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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 07.03.2019

CORAM:

THE HONOURABLE MR. **JUSTICE T.RAJA**

Second Appeal No.298 of 2007 and

CRP.NPD.No.2874 of 2010

Second Appeal No.298 of 2007 :

1. Acha @ Dakshinamurthy

2. Mathialagan

3. Murugamani

4. Muthumani

.. Appellants/Respondent/
Defendant

-Vs-

V.Ganesan

.. Respondent/Appellant/
plaintiff

SECOND APPEAL filed under Section 100 of Code of Civil Procedure against the judgment and decree passed in A.S.No.2 of 2005 dated 25.4.2005 on the file of the Principal Sub-Court, Nagapattinam, reversing the judgment and decree passed by the District Munsif Court, Nagapattinam in O.S.No.66 of 2004 (O.S.No.247/99) on the file of the Principal Sub-Court, Nagapattinam dated 27.10.2004.

For Appellants : Ms.P.Srividhya
for Mr.A.Muthukumar

For Respondent : Ms.V.J.Latha

- - -

CRP.NPD.No.2874 of 2010:

Mathiazhagan

... Petitioner/Appellant/
2nd Respondent/2nd Defendant

vs.

1. Ganesan

2. Acha @ Dakshinamoorthy

3. Murugamani

4. Muthumani

... Respondents/Appellants 1,3 & 4
Petitioner/Respondents 1,3 & 4
Plaintiff/Defendants 1,3 & 4

Civil Revision Petition filed against the fair and decreetal orders passed in C.M.A.No.2 of 2008 dated 07.04.2010 on the file of the Court of Subordinate Judge, Nagapattinam in confirming the fair and decreetal orders passed in I.A.No.378 of



2006 in O.S.No.66 of 2004 dated 13.08.2007 on the file of the Court of District Munsif, Nagapattinam.

For Petitioner : Ms.P.Srividhya
for Mr.A.Muthukumar

For 1st Respondent : Ms.V.J.Latha

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C O M M O N J U D G M E N T

The Second Appeal has been filed against the judgment and decree passed in A.S.No.2 of 2005 dated 25.4.2005 on the file of the Principal Subordinate Judge, Nagapattinam, reversing the judgment and decree passed by the District Munsif, Nagapattinam in O.S.No.66 of 2004 (O.S.No.247/99 on the file of the Principal Subordinate Judge, Nagapattinam) dated 27.10.2004.

2. Civil Revision Petition filed against the fair and decreetal orders passed in C.M.A.No.2 of 2008 dated 07.04.2010 on the file of the Court of Subordinate Judge, Nagapattinam in confirming the fair and decreetal orders passed in I.A.No.378 of 2006 in O.S.No.66 of 2004 dated 13.08.2007 on the file of the District Munsif, Nagapattinam.

3. Learned Counsel appearing for the appellants in the Second Appeal and the Revision Petition in the Civil Revision Petition submitted that the suit was originally filed for recovery of possession and for mesne profits on the file of the Principal Sub-Court, Nagapattinam in O.S.No.247/1999 and thereafter, the same was transferred to District Munsif Court, Nagapattinam and renumbered as O.S.No.66/2004. By judgment and decree dated 27.10.2004, the same was dismissed. On appeal by the respondent herein/plaintiff before the Principal Subordinate Judge, Nagapattinam, by judgment and decree dated 25.04.2005, the I Appellate Court allowed the case of the plaintiff and reversed the judgment and decree of the trial court.

4. The learned Counsel for the appellants further submitted that the lower appellate court accepted the case of the plaintiff, decreed the suit by holding that there cannot be any adverse possession and that the defendants cannot be put into possession on the basis of an unregistered mortgage deed, however, mesne profits was dismissed. Since the prayer for mesne profits was dismissed, the plaintiff filed an appeal in A.S.No.16 of 2002 on the file of the Principal Subordinate Judge, Nagapattinam. By judgment and decree dated 26.12.2002, the learned I Appellate Court, though concurred with the view of the trial court that the defendants cannot claim adverse possession when they claimed to have entered into the possession



of the suit property legally, remanded the matter for further evidence with regard to the mesne profits. After remand, the learned Subordinate Judge, Nagapattinam, again going into the entire issue, dismissed the suit. As against that, an appeal in A.S.No.2/2005 was filed before the Principal Subordinate Judge, Nagapattinam, which was allowed by judgment and decree dated 25.04.2005 holding that both the parties admitted that the suit property belonged to one Ramachandra Gounder and further claimed title through the said Ramachandra Gounder. When the defendants claimed that once a mortgage is always a mortgage, there cannot be a claim for adverse possession. Further, the right to redeem the property by a mortgagor under Article 61(a) of the Limitation Act is 30 years, when the right to redeem to recover possession accrues. Therefore, when the I Appellate Court decreed the suit, however, with regard to past and future mesne profits, parties were relegated to separate proceedings. Therefore, the plaintiff/respondent herein filed I.A.No.378/2006 in O.S.No.66/2004 on the file of the District Munsif Court, Nagapattinam.

5. The learned District Munsif, Nagapattinam, has also appointed an Advocate Commissioner to ascertain the mesne profits. Thereafter, the Advocate Commissioner inspected the suit property and examined the witnesses in all aspects and filed a report stating that the petitioner therein was doing prawn culture in the suit property from 20.03.1998 to 06.09.1999 and ascertained the income from the property as Rs.1,92,000/- per culture and after deducting the actual expenses of Rs.1,37,500/- arrived at the net profit per culture as Rs.54,500/-. It was also reported that the petitioner had done four prawn culture from 20.03.1998 to 06.09.1999. Therefore, the Advocate Commissioner submitted a report stating that the petitioner earned a profit of Rs.2,18,000/- from the prawn culture for the period from 20.03.1998 to 06.09.1999. Therefore, the trial court, accepting the report of the Advocate Commissioner, passed a final decree in favour of the 1st respondent. Challenging the same, the revision petitioner herein preferred an appeal in C.M.A.No.2 of 2008 before the Subordinate Judge, Nagapattinam.

6. After perusing the report of the Advocate Commissioner and the order passed by the learned Trial Court, the learned Appellate Court also held that though the appellant had preferred an appeal, he had not adduced any documentary evidence to negative the report and also had not filed any objections and hence, dismissed the appeal. Thereafter, the present Civil Revision Petition has been filed.

7. When the Second Appeal and the Civil Revision Petition were taken up for common disposal, the learned Counsel appearing for the defendants/appellants submitted that this Court, at the



time of admitting the Second Appeal on 08.03.2007, has framed the following substantial questions of law:

1. Whether the appellant is entitled to possession of the suit property under which Mortgage Bond Exhibit B.10 dated 16.04.1981 was marked?

2. Whether the appellant should have the right to claim the adverse possession of the suit property?

3. Whether the respondent herein has right to claim the mesne profits from the appellant in accordance with law?

8. A perusal of the three questions of law framed as Substantial Questions of law clearly indicate that none of these three questions can be accepted as Substantial Questions of law. Firstly, when the defendants/appellants herein have claimed that while they were in possession of the lands in the east and south of the suit property, the defendants approached the plaintiff/respondent herein for exchange of the suit land for their land. Accordingly, the defendants were put in possession of the suit property whereas the defendants in turn did not put the plaintiff/respondent herein in possession of their land. Therefore, a suit was laid by the plaintiff for recovery of possession intere alia that when there was no registered exchange deed between the plaintiff and the defendants, the question of exchange of lands of the plaintiff and the defendants, between them is far from acceptance.

9. Secondly, it was also submitted that when the defendants claimed that they were put in possession of the plaintiff's suit land so long as the plaintiff was not in possession of the land belonging to the defendants, the defendants/appellants herein cannot claim that they alone were put in possession of the land belonging to the plaintiff. Thirdly, it was claimed by the plaintiff/respondent herein that when the defendants/appellants herein have claimed their possession in the suit land on the basis of the unregistered Mortgage Deed, the very plea made by the defendants/appellants that there was exchange of the lands between the plaintiff and the defendants became doubtful and falsified their own case. Moreover, even if it is admitted that the defendants/appellant have claimed possession on the basis of the agreement that there was an exchange of suit land, it is not open to the revision petitioner to claim the adverse possession for two reasons. Firstly, there was no registered document to prove exchange of the suit land and secondly, it was not acted upon by both parties. Therefore, when the defendants have set up their plea that they are in the physical possession of the land on the basis of an arrangement made for exchange of lands of the plaintiff and the defendants, it is not open to the petitioner to take a contrary stand that they are entitled to be put in possession of the suit property on the basis of the unregistered Mortgage Deed, when their two side lands were not exchanged



between them.

10. It is at this stage, the learned Counsel for the plaintiff/respondent submitted that even that unregistered mortgage deed was not even filed as Exhibit before the trial court and only after the remand was made by the learned I Appellate Court, the defendants have discovered the mortgage deed. Therefore, it was not accepted by the trial court as an after thought.

11. I also find substantial force on the submission made by the learned Counsel for the plaintiff/respondent that when the defendants/appellants have set up their claim to resist the decree for recovery of possession in favour of the revision petitioner, taking a stand that the defendants/appellants were coming to the possession of the suit land on the basis of the arrangement for exchange of suit land, in the absence of filing any document before the trial court resisting the prayer for passing a decree for recovery of possession in favour of the plaintiff and that the alleged unregistered mortgage deed came to be filed only after the remand, the entire case of the defendants/appellants is wholly unbelievable and this has been rightly considered into by the courts below, therefore, on this score, the Second Appeal is liable to fail.

12. Coming to the second substantial question of law, since this Court has answered that after taking a plea that the defendants/appellants have been put in possession of the suit land on the basis of the arrangement for exchange of land after loosing his case before the trial court when a mortgage deed which is unregistered was also filed as Ex.B.10, the defendants/appellants have once again disproved their case that their claim for exchange of land was also untrue. Secondly, when the mortgage deed was unregistered, it is not open to the defendants/appellants to claim that they have got a right to claim adverse possession of the suit property. Therefore, the second substantial question of law is also answered against the appellant.

13. So far as the right to claim mesne profits is concerned, both the Trial Court as well as the First Appellate Court have come to the conclusion that no document whatsoever has been produced before the Advocate Commissioner to prove that the prawns of the defendants were inflicted with white spot disease and died. Further, the Advocate Commissioner's Report marked as Ex.C.1 has not been objected to by filing any objection by the Defendants/appellants herein/revision petitioner. Therefore, when the Advocate Commissioner has filed the report after examining the plaintiff and one Rajendran as plaintiff's side witnesses and one Veeramani as defendant's side witness, considering the evidence of the witnesses, the Advocate



Commissioner has given a finding that actual expenses incurred by the appellant for Prawn Farm Culture is at Rs.1,37,500/-. On the basis of the evidence of witnesses Rajendran and Veeramani, it was arrived that the selling cost of prawn 30 count is Rs.240/- per kilo and also consequently arrived that the revision petitioner would get a minimum of 800 kilo per culture and the same would be sold at Rs.240/- per kilo and thus, he would get Rs.1,92,000/- and after deducting the actual expenses of Rs.1,37,500/- from that, the Advocate Commissioner has arrived the profit per culture as Rs.54,300/-. Thereafter, in my considered view, multiplying by 4 for 4 cultures, the past profits were rightly calculated by the Advocate Commissioner as Rs.2,18,000/-. As there was no objection filed, the report of the Advocate Commissioner was taken as a well considered report. Therefore, when the report of the Advocate Commissioner has been accepted as perfect and the revision petitioner has also not filed any objection in spite of reasonable time granted to him, the past profits arrived at by the Advocate Commissioner as Rs.2,18,000/- has been held to be reasonable and acceptable and cannot be doubted. In view of all the above, the findings of facts held by both the courts below have to be accepted for the simple reason that the revision petitioner has not come forward to file any objection. For all these reasons mentioned above, the Second Appeal and the Civil Revision Petition are dismissed with costs throughout.

-s/d-
Assistant Registrar

True Copy
Sub-Assistant Registrar

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To

1. The Principal Subordinate Judge, Nagapattinam.
2. The District Munsif, Nagapattinam.

+1 cc to Mr.A.Muthukumar Advocate sr 22290
+1 cc to Mr.V.J.Latha Advocate sr 21558

Second Appeal No.298/2007 &
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vba(co)
aa04/09/2019