IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.01.2019

PRONOUNCED ON : 22.01.2019

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.1607 of 2004

Ramakrishnan ...Appellant

Vs

Sathyanathan ... Respondent

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree of the learned Subordinate Judge, Ariyalur, passed in A.S.No.88 of 1998 dated 23.02.2004 reversing the judgment and decree of the learned District Munsif, Jayamkondam passed in O.S.No.359 of 1996 dated 10.02.1998.

For Appellant : Mr.T.Kalaimani

For Respondent : Mr.S.Subbaiah, Senior Counsel for Mrs.Elizabeth Ravi

JUDGMENT

The appellant herein is the sole defendant before the trial Court in O.S.No.359 of 1996. The suit for declaration and permanent injunction was filed by the plaintiff in respect of the suit property to an extent of 17 cents in

New S.No.285/7 at Udayarpalayam Taluk, Andimadam, Periyakrishnapuram Village.

2.The case of the plaintiff is that, the above mentioned suit property was purchased by him from one Sundaramurthy for Rs.6,200/- on 15.10.1993. Since then, he is in possession and enjoyment of the property. His vendor, Sundaramurthy along with his brother Narayanasamy were jointly in possession of 62 cents of land in the above survey number inclusive of the suit property. They both got the property under the settlement deed executed by their brother Pakirisamy on 16.09.1971. At the time of settlement, the plaintiff's vendor, Sundaramurthy and Narayanasamy were minors. Their mother Kanagayalai was appointed as guardian. Though 62 cents of land was settled in favour of Sundaramurthy and Narayanasamy, the actual extent in the field was 67 cents. At the instance of Narayanasamy, Sundaramurthy sold his portion of the share in the property to the defendant. After selling 17 cents of the land to the defendant, the remaining 17 cents was sold to the plaintiff.

3.The defendant, with an intention to grab the plaintiff's property, trying to encroach upon it. On 24.07.1975, the defendant tried to trespass into the plaint schedule property but, was prevented by the plaintiff with the help of the villagers. Hence, the suit has been laid for declaration and permanent injunction.

4.The appellant herein has filed a written statement wherein, he has denied the averments made in the plaint. The sale deed dated 15.10.1993 alleged to have been executed by Sundaramurthy through which the plaintiff claims title and possession is denied as false document. Similarly, the settlement deed dated 16.09.1971 alleged to have been executed by Pakkirisamy also denied. The said settlement is questioned on the ground that, in a joint Hindu family, the property cannot be settled by one sharer without effecting division. So, the said settlement deed is a sham and nominal document.

5.In S.No.285/7, out of 50 cents, Pakkirisamy was in enjoyment of 18 ½ cents on the Western side. After his demise, his wife Thaiyalnayagi and his sons were inherited and enjoying the same. They have alienated their share jointly in favour of one Balaiah and the siad Balaiah is in possession of the said portion of the land. The division among the three brothers were effected in the year 1983. Out of 50 cents, Pakkirisamy was allotted 18 ½ cents on the Western side. Sundaramurthy was allotted 16 ½ cents on the Eastern side and the middle portion of 15 cents was allotted to

Narayanasamy. All the three brothers have fixed their boundaries with ridges and enjoying the same separately. On 22.12.1988, Sundaramurthy sold his share of 16 ½ cents to the defendant. On 13.09.1993, Narayanasamy sold his share of 15 cents to the defendant. After the demise of Pakkirisamy, his share of 18 ½ cents was sold to Balaiah by his wife Thayalnayagi and his son Ramadoss. Without impleading Balaiah and Sundaramurthy who are necessary parties to the suit, the suit is not maintainable.

6.In the sale deed dated 22.12.1988, executed by Sundaramurthy in favour of the defendant, land on the Western side is shown as the property of Narayanasamy. The said property was later purchased by the defendant from Narayanasamy under sale deed dated 13.09.1993. Therefore, Sundaramurthy who is the vendor of the plaintiff in the sale deed dated 15.10.1993 cannot deny the right of Narayanasamy by pleading contrary to the earlier document executed by him.

7.62 cents out of 99 cents in S.No.285/7 was never settled by Pakkirisamy in favour of Narayanasamy and Sundaramurthy. The claim of the plaintiff that the Narayanasamy and Sundaramurthy were jointly enjoying 67 cents is also not a valid plea. The sale deed dated 22.12.1988 executed by Sundaramurthy in favour of the defendant was a voluntary and not at the instance of Narayanasamy, as alleged in the plaint. After alienating his 16 ½ cents, Sundaramurthy had no land in the said survey number. Therefore, the subsequent sale deed alleged to have been executed by Sundaramurthy in respect of 17 cents in favour of the plaintiff is without any title.

8.In the land purchased from Sundaramurthy on 22.12.1988, the defendant has put up construction and enjoying the 15 cents of land on the Western side which, he has purchased from Narayanasamy on 13.09.1993. This defendant and his vendor Narayanasamy, continuously are in enjoyment of this 15 cents of land since 1983, ousting the plaintiff and his vendor Sundaramurthy for more than 12 years. Thus, they have perfected title by adverse possession also.

9.The trial Court, based on the pleadings, framed the following issues:-

> "(i)Whether the plaintiff is entitled for the relief of declaration that the suit property is owned by the plaintiff ? ;
>
> (ii)Whether the plaintiff is entitled for permanent permanent injunction ? and
>
> (iii)To what other relief, the plaintiff is entitled to ?"

10.Before the trial Court, on behalf of the plaintiff, four witnesses were examined and five documents, Exs.A.1 to A.5 were marked. On behalf of the defendant, two witnesses were examined and eleven documents, Exs.B.1 to B.11, were marked.

11.The trial Court comparing the schedule of property shown in Ex.A.1, Ex.B.3 and Ex.B.4, held that the boundaries shown in these three documents tally with each other. Whereas, the boundaries shown in Ex.B.2 does not refer to the suit property. East of Ex.B.3 property is Ex.B.2 property. East of B.2 property is Ex.B.1 property. Therefore, comparing the boundaries of these documents and the suit schedule, described in the plaint, held that the plaintiff has failed to prove that his vendor Sundaramurthy had title over the suit property. The plaintiff has failed to trace title of his vendor in Ex.A.2 – sale deed. Except Ex.A.1, there is no other document to prove the title of the plaintiff's vendor.

12.The deposition of P.Ws.3 and 4 regarding the enjoyment of the suit property by the plaintiff are not believable since, P.W.3 admits that the house built by the defendant is in the land purchased by the defendant from Narayanasamy and the plaintiff himself has admitted that the defendant has purchased properties in the said survey number from Narayanasamy and

Sundaramurthy. Further, the trial Court accepting the kist receipts produced by the defendant, for his possession. Referring the chitta and adangal which stands in the name of Pakkirisamy and Narayanasamy, held that the property under S.No.285/7 D,E,F, F.1 are in possession of the defendant. The trial Court particularly, after analysing the depositions of the witnesses has held that, Sundaramurthy, the vendor of the plaintiff has not proved his title and right to alienate the suit property to the plaintiff after admittedly alienating 16 ½ cents of land to the defendant in the year 1988 under Ex.B.1.

13.Aggrieved by the finding of the trial Court, the plaintiff has preferred First Appeal in A.S.No.88 of 1998. The First Appellate Court has formulated the following points for determination:-

> "(i)Whether the suit property is owned by the plaintiff/appellant ?;
>
> (ii)Whether the suit property is owned by the defendant/respondent ? and
>
> (iii)To what other relief, the plaintiff is entitled to ?

14.The First Appellate Court, after considering the deposition of the plaintiff examined as P.W.1, the settlement deed - Ex.A.2 executed by Pakkirisamy and the sale by Sundaramurthy to the plaintiff under Ex.A.1. Compared the boundaries shown in Ex.A.1 and Ex.B.2 held that the boundaries shown in the plaint does not tally with the boundaries shown in Ex.B.2. Particularly, in Ex.B.2, the property is shown as East of Thayalnayagi land whereas, the suit schedule property is shown as East of Khan Mohammed property. Therefore, believing Ex.A.1, and relying upon the deposition of P.W.2, has reversed the finding of the trial Court and allowed the suit in favour of the plaintiff. Aggrieved by the finding of the First Appellate Court, the defendant has preferred the second appeal.

15.At the time of admission, this Court has formulated the following substantial questions of law:-

> "1.Was it correct to exercise jurisdiction to decide the cause of action and the issues framed, when a person, who is not a party to the suit or appeal, is in possession and paying kists and having patta in respect of the suit lands and when admittedly, the suit is for declaration and injunction alone without any prayer for recovery of possession of the suit lands ? And

2.Was it correct that the decision of the First Appellate Court that the settlement deed by Pakkirisamy is null and void in view of Section 6 of Transfer of Property Act ? ”

16.On 15.10.2014, the appellant has raised the following additional additional substantial questions of law for consideration:-

“1.Whether the finding that Ex.A.1 will prevail over Ex.B.2 which is based on erroneous reading of boundaries in Ex.B.2 is sustainable ?;

2.Whether the finding on the validity of Ex.A.1 is correct in view of S.47 of Indian Registration Act ? and

3.Whether the non-examination of Mr.Narayanasamy who was dead even according to evidence of P.W.1 can be a ground for rejecting Ex.B.2”

17.The learned counsel appearing for the appellant and the respondents emphatically placed the merits of their respective case. The suit property falls under S.No.285/7 which was subsequently subdivided as S.No.285/7 F. The earliest document produced by the parties is the settlement deed executed by Pakkirisamy dated 16.09.1971 in favour of his minor brothers Sundaramurthy and Narayanasamy appointing their mother Kanagayalai as guardian. In the recital of this settlement deed he has described the property as his own property and he out of love and affection settling the same in favour of his minor brothers, who are living in poverty to financially support them. It is specifically mentioned in the settlement deed that he will transfer patta in respect of this property. The four boundaries shown in Ex.A.2 settlement deed does not indicate Pakkirisamy had any other property apart from the 62 cents settled in favour of his two brothers.

18.Whether the settlement deed was acted upon and pursuant to the settlement deed, whether Kanagayalai took possession of the property and enjoyed the same till her minor sons viz., Sundaramurthy and Narayanasamy attained majority are not clearly established by the plaintiff. Particularly, when the recital of the settlement deed - Ex.A.2, records that on the day of deed, Pakkirisamy has transferred patta in the name of Kanagayalai as guardian of Sundaramurthy and Narayanasamy, no such patta document produced before the Court. The only revenue record which is placed before the Court is marked as Ex.A.5 is the patta in the name of Narayanasamy, Pakkirisamy and Sundaramurthy jointly. This patta was issued in the year 1985. Therefore, it could be easily inferred that the settlement deed Ex.A.2 relied by the plaintiff to trace the title of his vendor Sundaramurthy never been acted upon. That is the reason why when Sundaramurthy, sold 16 ½ cents of land to the defendant on 22.12.1988 under Ex.B.1, has shown his brother Narayanasamy land as one of the boundary.

19.Further, a close reading of the recital of Ex.B.1, we see that Sundaramurthy and his brother Narayanasamy has mortgaged the suit property and other properties in favour of Vasuki w/o Ramakrishnan on 10.09.1987 under a registered document for Rs.3,500/- later, instead of redeeming the mortgage, Sundaramurthy has sold his share in the property for a total sale consideration of Rs.2,610/- adjusting his mortgage debt Rs.1,750/- he had received Rs.860/- in cash and has executed Ex.B.1 in favour of the defendant, on 22.12.1988. In the said document, one of the boundary of the property is shown as Narayanasamy land. The said land has been subsequently sold by Narayanasamy under Ex.B.2 to the defendant.

20.The learned counsel for the appellant would submit that though Ex.B.2 was registered on 25.10.1993, the document was executed on 13.09.1993 and therefore, as per Section 47 of Indian Registration Act, the date of execution of the document should be taken into account for transfer of property and not the date of registration. In support of his submission, the learned counsel for the appellant would rely on a judgment of the Hon'ble Supreme Court in **K.J.Nathan v. S.V.Maruthi Rao** (AIR 1965 SC 430) wherein, in paragraph No.19, it has been held as follows:-

> "19.If the mortgage by deposit of title deeds was effected on May 10, 1947, or on July 5, 1947, the legal position would be the same, as the mortgage deed in favour of the 3rd defendant was executed only on October 10, 1947. Though Ex.A-19 was registered on June 22, 1948, under S.47 of the Registration Act the agreement would take effect from July 5, 1947."

21.Per contra, the learned counsel for the respondent would submit that the First Appellate Court has rightly held that Ex.B.2 is not a document reliable to confer title upon the defendant. In support of his submission, the learned counsel would rely upon the judgment of the Hon'ble Supreme Court in **Thiruvengadam Pillai v. Navaneethammal** (2008(4) SCC 530) wherein, it has been held as follows:-

> "13. If a person wants to create or a back-dated agreement, the first hurdle he faces is the non-availability of stamp paper of such old date.

Therefore tampering of the date of issue and seal affixed by the stamp vendor, as also the entries made by the stamp vendor, are quite common in a forged document. When the agreement is dated 5.1.1980, and the stamp papers used are purchased in the years 1973 and 1978, one of the possible inferences is that the plaintiff not being able to secure an anti-dated stamp paper for creating the agreement (bearing a date prior to the date of sale in favour of second defendant), made use of some old stamp papers that were available with him, to fabricate the document. The fact that very old stamp papers of different dates have been used, may certainly be a circumstance that can be used as a piece of evidence to cast doubt on the authenticity of the agreement. But that cannot be a clinching evidence. There is also a possibility that a lay man unfamiliar with legal provisions relating to stamps, may bona fide think that he could use the old unused stamp papers lying with him for preparation of the document and accordingly use the old stamp papers."

22.The learned counsel for the respondent contended that the date of the stamp paper purchased, the date on which it was registered and the date of its execution coupled with multiple corrections found in the document Ex.B.2 and inadequacy of stamp papers, put together undoubtedly indicate that Ex.B.2 is a back dated document. Therefore, having purchased the property from a lawful owner, the finding of the First Appellate Court has to be confirmed.

23.As far as Ex.B.2 is concerned no doubt, it gives a very strong impression that it is a back dated document. The said document though alleged to have been executed on 13.09.1993, it was duly registered only on 25.10.1993. 10 days prior to the registration of Ex.B.2, the plaintiff has got his document Ex.A.1 executed and registered. The recital of Ex.A.1 reads that the suit property was purchased by the father of Sundaramurthy and after the demise of his father, Sundaramurthy got possession and enjoyment of the same. He alienates to Sathyanathan (the plaintiff), 17 cents of land for a sale consideration of Rs.6,200/-. One of the boundary of the property is shown as West of Ramakrishnan land (defendant). In this document the new survey number of the property is mentioned as S.No.285/7F. The Field Map Sketch for S.No.285 which is marked as Ex.B.9 would show that S.No.285/F has been further sub-divided into 285/F 1 and F.2 . The actual extent of the land under S.No.285/F.1 is 0.12.5 ares which is nearly 32 cents. Whereas, under Ex.A.1, the plaintiff claims that he had purchased 17 cents of land from Sundaramurthy on 15.10.1993 which Sundaramurthy claims who have inherited from his father. At the same time, the plaintiff also relies upon

Ex.A.2, the settlement deed executed by Pakkirisamy which reads as if the said property was the personal property of Pakkirisamy which has been settled in favour of his two minor brothers living in poverty. The comparison of the recital in both the documents viz., Ex.A.1 and A.2 relied by the plaintiff to trace the source of title itself goes to show that Sundaramurthy, the vendor of the plaintiff had no title to alienate 17 cents of land to the plaintiff after alienating his share of 16 ½ cents to the defendant under Ex.B.1 on 22.12.1988, showing his brother Narayanasamy land has one of the boundary and also referring the usufructuary mortgage created by him and his brother Narayanasamy in favour of Vasuki w/o Ramakrishnan.

24.The First Appellate Court being carried away by the manner in which Ex.B.2 created and registered had disbelieved the case of the defendant. Sundaramurthy, the vendor of the plaintiff himself has not denied that his brother Narayanasamy had some share in S.No.285/7 when deposed as P.W.2. In the chief examination, he admits that he and his brother Narayanasamy were enjoying the larger extent of the land including the suit property. In his cross examination, he claims that he got the property through the settlement deed executed by his brother. However, the recital of Ex.A.1 does not disclose the said fact. Contrarily, it reads as if Sundaramurthy got the property from his father and not from his brother.

Ex.B.2 despite of all the suspicious corrections it contains, undisputedly, it is executed by Narayanasamy and the executant has not challenged it. Neither the plaintiff nor his vendor denies the share of Narayanasamy in S.No.285/7. The first sale deed executed by Sundaramurthy in favour of the defendant which is marked as Ex.B.1, Narayanasamy share is recognised in recital as well as that property is shown as one of the boundary of the property. While so, when Sundaramurthy has already alienated his right in the property, falling under S.No.285/7 and have no inch of land, in the said survey number, he cannot alienate any further land. Therefore, Ex.A.1 though it was registered prior to Ex.B.2, the vendors of Ex.A.1 and Ex.B.2 are different. While Sundaramurthy, Narayanasamy and Pakkirisamy jointly owned land in S.No.285/7, Sundaramurthy has first alienated 16 ½ cents of land to Ramakrishnan (the defendant herein), on 22.12.1988 under Ex.B.1. Next, Narayanasamy has sold 15 cents of land to Ramakrishnan (the defendant herein) on 13.09.1993, under Ex.B.2, later under Ex.B.3 on 15.05.1995, Thayalnayagi w/o Pakkirisamy along with her sons had sold 18 ½ cents falling under S.No.285/7F, to one Balaiah. In between Sundaramurthy has executed Ex.A.1 to the plaintiff 17 cents of land in S.No.285/7 on 15.10.1993.

25.The case of the defendant/appellant is more probablise rather than the case of the plaintiff/respondent. In a suit for declaration and injunction, the plaintiff is bound to prove his title better than the title of the defendant and also should establish his possession. In this case,the plaintiff traces his title through the sale deed Ex.A.1. His vendor Sundaramurthy traces his title through his father as per the recital in Ex.A.1. Whereas, in the deposition, he relies upon the settlement deed executed by his brother Pakkirisamy, as his source of title. The recital of the settlement deed does not indicate the suit property as a ancestral property.

26.The admitted case of the contesting parties is that the property is a ancestral property. While so, the settlement deed relied by the plaintiff cannot be given any credence which claims it as self acquired prpoerty of the settlor. Being the ancestral property of the three brothers, each of them have share in the property. Three sale deeds are executed by the brothers and their legal heirs. While Sundaramurthy, the vendor of the plaintiff has already alienated his share of property under Ex.B.1, in favour of the defendant, his subsequent sale of 17 cents in favour of the plaintiff is without any title. Therefore, the suit is liable to be dismissed. Though the trial Court has rightly dismissed the suit, the First Appellate Court has wrongly reversed the trial Court judgment.

27.In the result, the second appeal is allowed and the judgment and decree passed by the First Appellate Court in A.S.No.88 of 1998 dated 23.02.2004 is set aside and the judgment and decree passed by the trial Court in O.S.No.359 of 1996 dated 10.02.1998 is restored. There shall be no order as to cost.

22.01.2019

jbm

Index: Yes/No
Speaking order/non speaking order

To

1.The Subordinate Judge,
Ariyalur.

2.District Munsif,
Jayamkondam.

Dr.G.JAYACHANDRAN.J.,

jbm

Pre Delivery judgment made in

Second Appeal No.1607 of 2004

22.01.2019