



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.11.2019

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.Nos.621 and 622 of 2014

M.Subramani

... Appellant/Appellant in both the
Appeals/Defendant in O.S.No.4344/2005 &
Plaintiff in O.S.No.4327/2004

Vs.

G.Anbazagan

...Respondent/ Respondent in both the
Appeals /Plaintiff in O.S.No.4344/2005
& Defendant in O.S.No.4327/2004.

PRAYER in S.A.No.621 of 2014: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree in A.S.No.209 of 2012 dated 28.01.2014 on the file of the III Additional Judge, City Civil Court at Chennai confirming the judgment and decree in O.S.No.4344 of 2005 dated 29.08.2011 on the file of the I Assistant Judge, City Civil Court at Madras.

PRAYER in S.A.No.622 of 2014: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree in A.S.No.210 of 2012 dated 28.01.2014 on the file of the III Additional Judge, City Civil Court at Chennai confirming the judgment and decree in O.S.No.4327 of 2004 dated 29.08.2011 on the file of the I Assistant Judge City Civil Court at Madras.

For Appellant : Mr.V.Lakshminarayanan
in both the appeals

For Respondent : Mr.V.Subramanian
in both the appeals

J U D G M E N T

These two appeals arise out of two cross suits. The first suit in O.S.No.4327 of 2004 was filed by the plaintiff seeking a declaration that the settlement deed dated 22.03.1995 executed by one Ganesan in favour of the defendant is void abinitio and not binding on the plaintiff, for recovery of possession and for mesne profits.



2. According to the plaintiff, the suit property belonged to his father G.Mangaleeswaran @ G.M.Easwaran. It being a grama natham property, the plaintiff would rely upon the patta said to have been issued by the Special Tahsildar on 20.05.1976 in proof of his possession as well as title. But, the defendant who is none else than the paternal uncle of the plaintiff, according to the plaintiff, was put in permissive possession of a portion of the property and after the death of the father viz., G.Mangaleeswaran @ G.M.Easwaran, the defendant started setting up title over the property claiming under the settlement deed executed by his father Ganesan on 22.03.1995. Contending that Ganesan had no right over the property to enable him to execute the settlement deed, the plaintiff sought for the reliefs stated supra. The execution of the settlement deed by Ganesan was also specifically denied.

3. This suit was resisted by the defendant contending that his father Ganesan was in possession of the property for a long time and he had executed a settlement deed dated 22.03.1995 settling the property on the defendant. It is the further contention of the defendant that the patta under which the plaintiff claims is a fabricated document and therefore, the plaintiff has no title to the property. On the above contentions, the defendant sought for dismissal of the suit in O.S.No.4327 of 2004.

4. The defendant in O.S.No.4327 of 2004 laid the other suit in O.S.No.4344 of 2005 seeking recovery of possession of a portion of the property contending that he is the absolute owner of the entirety of the property as per the settlement deed dated 22.03.1995 and the plaintiff in O.S.No.4327 of 2004/ defendant in O.S.No.4344 of 2005 is a permissive occupier.

5. The second suit was resisted by the defendant therein/ plaintiff in O.S.No.4327 of 2004 contending that the settlor under the settlement deed dated 22.03.1995 had no title to convey. It was also pleaded that the settlement deed was not executed by the said Ganesan. On the above pleadings, the defendant sought for dismissal of the suit.

6. Originally the plaint in O.S.No.4327 of 2004 was rejected and the appeal against the order of rejection was also dismissed. However, in second appeal, this court had set aside the order of rejection and remitted the suit for trial.

7. Upon the order of remission, both the suits were tired together. The plaintiff in O.S.No.4344 of 2005 was examined as PW1 and Ex.A1 to Ex.A5 were marked. The plaintiff in O.S.No.4327 of 2004 was examined as DW1 and Ex.B1 to Ex.B5 were marked.



8. The trial court, upon consideration of the evidence, concluded that the plaintiff in O.S.No.4327 of 2004 has not proved his title since the revenue documents filed by him were found to be not genuine. The trial court also concluded that the settlement deed executed by Ganesan in favour of the plaintiff in O.S.No.4344 of 2005 was true and valid. On the said conclusions, the suit in O.S.No.4344 of 2005 was decreed while the suit in O.S.No.4327 of 2004 was dismissed.

9. Aggrieved the plaintiff in O.S.No.4327 of 2004 filed two appeals in A.S.No.209 of 2012 and A.S.No.210 of 2012. The lower appellate court, on a re-consideration of the evidence on record, concurred with the findings of the trial court and dismissed both the appeals. Aggrieved the plaintiff in O.S.No.4327 of 2004 has come up by way of these two Second Appeals.

10. The following questions of law were framed at the time of admission:-

1. When there is cloud over title and especially when the title of the plaintiff is specifically denied, is the bare suit for recovery of possession is sustainable in the absence of declaratory relief?
2. Whether the courts below are justified in ordering recovery of possession by placing reliance based on an unmarked document, namely, alleged letter issued by the Tahsildar which was neither marked in the course of examination nor produced by the competent person on proper summons?
3. Having held that neither plaintiff nor defendant has proved title over the property, is the court below justified in decreeing the suit for recovery of possession, especially when the possession is sought for on the basis of title?
4. Whether lodging of complaint resulting in registering an FIR will by itself amounts to proof of forgery, in the absence of any oral and documentary evidence to substantiate the case of forgery before the civil court?



11. Upon hearing the counsels appearing on either side, an additional question of law is also framed for consideration:-

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Whether the courts below were right in concluding that the settlement deed dated 22.03.1995 has been proved in accordance with law, in the absence of examination of the attesting witness, since the execution of the document by Ganesan has been specifically denied in the written statement in O.S.No.4344 of 2005?

12. I have heard Mr.V.Lakshminarayanan, learned counsel appearing for the appellant and Mr.V.Subramanian, learned counsel appearing for the respondent on all the above questions of law framed.

13. Elaborating on the questions of law framed, Mr.V.Lakshminarayanan, learned counsel appearing for the appellant would vehemently contend that since the appellant/defendant in O.S.No.4344 of 2005 had specifically denied the execution of the settlement deed dated 22.03.1995 by Ganesan, in the absence of examination of the attesting witness under Section 68 of the Evidence Act or a person acquainted with the signature of the attesting witness under Section 69 of the Evidence Act, the courts below were wrong in upholding the settlement deed dated 22.03.1995.

14. Contending contra Mr.V.Subramanian, learned counsel appearing for the respondent would submit that there was no specific denial of execution of settlement deed by Ganesan, all that was projected in the written statement was the capacity of Ganesan to execute the settlement deed since the defendant in O.S.No.4344 of 2005 denied title of Ganesan to the suit property. The relevant portion of the written statement in O.S.No.4344 of 2005 regarding the execution of the settlement deed reads as follows:-

The person who had executed the documents does not have any right and furthermore, the due execution and registration of the document is denied. In any event, the document was not acted upon.

15. In view of the above plea it is incumbent on the plaintiff who relies on the settlement deed dated 22.03.1995 to prove the due execution of the document by examination of attesting witness as required under Section 68 of the Evidence Act.



16. As already stated except the plaintiff in O.S.No.4344 of 2005 who was examined as PW1 no other witness was examined. Both the courts below have lost sight of this important aspect and upheld the settlement deed without giving any reasons for non-examination of the attesting witness. Once the execution of the settlement deed is denied by the defendant, it is for the plaintiff, as a person who propounds the settlement deed to prove the same in accordance with law as per Section 68 or 69 of the Evidence Act. In the absence of such evidence, it cannot be concluded that the settlement deed is valid. Therefore, the first additional question of law has to be answered against the respondent herein.

17. Mr.V.Lakshminarayanan, learned counsel appearing for the appellant would however contend that there is no proof of title of Ganesan. He would rely upon the written statement filed in O.S.No.4344 of 2005, wherein, the defendant has questioned the title of Ganesan specifically. From the documents produced by the plaintiff in O.S.No.4344 of 2005, it can be seen that there was no evidence of proof of title of Ganesan. All that has been produced is settlement deed dated 22.03.1995, police complaint dated 23.08.2004, lawyers notice and reply notice thereto. These documents would not in my considered opinion establish the title of Ganesan.

18. Mr.V.Subramaninan, learned counsel appearing for the respondent would however contend that the settlement deed recites that Ganesan has been in possession of the property for more than 40 years.

19. I have already held that the settlement deed has not been proved in accordance with law. Any recitals therein cannot be looked into to feed the title of the settlor. It is incumbent upon the person who claims under the settlement deed to establish the title of the settlor. In the absence of any evidence to show that Ganesan had title to the property, which he could have validly conveyed under the settlement deed Ex.A1, the courts below were not right in granting a decree for recovery of possession in favour of the person who has no title.

20. No doubt, while deciding O.S.No.4327 of 2004, the courts below have reached a conclusion that the patta Ex.A1 produced by the defendant to set up the claim of title over the suit properties was found to be a forged instrument. The courts below have been carried away by the fact that the plaintiff in O.S.No.4327 of 2004 has produced forged instrument to set up title over the property and on the failure of the plaintiff in O.S.No.4327 of 2004 to prove his title, granted the relief in favour of the plaintiff in O.S.No.4344 of 2005.



21. I am afraid, such method of disposal by the courts below cannot be approved by this court. Admittedly, the plaintiff in O.S.No.4327 of 2004 is in possession of a portion of the property. Possession is nine points in law. A person in possession cannot be evicted except by a true owner. Once the plaintiff in O.S.No.4344 of 2005 has not proved his title he cannot be favoured with a decree for recovery of possession.

22. As regards the claim of the plaintiff in O.S.No.4327 of 2004 both the courts below have recorded a factual finding that Ex.A1 patta produced by him is not a genuine document. In view of the same, the plaintiff in O.S.No.4327 of 2004 cannot seek recovery of possession of the property from the defendant therein/ plaintiff in O.S.No.4344 of 2005.

23. As regards the first question of law framed at the time of admission, I do not think that the principles of law which applies to injunction suit which requires the plaintiff in a suit for injunction to seek declaration of title if his/her title is denied could be extended to suit for possession. As far as the suit for possession is concerned, the courts below while deciding whether the plaintiff is entitled to possession or not could definitely go into the question of title and decide the issue of title also. Unless the plaintiff proves his title, he cannot be favoured with a decree for possession.

24. The same is not the case in a suit for injunction. Even a person without title can prevent another person who has even a better title than him from interfering with his possession of the property except under due process of law. Therefore, the first question of law has to be answered necessarily in favour of the respondent to the effect that in a suit for recovery of possession even if the title is denied the plaintiff is not required to amend the plaint or seek the relief of declaration. He can very well prove his title in the said suit and seek recovery of possession.

25. The second question of law has to be answered necessarily in favour of the appellant in view of the finding recorded by me that the plaintiff in O.S.No.4344 of 2005 has not established his title to the property and the fact that the courts below have been carried away by the production of fabricated revenue document in order to prove his title. However, it should be pointed out that the courts below were not right in relying upon the letter addressed by the Tahsildar to the Government Pleader in the absence of same being marked as document in the suit by examination of the proper witness to arrive at the said conclusion. In any event, since the patta



has been found to be forged, the courts below were right in negativing the relief of recovery of possession in favour of the plaintiff in O.S.No.4327 of 2004 also.

26. The third question of law is also answered in favour of the appellant. Once it is found that neither the plaintiff nor the defendant have established the title to the property, then neither of them will be entitled to recovery of possession from the other party. It is now claimed that the criminal case has ended in acquittal. Since the courts below have concluded that the document viz., Ex.A1 patta is a forged instrument and the plaintiff in O.S.No.4327 of 2004 is unable to produce any other document of title to show that his father was in possession of the property and he inherited the same from his father.

27. I do not think that the conclusion of the courts below could be termed as perverse or that they were based on the fact that the FIR has been registered. Hence, the fourth question of law is also answered in favour of the respondent to the effect that the courts below have not based their conclusion only on the fact that FIR has been registered.

28. In view of the above findings and the answerers to the questions of law, the Second Appeal in S.A.No.622 of 2014 arisen out of O.S.No.4327 of 2004 will stand partly allowed confirming the dismissal of the said suit with reference to the relief of recovery of possession. As regards the relief of declaration that the settlement deed is invalid the same has to be granted in view of the finding that the defendant in the said suit has not proved the settlement deed in the manner known to law and has not proved the title of settlor to the properties settled thereunder.

29. The Second Appeal in S.A.No.621 of 2014 filed against O.S.No.4344 of 2005 is allowed, the judgment and decree of the courts below will stand set aside. O.S.No.4344 of 2005 being one for possession will stand dismissed.

30. In fine, S.A.No.621 of 2014 is allowed in part. The suit in O.S.No.4327 of 2004 will stand decreed in respect of the prayer for declaration that the settlement deed dated 22.03.1995 is invalid and not binding on the plaintiff therein. In respect of the other reliefs viz., recovery of possession and mesne profits, the suit will stand dismissed.



31. S.A.No.621 of 2014 is allowed, the judgment and decree of the courts below will stand set aside. The suit in O.S.No.4344 of 2005 will stand dismissed. However, in the circumstances of the case, there will be no orders as to costs.

-s/d-

Assistant Registrar(CCC)

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Sub-Assistant Registrar

To

1. The III Additional Judge,
City Civil Court, Chennai.
2. The I Assistant Judge,
City Civil Court, Chennai.

+1 CC to Mr.V.Raghavachari, Advocate sr 96356

+1 CC to Mr.V.Subramanian, Advocate sr 96405

S.A.Nos.621 and 622 of 2014

TM(CO)
SP(22/01/2020)