

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :02.01.2019

Pronounced on :11.01.2019

Coram:

THE HON'BLE DR. JUSTICE G. JAYACHANDRAN

Second Appeal No.1205 of 2004

Krishnamoorthy

.. Appellant

/versus/

1. Veerabadra Gramini (deceased)
2.V.Karunanidhi
3.Raja @ Jayakumar
4.Chandran
5.Ramu
6.Santha
(RR2 to 6 brought on record as LRS of
the deceased sole respondent vide
order of Court dated 10.12.2018 made
in C.M.P.No.94 to 96/2014 in SA.N.1205/2004
(Dr.GJJ))

.. Respondents

Second Appeal has been filed under Section 100 of the Civil Procedure Code against the judgment and decree in A.S.No. 18 of 2001 on the file of the I Additional District Judge, Fast Track Court I, Chengalpattu and dated 25.09.2003 in reversing the well considered judgment and decree in O.S.No.461/1990 on the file of the District Munsif, Chengalpattu dated 27.02.2001.

For Appellant :Mrs.V.Srimathi

For Respondents :Mr.J.Hariharan for
M/s V.Nicholas, R2 to R6
R1-died

J U D G M E N T

The plaintiff in O.S.No.461 of 1990 is the appellant in the second appeal. Initially, the said suit was laid on 06.11.1990 for declaration and permanent injunction in respect of the suit schedule property. Later, the relief was amended for recovery of possession alleging that pending suit, the defendant with the help of his henchmen on 01.07.2000 illegally and high handedly trespassed into the suit property and forcibly taken possession of the suit property. The trial Court has allowed the

suit as prayed. Hence, the present second appeal.

2. Gist of the plaint averments:

The plaintiff purchased the suit property under a registered sale deed dated 29.05.1990 for valuable consideration from one Elumalai Gramani. Since his purchase, he is in possession and enjoyment. The plaintiff is cultivating the suit property and paying kists. In 0.28 cents of land, he has raised gingely crop and has ploughed 0.32 cents land for raising paddy. Whiles, the defendant, who is inimical and hostile towards the plaintiff, attempted to trespass into the suit property by casting cloud upon the plaintiff's title. The attempt was prevented on 03.07.1990. To avoid such attempts in future, he prayed for declaration and for permanent injunction.

3. The cause of action for the suit has been shown as 29.05.1990, the date on which the suit property was purchased by the plaintiff and on 03.07.1990, the date of the alleged attempt of trespass by the defendant. Later, Interlocutory application in I.A.No.574 of 2000 was ordered on 16.10.2000 and the plaint has been amended. As per the amended plaint, it is averred that on 01.07.2000, pending suit, the defendant with the help of his henchmen had illegally trespassed into the suit property and forcibly taken possession of the suit property together with casuarina tree of 3 years old in item No.2. Therefore, as a lawful owner of the property, he is entitled for possession of the suit property. Hence, the prayer for permanent injunction has been substituted with the relief of directing the defendant to deliver possession of the suit property to the plaintiff.

4. The defendant has filed a written statement on 10.07.1990. The defendant has denied the plaint averments as false, frivolous, vexatious and unsustainable in law. According to the defendant, the suit land was originally owned by Elumalai gramani. He executed a sale agreement in respect of the suit land to the defendant on 01.06.1974 for valuable sale consideration of Rs.1500/-. On receiving Rs.1000/- towards part payment, the suit land was delivered to the defendant agreeing to receive Rs.500/- within a period of 6 months from the date of the agreement. Later, the balance consideration of Rs.500/- was paid to Elumalai Gramani and duly endorsed by Elumalai Gramani on the back of the sale agreement. Though the defendants were ready to register the sale deed, since Elumali Gramani broke his leg and fell ill, the sale deed could not be registered. Later, Elumalai Gramani left the village and migrated to Madras. Having delivered the possession of the entire suit land to the defendant and received the entire sale consideration, the defendant did not think it seriously to obtain the sale deed from Elumalai Gramani since from the date of agreement, he is in

exclusive possession of the suit land, cultivating the same and paying kists.

5. The sale deed of conveyance has not been registered in the revenue records. So, the name of Elumalai Gramani was not altered. However, the kist for the land was paid only by the defendant. On 21.12.1984, there was a partition between the family members of the defendant. The suit land was allotted to Nallathambi the second son of the defendant Veerabadira gramani. The UDR patta in respect of the suit land was issued to Nallathambi and Nallathambi alone is in possession of the suit land. He is cultivating the suit land by raising crops and paying the necessary kists. Being in possession from the date of agreement (01.06.1974) for over the statutory period, the defendant has acquired the title to the suit land by adverse possession in their own right as owner of the suit property.

6. The plaintiff, who is well aware of the agreement dated 01.06.1974 in favour of the defendant and delivery of possession of the suit property to the defendant on the date of agreement itself has created a document as if sale deed executed in favour of the plaintiff by Elumalai gramani. The said transfer is not a bona fide transfer. The plaintiff has not got any possession of the suit property by virtue of the said transfer. The suit land is not cultivated by the plaintiff as alleged in the plaint. The gingely crop in 0.28 cents bearing S.No.24/54 (0.07 cents) and 25/2 (0.21 cents) was cultivated by Nallathambi, son of defendant. I.R.-50 paddy seedlings has been transplanted in 0.32 cents of land by Nallathambi. The claim of the plaintiff that the gingely crop and paddy was cultivated by him is false. The said claim is an afterthought. That is the reason why in the original plaint averment, the plaintiff has cultivated gingely crop in 0.28 cents and ploughed 32 cents of land by raising paddy, has been written in hand as a interpolation.

7. The claim of the plaintiff is that he has purchased the property from Elumalai Gramani vide sale deed dated 29.05.1990. After the amendment of the plaint and inclusion of relief of recovery of possession, the defendant has filed additional written statement denying the alleged trespass and dispossession of the suit property on 01.07.2000. Relying upon the adangal, the defendant has contended that the property is in his possession and cultivation ever since it was purchased from Elumalai Gramani on 01.06.1974. The patta number 60 is in the name of Nallathambi pursuant to the partition effected between the family members on 21.12.1984. The contention of the plaintiff that he was dispossessed from the suit property on 01.07.2000 is false. The casurina tree which stands in suit item No.3 was planted by Nallathambi, son of the defendant and

not by the plaintiff.

8. Based on the above averments, the following Issues were re-casted by the trial Court:

1. Whether the plaintiff is entitled for declaration of title?

2. Whether the defendant forcibly trespassed into the suit land on 01.07.2000, after institution of the suit?

3. Whether the defendant is liable to handover the possession of the suit property?

4. Whether the possession of the suit property was handed over to the defendant on 01.06.1974 pursuant to the sale agreement between the defendant and Elumalai gramani after receiving the sale consideration?

5. Whether the agreement is true, valid and binding on the parties?

6. What other relief the plaintiff is entitled to?

9. In the trial Court, the plaintiff examined himself as PW1 and one Sekar was examined as PW-2. 5 Exhibits were marked as Exs.A1 to A5 namely, sale deed executed by Elumalai gramani in favour of the plaintiff (Ex.A1), encumbrance certificate (Ex.A2), chitta for patta No.3 (Ex.A3), patta bass book for patta No.39 (Ex.A4) and kist receipts (Ex.A5). On behalf of the defendant four witnesses were examined and eight exhibits were marked as Exs.B1 to B8. They are the sale agreement with Elumalai gramani dated 01.06.1974; kist receipts from the year 1980 with intermediate intervention; the chitta and adangal.

10. The trial Court, on appreciating the facts and law, has observed that the plaintiff has not produced any documentary proof to establish that the defendant has forcibly trespassed into the suit land on 01.07.2000. The kist receipts relied on by the plaintiff as well as the defendant though indicate that they were paying kists alternatively, at the time of final hearing of the suit, it is clear that the possession of the suit property was with the defendant, though the possession without title by the defendant is unlawful. Therefore, the plaintiff is entitled for claiming recovery of possession.

11. Relying upon the sale deed (Ex.A1), encumbrance certificate (Ex.A2), the sale agreement in favour of the defendant and endorsement made on the said sale agreement for the payment (Exs.B1 and B2), the trial Court has held that though the defendant has paid the sale consideration pursuant to the sale agreement; having not transferred the title in his favour by duly registering the conveyance, the plaintiff, after obtaining encumbrance certificate, registered the sale deed from

Elumalai gramani and acquired title over the suit property. Therefore, the trial Court has held that the plaintiff has proved his case. However, it was observed by the trial Court that the defendant has claimed that from 1974 he is in possession of the property but he has not filed kist receipts for the period between 1974 to 1980, therefore, there is no strong evidence to show that the possession of the suit was handed over to the defendant pursuant to the sale agreement as a part performance of the sale agreement.

12. Aggrieved by the finding of the trial Court, the defendant has preferred A.S.No.18 of 2001 before the Additional District Judge (FTC No.1) Chengalpattu. The lower appellate Court has formulated the following points for determination:

1. Whether the possession of the suit property was handed over to the defendant pursuant to Ex.B1 sale agreement dated 01.06.1974?

2. Whether the averment of the plaintiff that he got the possession of the suit property pursuant to the sale deed dated 29.05.2000 and enjoying the same till 01.07.2000 when the defendant forcibly trespassed into the suit land and took possession is acceptable?

3. Whether the possession of the defendant is protected under Section 53A of transfer of property and attested on the sale agreement dated 01.06.1974?

4. Whether the relief of recovery of possession granted by the trial Court in favour of the plaintiff is proper?

5. What the other relief the appellant/defendant is entitled to?

13. The lower appellate Court, re-appreciating the evidence and the recitals found in Ex.B1-sale agreement has held that the possession of the property has been handed over to the defendant by Elumalai gramani on 01.06.1974, pursuant to the Ex.B1. Though Ex.B1 was not written in a stamp paper, the ingredients required for a sale agreement is found in the recitals and therefore, the sale agreement is valid and duly executed by Elumalai gramani. Regarding the difference in ink while mentioning survey number and scoring of the extent and corrections found in Ex.B1, the explanation given by the

defendant that while reducing the agreement into writing, the particulars regarding survey number and extent was left blank and filled up later, after verifying the records with the Village Assistant (Kanakakupillai) has been accepted by the lower appellate Court. As a justification to accept the explanation, the lower appellate Court has also compared the colour of the ink in which Elumalai gramani and the witnesses have signed which go with the colour of the ink the survey number and the extent written. Therefore, the lower appellate Court has held that only after the corrections and filling up the blanks regarding the survey number and extent, the executant Elumalai gramani and the witnesses have signed Ex.B1 and therefore, there is no reason to doubt the genuineness of the document. Therefore, the contention of the defendant that pursuant to Ex.B1, the possession of the property was handed over to him by Elumalai gramani as a part performance of the agreement has to be accepted.

14. As far as the possession of the property is concerned, the lower appellate Court has found that Ex.A4 patta still stands in the name of the vendor Elumalai Gramani. The chitta is not a document for possession and enjoyment. The encumbrance certificate has been obtained by the plaintiff subsequent to the purchase of the land under Ex.A1. The kist receipts produced by the plaintiff are for the payment made by the plaintiff 4 ½ years subsequent to his purchase of the property. Therefore, the plaintiff has failed to prove through Exs.A3 to A5 that pursuant to Ex.A1 sale deed, he was put into the possession and enjoyment of the suit property.

15. Contrarily, the defendant has established his continuous possession through kist receipts and adangal which covers 1986 to 1997. Ex.B3 kist is of the year 1980. For the rest of the period the defendant has claimed that he has lost the receipts and was able to file receipts for the year 1980 and 1986 and thereafter, this explanation found to be acceptable by the lower appellate Court. In any event, the defendant has proved his possession atleast four years prior to the alleged sale deed in favour of the plaintiff and there is no proof that immediately after purchase of the property under Ex.A1, the plaintiff was put into the possession of the property by his vendor and on 01.07.2000 there was an attempt to dispossess and pending the suit, he was dispossessed.

16. The lower appellate Court has held that the plaintiff has not proved his possession of the suit property at the time of filing the suit and the allegation against the defendant that pending suit the defendant forcibly entered into the suit property and took possession of the suit property. As a result, the lower appellate Court has allowed the appeal reversing the

finding of the trial Court. Aggrieved by the reversal finding, the plaintiff has preferred the present second appeal raising the following Substantial Questions of Law:

1. Whether the lower appellate Court is right in relying upon Exs.B1 and B2 which is inadmissible in evidence under Section 35 of the Stamp Act and 17 of the Registration Act?

2. Whether an agreement of sale under Ex.B1 can confer a legal right upon the defendant assuming the document to be true?

3. Whether Section 53 A of the Transfer of Property Act be used as a sword for establishing title?

17. The specific case of the plaintiff at the time of filing the suit is that under Ex.A1 he purchased the suit property from Elumalai Gramani and was in enjoyment of the same. He has cultivated gingely crop in 28 cents and ploughed 32 cents of land to raise paddy. Further averment is that the defendant tried to dispossess him by force which was successfully prevented, but he feared similar attempt by the defendant in future. Therefore, he filed the suit for declaration and injunction. Both the Courts below have found that on 01.07.2000, there was no proof to show that the defendant tried to dispossess the plaintiff. There is no evidence on the side of the plaintiff that he had ever been in possession and enjoyment of the suit property after execution of A1 by Elumalai Gramani in his favour or he has not produced any document to prove that his predecessor in title Elumalai was in possession and enjoyment of the property soon before he sold the property to him. Contrarily, the kist receipts and the sale agreement go to show that the possession of the suit property was vested with the defendant long before the execution of Ex.A1.

18. The main contention raised by the learned counsel appearing for the appellant is that the unregistered sale agreement Ex.B1 will prevail upon the duly registered sale deed (EX.A1). No doubt for conferment of title, a duly registered conveyance will prevail upon an unregistered agreement but in this case the fact under dispute is regarding title as well as possession.

19. The plaintiff who has approached this Court had not contended that the possession of the property was not transferred to him pursuant to Ex.A1. Contrarily, his contention is that pursuant to Ex.A1, the possession of the suit property

was handed over to him by his predecessor in title. The defendant has denied the dispute and also proved that the claim of the plaintiff is false through documentary evidence. Realising that declaration and injunction relief will not help him, the plaintiff has amended his plaint with a contention that he was forcibly dispossessed by the defendant on 01.07.2000. The verification of the original plaint discloses that the plaint was signed by the plaintiff on 05.07.1990 at Chengalpattu. The suit was presented on 06.07.1990 and taken on file on the same day.

20. While so, when the plaint was signed and presented, the plaintiff has alleged that he was in possession of the suit property and sought for injunction. Later, he has amended his pleadings and the relief alleging that on 01.07.2000 itself he was dispossessed by the defendant and his henchmen and the three year old casurina tree in item No.3 of the suit property at the time of his dispossession. This averment on the face of the record indicates the blatant lie and falsehood of the plaintiff regarding his possession. If really he was dispossessed only on 01.07.2000, he could have asked for repossession in the plaint which he signed and presented on 05.07.1990 which he has failed to do so.

21. Ex.B1 is relied by the defendant to prove his title. The lower appellate Court has not considered it as a proof of title but has rightly considered the document only for a collateral purpose to find out the possession of the suit property. Under Section 53 of the Transfer of Property Act, pending completion of the sale agreement, delivery of possession towards part performance is permissible. Being in possession of the suit property over and above the prescribed period of limitation, the recovery of possession of the property ought to have been made within the period prescribed.

22. In this case, the plaintiff claims adverse title upon the suit property based on Ex.A1 which is dated 28.05.1990. Though this document may confer title upon the plaintiff, as far as the possession is concerned, his vendor has already transferred the possession to the defendant under Ex.B1 as early as 1974. Neither the plaintiff nor his vendor has produced any document that the possession of the suit property was not with the defendant after 1974. On behalf of the defendant, the kist receipt for the year 1980; partition of the year 1984; adangal for the period of 1986 to 1997 and patta in favour of the Nallathambi, son of the defendant are all filed and proved to show the continuous possession.

23. To lay the suit for recovery of possession, based on the title, it should be done within 12 years. The plaint filed in the year 1990 alleging that the possession was with the plaintiff and after his dispossession, which was later altered

and amended as if the possession was taken over by the defendant pending the suit, which itself is contrary to the plaintiff pleadings. The plaintiff is not entitled to seek recovery of possession beyond the period of 12 years of continuous possession and enjoyment by the defendant hostile to the plaintiff. It is not as if the defendant has not raised the plea of adverse possession besides title by prescription. In fact, the defendant in the written statement itself has specifically averred that he is in continuous possession beyond period prescribed. Even if under Ex.B1 the title of the suit property is not legally transferred in favour of the defendant, as far as the possession is concerned, the transfer of possession as a part performance is absolutely legal and permissible in law for want of registration. Such transfer of possession cannot be held unsustainable.

24. Section 35 of the Stamp Act, 1899 and 17 of Indian Registration Act, 1908 reads as follows:

35. Instruments not duly stamped inadmissible in evidence etc. --- No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped.

Section 17 - Documents of which registration is compulsory-

(1) The following documents shall be registered, if the properties to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act XVI of 1864, or the Indian Registration Act 1866, or the Indian Registration Act 1871, or the Indian Registration Act 1877, or the this Act came or comes into force, namely:-

(a) instruments of gift of immovable property;
(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees, and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation,

declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

(e) non-testamentary instruments transferring or assigning any decree or order of a court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property:]

PROVIDED that the [State Government] may, by order published in the [Official Gazette], exempt from the operation of this sub-section any leases executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rent reserved by which do not exceed fifty rupees.

[(1-A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53-A of the Transfer of Property Act, 1882, shall be registered if they have been executed on or after the commencement of the Registration and other related Laws (Amendment) Act, 2001, and if such documents are not registered on or after such commencement then, they shall have no effect for the purposes of the said section 53-A]

(2) Nothing in clauses (b) and (c) of sub-section (1) applies to

(i) any composition-deed; or
(ii) any instrument relating to shares in a joint stock company, notwithstanding that the assets of such company consists in whole or in part of immoveable property; or
(iii) any debenture issued by any such company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immoveable property except insofar as it entitles the holder to the security afforded by a registered instrument whereby the company has mortgaged, conveyed or otherwise transferred the whole or part of its immoveable property or any interest therein to

trustees upon trust for the benefit of the holders of such debentures; or
(iv) any endorsement upon or transfer of any debenture issued by any such company; or
(v) any document other than the documents specified in sub-section (1-A) not itself creating, declaring, assigning, limiting or extinguishing any right or title or interest of the value of one hundred rupees and upwards to or in immoveable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or
(vi) any decree or order of a court [except a decree or order expressed to be made on a compromise and comprising immoveable property other than that which is the subject-matter of the suit or proceedings]; or
(vii) any grant of immoveable property by government; or
(viii) any instrument of partition made by a revenue officer; or
(ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act 1871, or the Land Improvement Loans Act 1883; or
(x) any order granting a loan under the Agriculturists Loans Act 1884, or instrument for securing the repayment of a loan made under that Act; or
[(x-a) any order made under the Charitable Endowments Act 1890 (6 of 1890) vesting any property in a treasurer of Charitable Endowments or divesting any such treasurer of any property; or]
(xi) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage; or
(xii) any certificate of sale granted to the purchaser of any property sold by public auction by a civil or revenue officer.

[Explanation: A document purporting or operating to effect a contract for the sale of immoveable property shall not be deemed to require or ever to have required registration

by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money].

(3) Authorities to adopt a son, executed after the 1st day of January 1872, and not conferred by a will, shall also be registered."

25. Ex.B1 sale agreement and Ex.B2 endorsement found in Ex.A1 for receipt of balance sale consideration are looked into by the lower appellate Court only for collateral purpose regarding the nature of the possession over the suit land. The possession of the property has been handed over to the defendant by Elumalai Gramani under a written document. The defendant has relied upon this document as a defence to the plaintiff's claim over the title and possession of the suit land, has been used as a sword to protect his possession. The vendor of the plaintiff had already lost his possession, pursuant to the written agreement with the defendant. After receiving the entire sale consideration, he has not executed the sale deed. The defendant has also not taken care or shown any interest for registration of the sale deed. At most it will only end up in non transfer of the title. However, by continuous possession and enjoyment of the suit property in exclusion of true owner and well within the knowledge of the true owner he has perfected his title by adverse possession which pleading he has taken in his written statement itself as a alternative plea.

26. When the suit for recovery of possession has been filed by the plaintiff, he has to establish the entitlement of his possession. When the predecessor himself has lost the entitlement of possession by permitting the defendant enjoying the property over the period prescribed under law, the vendor cannot convey a better right to the plaintiff. More so, when the plaintiff has come before this Court with unclean hands, the suppression of facts are fatal.

27. In a case, which is identical to the facts of the case in Bondar Singh and others v. Nihar Singh and others reported in AIR 2003 SC 1905, the Hon'ble Supreme Court has observed that "The main question as we have already noted is the question of continuous possession of the plaintiffs over the suit lands. The sale deed dated 09.05.1931 by Fakir Chand, father of the defendants in favour of Tola Singh, the predecessor interest of the plaintiff, is an admitted document in the sense its execution is not in dispute. The only defence set up against said document is that it is unstamped and unregistered and therefore it cannot convey title to the land in favour of plaintiffs. Under the law a sale deed is required to

be properly stamped and registered before it can convey title to the vendee. However, legal position is clear law that a document like the sale deed in the present case, even though not admissible in evidence, can be looked into for collateral purposes. In the present case the collateral purpose to be seen is the nature of possession of the plaintiffs over the suit land. The sale deed in question at least shows that initial possession of the plaintiffs over the suit land was not illegal or unauthorised."

28. In the light of the above discussion, this Court finds that there is no merits in the appeal to interfere with the Substantial Questions of law held against the appellant. Accordingly, this Second Appeal is dismissed. The judgment and decree of the lower appellate Court in A.S.No.18 of 2001 are confirmed and the suit in O.S.No.461 of 1990 filed for recovery of possession is dismissed with costs.

Sd/-

Assistant Registrar (CS-VI)

//True Copy//

Sub Assistant Registrar

Ari

To

1.The I Additional District Judge, Fast Track Court I, Chengalpattu.

2.The District Munsif, Chengalpattu.

+1cc to Mr.Nicholas, Advocate, S.R.No. 3423

+1cc to Mr.Raghavachari, Advocate, S.R.No. 3036

S.A.No.1205 of 2004

MG(CO)
GN(29/04/2019)

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