IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.04.2018

CORAM :

THE HONOURABLE MS. JUSTICE V.M.VELUMANI

Second Appeal No.942 of 2015
and M.P.No.1 of 2015

Vannakili ... Appellant/2nd Respondent

Vs.

1.Bangaru @ Bangarusamy .. 1st Respondent/Plaintiff
2.Saminathan ...2nd Respondent/1st Defendant

PRAYER:- Second Appeal has been filed under Section 100 of C.P.C to set aside the judgment and decree dated 25.03.2014 made in A.S.No.63 of 2010 on the file of the Subordinate Court, Namakkal, confirming the judgment and decree dated 16.08.2010 made in O.S.No.389 of 2007 on the file of the Principal District Munsif Court, Namakkal.

For Appellant : Mr.N.Manokaran

For R1 : M/s.D.Shivakumaran

For R2 : M/s.T.L.Thirumalaisamy
for M/s.S.Venkataswamy Babu

J U D G M E N T

This Second Appeal has been filed to set aside the judgment and decree dated 25.03.2014 made in A.S.No.63 of 2010 on the file of the Sub Court, Namakkal, confirming the judgment and decree dated 16.08.2010 made in O.S.No.389 of 2007 on the file of the Principal District Munsif Court, Namakkal.

2.The appellant is second defendant, first respondent is the plaintiff and second respondent is the first defendant in O.S.No.389 of 2007 on the file of the Principal District Munsif Court, Namakkal. The first respondent filed the said suit for declaration that suit property belongs to him; for possession from the appellant and for permanent injunction. According to the first respondent, the suit property is grama natham. It was in possession of first respondent and his family members. The first respondent and his brother Duraisamy put up a thatched house in the suit property in the year 1975 and divided the same into two portions. The first respondent was residing in western portion and his brother was residing in the eastern portion. In the year 1980, the first respondent constructed a tiled house in the suit property and obtained electricity connection in his name. In the year 1994, the assignment patta was issued by the Government in his favour. The property tax was assigned in the name of the first respondent and he is paying the property tax and electricity charges. The second respondent who is the brother of first respondent due to difference of opinion with his wife, was residing with the first respondent from the year 1995.

2(a).In the year 1997, when the first respondent left for Bangalore in search of work, he handed over the suit property to the second respondent for maintaining the house and return the same to the first respondent on his return from Bangalore. After the first respondent left the suit property, the second respondent developed illicit relationship with the appellant and they were living together in the suit property. The appellant and second respondent colluded together and appellant initiated a collusive suit in O.S.No.438 of 1997 and obtained a collusive decree. It appears that in execution of said collusive decree against the second respondent, the appellant brought the suit property for sale and she herself purchased the suit property. The first respondent came to know about the same when the Court official and police removed all the articles of the first respondent and locked the premises. The second respondent is not owner of the suit property and the sale in favour of the appellant is not binding on the first respondent. The first respondent is not party to the suit or execution proceedings.

3.The second respondent filed written statement and denied all the averments of the first respondent and also denied that he and appellant are living together.

4.The appellant filed written statement and denied that the property was handed over to the second respondent to be returned to the first respondent when he comes back from Bangalore. There is no cordial relationship between the second respondent and the appellant. The first respondent is not owner of the suit property. The second respondent is the owner of the suit property. The assignment patta is not a genuine document. Even in the assignment patta, only 3 cents is assigned to the first respondent, while the first respondent is claiming title for 7 cents. There is no collusion between appellant and second respondent. The appellant filed suit O.S.No.438 of 1997 and obtained decree. It is not a collusive suit or collusive decree. The first respondent filed claim petition on 21.10.2002, stating that the property belongs to him and therefore, he knew about the suit filed by the appellant, decree passed in the said suit and E.P filed to execute the said decree at that time itself. He ought to have filed the suit within 3 years from the date of claim petition i.e., on 21.10.2002. The suit filed in the year 2007 is barred by limitation and prayed for dismissal of the suit.

5.Based on the pleadings, the learned Judge framed necessary issues. Before the learned Judge, the first respondent examined himself as P.W1 and his brother, Duraisamy was examined as P.W.2 and marked 6 documents as Exs.A1 to A6. The appellant examined herself as D.W.2 and examined two others as D.Ws1 and 3 and marked three documents as Exs.B1 to B3.

6.The Trial Court considering the pleadings, oral and documentary evidence, decreed the suit by the judgment and decree dated 16.08.2010. Against the said judgment and decree, the appellant has filed A.S.No.63 of 2010. The learned First Appellate Judge framed necessary points for consideration. The learned First Appellate Judge considering the pleadings, oral and documentary evidence and judgment of the Trial Court, dismissed the First Appeal, confirming the judgment and decree of the Trial Court.

7.Against the said judgment and decree dated 25.03.2014 made in A.S.No.63 of 2010, the appellant has come out with the present Second Appeal.

8.At the time of admission, the following Substantial Question of Law was framed:

> "Whether the present suit at the instance of the plaintiff is barred in view of the fact that in E.P.No.151 of 2000 in O.S.No.437 of 1997 on the file of the learned District Munsif, Namakkal, though the plaintiff filed an application, but did not pursue the same by getting numbered and disposed of by means of a judicial order?"

9.The learned counsel for the appellant submitted that the first respondent has not identified and co-related the Survey numbers mentioned in the assignment patta No.136/3 and Survey No.478/25 mentioned in the suit. The first respondent failed to identify the property assigned to him. The first respondent mentioned more extent than 3 cents which was assigned to him. The description of the property is not correct and he has given a different version in the evidence. The second respondent in the suit filed by the appellant did not deny his title. Unless the decree and sale in favour of the appeal is set aside, the first respondent is not entitled to the relief sought for in the suit. The first respondent filed claim petition in E.P, but did not pursue the same. The claim petition is filed on 21.10.2002 and the present suit is filed in the year 2007 and hence the suit is barred by limitation. The first respondent has filed the suit for declaration of title. For such a declaration the period of limitation is only 3 years as per Article 58 of the Limitation Act, 1963. The cause of action arose on 21.10.2002, when the first respondent filed claim petition. Article 65 of the Limitation Act, 1963 is not applicable. The said Article will apply when a party claims adverse possession.

10.The learned counsel for the appellant in support of his contentions relied on the judgments reported in:

(i)1994(1) SCC 1 (S.P.Chengalvaraya Naidu (Dead) by legal heirs vs. Jagannath (Dead) by legal heirs and others):

> "6.The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the court. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Exhibit B-15) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Non-production and even non-mentioning of the release deed at the trial tantamounts to playing fraud on the court. We do not agree with the observations of the High Court that the appellants-defendants could have easily produced the certified registered copy of Exhibit B-15 and non-suited the plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would he guilty of playing fraud on the court as well as on the opposite party."

(ii)(2014) 2 SCC 269 (Union of India and others Vs. Vasavi Cooperative Housing Society Limited and others):

"17.At the outset, let us examine the legal position with regard to whom the burden of proof lies in a suit for declaration of title and possession. This Court in Moran Mar Basselios Catholicos V. Thukalan Paulo Avira observed that: (AIR p.37, para 20)

> "20.... in a suit (for declaration) if the plaintiffs are to succeed they must do so on the strength of their own title.""

"18.In Nagar Palika, Jind V. Jagat Singh ((1995) 3 SCC 426)

> "The onus to prove title to the property in question was on the plaintiff-respondent. ... In a suit for ejectment based on title it was incumbent on the part of the court of appeal first to record a finding on the claim of title to the suit land made on behalf of the plaintiff. The court is bound to enquire or investigate that question first before going into any other question that may arise in a suit.""

"19.The legal position, therefore, is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. We are of the view that even if the title set up by the defendants is found against (sic them) in the absence of establishment of the plaintiff's own title, the plaintiff must be non-suited."

(iii)(2013) 3 SCC 182 (Board of Trustees of Port of Kandla Vs. Hargovind Jasraj and another):

> "27.The termination of the lease deed was by an order which the plaintiffs ought to get rid of by having the same set aside, or declared invalid for whatever reasons, it may be permissible to do so. No order bears a label of its being valid or invalid on its forehead. Anyone affected by any such order ought to seek redress against the same within the period

permissible for doing so....."

11.Per contra, the learned counsel for the first respondent contended that the first respondent has proved his title over the suit property. He also proved that the second respondent is not owner of the suit property and that he has no right, interest and title over the suit property. The suit, subsequent E.P and sale in favour of the appellant are collusive one. The first respondent is not a party to the suit and the same is not binding on him. The Courts below have considered the facts and have rejected the contention of the appellant. The suit decree, E.P, sale and purchase by the appellant are by playing fraud on the Court. The second respondent is not owner of the property. By obtaining collusive decree, the appellant has brought the suit property belonging to the first respondent for sale and fraudulently purchased the property. In view of the fraud played by the appellant on the Court, the entire proceedings is null and void and non-est. This concurrent findings of the Court cannot be canvassed by the appellant in the Second Appeal.

12.The learned counsel for the first respondent in support of his contentions, relied on the following judgments reported in:

(i)AIR 2006 Madras 288 (Dr.T.Vijayendradas and another Vs. M.Subramanian and others):

> "13.In support of his contention, the learned counsel for the respondents relied on the decision in Chengalvaraya Naidu v. Jagannath reported in 1994 (1) L.W. 21, the Supreme Court has held as follows:-
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> > "Fraud avoids all judicial acts, ecclesiastical or temporal as observed by Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decree b the first court or by the highest court has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."

> "17. In Velumani v. Chenna Basavan and 7 Ors. reported in 1991 (II) L.W. 587, M.Srinivasan,J., (as His Lordship then was) while dealing with Section 88 of the District Municipalities Act, held as follows:-

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16.It is elementary principle that in court auction sales, there is no warranty of title and the principle of caveat emptor will apply to such sales (vide Ahamedabad Municipality v. Haji Abdul Gafur).

17.It has been repeatedly held that if an execution proceedings taken against a property without impleading the owner of the property, as a party thereof, the proceedings are null and void and any sale held in such execution is a nullity.

In Kairajmal v. Daim (ILR 32 Calcutta 296) the Privy Council observed as follows:- Their Lordships agree that the sales cannot be treated as void or now be avoided on the grounds of any mere irregularities of procedure in obtaining the decrees or in the execution of them. But, on the other hand the court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons, the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside. If authority be desired for these elementary propositions it may be found in the judgment of Sir Barnes Peacock in Kishen Chunder Ghose v. Asheerun (1863 I March, 647).

A similar ruling was rendered in Kedar Nath v. Munshi Ram (AIR 1935 PC 139)."

21.In AIR 1998 AP 247, (Pavan Kumar v. K.Gopalakrishna) a Division Bench of the Andhra Pradesh High Court has held as follows:-

"12.The suit is essentially and primarily a suit for possession based on title. The mere fact that the declaration of title is also sought for therein does not bring it within Art.58 or 113 so as to attract the three years period of Limitation, as observed by the learned single Judge. There is practically no controversy as to title for the simple reason that the defendants recognise the plaintiff as the predecessor in title and it is the specific case of the defendants that the plaintiff sold the property to Choudary Rajanna, who in turn effected the sale to them. As already noticed, the sale by Gopal Krishna to Choudary Rajanna was disbelieved by the trial court. Under these circumstances, as far as the title of the plaintiff is concerned, there could hardly be any controversy that a formal declaration of title fro the court was fought for, may be by way of caution. Realising the difficulty in pursuing the argument as regards inapplicability of Art.65, the learned counsel for the appellantshas chosen the obvious course of highlighting the alternative argument that even if ARt.65, applies, the suit is barred."

22.In AIR 1990 Bombay,98 Indira B. Gokhale V. Union of India, a learned Judge of the Bombay High Court held as follows:-

"9...In the instant case, the plaintiff was seeking a declaration. Truly speaking, a declaration was not necessary for once it is found that the requisition was without notice to the owner and the acquisition was without the same being sanction by clauses (a) and (b) of S.36(1) of the Act, plaintiff can ignore both the orders. The orders being void can be treated as such and no consequence ensues to the suitor proceeding with the main relief ignoring acts which have no existence in the eyes of law. The fact that the plaintiff claims a declaration does not mean that no other relief can be granted to her. The main relief which she is claiming is not the declaration even though she may describe it as the principal relief. In construing these matters what is necessary is to take an overall view of the matter. Thus, it was not necessary for the plaintiff to seek any declaration in respect of the void orders. The suit is primarily one for possession and mesne profits. Her failure to obtain a declaration is of no consequence of the order which is put forth by the defendants to justify their action is non est in the eyes of law. The dispossession of the plaintiff took place on 20h May 1963 and the suit was filed on 25.6.1971. Being a suit for recovery of possession and brought within 12 years the same was within Limitation. As far as this case is concerned, the main prayer sought for by the plaintiff is to get recovery of possession and incidentally she also wants to confirm her title to the property and therefore the suit is well within time.........."

(ii)CDJ 2011 SC 1068 (M/s.Royal Orchid Hotels Limited & Others Vs. G.Jayarama Reddy & Others):

"5....Where object of providing lands to a private individuals, if acquisition proceedings are reported to or power of eminent domain comes to be exercised, it would nothing more than fraud on power. There it is a case of fraud it would unreveal everything. It cannot be valid in part and invalid in other parts (See Lazarus Estates Ltd. Vs. Gurdial Singh - AIR 1980 SC 319: Pratap Singh V. State of Punjab - AIR 1964 SC 73: Narayana Reddy V. State of Karnataka - ILR 1991 KAR. 2248.) Therefore the question of limitation does not arise in such cases......"

(iii)1998 (1) CTC 529 (Kalavathi Vs. Chitra):

"3.The learned Judge has also given another reason, namely, in as much as the suit having been filed in the year 1990, the present application for amendment, which was filed in the year 1996, is hopelessly barred by limitation. According to him, the same ought to have been filed within 3 years from the date of action. The said conclusion of the Court below cannot be sustained, since claim in respect of immovable properties, as per Article 65 of the Limitation Act, the period of limitation is 12 years. In such a circumstances, the conclusion arrived at by the Court below is erroneous and the same is liable to be set aside. I have already concluded that there is no delay on the part of the plaintiff in filing the present application for amendment, since the defendant herself had filed her written statement only on 01.11.1996, i.e., after a lapse of six years."

(iv)CDJ 2009 SC 1059 (Commissioner of Customs (Preventive) Vs. M/s.Aafloat Textiles (I) Pvt. Ltd. & Others):

"28.As noted above, SILs were not genuine documents and were forged. Since fraud was involved, in the eye of law such documents had no existence. Since the documents have been established to be forged or fake, obviously fraud was involved and that was sufficient to extend the period of limitation."

13.The learned counsel for the second respondent contended that though the second respondent claimed ownership in the written statement, he has admitted in the cross examination that he is not the owner of the property.

14.Heard the learned counsel for the appellant, first respondent as well as the second respondent and perused the materials available on record.

15.The various contentions made by the learned counsel for the appellant, only question of limitation is challenged. Both the Court below, by appreciating the facts, have held that first respondent is owner of the property and the second respondent has no title over the suit property. The decree and sale in favour of the appellant in execution of the said decree is not binding on the first respondent. There is no reason to set aside the concurrent findings of the fact as there is no error of law. The appellant had brought to sale the property belonging to first respondent as though the property belonged to second respondent. This amounts to fraud played on Court and first respondent not being a party to the suit as well as Execution Proceedings, the said proceedings are not binding on first respondent.

16.As far as question of limitation is concerned, the first respondent has filed suit for declaration, possession and permanent injunction in respect of immovable property. The learned counsel for the appellant contended that as per Section 3 and Article 58 of the Limitation Act, 1963, the suit is barred by limitation. According to the learned counsel for the appellant, the first respondent ought to have filed suit within 3 years from date of his knowledge i.e., from 21.10.2002, when he filed claim petition in the Execution Proceedings. The said contention is without merits. Section 3 of Limitation Act, 1963 is general provision whereby the Courts have given power to consider the question of limitation even if parties do not raise the issue and Courts have power to dismiss the proceedings if it is barred by limitation.

17.In the present suit, the first respondent is not only seeking decree of declaration, but also possession. The main prayer of the first respondent is for recovery of possession and the declaration of his title is incidental to the said relief. Further, the appellant has played fraud on the Court and brought the property belonging to the first respondent as though the same belongs to the second respondent. Any fraudulent decree is non-est in law and E.P, sale of the suit property and purchase by the appellant are fraudulent one. In view of the same, the entire proceedings is non-est in law. The Executing Court did not have power to sell the property of the first respondent when he is not a party to the suit as well as Execution Proceedings. The sale in favour of the appellant in such circumstances is nullity and first respondent has a right to ignore and disregard such a sale without taking any legal proceedings to set aside the said sale.

18.The learned counsel for first respondent relied on the judgment of this Court reported in AIR 2006 Madras 288 (Dr.T.Vijayendradas and another Vs. M.Subramanian and others) wherein the paragraphs 17 and 22 are squarely applicable to the facts of the present case. This Court in paragraph 22 of the above said judgment had referred to the judgment of Bombay High Court reported in AIR 1990 Bombay, 98 (Indira B. Gokhale V. Union of India) and concluded that in a suit for recovery of possession and declaration of title, the period of limitation is 12 years as per Article 65 of Limitation Act, 1963. Similar view is taken in other three judgments relied on by the learned counsel for the first respondent. It is consistently held by the Courts that limitation in respect of immovable property is 12 years. In the present case, for the relief sought for by the first respondent, only Article 65 of the Limitation Act, 1963 is applicable as first respondent is seeking relief of declaration and for possession of the immovable property. Article 65 of the said act reads as follows:

Description of suit	Period of limitation	Time from which period begins to run
65.For the possession of immovable property or any interest therein based on title.Explanation - For the purpose of this article - (a)where the suit is by a remainderman, a reversioner (other than a landlord) or a devisee, the possession of the defendnat shall be deemed to become adverse only when the estate of the remainderman, reversioner or devisee, as the case may be, falls into possession; (b)where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies; (c)where the suit is by a purchaser at a sale in execution of a decree when the judgment-debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgment-debtor who was out of possession.	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.

19.As per Article 65 of the Limitation Act, 1963, the period of limitation is 12 years. The suit is not barred by limitation. Therefore, substantial question of law framed by this Court is answered against the appellant.

20.In the result, the Second Appeal is dismissed. The judgment and decree dated 25.03.2014 passed by the learned Subordinate Judge, Namakkal in A.S.No.63 of 2010 is confirmed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

gsa

To

1. The Subordinate Judge,
   Namakkal.

2. The Principal District Munsif,
   Namakkal.

+1cc to Mr.N.Manokaran, Advocate, S.R.No.28497
+1cc to M/s.D.Shivakumaran, Advocate, S.R.No.27978
+1cc to M/s.T.L.Thirumalaisamy, Advocate, S.R.No.28182

Second Appeal No.942 of 2015
and M.P.No.1 of 2015

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