



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 26.04.2019

Delivered on: 23.05.2019

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CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.733 of 1997

- 1.Jayarama Naidu (Deceased)
- 2.Ramalingam
- 3.Dakshinamurthy
- 4.Purushothaman
- 5.Sarojini
- 6.Kasthuri
- 7.Kamala
- 8.Shantha

... Appellants/Appellant

(Appellants 5 to 8 brought on record
as Lrs of the deceased 1st appellants
vide order of Court dated 21.07.2014
made in CMP.No.140 to 142 of 2011
in S.A.No.733 of 1997.

Vs.

D.Varadarajalu Naidu

... Respondent/Respondent

PRAYER : Second Appeal filed under Section 100 of C.P.C.,
against the decree/judgment dated 25.09.1996 passed in A.S.No.14
of 1992 on the file of Subordinate Judge, Chidambaram,
confirming the judgment and decree dated 22.11.1991 passed in
O.S.No.162 of 1989 on the file of the District Munsif,
Chidambaram.

For Appellants : Mr.T.R.Raja Gopalan, Senior Counsel
for Mr.S.Navaneetha Krishnan

For Respondent : Mr.P.Sheshadri

J U D G M E N T

This Second Appeal has been filed by the plaintiffs
against the judgment and decree passed by the sub-Judge,
Chidambaram in A.S.No.14 of 1992 dated 25.09.1996 confirming the
judgment and decree passed by the District Munsif, Chidambaram
in O.S.No.162 of 1989 dated 22.11.1991.



2.The appellants herein had filed a suit in O.S.No.1346 of 1981 on the file of the District Munsif, Cuddalore, to declare their title over the suit B-schedule property and for recovery of possession of the said property and also to ascertain mesne profits. The said suit subsequently transferred to the Court of District Munsif, Chidambaram, and re-numbered as O.S.No.162 of 1989.

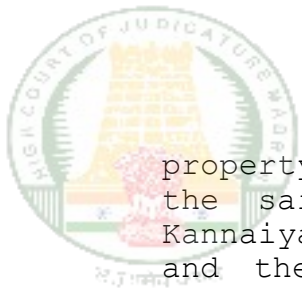
3.The learned District Munsif, Chidambaram, by the judgment dated 22.11.1991 had dismissed the said suit. Aggrieved by the same, the plaintiffs had filed an appeal in A.S.No.14 of 1992 on the file of the Sub-Judge, Chidambaram. The learned sub-Judge, Chidambaram, by the judgment dated 25.09.1996 had dismissed the said appeal confirming the judgment and decree passed by the Trial Court. Feeling aggrieved, the plaintiffs had filed the present Second Appeal.

4.For the sake of convenience, the parties are referred to as described before the Trial Court.

5.The averments made in the amended plaint are in brief as follows:

(a) The first plaintiff is the son of one N.Kuppusamy Naidu and the plaintiffs 2 and 3 are the sons of the first plaintiff. The first plaintiff got two brothers namely Thambu Naidu and Kannaiya Naidu and both of them are no more. The fourth plaintiff is the only son of Thambu Naidu. The said Thambu Naidu died in or about 1968 or so, leaving his widow Ramanujam Ammal and the fourth plaintiff as his legal heirs. Kannaiya Naidu died without any issues and his wife Padma Ammal is alive. The said Thambu Naidu, Jayarama Naidu and Kannaiya Naidu are the sons of Kuppusamy Naidu through his second wife Muthalammal. The said Muthalammal also died in or about 1957. The said Kuppusamy Naidu had a son by name Ramamurthy Naidu through his first wife and the said Ramamurthy Naidu had a son by name Krishnamurthy Naidu, who also died in or about 1966. Amudha is the only daughter to the said Krishnamurthy Naidu. The said Krishnamurthy Naidu had no male issues. Desammal is the widow of Krishnamurthy Naidu, the genology is set out in plaint 'A' schedule.

(b) The suit B-schedule property is a brick built house with a garden bearing Door No.50, Ellaikal Street, Kurinjipadi, Cuddalore Taluk. The said house is the absolute self-acquired property of Muthalammal. On 25.02.1945, Muthalammal executed a registered settlement deed in respect of the suit B-schedule property in favour of her sons Thambu Naidu, Jayarama Naidu and Kannaiya Naidu and grand son Krishnamurthi Naidu, S/o.Ramamurthy Naidu by giving life interest and after their death, the said



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property should go to their male children. After the death of the said Muthalammal and Thambu Naidu, Jayarama Naidu and Kannaiya Naidu, the plaintiffs got the suit B-schedule property and they have been in possession and enjoyment as absolute owners.

(c) The defendant is the native of Mambazapattu Village, Villupuram Taluk and he is the son of one Duraisamy Naidu and the brother of Ramanujam Ammal, the mother of the fourth plaintiff. The defendant claiming to be entitled to the suit property attempted to trespass into the suit property in the second week of June 1981 and hence the plaintiffs were constrained to file a suit for the relief of declaration and permanent injunction.

(d) During pendency of the said suit, the plaintiffs had filed an application in I.A.No.2337 of 1981 seeking interim injunction to restrain the defendant from interfering with their peaceful possession and enjoyment of the suit property. The said application was dismissed; as against which an appeal in CMA No.53 of 1982 was filed before the Additional Sub-Judge, Cuddalore and the same was also dismissed on 17.11.1982 and thereafter the plaintiffs had filed an application in I.A.No.1513 of 1984 seeking permission to amend the plaint and the same was allowed. Accordingly, the plaintiffs have amended the plaint stating that taking advantage of the dismissal of the I.A.No.2337 of 1981, the defendant committed trespass into the suit property from 30.11.1981 and hence he should be directed to deliver vacant possession of the suit property and also for mesne profits from 30.11.1981.

6.The averments made in the written statement are in brief as follows:-

- (a) It is false to say that the B-schedule property is the absolute and self-acquired property of Muthalammal and that on 25.02.1945, she had executed a registered settlement deed in respect of the same in favour of her sons and grand son who was born through the first wife of her husband. The suit property never belonged to Muthalammal and as such she had no right to execute the alleged settlement deed. The said settlement deed will not confer any right upon the plaintiffs.
- (b) The suit property was originally owned by the defendant's father Duraisamy Naidu. He executed a benami deed without consideration styled as a sale deed in favour of Muthalammal, who is none other than his daughter's mother-in-law. Duraisamy Naidu's daughter Ramanujam Ammal was given in marriage to Muthalammal's son Thambu Naidu in or about 1925 and there was no issue to them, by then. At that time, the defendant was



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living there with his sister Ramanujam Ammal studying at Kurinjipadi Kuppam itself and he was brought up like their son. So, Duraisamy Naidu who purchased the suit B-schedule property out of joint family funds wanted to give them to the defendant. Since, he was minor then and he was brought up in the family if Muthalammal, it was agreed and the deed was written in the name of Muthalammal who was the eldest in the family. So, the deed was executed only for the benefit of the defendant and the defendant alone is the real and absolute owner of the said property. Only the defendant had been and is in possession and enjoyment of the said property for the last nearly 43 years, ever since the date of deed, openly, continuously and absolutely, adverse to the interest of all and has also prescribed his title by adverse possession.

- (c) None of the plaintiffs resides in the suit property as alleged. Only the defendant is in possession and enjoyment of the suit property. The plaintiffs with their hooligans broke open the door of the suit property on the evening of 22.05.1981 when the defendant was absent and committed theft of tax receipts and certain documents besides vessels, cash, etc. and the defendant gave a complaint to police also on 23.05.1981 as soon as he returned to the suit house. After having committed theft of the documents and receipts, the plaintiffs had filed the above vexatious suit with false grounds. The tax receipts filed by the plaintiffs are only for the payments paid by the defendant, which were committed theft of, by the plaintiffs. Whatever title the plaintiffs had, which is denied, it was lost by adverse possession of the defendant and the plaintiffs have got no right, title or interest whatsoever in the suit property and therefore the defendant prayed to dismiss the suit.

7.The averments made in the additional written statement filed by the defendant are in brief as follows:

It is false to say that taking advantage of the dismissal of the injunction application, the defendant committed trespass into the suit property from 30.11.1981 and that the possession of the defendant is unlawful and hence, he is liable to surrender possession of the suit property to the plaintiffs. The defendant is already in possession as stated in the main written statement. There is no question of rendering account to the plaintiffs. The plaintiffs are not entitled for the relief of delivery of possession and for mesne profits. Therefore, the defendant prayed to dismiss the suit.

8.Based on the aforesaid pleadings, the learned Sub-Judge, Chidambaram had framed necessary issues and tried the suit. During trial, on the side of the plaintiffs, the first plaintiff was examined as P.W.1 and fourth plaintiff was examined as P.W.5



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and they also examined three more witnesses as P.Ws.2 to 4. They have marked Ex.A1 to A79 as exhibits. On the side of the defendant, the defendant examined himself as D.W.1 and he also examined one more witness as D.W.2. He has marked Ex.B1 to B96 as exhibits.

9.The learned District Munsif, Chidambaram after considering the materials placed before him found that Ex.B1 sale deed dated 05.11.1938 stands in the name of Muthalammal is a sham and nominal document and through the said document, no title was transferred to the said Muthalammal. He further found that the alleged trespass by the defendant on 30.11.1981 is false. He further found that the defendant is in possession and enjoyment of the suit property from the year 1969-1970 and hence he perfected title to the suit property by adverse possession also. Accordingly, he dismissed the suit. Aggrieved by the same, the plaintiffs had filed an appeal in A.s.No.14 of 1992 on the file of the Sub-Judge, Chidambaram. The learned sub-Judge, Chidambaram had dismissed the said appeal confirming the judgment and decree passed by the Trial Court. Feeling aggrieved, the plaintiffs have filed the present Second Appeal.

10.This Court at the time of admitting the Second Appeal, has formulated the following substantial questions of law:-

"1.Are not the Courts below committed an error under law in dismissing the suit holding the transaction under Ex.B1 as sham and nominal one, when it was fully supported by consideration?

2.Whether Courts below are correct in placing the burden on the plaintiff to disprove the case of the defendant of his claim for adverse possession in respect of the suit property?

3.Whether the Courts below are correct in dismissing the suit by accepting the claim of adverse possession laid by the defendant especially when one of the plaintiff was still a minor at the time of filing the suit?"

11.Heard Mr.T.R.Raja Gopalan, Senior Counsel, for Mr.S.Navaneetha Krishnan, the learned counsel for the appellants/plaintiffs and Mr.P.Sheshadri, the learned counsel for the respondent/defendant.

12.The substantial questions of law 1 to 3:-

The learned senior counsel for the appellants/plaintiffs has submitted that the Courts below failed to note that when the defendant has taken a plea of benami, the burden is upon him to prove that Ex.B1 sale deed dated 05.11.1938 is only a sham and



nominal document. He further submitted that in the said document itself, it is stated how the sale consideration was passed and without taking into consideration of the same, the Courts below held that the said document is a sham and nominal document. He further submitted that the Courts below failed to note that at the time of execution of Ex.B1, sale deed, the defendant was only 10 years old child and that being so, he could not have any knowledge about whether actually consideration was passed or not for the said transaction. He further submitted that the Courts below failed to note that the defendant has not examined any of the person who are connected with Ex.B1 sale deed and therefore he failed to discharge the burden. He further submitted that the Courts below failed to note that the defendant cannot claim ownership and also adverse possession and both the pleading are inconsistent to each other. He further submitted that since the defendant has taken a plea of adverse possession, it has to be presumed that he has admitted the title of the plaintiffs. He further submitted that the Courts below failed to note that since the defendant pleaded adverse possession, the burden is upon him from which date his possession has become adverse to the knowledge of the plaintiffs, but in this case, the defendant has not specifically pleaded and proved that from which date his possession has become adverse to the knowledge of the plaintiffs and therefore he prayed to allow the Second Appeal and set aside the judgments and decrees passed by the Courts below and decree the suit as prayed for.

13.The learned senior counsel for the appellants/plaintiffs, in support of the aforesaid contentions relied upon the following decisions:-

- 1.Karnataka Board of Wakf Vs. Government of India and Others (2004) 10 SCC 779;
- 2.M.Venkatesh and Others Vs. Commissioner, Bangalore Development Authority (2015) 17 SCC 1;
- 3.Dagadabai (Dead) by Legal Representatives Vs. Abbas Alias Gulab Rustum Pinjari (2017) 13 SCC 705;
- 4.Narendra and Others Vs. Ajabrao S/o Narayan Katare (Dead) Through Legal Representatives (2018) 11 SCC 564.

14.Per Contra, the learned counsel for the respondent/defendant has submitted that the plaintiffs have not come to the Court with clean hands. He further submitted that originally, the plaintiffs have filed the suit stating that they are in possession and enjoyment of the suit property, but, the



injunction application filed by them has been dismissed by the Trial Court holding that the defendant alone in possession of the suit property and as against the said order, the plaintiffs had filed an appeal in C.M.A.No.53 of 1982 and the same was also dismissed and only thereafter, they had amended the plaint stating that taking advantage of the dismissal of the injunction application, the defendant committed trespass from 30.11.1981, but the evidence on record would clearly show that the plaintiffs never in possession of the suit property at any point of time and it is only the defendant who is in possession of the suit property even from the date of Ex.B1 sale deed and taking into consideration of the aforesaid facts, the Courts below rightly held that the defendant has perfected to his title by adverse possession. He further submitted that since the plaintiffs have filed the suit for declaration and delivery of possession, the burden is upon them to prove the title and also they have filed the suit within the limitation. But, in this case, they miserably failed to prove the title. He further submitted that the Courts below taking into consideration of the fact that the defendant alone in possession of the suit property and also the fact that he only produced the original sale deed dated 05.11.1938 (Ex.B1) and also mortgage deed dated 15.05.1946 (Ex.B15) concurrently found that Ex.B1 sale deed is only a sham and nominal document and through the said document, no title was passed on to the said Muthalammal and in the said factual concurrent findings, this Court cannot interfere. Therefore, he prayed to dismiss the Second Appeal.

15.The learned counsel for the respondent/defendant in support of the aforesaid contentions, relied upon the following decisions:-

1.Santosh Hazari Vs. Purushottam Tiwari (Deceased) by LRS (2001) 3 SCC 179

2.Rajgopal (Dead) by LRS. Vs. Kishan Gopal and Another (2003) 10 SCC 653

3.I.T.C. LIMITED Vs. Debts Recovery Appellate Tribunal and Others (1998) 2 SCC 70

4.Md. Akhtar Hossain Vs. Suresh Singh and Others, AIR 2004 CALCUTTA 99



5.Muni Lal Vs. Oriental Fire & General Insurance Co.Ltd and Another (1996) 1 SCC 90

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6.Vijendra Kumar Goel Vs. Kusum Bhuwania (Smt) (1997) 11 SCC 457

7.Nair Service Society Ltd. Vs. K.C.Alexander, 1968 AIR (SC) 1165

8.Bhavnagar Municipality Vs. Union of India and others, AIR 1990 SC 717

9.Mohd. Ilyas Vs. Mohd. Adil, 1994 AIR (Delhi) 212

10.Ghewarchand and Others Vs. Mahendra Singh and Others, (2018) 10 SCC 588

16.Admittedly, the plaintiffs and the defendant are close relatives. The defendant's sister Ramanujam Ammal, was given in marriage to one of the sons of Muthalammal namely Thambu Naidu. The fourth plaintiff is the son of the said Ramanujam Ammal. So, it is clear that the defendant is the maternal uncle of the fourth plaintiff.

17.According to the plaintiffs, the said Muthalammal had three sons namely Thambu Naidu (father of the fourth plaintiff), Jayarama Naidu (first plaintiff) and Kannaiya Naidu. Their further case is that by virtue of the sale deed dated 05.11.1938 (Ex.B1), the said Muthalammal was an absolute owner of the suit property and she executed a registered settlement deed dated 25.02.1945 (Ex.A9) and by virtue of the said settlement deed, they became the absolute owners of the suit property. The case of the defendant is that the suit property originally owned by his father Duraisamy Naidu and he executed a benami deed (Ex.B1) without consideration, styled as a sale deed, in favour of Muthalammal, who is none other than the mother-in-law of his daughter. Therefore, the burden is upon the defendant to prove that Ex.B1 sale deed is a sham and nominal document and under the said document, no title was passed on to the said Muthalammal.



18. In this context, it would be relevant, to refer to the decision in Jaydayal Poddar (Deceased) Vs. Mst. Bibi Hazra and Others AIR 1974 SC 171: (1974) SCC (1) 3 wherein the Hon'ble Supreme Court has held as follows:

".....It is well settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of Benami or establish circumstances, unerringly and reasonably raising an inference of that fact. The essence, of a benami is the intention of the party or parties concerned; and not unoften such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him; nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. The reason is that a deed is a solemn document prepared and executed after considerable deliberation and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs. Though the question, whether a particular sale is Benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid tests, uniformly applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by these circumstances: (1) the source from which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive, if any, for giving the transaction a benami color; (4) the position of the parties and the relationship, if any between the claimant and the alleged benamidar; (5) the custody of the title-deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale.

The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless no.1, viz. The source whence The purchase money came, is by far the most important test for determining whether the sale standing in



the name of one person, is in reality for the benefit of another."

19. In this case, no doubt, the defendant had produced the original sale deed dated 05.11.1938 which has been executed by his father Duraisamy Naidu in favour of Muthalammal. Further, admittedly on the date of filing of the suit, the defendant is in possession of the suit property. But, based on the aforesaid circumstances alone it cannot be said that the said transaction is only a benami transaction, because, as per the aforesaid decision of the Hon'ble Supreme Court, the source from which the purchase money came is the most important test for determining whether the sale standing in the name of one person, is in reality for the benefit of another.

20. In Ex. B1 sale deed, it is stated that Duraisamy Naidu, and his two sons namely Dhanapal Naidu and Varadarajalu Naidu (the defendant) had executed the sale deed in favour of Muthalammal on 05.11.1938 in respect of the suit property for Rs.500/-. Since, at that time the defendant was a minor, on his behalf his father Duraisamy Naidu executed the said document as guardian. In the said document, it is also stated that at the time of execution of the said document, the age of the defendant was only 10 years and that being so, he could not have any knowledge about the said transaction. He has not examined any of the persons, connected with the said sale deed.

21. It is to be pointed out that in Ex.B1, it is stated that out of total consideration of Rs.500/-, only Rs.190/- was paid as cash, the purchaser was directed to pay Rs.220/- towards the mortgage made by the said Duraisamy Naidu in favour of one Subburaya Chettiar on 19.03.1937 and to pay a sum of Rs.90/- which was due on a promisory note executed by the said Duraisamy Naidu in favour of one Chinnaasamy Naidu. So, as per Ex.B1 sale deed, the purchaser namely Muthalammal has to discharge the mortgage dated 19.03.1997 made by Duraisamy Naidu in favour of Subburaya Chettiar and also the debt due on the promisory note executed by Duraisamy Naidu in favour of Chinnaasamy Naidu.

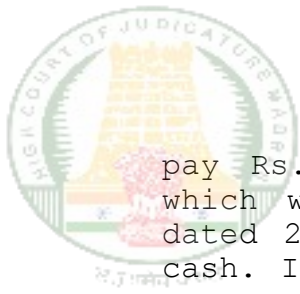
22. It is seen from Ex.A4 (original usufructuary mortgage deed dated 28.11.1938) that the said Muthalammal after purchasing the suit property from Duraisamy Naidu and his sons, mortgaged the suit property on 28.11.1938 with one Anjalatchi Ammal for Rs.275/-. Through the said document the said Muthalammal directed the mortgagee Anjalatchi Ammal to pay a sum of Rs.230/- towards the mortgage created by Duraisamy Naidu on 19.03.1937 in favour of Subburaya Cettiar and she received balance amount of Rs.45/-.



23.The plaintiffs have produced the said original mortgage deed dated 19.03.1937 executed by Duraisamy Naidu in favour of Subburaya Chettiar and marked as Ex.A1. In the said document, there is an endorsement dated 28.11.1938 to the effect that the said mortgage has been discharged and the said endorsement has been marked as Ex.A2. In the said endorsement, it is also stated that already on 14.05.1937, the said Duraisamy Naidu had paid a sum of Rs.100/- and today that is on 28.11.1938, Anjalatchi Ammal paid a sum of Rs.230/- and totally a sum of Rs.330/- has been received towards the full quit of mortgage. So, it is clear that as per the directions given in Ex.B1 sale deed, the said Muthalammal had discharged the mortgage dated 19.03.1937 which was created by Duraisamy Naidu in favour of Subburayalu Chettiar. But, the Courts below misconstrued Ex.A2 endorsement that after executing Ex.B1 sale deed, on 28.11.1938, the said Duraisamy Naidu paid a sum of Rs.100/- towards the discharge of mortgage deed. The said finding is not correct. In Ex.A2 endorsement, it is clearly stated that on 14.05.1937 itself Duraisamy Naidu paid Rs.100/- and on the date of the said endorsement that is on 28.11.1938, it was only Anjalatchi Ammal had paid Rs.230/- and taking into consideration of the amount which was already paid by Duraisamy Naidu on 14.05.1937 that is Rs.100/-, the mortgagee namely Subburaya Chettiar made an endorsement that the entire mortgage discharged.

24.It is seen from Ex.A5 (original lease deed) that on the same date that is on 28.11.1938, after, executing Ex.A4 usufructuary mortgage in favour of Anjalatchi Ammal, mortgagor viz., Muthalammal took the suit property for lease from the said Anjalatchi Ammal for the purpose of residence. But, the Courts below again misconstrued that after creating usufructuary mortgage in favour of Anjalatchi Ammal, the said Muthalammal and Anjalatchi Ammal entered into Ex.A5 lease deed and as per the terms of the said lease deed, Anjalatchi Ammal was inducted as a tenant and hence, the said transactions could not be real transactions. The said findings are contrary to the evidence. In fact, the said Muthalammal had not leased out the suit property to Anjalatchi Ammal. Since, under Ex.A4, Muthalammal created usufructuary mortgage and handed over the possession of the suit property to Anjalatchi Ammal, for the purpose of residence, the said Muthalammal took the suit property on lease from the mortgagee namely Anjalatchi Ammal under Ex.A5.

25.It is seen from Ex.A7 (usufructuary mortgage deed) that on 29.04.1939, the said Muthalammal created usufructuary mortgage in respect of the suit property in favour of one Namachivayam Mudaliar and Sivanandha Mudaliar for Rs.300/-. In the said document it is stated that the said mortgagees have to



pay Rs.278/- towards the discharge of usufructuary mortgage which was created in favour of Anjalatchi Ammal under Ex.A4 dated 28.11.1938 and received the balance amount of Rs.25/- by cash. It is seen from Ex.A6 (endorsement made in Ex.A4) that in pursuance of the directions given by Muthalammal under Ex.A7, one of the mortgagees namely Namachivaya Mudaliar paid a sum of Rs.275/- to the said Anjalatchi Ammal on 05.05.1941 towards the discharge of the usufructuary mortgage which was created under Ex.A4.

26.It is seen from Ex.A9 (settlement deed) that on 25.02.1945, the said Muthalammal had executed a registered settlement deed in respect of the suit property in favour of her sons namely Thambu Naidu, Jayarama Naidu (first plaintiff) and Kannaiya Naidu and grand son Krishnasami Naidu by giving life interest to them and after their death, male issues will get absolute right. In the said document it is also stated that the settlees have to discharge the mortgage which was created by the settlor Muthalammal in favour of Namachivaya Mudaliar and Sivanandha Mudaliar on 29.04.1939 under Ex.A7. She also directed the settlees to discharge the debt of Rs.150/- which is due to one Angamuthu Mudaliar. In pursuance of the said directions, the settlees Thambu Naidu and others have discharged Ex.A7 mortgage on 29.04.1989 and to that effect an endorsement has been made in Ex.A7 itself. The said endorsement has been marked as Ex.A8. The aforesaid documents would clearly show that from the date of purchase, under Ex.B1, the purchaser namely Muthalammal continuously dealt with said property by creating mortgages. It is also clear that she paid the debts as directed by the vendors namely Duraisamy Naidu and his sons under Ex.B1. Therefore, by no stretch of imagination it can be said that Ex.B1 is only a benami deed or a sham and nominal document.

27.Ex.A10 shows that the settlees namely the sons of Muthalammal and grandsons had dealt with the suit property by creating mortgage on 07.07.1963 in favour of one Murthy Pathar and subsequently they had discharged the said mortgage on 27.08.1966 vide Ex.A11 endorsement Ex.A12 shows that when the suit property was attached by one Kulla Mudaliar by executing a decree obtained by him in S.A.No.796 of 1956, the plaintiffs 1 and 4 and one Kannaiya Naidu, who is also one of the sons of Muthalammal had filed a suit in O.S.No.21 of 1960 on the file of the District Munsif of Virudhachalam and got the decree in their favour. The aforesaid act would show that the plaintiffs 1 and 4 and Kannaiya Naidu took efforts to save the property from knocking away by the third parties. Taking into consideration all the aforesaid facts, this Court is of the view that the plaintiffs have proved their title over the suit property.



28.It is the case of the defendant that his sister Ramanujam Ammal was given in marriage to one of the sons of Muthalammal namely Thambu Naidu in or about 1925 and there was no issues for them, by then and at that time he was living there with his sister Ramanujam Ammal studying at Kurinjipadi Kuppam itself and he was brought up like their son. His further case is that taking into consideration of the aforesaid facts, his father wanted to give the suit property to him and since at that time he was a minor, the sale deed was executed in favour of Muthalammal as she was the eldest in the family and the said sale deed was executed only for the benefit of him. If really the said Duraisamy Naidu wanted to give the suit property to his son (defendant), he could have directly executed a settlement deed in favour of the defendant. There was no necessity to execute a sale deed in favour of Muthalammal. Further, the recital in Ex.B1 would clearly show that already Duraisamy Naidu borrowed money by executing mortgage, in favour of one Suburaya Chettiar and also executing a promissory note in favour of one Chinniya Naidu and mainly for the purpose of discharge of the aforesaid debts, he executed Ex.B1 sale deed in favour of Muthalammal. Further, through the said document, Duraisamy Naidu and his sons had received balance sell consideration of Rs.190/- by cash to meet out their family expenses. There is no evidence that after executing Ex.B1 sale deed, the Said Duraisamy Naidu or his sons had discharged the debts mentioned in the said sale deed. On the contrary, the documentary evidence produced by the plaintiffs has clearly established that the said Muthalammal had discharged the said debts by creating mortgages. The evidence on record would show that for the purpose of discharging the mortgage debt which was obtained by the said Duraisamy Naidu from Subburaya Chettiar, the said Muthalammal created usufructuary mortgage in favour of Anjalatchi Ammal and subsequently she resided in her own house as a tenant by executing the lease deed in favour of Anjalatchi Ammal. So the evidence on record would clearly show that the said Muthalammal took much efforts to protect the suit property. But neither the defendant nor his brother nor their father took any steps to discharge the debts which have been mentioned above. Therefore, the contention of the defendant that only for his benefit, Ex.B1 sale deed was executed in favour of Muthalammal without any consideration cannot be accepted.

29.The defendant relying upon the school certificate and the communications sent by others to him to the address of the suit property, claimed that he is in possession of the suit property from the childhood and hence he perfected title by adverse possession. Even according to the own statement of the defendant, his sister Ramanuja Ammal was married to one of the sons of Muthalammal namely Thambu Naidu and at that time they



did not have issues. At that time, the defendant was living there with his sister Ramanujam Ammal studying at Kurinjipadi Kuppam itself and he was brought up like their son. It is clear that even according to the defendant, he was not in possession of the suit property in pursuance of Ex.B1 sale deed. He was living with his sister's family and the same cannot be taken as that he is in exclusive possession of the suit property. He has been living there only as a relative and not on his own right.

30. In Karnataka Board of Wakf Vs. Government of India and Others; (cited supra), the Hon'ble Supreme Court in paragraph 11 and 12 has held as follows:

11. In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extend to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. See S.M. Karim v. Bibi Sakina, Parsinni v. Sukhi and D.N. Venkatarayappa v. State of Karnataka.) Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. [Mahesh Chand Sharma (Dr.) v. Raj Kumari Sharma.]



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12.A plaintiff filing a title suit should be very clear about the origin of title over the property. He must specifically plead it. (See S.M.Karim v. Bibi Sakina.) In P.Periasami v. P.Periathambi this Court ruled that: (SCC p.527, para 5)

"Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property."

The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Dealing with Mohan Lal v. Mirza Abdul Gaffar that is similar to the case in hand, this Court held: (SCC pp.640-41, para 4)

"4.As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years i.e. Up to completing the period his title by prescription nec vi, nec clam, nec precario. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant."

31.From the aforesaid decision, it is clear that in the eye of law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of true owner. It is also clear, a person who claims adverse possession, has to prove that on what date he came into possession, what was the nature of his possession, whether the factum of possession was known to the other party, how long his possession had continued and his possession was open and undisturbed. It is also clear a person claiming adverse possession has no equities in his favour. Since, he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. It is also clear



that the plea on title and adverse possession are mutually inconsistent and the later does not begin to operate until the former is renounced. In this case, as already pointed out that the defendant claims title by saying that no title was passed on under Ex.B1 to Muthalammal and that the said document itself was executed only for his benefit and at the same time, he has pleaded adverse possession. In this case, the defendant has not renounced the plea of title, and as such he is not entitled to take the plea of adverse possession.

32. In *M. Venkatesh and Others Vs. Commissioner, Bangalore Development Authority* (cited supra), the Hon'ble Supreme Court has held that in terms of Article 65 of the Limitation Act, the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendant's possession becomes adverse. It was further held that "Animus possidendi" is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence.

33. In *Dagadabai (Dead) by Legal Representatives Vs. Abbas Alias Gulab Rustum Pinjari* (cited supra), the Hon'ble Supreme Court in paragraph 15 and 16 has observed as follows:

15. Third, the plea of adverse possession being essentially a plea based on facts, it was required to be proved by the party raising it on the basis of proper pleadings and evidence. The burden to prove such plea was, therefore, on the defendant who had raised it. It was, therefore, necessary for him to have discharged the burden that lay on him in accordance with law. When both the courts below held and, in our view, rightly that the defendant has failed to prove the plea of adverse possession in relation to the suit land then such concurrent findings of fact were unimpeachable and binding on the High Court.

16. Fourth, the High Court erred fundamentally in observing in para 7 that, "it was not necessary for him (defendant) to first admit the ownership of the plaintiff before raising such a plea". In our considered opinion, these observations of the High Court are against the law of adverse possession. It is a settled principle of law of adverse possession that the person, who claims title over the property on the strength of adverse possession and thereby wants the Court to divest the true owner of his ownership rights



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over such property, is required to prove his case only against the true owner of the property. It is equally well settled that such person must necessarily first admit the ownership of the true owner over the property to the knowledge of the true owner and secondly, the true owner has to be made a party to the suit to enable the Court to decide the plea of adverse possession between the two rival claimants.

34. From the aforesaid decision, it is clear that the person who raised a plea of adverse possession should prove the same in accordance with law. It is also clear that the person who claiming title over the property on the strength of adverse possession first admit the ownership of the true owner of the property. In this case, the defendant set up title over the suit property and also raised a plea of adverse possession. When he raised a plea of adverse possession, he should admit that the plaintiffs are the true owners.

35. In Narendra and Others Vs. Ajabrao S/o Narayan Katare (Dead) Through Legal Representatives, (cited supra), relying on the earlier decision in T. Anjanappa and Others Vs. Somalingappa and Another, (2006) 7 SCC 570, the Hon'ble Supreme Court has held mere possession however long it may be does not necessarily mean that it is adverse to the true owner and the classical requirement of acquisition of title by adverse possession is that such possessions are in denial of the true owners. In this case also, the defendant has simply pleaded that he is in possession of the suit property for 45 years from his childhood but nowhere he has stated in his written statement that from which date, his possession became adverse to the knowledge of the true owners. Therefore, merely because the defendant is in possession of the suit property for several years that would not confer any right or title unless he proves that his possession is adverse to the knowledge of the owners for more than 12 years.

36. In Santosh Hazari Vs. Purushottam Tiwari (Deceased) by LRS (cited supra), relying on the decision of the constitution bench in Sir Chunilal V. Mehta & Sons Ltd. Vs. Century Spg. and Mfg. Co. Ltd., AIR 1962 SC 1314, the Hon'ble Supreme Court has held that the proper test for determining whether a substantial question of law raised in the case is substantial would, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by the Hon'ble Supreme Court or by the Privy counsel or by the federal Court or is not free from difficulty or calls for discussion of alternative views.



37. In Rajgopal (Dead) by LRS. Vs. Kishan Gopal and Another, (Cited supra), the Hon'ble Supreme Court has held that under section 100 of CPC, the findings of the facts recorded by the First Appellate Court cannot be interfered with, by the High Court more so when no substantial question of law is involved. But, in this case, the findings of the Courts below are opposed to pleadings and evidence. Further, the substantial rights of the parties are also involved and hence this Court is of the view that substantial questions of law are involved in this case.

38. In I.T.C. LIMITED Vs. Debts Recovery Appellate Tribunal and Others (cited supra), the Honorable Supreme Court, while dealing with the provisions of Order 7 Rule 11(a) of CPC held that if the plaint does not disclose a cause of action, the plaint has to be rejected.

39. In Md. Akhtar Hossain Vs. Suresh Singh and Others, (cited supra), it was held that if no convincing ground mentioned in explaining the delay, the plaint has to be rejected on the ground, the suit is barred by limitation. But, in this case, no such occasion has arisen. Hence, the aforesaid decisions will not apply to the facts of this case.

40. In Muni Lal Vs. Oriental Fire & General Insurance Co. Ltd and Another (cited supra), the suit for mere declaration without seeking consequential relief dismissed by Trial Court as being not maintainable under proviso to Section 34 of Specific Relief Act. The plaintiff filed an application under Order 6 Rule 17 CPC, in the Appellate Court seeking consequential relief. The Appellate Court rejected the said application as it was barred by limitation and the same has been confirmed by the Hon'ble Supreme Court.

41. In Vijendra Kumar Goel Vs. Kusum Bhuwania (Smt) (cited supra), a suit for declaration and enjoyment was filed, subsequently the plaintiff filed a petition seeking to amend the plaint for specific performance. The Hon'ble Supreme Court has held that such amendment cannot be allowed. In this case, originally the suit was filed for declaration and permanent injunction and subsequently the plaint was amended seeking delivery of possession. As against the same, the defendant has not filed any revision. Therefore, now he cannot question the said amendment. Therefore, the aforesaid decision will not help the defendant.



42. In Nair Service Society Ltd. Vs. K.C. Alexander, (Cited supra), the Hon'ble Supreme Court has held that "it cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by the process of law within the period prescribed by the provisions of the statute of limitation applicable to the case, his right is for ever extinguished and the possessory owner acquires an absolute title."

43. As per Article 65 of the Limitation Act, a suit for delivery of possession based on title has to be filed within 12 years from the date of the possession became adverse. In this case, the defendant has not pleaded and proved that when his possession has become adverse to the true owners. Therefore, the aforesaid decision also will not help the defendant.

44. In Bhavnagar Municipality Vs. Union of India and others, (cited supra), a suit for possession on the basis of title was filed. The defendant denied the title of the plaintiff and under the said circumstances, the Hon'ble Supreme Court has held that since the suit is for possession based on title to the suit property and the defendant has denied the title of the plaintiff, it is necessary for the Court to come to a finding on title of the plaintiff even if the defendants in possession had not pleaded adverse possession. In this case, the defendant has not simply denied the title of the plaintiffs. But, he has raised the plea of adverse possession and in such a case, first he should admit the title of the plaintiffs and he has to plead and prove from which date his possession became adverse to the true owners. But, in this case, the defendant has not discharged the burden and hence the aforesaid decision cannot be applied to the facts of this case.

45. In Mohd. Ilyas Vs. Mohd. Adil, (cited supra), a suit was filed for possession based on previous possession and not on title. Hence, the Delhi High Court has held that Article 64 of Limitation Act alone will apply and as such, the suit should have been filed within 12 years from the date of dispossession. Whereas, in this case, the suit was filed not on the basis of previous possession but on the basis of title and therefore the aforesaid decision will not apply to the facts of this Case.



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46. In Ghewarchand and Others Vs. Mahendra Singh and Others, (cited supra), the Hon'ble Supreme Court has held that in order to decide the question of limitation as to whether the suit is filed within the time or not, the Court is mainly required to see the plaint allegations and how the plaintiff has pleaded accrual of cause of action for filing the suit. In this case initially the suit was filed for declaration and permanent injunction and subsequently the plaint was amended stating that during pendency of the suit, taking advantage of the dismissal of the injunction application, the defendant committed trespass and hence, the delivery of possession has to be ordered. Even assuming that the allegation that only during pendency of the suit, the defendant trespassed into the suit property is not true, since the defendant raised a plea of adverse possession, the burden is upon him to prove the said plea of adverse possession. In this case, the defendant failed to prove the adverse possession. Therefore, the plaintiffs are entitled for the relief of delivery of possession. Therefore, the aforesaid decision also will not help the defendant.

47. For the aforesaid reasons, this Court is of the view that the plaintiffs have proved the transaction which took place under Ex.B1 sale deed is a real transaction and hence they got title over the suit property. But, the defendant failed to prove that the said document is only a sham and nominal. Further, this Court is of the view that the defendant failed to prove the plea of adverse possession also and hence the plaintiffs are entitled for the relief of declaration and delivery of possession and for mesne profits. But, the Courts below without considering the evidence in a proper perspective concurrently found that Ex.B1 sale deed is only a sham and nominal and under the said document no title was transferred to Muthalammal and further, it was held that the defendant perfected title by adverse possession and therefore, the said findings are liable to be set aside. Accordingly, substantial questions of law are answered in favour of the appellants/plaintiffs.

48. In the result, the Second Appeal is allowed. No Costs. The judgment and decree passed by the Courts below are set aside. The suit in O.S.No.162 of 1989 is decreed as follows:

1. that it is declared that the plaintiffs are absolute owners of the B schedule property;



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2.that the defendant is directed to deliver vacant possession of the suit property to the plaintiffs within three months from the date of receipt of copy of this judgment;

3.that with regard to mesne profits, a separate enquiry under Order 20 Rule 12 is ordered; and

4.that considering the facts and circumstances of the case, the parties are directed to bear their respective costs.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

To

1. The Subordinate Judge,
Chidambaram.
2. The District Munsif,
Chidambaram.
3. The Section Officer, VR Section,
High Court,
Madras.

S.A.No.733 of 1997

BS (CO)
SP(17/10/2019)