

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 18.10.2019

PRONOUNCED ON : 25.10.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.631 of 2002

Saradambal ... Appellant/Plaintiff

Vs.

1. Sundaram

2. S.Kothandapani (died)
(R2 died. R1 is recorded as
LR of the deceased R2
viz., S.Kothandapani vide
order of court dated 9.9.19
made in SA.No.631 of 2002
as per memo dated 19.09.2019
are recorded)

3. G.Govindasamy ... Respondents /Defendants

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the judgment and decree of the learned Additional District Judge of Villupuram made in A.S.No.157 of 1999 dated 29.12.2000 by reversing the judgment and decree of the learned Principal District Munsif, Ulundurpet made in OS.No.1225 of 1995 dated 27.08.1999.

For Appellant : Mr.T.Gandhi

For Respondents : R1 and R3 set exparte

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JUDGMENT

This second appeal has been filed by the plaintiff against the judgment and decree passed by the Additional District Judge, Villupuram in AS.No.157 of 1999 dated 29.12.2000 reversing the judgment and decree passed by the Principal District Munsif, Ulundurpet in OS.No.1225 of 1995 dated 27.08.1999.

2. The appellant herein had filed a suit in OS.No.1225

of 1995 on the file of the Principal District Munsif, Ulundurpet to declare that she is the absolute owner of the suit property and for permanent injunction to restrain the defendants from interfering with her peaceful possession and enjoyment of the suit property. The learned Principal District Munsif, Ulundurpet by the Judgment dated 27.08.1999 had decreed the suit as prayed for with costs. Aggrieved by the same, the defendants had filed an appeal in AS.No.136 of 1999 on the file of the Sub-Judge, Villupuram and subsequently the said appeal was transferred to the Additional District Judge, Villupuram and numbered as AS.No.157 of 1999. The learned Additional District Judge, Villupuram by the judgment dated 29.12.2000 had allowed the said appeal and set aside the judgment and decree passed by the trial court and dismissed the suit. However, he directed the parties to bear their respective costs. Feeling aggrieved, the plaintiff has filed the present second appeal.

3. For the sake of convenience, the parties are referred to as described before the trial court.

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

The suit property originally belonged to the plaintiff's uncle Thangarasu. The said Thangarasu had orally sold the suit property fifteen years ago and also handed over possession to her. At the time of sale, the suit property was not fit for cultivation and hence after taking possession, the plaintiff with the help of her family members reclaimed the same and made it fit for cultivation. She cultivated pearl millet (Kambu) and groundnuts. Patta also transferred in the name of the plaintiff and she has been paying kist to the suit property. The Village Administrative Officer also granted possession certificate. Since the plaintiff has been in possession and enjoyment of the suit property for more than 12 years, she perfected title by adverse possession also. The defendants are having lands adjacent to the suit property and they are trying to trespass into the suit property and hence the plaintiff was constrained to file suit for declaration and permanent injunction.

5. The averments made in the written statement filed by the first defendant and adopted by the defendants 2 and 3 are in brief as follows:

The plaintiff and the first defendant are sisters. The above said Thangarasu is their uncle. The plaintiff got married in Pa Killanur village and came to Kattur Paramanatham only few years ago. The first defendant was in possession and enjoyment of the suit property from early date when Thangarasu was leaving from native village to Singapore. The defendants denying the allegations that the plaintiff got the suit property by oral sale and she is in exclusive possession of the suit property.

Since the value of the suit property is more than Rs.100/-, the alleged oral sale will not convey any title to the plaintiff. The allegation that the plaintiff alone is in possession and enjoyment of the suit property is false. When the plaintiff was unable to maintain her family in her native village, she came to the suit village and made a request with the first defendant to give some portion of land for her livelihood. Accordingly, the first defendant permitted the plaintiff to enjoy some portion of the suit property and the remaining portion is with the defendants. Taking advantage of the same, the plaintiff managed to transfer patta in her name and that will not create any right over the suit property and the allegation that the plaintiff perfected title by adverse possession is false. It is also false to state that the defendants are trying to encroach the suit property, because they are already in possession and enjoyment of the suit property. Therefore, the defendants prayed to dismiss the suit.

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

As against the order passed by the Tahsildar with regard to the transfer of patta in the name of the plaintiff, the first defendant had filed an appeal before Revenue Divisional Officer, Thirukovilur and the same is still pending. Therefore, the plaintiff cannot rely upon the patta which was transferred to her name. Further, the Revenue Divisional Officer has to be impleaded as defendant, but, Revenue Divisional Officer was not impleaded as party and hence, the suit is bad for non-joinder of necessary party.

7. Based on the aforesaid pleadings, the learned District Munsif had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined herself as PW1 and also examine one more witness as PW2. She had marked Exs.A1 to A13 as exhibits. On the side of the defendants, the third defendant was examined as DW1, the first defendant was examined as DW2 and one more witness was examined as DW3. The defendants had marked Exs.B1 to B4 as exhibits . One exhibit was marked as Ex.X1.

8. The learned District Munsif, after considering the materials placed before him found that the plaintiff had proved her title by adverse possession. Accordingly, he decreed the suit as prayed for with costs. Feeling aggrieved, the defendants had filed an appeal in AS.No.136 of 1999 on the file of the Sub Judge, Villupuram and subsequently the said appeal was transferred to the Additional District Judge, Villupuram and numbered as AS.No.157 of 1999.

9. When the said appeal is pending before the Additional

District Judge, Villupuram, the defendants had filed an application in IA.No.74 of 2000 under Order 41 Rule 27 of CPC to receive copy of the order passed by the District Revenue Officer, Villupuram dated 24.08.2000 as additional documentary evidence.

10. The learned Additional District Judge by the judgment and Order dated 29.12.2000 had allowed the said IA.No.74 of 2000 and marked the order passed by the District Revenue Officer in Revision Petition No.A3/79352/1998 dated 24.08.2000 as Ex.B5 and finally allowed the appeal and set aside the judgment and decree passed by the trial court and dismissed the suit. Feeling aggrieved, the plaintiff has filed the present second appeal.

11. This court at the time of admitting the second appeal has formulated the following substantial questions of law :

"1) Whether the lower appellate court is right in holding that Revenue Authority's decision will bind the Civil Court while deciding the title of the suit property?

2) Whether the lower appellate court is right in deciding that the appellant cannot claim adverse possession when she claims ownership of the suit property?

3) Whether the lower appellate court's decree and judgment is correct in dismissing the suit for declaration and permanent injunction eventhough the respondents themselves admit that the appellant is in possession of 50% of the suit property?"

12. During pendency of the second appeal, the learned counsel for the appellant has filed a memo stating that the second respondent died and his legal representative (wife) is already on record as first respondent and the said memo has been recorded. Though, notices were served on the respondents 1 and 3 and their names also printed in the cause-list, they have not appeared either in person or through counsel. They are called absent and set exparte. Thereafter, the arguments of the learned counsel for the appellant heard. After considering the arguments of the learned counsel for the appellant and perusing the records, judgment is being passed in this second appeal.

13. Substantial Questions of Law 1 to 3:

The learned counsel for the appellants has submitted that the first appellate court erred in reversing the well considered judgment of the trial court. He further submitted that the first appellate court failed to consider that the

plaintiff has produced Patta, Chitta, Adangal and kist receipts to show that she only enjoying the suit property. He further submitted that the first appellate court failed to consider that the defendants have not produced any documentary evidence to show that they also in joint possession of the suit property. He further submitted that the oral and documentary evidence adduced by the plaintiff clearly shows that the plaintiff has been in exclusive possession and enjoyment of the suit property for more than 12 years and thereby she perfected title by adverse possession. He further submitted that the first appellate court failed to see that when the civil suit is pending, the decision of the Revenue Authorities with regard to transfer of patta will not have any binding effect. He further submitted that since the defendants themselves admitted in their written statement that the appellant is in possession of 50% of the suit property, the first appellate court ought not to have dismissed the suit. He further submitted that the first appellate court failed to consider that the defendants have not produced any oral or documentary evidence to show that they are in possession and enjoyment of the suit property. He further submitted that the trial court taking into consideration of the aforesaid facts and evidence in proper perspective had rightly decreed the suit as prayed for. But, the first appellate court erroneously reversed the well considered findings of the trial court. Therefore, he prayed to allow the second appeal and set aside the judgment and decree passed by the first appellate court and restore the judgment and decree passed by the trial court.

14. It is an admitted fact that the plaintiff and the first defendant are sisters. It is also an admitted fact that the suit property originally belonged to one Thangarasu who is none other than the uncle of the plaintiff and the first defendant. It is also an admitted fact that the said Thangarasu left India fifty years ago and permanently settled at Singapore and subsequently he died there itself.

15. According to the plaintiff, the said Thangarasu while leaving India, had orally sold the property to her and handed over possession to her. Her further case is that in pursuance of the said oral sale, patta has been transferred to her name and she has been paying kist to the Government. She has been enjoying the suit property by making reclamation and cultivated the land. In support of her case, she filed patta which stands in her name and marked as Ex.A.1 and Patta Transfer Proceedings as Ex.A2. She has produced kist receipts and marked as Exs.A3 to A11. She also produced certified copy of Chitta and Adangal and marked as Exs.A12 and A13 respectively.

16. The case of the defendants is that the plaintiff was married in Pa Killanur village whereas the first defendant was

married in the local village ie., Kattur Paramanatham village. Their uncle Thangarasu while leaving India, put the first defendant in possession of the suit property. Their further case is that after few years, the plaintiff came to the Kattur Paramanatham village and made a request with the first defendant to make some provision for livelihood for her and her family members and accordingly, the first defendant permitted the plaintiff to occupy a portion of the suit property. Their further case is that the plaintiff taking advantage that she is also in possession of suit property had clandestinely obtained patta in her name without the knowledge of them and after knowing the said fact they filed appeal before the Revenue Divisional Officer, Thirukovilur and that the Revenue Divisional Officer after hearing both sides had set aside the order passed by the Tahsildhar transferring the patta in her name. Their further case is that as against the order passed by the Revenue Divisional Officer, Thirukovilur, the plaintiff had filed Revision Petition before the District Revenue Officer, Villupuram and the same was dismissed, confirming the order of the Revenue Divisional Officer, Thirukovilur and therefore the plaintiff cannot rely upon the patta which was granted in her name. Their further case is that they also paid kist and in order to prove their case, they produced the original patta pass book which stands in the name of Thangarasu and marked as Ex.B.1. They also marked two kist receipts as Exs.B2 and B3. They have marked the order passed by the Revenue Divisional Officer, Thirukovilur as Ex.B4.

17. As already pointed out that the patta granted in the name of the plaintiff under Exs.A1 and A2, was cancelled by the Revenue Divisional Officer, Thirukovilur by the proceedings under Ex.B4. But, the trial court relying upon Exs.A1 and A2 and also kist receipts and certified copies of Chitta and Adangal had decreed the suit as prayed for. As already pointed out that the plaintiff in her plaint has claimed the suit property as she has purchased the same orally from the original owner Thangarasu. She also claimed adverse possession, but she has not added the original owner Thangarasu as party. Adverse possession can be claimed against true owner only, but in this case, the true owner Thangarasu has not been added as a party. Further, in the evidence, the plaintiff while examining herself as PW1 has stated that the said Thangarasu had executed a will bequeathing the suit property to her, but she has stated that the said will was destroyed in fire and hence she could not produce the same. So it is not clear whether the plaintiff claims right over the suit property through will or through oral sale or by adverse possession.

18. As already pointed out that the defendants had filed original patta pass book which stands in the name of the

original owner namely Thangarasu and marked as Ex.B1 and also filed two kist receipts marked as Exs.B2 and B3. There is no explanation from the plaintiff, as to how those documents came to the hands of the defendants. It appears that the Patta and Adangal were transferred to the name of plaintiff based on Exs.A1 and A2 Patta. Since the patta has been cancelled by the Revenue Divisional Officer under Ex.B4, no reliance can be placed on Exs.A1 to A13.

19. It is also to be pointed out that DW3 had produced one document said to have been executed by one Kabilan who is the son of the Original Owner and marked as Ex.X1. While marking the said document, it appears that the plaintiff had raised an objection, but it is not known what was her objection. In the deposition of DW3, it has been simply stated that the said document has been marked subject to objection. In the said document, it is stated that the plaintiff and the first defendant should have enjoyed the suit property equally. The trial court has not at all discussed about the said document. The first appellate court also has simply stated that the said document came into existence during pendency of the suit and apart from the said finding, no other finding has been recorded with regard to Ex.X1.

20. As already pointed out that the said document said to have been executed by one Kabilan who is the son of the original owner Thangarasu and that being so, the Courts below should have given definite finding with regard to the said document but the courts below have not given any finding as to whether any weightage can be given to the recitals made in the said document or not.

21. It is seen from the records that when the first appeal was pending, the defendants had filed an application in IA.No.74 of 2000 under Order 41 Rule 27 of CPC to receive the order passed by the District Revenue Officer, Villupuram confirming the order passed by the Revenue Divisional Officer, Thirukovilur as an additional documentary evidence. Eventhough, the plaintiff had opposed for receiving the said document as additional documentary evidence, the first appellate court had allowed the said application. After allowing the said application, the first appellate court did not follow the procedure prescribed under Order 41 Rule 27 CPC. On the contrary, it had straight away marked the said document as Ex.B5 and relying upon the said document set aside the judgment and decree passed by the trial court. The procedure followed by the first appellate court is contrary to law. Once, the appellate court decided to allow the application which was filed under Order 41 Rule 27 CPC, it should have followed the procedure which is prescribed under Order 41 Rule 28 CPC. As per the said

provision, the appellate court may either take evidence or direct the court from whose decree the appeal is preferred or any other subordinate court to take such evidence and to send it when taken to the appellate court. But the said procedure has not been followed. Hence, this court of the view that an opportunity should be given to the plaintiff to challenge the said document. Further, as already pointed out that the courts below did not give any finding with regard to Ex.X1. Therefore, this court is of the view that the matter has to be remitted back to the trial court with a view to give an opportunity to both parties to adduce evidence with regard to Ex.B5 and also the trial court has to give a finding with regard to Exs.X1 and Ex.B5. Accordingly, the substantial questions of law are answered.

22. In the result, the second appeal is allowed. The judgments and decrees of the courts below are set aside. The matter is remitted back to the trial court. The trial court is directed to give an opportunity to both parties to adduce oral evidence with regard to Ex.B5 and also additional evidence and thereafter give a finding with regard to Exs.B5 and X1 and also with regard to additional evidence if any adduced. Considering the facts and circumstances of the case, the parties are directed to bear their respective costs. Consequently, connected miscellaneous petitions is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

Vv

To

1. The Additional District Judge, Villupuram.
2. The Principal District Munsif, Ulundurpet.
3. The Section Officer, VR Section,
High Court, Madras.

+1cc to Mr.T.Gandhi, Advocate, S.R.No. 90072

S.A.No.631 of 2002

SR(CO)
GN(29/09/2020)