

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :23.03.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.1993 of 2001

Kannan

... Appellant/plaintiff

Vs.

1. Sheikh Alavudhin(deceased)

2. Idrish

...Respondent/defendant

(R2 brought on record as LR of the deceased sole respondent vide order of the court dt 28.02.2018 made in CMP.Nos.1351 to 1353/2018)

PRAYER: The Second Appeal has been filed under Section 100 of C.P.C., to set aside the Judgment and Decree dated 24.08.2000 passed by the learned Principal Subordinate Judge, Mayiladuthurai in A.S.No.43/2000 confirming the Judgment and Decree of the District Munsif Court, Sirkali in O.S.No.212/1996 dated 21.09.1998.

For Appellant : Mr.S.Sounthar

For Respondents : No appearance

J U D G M E N T

The plaintiff has filed a suit in O.S.No.212/1996 for bare injunction. The unsuccessful plaintiff, who lost the case before the courts below has filed the present second appeal.

2. For the sake of convenience, the parties are hereinafter referred to as per their rankings in the suit.

3. The averments contained in the plaint, in brief, are as follows:

a) The suit property is Punjai Kollai. The plaintiff is the owner of the property and he has inherited the property from his grandfather Appavu by means of a Will on 15.10.1970. After the Will, the plaintiff is in possession and enjoyment of the property. Thereafter the plaintiff has raised the bamboo, mango and portio trees. The plaintiff is a poor Harijan solely depending upon this punjai land cultivation for his

livelihood. Periodically, the plaintiff is renewing the fences of the suit property to have a safe enjoyment of trees.

b) The defendant is a rich man in the village having large landed properties. The suit punjai kollai is situated very near to his own lands. The proximity of the defendant's lands to the suit property has enabled him to purchase this Kollai and has become fruitless.

c) Since the defendant's land is adjacent land to the plaintiff, he intended to purchase the property. However the plaintiff refused to accept his request and he tried to trespass into the property on 27.07.1996 and the same was thwarted by the plaintiff and thereby, the plaintiff filed a suit for bare injunction.

4. The averments contained in the written statement, in brief, are as follows:

a) The defendant denied all the allegations made in the plaint except those that are specifically admitted in the written statement are hereunder.

The plaintiff is not the owner of the suit property and he is not in possession of the same. Infact, the defendant is the absolute owner of the suit property and he is in continuous physical and actual possession of the suit property.

b) On 28.06.1973, the defendant's father viz., Muthaiyan S/o.Appavu Harijan had sold the suit property through the registered sale deed. The sale deed was duly executed, signed and attested by the parties and the same was registered in the manner known to law.

c) Even from the date of sale-deed, the defendant's father was in possession and enjoyment of the suit property. After his death, the defendant automatically entered into the shares of his deceased father and now the defendant is in peaceful possession and enjoyment of the suit property.

d) The plaintiff also lost his right of partition and he waived his rights since the plaintiff and his father lived together. Hence, the suit is not maintainable for the relief of bare injunction. Since the plaintiff is not in actual and physical possession of the suit property.

e) The defendant denied the title of the suit property to the plaintiff. The suit property is not a cultivable lands. It is a barren thidal or punja property over which bamboo trees, neem trees, mango trees are available and they are brought up and being protected by the defendant and previously by his father.

f) There is no cause of action for filing the present suit. The plaintiff has fled a vexatious suit in order to grab something from the defendant.

5. In trial, the plaintiff examined three witnesses. He himself examined as PW1 and the attesor of the Will was

examined as PW2 and his sister was examined as PW3 and marked as Exs.A1 and A2. On the side of the defendant, the defendant has examined four witnesses and he himself examined as DW1 and three witnesses were examined and villagers were examined as three witnesses and marked as Exs.B1 to B6.

6. After trial and framing of issues, the lower court as well as the lower appellate court, have concurrently dismissed the suit. The lower appellate court also confirmed the dismissal order passed by the lower court. As against the concurrent findings, the second appeal is filed.

7. Pending second appeal, the sole respondent has died. After the death of the sole respondent, the appellant has filed the LR petition and the same was allowed on 28.02.2018. Thus the second respondent representing the estate of the first respondent was impleaded as one of the parties.

8. This court, while entertaining the appeal, has framed the following substantial questions of law:

i) Whether the Courts below erred in stating that the suit is barred by limitation when sale deed by father of the appellant was not executed by him as guardian of minor but on his individual capacity?

ii) Whether the Courts below erred in applying principles of limitation applicable to suit for cancellation of instrument to the suit for bare injunction?

9. Mr. Sounthar, learned counsel for the appellant would submit that admittedly the suit property belonged to Appavu, grandfather of the plaintiff. Out of love and affection, his grandfather executed a Will (Ex.A2) dated 15.10.1970 and the said Will was attested by two witnesses and one of the witnesses were examined and he clearly deposed that the said Appavu executed a Will in favour of the plaintiff/appellant and he confirmed the statements and signatures in the Will. However without verifying the veracity of the deposition of DW2, on an erroneous consideration, the lower appellate court has give several findings against the plaintiff. Ultimately, it confirmed the dismissal order passed by the lower court, which need to be interfered with. Accordingly, he prayed for allowing the second appeal.

10. Today, no one represented on behalf of the proposed respondent.

11. On perusal of the materials, records and findings of the courts below, admittedly, in order to prove his possession,

the plaintiff has marked the Will (Ex.A2) on his side. On perusal of Ex.A2, the Will was executed on 15.10.1970 and two witnesses attested the Will viz., Natesan and Pitchai. The said Natesan was examined as PW2. On perusal of his deposition, it is clear that he confirmed that he put signatures in the Will along with other witness, Pitchai. However on perusal of the depositions, it is seen that he affixed only thumb impression and there is no thumb impression in the Will. He signed in Ex.A2 - Will, however in deposition, he affixed only thumb impression. The above discrepancy was not properly explained in the deposition itself and the plaintiff has also not let in evidence in the discrepancy. Thereafter the defendants purchased a property on 28.06.1973 and the said sale deed was executed on 28.06.1973. However, the same was registered on 11.07.1973 vide document No.585/73 on the file of the Sub-Registrar, Sirkazhi and the sale deed was marked as Ex.B2. 11. On perusal of Ex.B2/sale deed, admittedly the plaintiff has not add a eo-nomine party. However, the father of the plaintiff executed the sale deed in favour of the defendant. On perusal of Ex.B2, it is seen that the suit property was purchased by the grandfather of plaintiff on 26.11.1935. Thereafter the plaintiff's father inherited the ancestral property by way of inheritance, he became the owner and executed sale deed in favour of the defendant.

12. At the time execution of sale deed by the plaintiff's father, plaintiff is only six years old. The lower appellate court went wrong in discussing the limitation point since the plaintiff himself did not establish that he is in possession of the property. Hence the question of granting injunction does not arise.

13. The plaintiff did not establish positive evidence before the lower court in order to prove his possession except Will - Ex.A2. However, on the side of the defendant, he examined four witnesses. They clearly deposed that after the said purchase, the defendant is in possession of the property.

14. In the absence of the positive evidence and documents, I do not find any error in the order passed by the courts below. Granting injunction in favour of the plaintiff is unsustainable since the plaintiff has not established his possession.

15. In view of the above, no substantial questions of law arise for consideration.

16. In the result, the second appeal is dismissed and the Judgment and Decree dated 24.08.2000 passed by the learned Principal Subordinate Judge, Mayiladuthurai in A.S.No.43/2000

confirming the Judgment and Decree of the District Munsif Court, Sirkali in O.S.No.212/1996 dated 21.09.1998, is confirmed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

gv
To

1. The learned Principal Subordinate Judge,
Mayiladuthurai.
2. The District Munsif Court,
Sirkali.

Copy to:

The Section Officer,
V.R. Section,
High Court, Madras.[2copies]

+1cc to Mr.S.Sounthar, Advocate Sr.22553

S.A.No.1993 of 2001

ak[co]
srg 23/05/2018

सत्यमेव जयते

WEB COPY