

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 25.03.2019	Delivered on: 22.5.2019
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THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.129 of 2013

and

M.P. No.1 of 2013

1.Anthony Mary

2.Anbu

... Appellants/Defendants

Vs.

1.Theresa Ammal

2.Felix

... 1st Respondent/Plaintiff

...2nd Respondent/2nd Defendant

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree passed by the learned Subordinate Judge, Arni dated 22.08.2012 in A.S.No.40 of 2008 confirming the decree and judgment of the learned District Munsif, Polur dated 30.04.2008 passed in O.S.No.144 of 2002.

For Appellants : Mr.T.R.Rajaraman
for Mr.V.V.Sairam

For Respondents: R1- for set exparte
Vide Court order dated 25/03/2019

: R2 -Dismissed - Vide Court order
dated 12/04/2018

JUDGMENT

This Second Appeal has been filed by the defendants 1 and 3 against the judgment and decree passed by the Sub-Judge, Arni, in A.S.No.40 of 2008 dated 22.08.2012 confirming the judgment and decree passed by the District Munsif, Polur in O.S.No.144 of 2002 dated 30.04.2008.

2. The first respondent herein had filed a suit in O.S.No.144 of 2002 on the file of the District Munsif, Polur, to declare that she is the absolute owner of the suit property and to restrain the defendants by means of permanent injunction from interfering with her peaceful possession and enjoyment of the suit property. The learned District Munsif, by the judgment dated 30.04.2008 had decreed the suit as prayed for with costs. Aggrieved by the same, the defendants had filed an appeal in A.S.No.40 of 2008 on the file of the Sub-Judge, Arni. The Sub-

Judge, Arni, by the judgment dated 22.08.2012 had dismissed the said appeal with costs and thereby confirmed the judgment and decree of the trial Court. Feeling aggrieved, the defendants 1 and 3 have filed the present Second Appeal.

3. For the sake of convenience, the parties are referred to as described before the trial Court.

4. The averments made in the plaint are in brief as follows:-

The suit property originally belonged to the plaintiff's mother Ellammal by virtue of a registered sale deed dated 01.12.1942. The said Ellammal died intestate in the year 1967 leaving behind her daughter (Plaintiff) and son Devaraj. The said Devaraj had left the village, leaving the property with the plaintiff to enjoy the same as absolute owner. From that date onwards, the plaintiff is in possession and enjoyment of the suit property. For the purpose of selling the suit property to the third party, the plaintiff applied for encumbrance certificate and found that on 26.04.1979, the first defendant had purchased the suit property from one K.Arulappan son of Kuzhandaisamy. The said K.Arulappan is in no way connected with the suit property. With a view to defraud the plaintiff, the first defendant and the said K.Arulappan had created a false document. With the aid of the said false document, the defendants attempted to trespass into the suit property in the month of March, 2002 and hence, the plaintiff was constrained to file the above suit for the relief of declaration and permanent injunction.

5. The averments made in the written statement filed by the first defendant and adopted by the defendants 2 and 3 are in brief as follows:-

(a) Originally the said Ellammal had married one Kuzhandaisamy and she begotten a son namely, K.Arulappan through Kuzhandaisamy and after the death of Kuzhandaisamy prior to 1942, the said Ellammal had permanently lived with one Arjunan through whom she had begotten one Therasa (plaintiff) and Devaraj. In fact, the legally wedded husband of Ellammal was Kuzhandaisamy alone and not the said Arjunan. Hence, the said K.Arulappan alone is the legitimate son of Ellammal. The plaintiff and her brother Devaraj are the illegitimate children of the said Ellammal. The said Ellammal died in the year 1967. After her death, Devaraj had left the suit village about 25 years back, and his whereabouts are not known and hence, the law presumes that Devaraj is under civil death. There was a family arrangement about 25 years back in between K.Arulappan and Therasa under which the suit property was allotted to K.Arulappan. From the date of the aforesaid family arrangement,

K.Arulappan was in absolute possession and enjoyment of the suit property and sold the suit property to the first defendant under a registered sale deed dated 06.04.1979 for a valuable consideration. From the date of the said purchase, the first defendant is in absolute possession and enjoyment of the suit property. After the first defendant had purchased the property, at the instigation of the plaintiff's husband, the plaintiff had filed the above suit.

(b) Since the plaintiff claimed share in the suit property, there was a mediation in between the first defendant's vendor K.Arulappan, her sister Therasa (plaintiff), the husband of the plaintiff and few others on 14.01.1980. In the said mediation, the plaintiff had executed a "release list" to the first defendant under which the plaintiff had admitted that the first defendant's vendor K.Arulappan is her legitimate brother. Further, the first defendant is in possession and enjoyment of the suit property from the date of purchase i.e., from 06.04.1979 and thereby perfected title by adverse possession also. The suit is barred by limitation. In fact, after purchase, the first defendant had obtained a loan from the State Bank of India, Polur, in the year 1996 by mortgaging the suit property and the said fact also would show that the first defendant is the absolute owner and she is in possession of the suit property. Therefore, the defendants 1 to 3 prayed to dismiss the suit.

6. Based on the aforesaid pleadings, the learned District Munsif, Polur, had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined herself as PW1 and also examined one more witness as PW2. She had marked Exs.A1 to A3 as exhibits. On the side of the defendants, the first defendant examined herself as DW1 and also examined three more witnesses as DW2 to DW4. The defendants had marked Exs.B1 to B11 as exhibits on their side.

7. The learned District Munsif, Polur, after considering the materials placed before him found that the first defendant failed to prove that her vendor K.Arulappan was the son of Ellammal. He further found that the first defendant failed to prove that in the family arrangement, the plaintiff relinquished her right in favour of the said K.Arulappan. He also found that the first defendant failed to prove that there was a mediation on 14.01.1980 and in the said mediation, the plaintiff had executed a release deed in favour of the first defendant. He further found that the plaintiff has proved that she is the daughter of Ellammal and after her death, she and her brother Devaraj succeeded to the suit property and the said Devaraj left the village 25 years ago, and the plaintiff alone is in possession and enjoyment of the suit property. Accordingly, the learned Trial Judge decreed the suit as prayed for with cost.

Aggrieved by the same, the defendants preferred an appeal in A.S.No.40 of 2008 on the file of the Sub-Judge, Arni. The Sub-Judge, Arni had dismissed the said appeal with costs and thereby confirmed the judgment and decree passed by the trial Court. Feeling aggrieved, the defendants 1 and 3 have filed the present Second Appeal.

8. This Court at the time of admitting the Second Appeal has formulated the following substantial questions of law:

"1.Whether the Courts below are right in granting the relief of declaration and injunction having clearly found that the plaintiff was not in possession of the suit property?

2.The Courts below was not in error in decreeing the suit when the same is bad for non joinder of the plaintiff's brother Devaraj?

3.Are the Court below right in ignoring the release deed execute Ex.B4 admittedly by Theresa Ammal releasing her rights in favour of Antony Mary Ammal?"

9. After receipt of the notice, the first respondent did not appear either in person or through counsel and hence, she has been set exparte. Since, no steps have been taken for sending notice to the second respondent/second defendant, the Second Appeal was dismissed for default in so far as second respondent is concerned as per the order passed by this Court dated 12.04.2018. Hence, after hearing the arguments of the learned counsel for the appellants /defendants 1 and 3 and perusing the records, judgment is being passed.

10. Substantial questions of law 1 to 3:

The learned counsel for the appellants/defendants 1 and 3 has submitted that the plaintiff while examining herself as PW1 during cross examination, she has categorically admitted that she had executed Ex.B4 release deed in favour of the first defendant and under the said circumstances, the Courts below should have dismissed the plaintiff's suit. He further submitted that the Courts below failed to consider that after purchase, the first defendant had mortgaged the suit property with the State Bank of India, Polur Branch and that it would show that she established that she dealt with the suit property as absolute owner. He further submitted that since the plaintiff has filed a suit for declaration and permanent injunction, the

burden is upon her to prove that she is the legitimate daughter of the deceased Ellammal, but she failed to prove the said fact. He further submitted that the Courts below erred in decreeing the suit when the same is bad for non-joinder of the plaintiff's brother Devaraj as a party.

11. He further submitted that since the first defendant is in possession and enjoyment of the suit property by virtue of the sale deed dated 06.04.1979, the suit which is filed in the year 2002 by the plaintiff is barred by limitation. He further submitted that even though the defendants had raised many points in the appeal memorandum filed before the first Appellate Court, the first Appellate Court has considered only one point i.e., whether the appeal can be allowed. He further submitted that the procedure followed by the First Appellate Court would clearly show that it has not followed the procedures prescribed under Order 41 Rule 31 CPC and therefore, he prayed to allow the Second Appeal and set aside the judgments and decrees passed by the Courts below and dismiss the suit.

12. In support of the aforesaid contention, he relied upon the decision in Vinod Kumar Vs. Gangadhar, (2015) 1 SCC 391.

13. The case of the plaintiff is that the suit property originally belonged to her mother Ellammal by virtue of the sale deed dated 01.12.1942. Her further case is that the said Ellammal died intestate in the year 1967 leaving behind herself and her brother Devaraj as legal heirs. Her further case is that her brother Devaraj left the village 25 years ago and his whereabouts are not known and hence, it has to be presumed that he is under civil death and that, she is in exclusive possession and enjoyment of the suit property. Her further case is that for the purpose of selling the suit property to the third party, she verified the encumbrance certificate with the office of the Sub-Registrar and came to know that on 06.04.1979, one K.Arulappan son of Kuzhandhaisamy had sold the suit property in favour of the first defendant and based on the said document, the defendants attempted to trespass into the suit property in the month of March, 2002 and hence, she was constrained to file the above suit.

14. The case of the defendants is that the said Ellammal was originally married to one Kuzhandhaisamy and through him one K.Arulappan was born and thereafter, the said Kuzhandhaisamy died and after his death, the said Ellammal had permanently lived with one Arjunan without any marriage and through him, the plaintiff and one Devaraj were born. Their further case is that after the death of Ellammal, Devaraj had left the suit village about 25 years back and his whereabouts are not known and hence, there was a family arrangement between the plaintiff and the said K.Arulappan and in the said family arrangement, the suit

property was allotted to the said K.Arulappan. Their further case is that based on the said family arrangement, the said K.Arulappan became absolute owner and he sold the suit property to the first defendant under a registered sale deed dated 06.04.1979 for valid consideration and from that date onwards, she has been in possession and enjoyment of the same.

15. Their further case is that after the said purchase, at the instigation of the plaintiff's husband, the plaintiff claimed right over the suit property and hence, there was a mediation in between the said K.Arulappan, the plaintiff and the first defendant on 14.01.1980 and in the said mediation the plaintiff had executed a release deed in favour of the first defendant and hence, the plaintiff had lost the right if any over the suit property.

16. The plaintiff had produced a registration copy of the sale deed dated 01.12.1942 and marked as Ex.A1. In the said document while describing the said Ellammal it is stated that she is the daughter of one Narayanan and wife of one Arjunan. So, it is clear that the said Ellammal is the wife of Arjunan only. Since the defendants have taken a stand that the said Ellammal originally married one Kuzhandhaisamy and through him one K.Arulappan was born and after the death of the said Kuzhandhaisamy, the said Ellammal had lived with one Arjunan, the burden is upon the defendants to prove that the said Ellammal had originally married one Kuzhandhaisamy. The defendants have not proved the fact that the said Ellammal had originally married one Kuzhandhaisamy and through him the said K.Arulappan was born.

17. The plaintiff had produced a registration copy of the sale deed said to have been executed by one K.Arulappan son of Kuzhandhaisamy in favour of the first defendant dated 06.04.1979 and marked as Ex.A2. It appears that the first defendant also produced a registration copy of the said sale deed and marked as Ex.B2 and B11. In the said sale deed, the said K.Arulappan has stated that he is the son of Kuzhandhaisamy. Further he has simply stated that the property sold under the said document belongs to him. He has not stated that he got the property through Ellammal and she is her mother. Therefore, the contention of the first defendant that her vendor K.Arulappan was the son of the original owner Ellammal cannot be accepted. Since the defendants failed to prove that the said K.Arulappan was the son of the original owner Ellammal, the contention that there was a family arrangement between the plaintiff and the said K.Arulappan and in the said family arrangement, the suit property was allotted to the said K.Arulappan was also cannot be accepted.

18. In the deposition of PW1, in cross examination it has

been recorded as follows:-

“1980ல் அக்கு விடுதலைப்பத்திரம் இந்த பிரதிவாதிக்கு எழுதிக்கொடுத்தேன் என்றால் சரிதான்.”

Relying on the aforesaid statement, the learned counsel for the appellants contended that the plaintiff has admitted the execution of release deed by her in favour of the first defendant.

19. At this juncture, it would be relevant to refer to the decision in Boramma Vs. Krishna Gowder and Others [(2000) 3 MLJ 199 (SC)], wherein, the Hon'ble Supreme Court in Para-10 has observed as follows:-

“10. In our view it will not be a sound rule of appreciation of evidence to pick up an answer from the cross-examination of a witness and draw inference taking it in isolation. The Court must see as to how consistent the testimony of the witness is and as to how that answer fits in with the rest of the evidence and probabilities of the case....”

20. In this case the evidence was not recorded in the question and answer form. Through out her deposition, the plaintiff (PW1) has categorically denied the alleged mediation and also execution of the release deed in favour of the first defendant. Her deposition would show that even after the aforesaid statement, she has subsequently denied the suggestion that she had executed a release deed in favour of the first defendant. Further, if she really admitted the execution of the said release deed, the said document would have been marked as exhibit through her, but it appears that no attempt was made to mark the said document through her. It was marked as Ex.B4 only through DW1 and at the time of marking the said document also, an objection was raised on behalf of the plaintiff and the said document was marked only subject to the said objection. So, it is clear that the aforesaid statement would have been recorded only due to typographical mistake. Therefore, it cannot be construed that the plaintiff has admitted the execution of the said release deed.

21. Since the first defendant has not proved that her vendor K.Arulappan had no conveyable title over the suit property, merely because she had mortgaged the property with the State Bank of India would not create any right over the suit property.

22. In Vinod Kumar Vs. Gangadhar, (cited supra) the Hon'ble Supreme Court in Para Nos.17 to 19 has observed as follows:-

17. Applying the aforesaid principle to the facts of the case, we find that the High Court while deciding the first appeal failed to keep the principle in consideration and rendered the impugned decision. Indeed, it is clear by mere reading of para 4 of the impugned order quoted below:

"After hearing the learned counsel for the parties and going through the evidence, I do not find any justification to throw overboard findings recorded by the trial court. After due appreciation of evidence, I do not find any merit and substance in this appeal. The same stands dismissed with costs. Counsel fee Rs 1000, if certified. Ordered accordingly."

18. In our considered opinion, the High Court did not deal with any of the submissions urged by the appellant and/or the respondent nor it took note of the grounds taken by the appellant in grounds of appeal nor made any attempt to appreciate the evidence adduced by the parties in the light of the settled legal principles and decided case law applicable to the issues arising in the case with a view to find out as to whether the judgment of the trial court can be sustained or not and if so, how, and if not, why.

19. Being the first appellate court, it was the duty of the High Court to have decided the first appeal keeping in view the scope and powers conferred on it under Section 96 read with Order 41 Rule 31 CPC mentioned above. It was unfortunately not done, thereby, resulting in causing prejudice to the appellant whose valuable right to prosecute in the first appeal on facts and law was adversely affected which, in turn, deprived him of a hearing in the appeal in accordance with law. It is for this reason, we are unable to uphold the impugned judgment of the High Court.

23. In this case, though the first Appellate Court has formulated only one point i.e., as to whether the appeal has to be allowed, while answering the said point, the first Appellate Court answered all the grounds urged by the appellants in the appeal memorandum. Therefore, it cannot be said that a prejudice has been caused to the appellants. Therefore, the

aforesaid decision will not help the appellants.

24. It appears that before the first Appellate Court, the appellants herein had filed an application in I.A.No.41 of 2012 under Order 41 Rule 27 of CPC to receive a xerox copy of Chitta extract as additional documentary evidence and the said petition has been dismissed by the first Appellate Court. It appears that no speaking order has been passed as to the dismissal of the said petition. The said document is only a xerox copy, which was issued by the Village Administrative Officer on 25.10.1994. The appellants have not stated any reason for not producing the said document before the trial Court. Therefore, merely because the first Appellate Court has not stated any reason for dismissing the said petition, this Court cannot allow the said petition. Further, in the said document it is stated that only as per the sale deed, the said property belongs to the first defendant. As already pointed out that the first defendant had purchased property from the person who has no right to convey the title over the suit property. Therefore, even if the said document is received that would not change the result of the case.

25. Admittedly, the suit property is a vacant site. The defendants have admitted in their written statement since it is a vacant site they did not pay tax to the said property and therefore, the kist receipts filed by them could not be related to the suit property. Since the suit property is a vacant site, the principle that the possession follows title will apply.

26. In this case, admittedly the suit property originally belonged to Ellammal and that the plaintiff is the daughter of the said Ellammal and naturally after the death of the said Ellammal, the plaintiff would have succeeded to the suit property as a legal heir. Taking into consideration of all the aforesaid facts, the Courts below have concurrently held that the plaintiff is entitled for the relief of declaration and permanent injunction. In the said concurrent factual findings, this Court cannot interfere. Accordingly, the substantial questions of law are against the appellants/defendants 1 and 3.

27. In the result, the Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-

Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

dna

To

1.The Subordinate Judge,
Arni.

2.The District Munsif,
Polur.

3.The Section Officer,
VR Section, High Court,
Madras.

S.A.No.129 of 2013 and
M.P. No.1 of 2013

KJI (CO)
GN(24/01/2020)