



IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Second Appeal No.346 of 2012

&

M.P.No.1 of 2012

1. Noorunnisa
2. Havamma

... Appellants/Respondents 1 & 4/
Defendants 1 & 4

Vs

1. Ajmath Bivi
2. Hajakamal
3. Hithar Mohammed
4. The Assistant Engineer,
TNEB, Parangipettai.
[respondents 2 to 4 are given up
as they remained exparte]

.. 1st Respondent/Appellant/Plaintiff

... Respondents 3 to 5/
Respondents 2, 3 & 5/Defendants

Prayer :-

Second Appeal has been filed under Section 100 of C.P.C. against the judgment and decree dated 08.09.2010 passed in A.S.No.47 of 2009 on the file of the Subordinate Court, Chidambaram reversing the judgment and decree dated 15.10.2009 passed in O.S.No.13 of 2007 on the file of the District Munsif cum Judicial Magistrate, Parangipettai.

For Appellants : Mr.A.Nilaphar
for Mrs.R.Meenal

For Respondents : Mr.R.Gururaj - R1
R2 to R4 Given up

JUDGMENT

Aggrieved over the decree and judgment of the first appellate Court reversing the decree and judgment of the trial Court in decreeing the suit filed by the plaintiff for declaration and recovery of possession, the second appeal has been filed.

2. The parties are arrayed as per their own ranking before the trial Court.



3. The brief facts of the plaintiff case is as follows :

The suit property is the absolute property of the plaintiff purchased in the year 1976. Eastern side of the suit property was purchased by the plaintiff's brother and the defendants 1 to 3 have purchased the property on the eastern side of the plaintiff's brother's property. The plaintiff has put up a thatched shed in the suit property. On 15.02.1997, the defendant's under the pretext of repairing their house has trespassed into the suit property. The plaintiff has also referred the matter to the jamath. Despite the undertaking by the defendants, the defendants had not handed over the possession of the property. Hence, the suit for declaration and recovery of possession.

4. The fourth defendant denying the allegation that she has trespassed into the suit property on 15.02.1997, it is her contention that the property originally belong to Badhal Bivi, paternal grandmother of the fourth defendant and in the year 1963, at the time of marriage of the fourth defendant, her grandmother Badhal Bivi, gifted the property to the fourth defendant. Ever since the date of 'oral Hiba' she is in possession of the property. The defendants 1 to 3 were born in the suit property. The defendants are in possession of the property from 1963 onwards. Patta has also been issued in her name. The electricity bills have also been paid by her. Hence, prayed for dismissal of the suit.

5. The trial Court framed the following issues :

1. How the plaintiff has acquired the suit property?

2. How the defendants have encroached over the suit property?

3. How the plaintiff is entitled for declaration as prayed for?

4. How the plaintiff is entitled for recovery of possession as prayed for?

5. Is the suit is bad for non joinder of necessary parties?

6. To what other reliefs the plaintiff is entitled?

6. On the side of the plaintiff, P.W.1 to P.W.3 were examined and Ex.A.1 to A9 marked. On the side of the defendants D.W.1 to D.W.3 examined and Ex.B.1 to Ex.B.7 marked.



7. The trial Court has dismissed the suit on the ground that the suit is not filed within the period of limitation and the defendants are in possession of the property. The first appellate Court set aside the decree of the trial court and granted decree in favour of the plaintiff. The first appellate Court has come to the conclusion that the documents relied upon by the defendants are after the period of 1997, besides adverse possession has also not been established by them. The 'oral Hiba' has also not been established. As against which, the present second appeal has been filed.

8. The learned counsel appearing for the appellant has submitted that the plaintiff has claimed title under Ex.A.1 sale deed said to have been executed by the children of one Badhal Bivi. Whereas, the said Badhal Bivi has orally gifted the above property in favour of the fourth defendant in the year 1963. Therefore, the plaintiff did not derive any title under Ex.A.1. The plaintiff had obtained patta only in the year 1994. Whereas, the defendants have produced patta of the year 1993. Therefore, the allegation that the plaintiff is in possession of the property till 1997 and the alleged encroachment of the defendant is highly improbable and cannot be accepted. The documents filed by the defendants clearly prove their possession. The evidence of D.W.3 also clearly prove 'oral Hiba'. Hence, submitted that the first appellate Court has not considered these aspects and decreed the suit. In support of his contentions she has also relied upon the judgments in Hafeeza Bibi and others Vs. Shaikh Farid (Dead) by Lrs. and others reported in 2011 (5) Supreme Court Cases 654 and Jamila Begum (Dead) through Legal representatives Vs. Shami Mohd. (Dead) through legal representatives and another respondents reported in 2019 (2) Supreme Court Cases 727.

9. The learned counsel appearing for the first respondent has submitted that under Ex.A.1, the plaintiff purchased the property and Ex.A.1 clearly show that the plaintiff has purchased the suit property from the defendants 1 to 3. The suit property is all along in the possession of the plaintiff. The alleged 'oral Hiba' has not been established. The fourth defendant herself has admitted before the Jamath that she will vacate and hand over possession. Ex.A.3 has also been filed in this regard. The evidence of P.W.2 and P.W.3 also prove the encroachment made by the defendants. Hence, it is submitted that the first appellate Court has rightly decreed the suit. In support of his contentions he relied upon the judgments in Ram Sara Lall and others Vs. Mst. Domini Kuer and others reported in AIR 1961 Supreme Court 1747 and Smt.Gitaranai Paul Vs. Dibyendra Kundu alias Dibyendra Kumar Kundu reported in AIR 1991 Supreme Court 395.



10. The following substantial questions of law have been raised in this Second Appeal :

1. Whether in law the lower appellate Court was not wrong in failing to see that even assuming that the 'oral Hiba' in favour of the first appellant is disbelieved, she had prescribed for title adverse possession?

2. Whether in law the lower appellate Court was right in over looking that it was for the plaintiff to prove her case and that the defendants need not prove the negative?

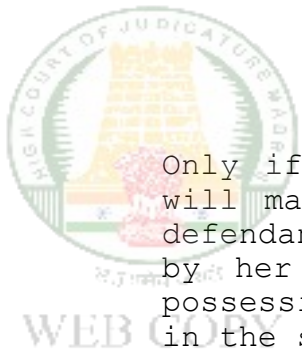
3. Whether in law the lower appellate Court was right in omitting to note that the first respondent not having proved her title or possession at any time or the trespass by the appellants, was not entitled to a decree of declaration and recovery of possession?

11. The plaintiff has filed the suit for declaration of title and also for recovery of possession. She has purchased the property under Ex.A.1. This fact is not in dispute. The property originally belong to one Badhal Bivi has also been admitted by both sides. It is the contention of the defendants that Badhal Bivi is the paternal grandmother of the fourth defendant. At the time of marriage of the fourth defendant in year 1963, the suit property was given to the fourth defendant in 'oral Hiba' by the said Badhal Bivi. It is the specific contention of the defendant that even the defendants 1 to 3 were born in the suit property and they are in continuous possession of the suit property.

12. Whereas, it is the specific contention of the plaintiff that only from the year 1997, the defendants, who were residing in the adjoining land, under the pretext of repairing their house have trespassed into the suit property and thereafter, refused to vacate the suit property. The defendants have set up a title on the basis of 'oral Hiba' of the year 1963.

13. It is well settled that for valid gift or Hiba of immovable property under Muslim Law, three essential ingredients are

- (i) declaration of the gift by the donor
- (ii) acceptance of the gift by the donee
- (iii) delivery of possession of the gifted property



Only if all the three essential requirements are fulfilled, it will make the gift irrevocable. It is the case of the fourth defendant that in the year 1963 the oral gift was given to her by her paternal grandmother. Ever since 1963, she was in possession of the property and the defendants 1 to 3 were born in the suit property.

14. It is curious to note that to show that on the basis of the 'oral Hiba' she was continuously in possession of the suit property and the possession was taken by her, no evidence, whatsoever, is available on record. If really the defendants 1 to 3 were born in the suit property, nothing prevented the fourth defendant at least to produce the birth certificate of the defendants 1 to 3 or school records to show that the defendants were residing in the suit property from the date of their birth. Though the defendants have filed Ex.B.1 to Ex.B.47, except Ex.B.1 of the year 1993, patta issued under the natham scheme, all other documents are after 1997. It is the specific case of the plaintiff that only in the year 1997, the defendants have encroached upon the suit property. Ex.B.2 to Ex.B.47 are subsequent to 1997. Therefore, when the fourth defendant specifically allege that there was 'oral Hiba' and the suit property was gifted to her and she has taken possession of the property, the burden lies on her to show that the property in fact was delivered in pursuant to the 'oral Hiba'. But no documents, whatsoever, have been filed to show that the delivery of the property was taken on the basis of the alleged 'oral Hiba' in favour of the fourth defendant. Having taken a specific stand that she became entitled to the suit property by oral gift, in her evidence, D.W.1 in the cross examination has admitted that she does not remember when Badhal Bivi gifted the property to her. She has further stated that Badhal Bivi originally gifted the property to her mother Julaiika Bivi and thereafter, her mother has given the property to the fourth defendant. This admission of the fourth defendant as D.W.1 is contrary to her pleadings in her written statement. Therefore, the alleged oral gift pleaded by the fourth defendant is highly improbable and cannot be relied upon.

15. It is to be noted that D.W.3, one Rengaiyan was examined to prove the alleged gift. He is said to be an employee of the said Badhal Bivi. He was present at the time of 'oral Hiba' 50 years back. It is to be noted that when the alleged gift was given by the defendant's grandmother, she would have declared the same in the presence of her relatives and declared her intention in front of her own relatives. There was no necessity, whatsoever, for the said Badhal Bivi to rely upon her employee, that too, who is from different religion. It is



also highly improbable and creates serious doubt about the 'oral Hiba'. At any event, to show that there is delivery of possession, absolutely, there is no evidence. Till 1993, there was no other document to show that the defendants were in possession of the property.

16. Further, the evidence of D.W.1 also makes it clear that her stand that there was an 'oral Hiba' cannot be believed. Whereas, the plaintiff has clearly established her title by Ex.A.1. P.W.2 and P.W.3 have also in their evidence clearly stated about the encroachment made by the defendants and in fact, they had also stated that the fourth defendant had agreed before the jamath to deliver the possession and thereafter, she had refused. Therefore, the plaintiff was advised to take legal recourse. Ex.B.2 to B47 are subsequent to the year 1997. Ex.B.1 is only a patta issued by the Tahsildhar under the natham scheme. Merely because patta was obtained under the natham scheme, the same cannot be a conclusive proof for possession and the patta has also been challenged by the husband of the plaintiff as per the evidence of D.W.2. Even assuming that the fourth defendant is in possession of the property on the basis of Ex.B.1 from 1993, that itself will not be sufficient to prove that she has perfected her title by way of adverse possession. Absolutely, there is no pleadings, whatsoever as to when her possession become adverse against true owner. Further there is no pleading as to when possession become hostile to the interest of the true owner. Further, to succeed the plea of adverse possession one has to establish that his or her possession is hostile, continuous, open and uninterrupted and she was exercising right as absolute owner.

17. The adverse possession has to be pleaded and proved. Only when the possession is open, hostile, uninterrupted and continuous, one can succeed in a suit for adverse possession. The evidence of PW.1 to 3 clearly indicate that the fourth defendant has come as an encroacher in the property and the documents filed by the fourth defendant are only after the year 1997 and delivery of possession also has not been proved. D.W.1 has also admitted before the jamath that she would hand over the encroached portion to the plaintiff. As long as adverse possession is not established, mere possession beyond the period of 12 years become adverse to real owner unless Animus is established. Ex.B.1 is only a patta obtained under natham scheme and that itself is not sufficient prove adverse possession. Admittedly, the property was originally owned by Badhal Bivi and she has transferred the property in year 1976 itself. Absolutely there is no dispute with regard to the judgments cited by the learned counsel for the appellants in



Hafeeza Bibi and others Vs. Shaikh Farid (Dead) by Lrs. and others reported in 2011 (5) Supreme Court Cases 654 and Jamila Begum (Dead) through Legal representatives Vs. Shami Mohd. (Dead) through legal representatives and another respondents reported in 2019 (2) Supreme Court Cases 727 and the same are not applicable to the facts of the present case. In the given case, the plaintiff has established the title to the land and the defendants contention of 'oral Hiba' has not been established and adverse possession has also not been established. Therefore, the plaintiff is certainly entitled to declaration and recovery of possession. The substantial questions of law are answered against the appellants.

18. Accordingly, the Second Appeal is dismissed and the judgment and the decree of the first appellate Court is confirmed. Consequently, connected miscellaneous petition is closed. No cost.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

vrc

To

1. The Subordinate Judge,
Chidambaram.
2. The District Munsif cum Judicial Magistrate,
Parangipettai.

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RSK(CO)
CS/17/10/2019