

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 28.06.2018

Judgment Pronounced on : 20.07.2018

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

A.S.No.723 of 2003

Rahmath Hani

... Appellant/Defendent

Vs

1.Salma Nachiyal

2.Habussa Hani

3.P.K.Hameed Maricar

Rep. by his Power Agent Salma Nachiyal

... Respondents/Plaintiffs

Prayer :- First Appeal filed under Section 96 of C.P.C., to set aside the judgment and decree dated 11.12.2002 made in O.S.No.61/2000 on the file of Additional District Court, Karaikal and allow the above appeal.

For Appellant : Mr.R.Thirugnanam

For Respondents : Mr.V.Raghavachari

JUDGMENT

1.1 The defendant in O.S.No.61 of 2000 on the file of the learned Additional District Court, Karaikkal is the appellant herein. This appeal is directed against the decree declaring plaintiffs' title to the suit property and for recovery of the said property.

1.2. This Court by its judgment dated 18.06.2010 had earlier allowed this appeal. Challenging the said decree of this Court, the respondents/plaintiffs had approached the Hon'ble Supreme Court in S.L.P.(Civil) No. 13287 of 2013,

and the Hon'ble Supreme Court, by its order dated 27.01.2016, had remanded the matter back to this court for fresh consideration.

1.3. For the sake of convenience, the parties would be referred to by their ranks before the Court below.

2. The facts on which the plaintiffs rest their cause of action, are as below:

- The suit property is described as a residential property in No.28, Karaikal Town, Nool Kadai Street, Ward F, Block 31, T.S.No.96, Resurvey No.77/1pt. The suit is laid for declaration of plaintiffs' title and for recovery of possession of the said property.
- The suit property originally belonged to a certain Naina Maricar. He had two sons and a daughter, of who, focus is now on his 2nd son Periyathambi. On Naina Maricar's demise, the suit property devolved on his three children. Periyathambi, had acquired the undivided share of his siblings and became the absolute owner of the suit property.
- Periyathambi was married twice, first to one Howla Ammal and subsequently to another Asia Ummal. He had no issues through Howla Ammal, but through Asia Ummal he had a son Kadhar Sultan. Kadhar Sultan had three children and they are the plaintiffs herein.
- A certain Sara Ummal, a stranger to the family of the plaintiffs had filed a suit for damages against plaintiffs' father Kadhar Sultan and grandmother Asia Ummal. Periyathambi's first wife Howla Ammal, one of his heirs to his estate was not a party to this suit. The suit was decreed. In execution of the said decree, the suit property was attached, and was brought to sale in Court auction on 18.11.1952. In that sale, one Sheik Abdul Kadher had purchased the suit property.
- Be that as it may, Howla Ammal (holder of a fractional share in the suit property as the heir of Periyathambi), moved the Execution Court to set aside the court auction sale dated 18.11.1952, on the ground that she was not a party to any of the proceedings. Her petition was allowed by the Execution Court vide its order dated 08.04.1960. The copy of this order is Ext.A3.
- Notwithstanding the setting aside of the court auction sale as referred to above, on 12.03.1967, the auction-purchaser Sheik Abdul Kadhar sold the suit property to one Mohamed Thahir. On 28.03.1969, Mohamed Thahir sold

the property to his wife Abitha Ummal (copy of the said sale deed is Ext.B5) and Abitha Ummal in turn gifted it in favour of her daughter Rahmathkani, the defendant herein on 10.09.1981, as evidenced in Ext.B8.

- While so, the defendant's mother Abitha Ummal trespassed into the suit property and occupied the same. Therefore, on 28.01.1997, the first plaintiff had issued a lawyer's notice on Abitha Ummal. In reply, Abitha Ummal sent a lawyer's notice dated 22.3.1997. In the said reply, it was admitted that Abitha Ummal was in possession of the suit property. This was followed by the plaintiffs issuing rejoinder notice dated 31.3.1997, in which correct facts pertaining to the title in property were detailed. However, before this rejoinder notice was issued, Rahmathkani, the defendant herein had laid a suit in O.S.No.103/1997 on the file of Principal District Munsif Court, Karaikkal against the plaintiffs (in O.S.No.61/2000) for permanent injunction that her possession should not be disturbed.
- The trial court decreed the suit in O.S.103 of 1997, and had held that Rahmathkani was in constructive possession of the property. The defendants in O.S.No.103 of 1997 (plaintiffs here) took up the matter in appeal before the Additional District Court, Pondicherry, at Karaikkal in A.S.40 of 1998. Before the Appellate Court, plaintiffs had produced Order of the Execution Court (marked as Ext.A-3 in the present suit) as additional evidence. The Appellate court Vide its judgement dated 13.10.1998 had held that the suit itself is for bare injunction, and since the appellants before it had admitted the possession of Abitha Ummal, it dismissed the appeal.

Under these circumstances, the present suit in O.S.No.61 of 2000 was came to be filed for declaration of title and for recovery of property against Rahmathkani.

3. After making what the defendant consider as an academic statement that the parties are governed by French law and that as per French law all rights both in rem and in personam will be extinguished on expiry of 30 years and that all substantial and procedural rights will be extinguished in the lapse of 12 years, the defendant contend in their written statement:

- Pursuant to the court-auction sale dated 18.11.1952,

Sheik Abdul Kadhar, the purchaser therein, had taken physical possession of the property on 29.10.1959. The delivery itself was effected when the proceeding for setting aside the sale at the instance of Howla Ammal was pending. The present suit is now filed some 48 years after the court auction sale and 42 years after Sheik Abdul Kadhar took physical delivery of the property.

- The effect of setting aside the sale would enure only to Howla Ammal and the consequence of the order that she had obtained in having the court auction sale at the best might make her a co-owner with Sheik Abdul Kadhar. The sale in favour of Mohamed Thahir by Sheik Abdul Kadhar and all subsequent and successive alienation of the suit property are valid. Both the defendant (Rahmathkani) and her mother have been exercising the right of ownership over the property. In deed they have even mortgaged the property and have redeemed it too. The possession of the defendant was also came to be recognised in the earlier appeal in A.S.No.40 of 1998 by Additional District Court, Karaikkal. There is no merit in the suit and the same is required to be dismissed.

4.1 Before the trial court, the 1st plaintiff had examined herself as PW1. For the defendant, her mother Abitha Ummal was examined as DW1. The plaintiffs have produced Exts.A-1 to A-14, while the defendant has produced Exts.B-1 to B-22. Defendant also examined one Thiagarajan as DW2 through whom Ext.X1 was marked. Of the documents produced, Exts.B-1 to B-4 are delivery lists which evidences that Sheik Abdul Kadhar was put in possession. Ext.A-2/A3 is the Order of the Execution Court setting aside the court auction sale in favour of Sheik Abdul kader.

4.2 Evaluating the evidence before him, the learned Additional District Judge who tried the suit, found title to the suit property in favour of the plaintiffs and accordingly decreed the suit. As stated in the opening paragraph, when this case was earlier decided by this court Vide judgment dated 18.06.2010, it allowed the appeal on the point of possession.

4.3. It may be stated that neither the trial court nor this Court in the earlier instance had raised an issue/point on limitation. This was taken in appeal through S.L.P.(Civil) No. 13287 of 2013, the Hon'ble Supreme Court has passed the following order:

the High Court, while exercising power of first Appellate Court, has neither considered the entire facts of the case, material issues and evidence in support thereof nor recorded finding with regard to possession.

4. Hence, for these reasons, the order passed by the High Court cannot be sustained.''

5. Point for consideration in this appeal:

- 1) Whether the proof of defendant's possession is sufficient to disturb the title of the plaintiffs?
- 2) Was the suit barred by limitation.

6. The learned counsel for the appellant submitted that the trial court had ignored the overwhelming documentary evidence to establish that she was in possession of the suit property, in continuation of the possession of the property by her predecessor in title since the time Sheik Abdul Kader, the auction-purchaser had taken delivery of the property through Court on 29-10-1959. This would imply that since the date of taking delivery, either Sheik Abdul Kadhar, or those who claim under him have been in continuous possession of the suit property. This possession continued, notwithstanding the setting aside the court auction sale on 08.04.1960 under Ext.A-3 at the instance of Howla Ammal. Necessarily the defendant have prescribed title by adverse possession. Reliance was placed on the authorities in Rajasekaran Gramani v. Nagarathinammal [MLJR 438], Lachman Singh v. Hazara Singh [(2008) 5 SCC 444] and Mahabir Singh v. Subbash [2008(1) CTC 173].

7. Per contra, the learned counsel for the respondents/plaintiffs would argue that:

- Nowhere the appellant had pleaded adverse possession in the manner that law required, nor has she established the same in the manner law demands.
- In order to prove possession, defendant has produced Exts. B-13 to B-17, all of which are either property tax receipts or land tax receipts. Of them, except Ext.B16, rest of them are issued in the name of Abitha Ummal. Only Ext.B16 was dated in the year 1976 but, this is issued in the name of Sheik Abdul Kadhar. But, according to Abitha Ummal she had

purchased the property even in the year 1969 under Ext.B-5. However, law is too well settled that tax receipts are not documents of title, and any possession claimed based on it cannot enlarge into title.

Reliance was placed by the learned counsel on the authorities in P.T.Munichikkanna Reddy and others v. Revamma and others [(2007) 6 SCC 59], L.N.Aswathama and another v. P.Prakash [(2009) 13 SCC 229], Ramalinga Bajanai Madametc., v. Gerart Pappammal & others [1998-2-L.W.371], Dagadabai (Dead) by Lrs v. Abbas @ Gulab Rustum Pinjari [2017(6) CTC 195], Gothamchand Jain v. Arumugam Alias Tamilarasan [(2013) 10 SCC 472], Arumugam @ Tamilarasan v. Gothamchand Jain [2011(3) MWN(Civil) 478, Coopposamy v. Alamelu and others [Manu/TN/0272/1987], Rangasamy @ Govindaram (Died) 5 others v. The Deputy Collector (Revenue) cum Land Acquisition Officer, Pondicherry [1997(II) CTC 97, and Janki Vashdeo Bhojwani v. Indusind Bank Ltd., [(2005) 2 SCC 217.

8. What is not disputed and perhaps a fact that remains indisputable on record is that the court auction sale in favour of Sheik Abdul Kadhar was set aside on 09.04.1960 under Ext.A3. Once this sale is set aside, and title to the property is lost, any possession sought or derived under the said court auction sale necessarily should become unlawful. The same however can be legitimised and justified only on the defendant pleading and proving adverse possession in the manner known to law. But, the defendant had chosen not to plead her only possible defence under circumstances - the plea of adverse possession, in her written statement. Therefore, what remains is the title of the plaintiffs and their entitlement to have possession of the suit property.

9. Here it is necessary to state that the defendant had earlier filed O.S.No.103 of 1997 which culminated a judgment of the Additional District Court, Karaikal in A.S.No.40 of 1998. Both before trial court and the appellate court, the defendant herein was successful not because she had established her title to be in possession for obtaining a decree for prohibitory injunction, but because the plaintiffs had admitted that she was in possession. It was their case, that defendant's mother had forcibly entered possession of the suit property and that the suit itself was filed even before they issued their rejoinder-notice on the defendant's mother. Based on this fact, which both the trial as well as the first appellate courts have treated as an admission, a decree of prohibitory injunction was passed. These judgements, which are available on record as Exts.A4, A5, A12 and A13 are not adequate to hold that the defendant and her predecessor in title have been in continuous

possession of the property as to disentitle the title holders of their right of possession over the suit property. And, to repeat with emphasis, the defendant has defaulted even in pleading adverse possession. Therefore, the evidence in aid of possession that the defendant has produced cannot confer any advantage on her.

10. In the end, this Court does not find any merit in the appeal and the same is dismissed and the judgment and decree dated 11.12.2002 made in O.S.No.61/2000 passed by the learned Additional District Court, Karaikal is confirmed. No costs.

Sd/-/-

Assistant Registrar (Co)

//True Copy//

Sub Assistant Registrar

ssn/ds

To:

1.The Additional District Judge,
Karaikal.

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

+2cc to Mr.R.Thirugnanam , Advocate SR.No. 48679,48680

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A.S.No.723 of 2003

ASK(12/10/2018)

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