that the suit is actually barred by any of the provisions of Code of Civil Procedure or by any other law for the time being in force. Certain provisions of the Code of Civil Procedure bar fresh suit on same cause of action like Order 9, Rule 9 and order 23, Rule 1 of the Code of Civil Procedure. But the said bar enacted in these provisions cannot be extended to bar a defence in a subsequent suit filed by the defendant in the earlier suit. It is always open to the plaintiff after withdrawing the suit filed by him to defend the subsequent suit filed by the defendant in his suit which was withdrawn. Such a right cannot be said to be barred under any of the provisions of the Code of Civil Procedure. Therefore, the 2nd question of law is also answered in favour of the appellant.

29. For the foregoing reasons the Second Appeal is allowed, the judgment and decree of the Courts below are set aside and the suit in O.S.No.55 of 2002 will stand dismissed, however, in the circumstances without costs.

Sd/-
Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

dsa

To

- 1.The Additional Subordinate Judge, Tiruvannamalai
- 2.The District Munsif Judge, Tiruvannamalai
- 3.The Section Officer, V.R. Section,
High Court of Madras, Chennai 600 104.

+1cc to Mr.P.Dinesh Kumar, Advocate, S.R.No. 57006
+1cc to Mr.R.Karthikeyan, Advocate, S.R.No. 56699

S.A.No.600 of 2008

RJ (CO)
GN (19/09/2018)