

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.02.2019

PRONOUNCED ON : 20.03.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No.1298 of 2006

and

M.P.No.1 of 2006

1. K.Manonmani ...1st Appellant / 2nd Defendant

2. K.Punithavathy

3. K.Thilagavathy

4. K.Nirmala ...Appellants 2 to 4 / Legal Heirs
of the deceased 1st Defendant.

Vs.

1.Dhanammal

2.Pushpakala ...Respondents 1 and 2 / Plaintiff

3.Parthasarathy Pillai

4.Madhava Pillai

5.M.Vijayakumar

6.M.Rajabhathar

7.George

8.Sundar

9.Mary

10.Govindaraj ...Respondents 3 to 10 /
Defendants 3 to 10.

(Respondents 3 to 10 are given up in this second appeal)

Prayer:

Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree made in A.S.No.187 of 1998 dated 25.06.2003 on the file of the IV Additional Judge, City Civil Court, Chennai, confirming the judgment and decree made in O.S.No.4286 of 1989 dated 29.09.1997 on the file of the XV Assistant City Civil Judge, Chennai.

For Appellants : Mr.Sugumar

For Respondent : Mr.S.V.Jayaraman, Senior Counsel
for M/s. S.Annamalai for R2
R1 - No appearance. Set Exparte
vide order dated 25.02.2019

JUDGMENT

In this second appeal, challenge is made to the judgment and decree dated 25.06.2003 passed in A.S.No.187 of 1998 on the file of the IV Additional Judge, City Civil Court, Chennai, confirming the judgment and decree dated 29.09.1997 passed in O.S.No.4286 of 1989 on the file of the XV Assistant Judge, City Civil Court, Chennai.

2. The second appeal has been admitted on the following substantial questions of law.

- "a) Whether the courts below have erred in not excluding from the record Ex.A6 inasmuch as it inadmissible in evidence it being unstamped and unregistered?
- b) Whether the courts below were right in finding that on the basis of the Ex.A6 the 1st plaintiff was entitled to the declaratory relief sought by her in the suit?
- c) Whether the courts below have committed an error in giving a finding of fact that the limitation for the sit started from the date of the Ex.A6?
- d) Whether the courts below were in error in rejecting the case of the 1st and 2nd defendants who pleaded that the suit was barred by limitation in terms of Section 27 of the Limitation Act 1963?
- e) Whether the courts below are justified in Law in granting a relief which was different from the one sought by the 1st plaintiff the relief sought was one for declaration of title for land of an extent of 1036 sq.ft whereas a newly carried out 958 sq.ft was decreed?

3. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4. The Parties are referred to as per their rankings in the trial Court for the sake of convenience.

5. The suit has been laid by the plaintiffs seeking the reliefs of declaration of title to the plaint 'E' schedule property, recovery of vacant possession of the 'E' schedule property, mandatory injunction directing the defendants to remove the huts and mud walls put up by them in the plaint 'E' schedule property and for permanent injunction restraining the defendants from putting up any further construction or dealing with the property described in the plaint 'E' schedule and for future mesne profits.

6. From the materials placed on record, it is found that certain facts are not in dispute between the parties. It is seen that the plaint 'A' schedule property belonged to the defendants 3 and 4 by virtue of the partition deed dated 15.12.1950 marked as Ex.A1. It is further seen that the plaint 'B' , 'C', 'D' and 'E' schedule properties all form part of the plaint 'A' schedule property and it is found that the defendants 3 and 4 had sold various extents of the plaint 'A' schedule property to others by way of various sale transactions and the plaintiffs and the defendants having acquired certain extent of land in the plaint 'A' schedule property from the defendants 3 and 4 by way of the abovesaid transactions. However, dispute arose between them as regards the actual extent of the property acquired by them from the defendants 3 and 4 out of the plaint 'A' schedule property and the present suit has come to be laid only with reference to the said issue.

7. As could be seen from the materials placed on record and also admitted by the parties, the first defendant's first wife Jagathambal had purchased an extent of land in the plaint 'A' schedule property from the defendants 3 and 4 by way of a sale deed dated 30.12.1958, which document has come to be marked as Ex.B1 and the said property is described as the plaint 'B' schedule property. It is further noted that the second defendant i.e. the second wife of the first defendant purchased an extent of property in the plaint 'A' schedule property from the defendants 3 and 4 by way of the sale deed dated 19.06.1986, which document has come to be marked as Ex.B2 and the same relates to the plaint 'C' schedule property. It is also not in dispute that the first plaintiff has purchased an extent of land in the plaint 'A' schedule property from the defendants 3 and 4 described in the plaint 'D' schedule property by way of the sale deed dated 10.12.1982, which document has come to be marked as Ex.A3. Now according to the plaintiff, the plaint 'E' schedule property form part of the plaint 'D' schedule property acquired by them by way of the sale deed marked as Ex.A3 and further it is the case of the plaintiff that the defendants had,

particularly, the defendants 1 and 2, unlawfully encroached into the plaint 'E' schedule property without any authority and accordingly, it is put forth by the plaintiffs that seeking appropriate reliefs as regards the plaint 'E' schedule property, they had been necessitated to lay the suit for appropriate reliefs.

8. The main plea put forth by the defendants to resist the plaintiffs' case is that after denying the alleged encroachment said to have been made by them in respect of the plaint 'E' schedule property, all the more, the defendants had also raised the plea that on account of their long and continuous possession and enjoyment of the plaint 'E' schedule property openly, continuously and uninterruptedly to the knowledge of one and all, including the plaintiffs, and by asserting title on themselves, it is contended that they have prescribed title to the 'E' schedule property by way of adverse possession and accordingly put forth the defence that the plaintiffs are not entitled to obtain the reliefs as prayed for.

9. As abovenoted, the parties are at issue only with reference to the actual extent of the land purchased by them in the plaint 'A' schedule property from the defendants 3 and 4, the original owners, by way of the various sale transactions as above adverted to. To ascertain the actual extent of property acquired by the abovesaid parties, as put forth by them in this matter, an advocate commissioner had been appointed to identify the plaint 'A' schedule property with reference to the boundaries, within which the same is located as described in Ex.A1 partition deed and also to ascertain the actual extent of the properties acquired by the litigants in the matter by way of the various sale transactions as projected by them and accordingly, the advocate commissioner, with the help of the surveyor, had measured the properties in dispute as well as the plaint 'A' schedule property and filed his report and plan, which documents have come to be marked as Exs.C1 to C4 and therefore, as rightly determined by the courts below, based on the actual lie of the properties acquired by the various parties under the respective sale transactions projected by them, the same could be determined on the appreciation of the report and plan submitted in the matter through the commissioner, as above noted, marked as Exs.C1 to C4.

10. As abovenoted, there is no dispute between the parties that plaint 'A' schedule property belonged to the defendants 3 and 4 by way of Ex.A1 partition deed. On a perusal of Ex.A1 partition deed, it is found that the extent of land comprised therein, had been described as located within the specific boundaries and the same is also reflected in the plaint 'A' schedule property. Accordingly, it is found that the plaint 'A'

schedule property is found to be measuring about 16 cents of land in the survey number bounded on the north by Kannapillai's property, south by Kaddampadi Pillai's land, east by mosque land and west by railway lane and accordingly, as the parties are not at all in dispute with reference to the abovesaid lie of the plaint 'A' schedule property, accordingly, the commissioner appointed in the matter, with the help of the surveyor, after ascertaining the boundaries of the plaint 'A' schedule property accordingly identified that the plaint 'A' schedule property is within the boundaries as described in the plaint 'A' schedule and noted that the plaint 'A' schedule property lies within the boundaries as stated in the plaint 'A' schedule and on measurement, the same is found to be measuring an extent of 12724.04 sq.ft and therefore, the courts below had correctly held that the commissioner, with the help of the surveyor, had identified the actual extent of land of the plaint 'A' schedule property and on that basis, proceeded to determine the issues involved between the parties as above noted.

11. As seen supra, it is putforth that the first defendant's wife Jagathambal acquired an extent of 2400 sq. ft. in the plaint 'A' schedule property from the defendants 3 and 4 by way of Ex.B1 sale deed. On the demise of Jagathambal, it is found that it is only the first defendant who had acquired title to the suit property by way of inheritance. The plaint 'C' schedule property found to have been purchased by the second defendant and the same is said to be comprising an extent of 600 sq. ft. by way of Ex.B2 sale deed. It is not in dispute that the first plaintiff has acquired an extent of 3600 sq. ft., in the plaint 'A' schedule property by way of Ex.A3 sale transaction from the defendants 3 and 4. On a perusal of Ex.A3 sale deed, the property comprised therein has been given with the extent of the property as well as the boundaries within which the same is located. However, the length and breadth measurements had not been mentioned in the said document. However, in the sale deeds marked as Exs.B1 and B2, both the boundaries as well as the length and breadth measurements had been furnished. However, as rightly determined by the courts below, when there is no dispute that the first plaintiff has acquired an extent of 3600 sq.ft. in the plaint 'A' schedule property by way of Ex.A3 sale transaction, on that footing, it has to be seen whether the plaintiffs are actually in the possession of 3600 sq. ft. on ground as acquired by them by way of Ex.A3 sale transaction within the boundaries recited there in. On a perusal of the description of the 'D' schedule property, it is found to be lying bounded on the north by Audikesava Pillai's land, south by Jagathambal's land, east by mosque land land and west by railway line. The Commissioner on noting the lie of the abovesaid property on ground noted that the three boundaries on the north, south and east tallied ,

however, the western boundary is found to be a salai and whereas in the plaint 'D' schedule , the western boundary is shown as railway line, but, on ground, the western boundary is found to be a salai and accordingly based on the available boundaries, on ground, the commissioner had noted the extent of 'D' schedule property as measuring 2752.5 sq. ft., shown as AEFG in the plaint. In the report and the plan marked as Exs.C1 and C2, therefore, on ground, it is seen that though admittedly the first plaintiff is found to have acquired an extent of 3600 sq. ft., by way of Ex.A3 sale transaction, they are found to be only in the occupation of 2752.5 sq.ft., and therefore, to determine as to whether how the shortage has acquired and in whose possession the land is available, the advocate commissioner and the surveyor endeavoured to measure the properties covered under Exs.B1 and B2 sale transactions. On measuring with the help of the boundaries recited in the documents as well as given in the plaint schedule, the property acquired by way of Ex.B1 sale transaction shown as the plaint 'B' schedule, the commissioner has noted the total extent as 2820 sq.ft., and shown the same as GIJL in Exs.C1 and C2 and he has shown the property comprised in Ex.B1 sale transaction as FIJK measuring an extent of 800 sq.ft., within the boundaries stated in the document. Furthermore, on ground, to the west of the defendants' property, the first defendant's daughter Punitha is found to be in the occupation of an extent of 1444.65 sq.ft., and as could be seen from the commissioner's report, despite the requisition to the defendants as well as Punitha to project her title deed with reference to the abovesaid extent of property in her occupation, no endeavour has been made by them to establish the title under which Punitha is occupying the abovesaid extent and when the commissioner had been appointed by the court only to identify the actual extent of the properties acquired by the various parties in dispute on the strength of the title deeds projected by them by measuring the actual extent on ground, in such view of the matter, when the defendants are found to be occupying more extent of land, as abovenoted, without establishing their entitlement to occupy the same in any manner, accordingly, as rightly determined by the courts below, it is found that it is only the defendants through their daughter, are actually in the possession and enjoyment of the abovesaid extent of 1444.65 sq. ft., in the plaint 'A' schedule property without any entitlement whatsoever.

12. The parties are not at issue as regards the extent of the property acquired by them and reflected in the various sale deeds and accordingly, when by way of the commission, the extent of the property in the occupation and enjoyment of the parties had come to be ascertained, as above noted, as rightly determined by the court below, when the first defendant and the second defendant are found to be in the occupation of more

extent of lands than reflected in their document of title marked as Exs.B1 and B2 and furthermore, the first defendant's daughter is also found to be in the occupation, particularly, the extent of land as abovenoted, without any entitlement whatsoever, and her claim is only through the first defendant as determined by the courts below, and on the other hand, the plaintiffs are found to be in the occupation and enjoyment of only lesser extent of land than what they had acquired by way of Ex.A3 sale transaction, accordingly, the courts below, based on the appreciation of the materials on record, particularly, the commissioner's report and plan and measuring the property from the point of 'G' denoted in the commissioner's report and plan held that the defendants had encroached into the plaintiffs' property to an extent of 958 sq. ft. i.e. they had encroached north to south 15.9 feet from point 'G' and east to west 60 feet, in all, determined that they had encroached the extent of 958 sq. ft., and the abovesaid determination as regards the encroachment committed by the defendants in the property belonging to the plaintiffs, being based on the appreciation of the factual matrix, as projected by the respective parties, and when the abovesaid determination of the courts below, in any manner, is not found to be perverse or illogical in any manner, the same does not warrant any interference as such.

13. Though the plaintiffs have come forward with the suit seeking for the recovery of possession of the plaint 'E' schedule property and though the plaint 'E' schedule property is described as measuring an extent of 1039 sq. ft., however, considering the materials available on record, in all, it is found that the defendants are found to have encroached only an extent of 958 sq. ft., as determined by the advocate commissioner and the surveyor on measurement of the respective properties, in such view of the matter, when the courts are entitled to grant even a lesser relief than prayed for, based on the evidence adduced in the matter, no interference is called for in the determination of the courts below holding that the plaintiffs are only entitled to recover the possession of 958 sq. ft., in the plaint 'E' schedule property and not 1038 sq. ft., as claimed by the plaintiffs in the plaint.

14. The main resistance put forth by the defendants against the plaintiffs case is that though they, at the first instance disputed the plea of encroachment put forth by the plaintiffs on their part, however, they had projected the case that inasmuch as they had been in the possession and enjoyment of the said extent alleged to have been encroached by them, over a considerable period of time openly and continuously as well as uninterruptedly beyond the statutory period by asserting title on themselves accordingly, the plea of adverse title has been projected by the defendants to resist the plaintiffs suit. In

this connection, the defendants mainly seem to have relied upon the mortgage deed marked as Ex.B3. According to the defendants, there is a well in the encroached property and the encroached property along with the well had been in their possession and enjoyment over a period of time continuously and considering the position that they had been enjoying the property inclusive of the well by mortgaging the same, etc., and as there is a reference of well in the mortgaged deed marked as Ex.B3, which had been executed on 20.11.1965, it is the case of the defendants that even prior to 1965 onwards the encroached property has been in their possession and enjoyment continuously and uninterruptedly and by way of the same, the plea of the adverse title put forth by them as regards the encroached property should be upheld. However, as regards their alleged possession and enjoyment of the encroached property openly, continuously even from the period prior to 1965, there is absolutely no document put forth by the defendants. With reference to sustain the said claim, other than Ex.B3 mortgage deed, there is no proof on the part of the defendants evidencing their claim of possession and enjoyment of the encroached property openly, continuously and uninterruptedly by exhibiting animus possidendi to the knowledge of one and all, including the plaintiffs, beyond the statutory period. As rightly determined by the courts below, the plaint 'E' schedule property is not shown to be comprising of a well by the plaintiffs. Furthermore, there is no acceptable material placed on the part of the defendants that the well lies within the disputed property, which had been encroached by the defendants and that they had been enjoying the same for more than the statutory period. When with reference to the enjoyment of the well, there is no proof placed on the part of the defendants worth acceptance, on a mere reference of the well in the mortgage deed marked as Ex.B3, we cannot hold that the defendants had been enjoying the encroached property right from 1965 onwards. As rightly put forth by the plaintiffs' counsel, mere possession, howsoever long, that by itself, would not enable the defendants to assert adverse title on themselves in the property in dispute, unless the defendants place acceptable and reliable materials that they had been in the possession and enjoyment of the property in dispute by asserting title on themselves to the knowledge of the real owners, namely, the plaintiffs and when the plaintiffs are not shown to have surrendered their right in any manner to the defendants or the defendants have failed to establish that they have asserted their title to the property in dispute by exercising ownership over the same, other than Ex.B3 mortgage deed, as rightly determined by the courts below, in such view of the matter, solely on Ex.B3, particularly, the defendants having failed to correlate the existence of well in the encroached property, as such, the plea of adverse title projected by the defendants has been rightly discountenanced by

the courts below and in my considered opinion, no interference is called for with reference to the same. When the defendants have failed to establish their adverse title to the encroached property from 1965 or so and when the plaintiffs are also not shown to have surrendered the right to the defendants in any manner, as above pointed out, the contention of the defendants that the plaintiffs have lost their right to recover the encroached property by virtue of Section 27 of the Limitation Act, as such, cannot be accepted. When the defendants have failed to establish that plaintiffs have not exercised their right over the property in dispute and that it is only the defendants who had been exercising absolute right over the same by ascertaining title on themselves openly and continuously, in such view of the matter, the invocation of Section 27 of the Limitation Act would not arise and therefore, the plea of the limitation projected by the defendants, on that angle, cannot be acceded to and rightly rejected by the courts below.

15. It is found that following the dispute between the parties as regards the extent of properties enjoyed by them and the encroachment committed by them one way or the other, the parties had also approached the police for settling the issues and it is seen that in such circumstances, the letter marked as Ex.A6 has come to be given by the defendants that they would remove the construction put up by them in the encroached property and entrust the same to the plaintiffs. The plaintiffs had projected Ex.A6 as a document for sustaining their case. However, as rightly put forth by the plaintiffs' counsel, the plaintiffs have not placed sole reliance upon Ex.A6 for claiming title to the property in dispute. On the other hand, Ex.A6 is projected as a piece of evidence on the part of the plaintiffs to put forth the case that the defendants had also admitted their encroachment before the police and assured to remove the encroachment committed by them by removing the superstructure put up therein. In such view of the matter, when the plaintiffs are not claiming title to the property by way of Ex.A6 letter, the argument put forth by the defendants' counsel that Ex.A6 should not be relied upon on the ground that the same is unstamped and unregistered, as such, cannot be accepted. When the plaintiffs are not claiming title to the suit property in dispute based on Ex.A6 document and the abovesaid document is projected only as a piece of evidence on the part of the plaintiffs to hold that the defendants have admitted their encroachment, in such view of the matter, the argument of the defendants' counsel that the courts below had solely accepted the plaintiffs' case based upon Ex.A6 document is found to be incorrect and on the other hand, the courts below are found to have accepted the case only based upon their title deed marked as Ex.A3 sale transaction, which document is not challenged in any manner. Therefore, the arguments projected by the

defendants' counsel mainly centering upon Ex.A6 as if the same is solely relied upon by the courts below for granting reliefs in favour of the plaintiffs, however, when the position being otherwise as above pointed out and when the courts below have granted relief in favour of the plaintiffs only based upon the title deed of the plaintiffs projected by them, the argument of the defendants' counsel, on the alleged reliance of Ex.A6 by the courts below, is found to be untenable and unacceptable.

16. Counsel for the defendants in support of his contentions placed reliance upon the following decisions

1. 1999 AIR (SC)876 : 1999(2) SCC 310 (Bailochan Karan vs. Basant Kumari Naik)
2. (2002)3 M.L.J. 343 (R.Venkatapathy Naidu alias Thambu and others vs. Devaraja Aiyar)
3. 1957 AIR (Madras) 472 (K.Panchapagesa Ayyar and another vs. K.Kalyanasundaram Ayyar and others)
4. 1999 AIR (Madras) 341 (D.Agastin vs. Devasagayam)
5. 1999 AIR (Allahabad) 167 (Bankey Bihari vs. Surya Narain alias Munnoo)
6. 1946 AIR (PC) 59 (Jagdish Narain vs. Nawab Said Ahmed Khan)
7. 1999(I) CTC 428 (Nagarajan vs. Rajamani Aiyar and others)
8. 2008(2) CTC 11 (Thailammai and others vs. Karuppanan and others)
9. (2007) 3 Supreme Court cases 569 (Krishnamurthy S.Setlur (dead) by lrs vs. O.V.Narasimha Setty and others).

The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at hand.

17. In the light of the above discussions, it is seen that the courts below, based upon the title deed of the plaintiffs in respect of the property in dispute rightly held that the plaintiffs are entitled to the appropriate reliefs as regards the extent of 952 sq.ft., in the plaint 'E' schedule property and accordingly granted the reliefs in favour of the plaintiffs as determined by them. No interference is called for in the abovesaid determination of the issues involved between the parties by the courts below and accordingly the substantial questions of law formulated in this second appeal are answered against the defendants and in favour of the plaintiffs.

18. In conclusion, the second appeal fails and is dismissed with costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

bga

To

1. IV Additional Judge, City Civil Court, Chennai,
2. XV Assistant Judge, City Civil Court, Chennai.

Copy to: The Section Officer,
V.R.Section,
High Court, Madras

+1 cc to M/s.Sugumar, Advocate, S.R.No.26361

+1 cc to M/s.S.Annamalai, Advocate, S.R.No.26780

S.A.No.1298 of 2006
and
M.P.No.1 of 2006

SKV (CO)
SSM(02/07/2019)

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