

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.10.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A.No. 1049 of 2019
and
C.M.P.No. 22630 of 2019

Perumal (died)
1.P.Vasanthammal
2.Durai @ Gunasekaran
3.Santhi
4.Dharanidharan
5.Porkodi
...Appellants

Vs.

Annamalai (died)
1.A.Sampath
2.A.Chinnapaiyan
3.A.Soundararajan
4.A.Sarasa
5.Chinnathai
6.Kuttiammal
...Respondents

Prayer: Memorandum of Second Appeal filed under Section. 100 of C.P.C. against the judgment and decree dated 10.07.2019 made in A.S.No. 21 of 2011 on the file of the learned Sub-Court, Gudiyattam reversing the judgment and decree dated 22.12.2010 made in O.S.No. 244 of 2007 on the file of the learned District Munsif Court, Gudiyattam.

For Appellants : Mr.N.Manokaran

J U D G M E N T

The legal heirs of the defendant in O.S.No.244 of 2007 having suffered a decree for declaration and recovery of possession at the hands of lower Appellate Court in A.S.No.21 of 2011 have come up with this second appeal.

2. The suit in O.S.No.244 of 2007 was laid by the predecessor of the respondents, Annamalai seeking declaration of title and recovery of possession. The plaintiff's case before the Trial Court was that the suit property was purchased by the plaintiff in the name of his father, Periyavan @ Periyasamy,

when he was alive. After the death of Periyavan @ Periyasamy, there was an oral partition between the plaintiff and his brothers, which was confirmed by a partition agreement / Muchilika dated 22.04.1974. In the said oral partition, the suit property was allotted to the plaintiff. The defendant, who is the brother of the plaintiff agreed to purchase the property for a consideration of Rs.20,000/- in the year 2003, paid an advance of Rs.1,000/- and he agreed to pay the balance of sale consideration within six(6) months. Pursuant to the said arrangement, the defendant was also put in possession of the property. Claiming that the defendant has not come forward to perform his part of the contract and that his possession is unauthorized, the plaintiff filed the suit for declaration and recovery of possession.

3. The suit was resisted by the defendant contending that there was no partition as alleged and that the defendant has been in continuous possession of the property. On the above contentions, the defendant sought for dismissal of the suit. At trial, the plaintiff examined himself as P.W.1 and he also examined three other witnesses namely, P.W.2, P.W.3 and P.W.4. P.W.3 is the other brother Pandarinathan and P.W.4 is the Village Administrative Officer of the Village, in which the suit property is situate. The defendant did not lead any evidence. The application in I.A.No.416 of 2006 in O.S.No.172 of 2006 was filed as Ex.B1. The partition arrangement / Muchalika was filed as Ex.A2. The sale deed in the name of Periyavan @ Periyasamy, father of the plaintiff and the defendant was filed as Ex.A1. Revenue records were also filed as Exs.A5 to A11. The Trial Court, on a consideration of the above evidence concluded that the oral partition pleaded by the plaintiff is true and as per the partition evidenced by Ex.A2, the suit property was allotted to the plaintiff. The Trial Court, however, disbelieved the case of the plaintiff that it was he, who purchased the property in the name of his father namely, Periyavan @ Periyasamy. However, on the findings relating to the oral partition, the Trial Court upheld the title of the plaintiff and concluded that the plaintiff is entitled to declaration of title.

4. On the question of possession, the Trial Court found that the plaintiff (P.W.1) as well as his son (P.W.2) had deposed that they were in possession of the property and they had never handed over the possession to the defendant. In view of the said evidence, the Trial Court declined the relief of possession. Aggrieved by the said partial dismissal of the suit with reference to the relief of possession, the plaintiff filed an appeal in A.S.No.21 of 2011 before the Sub-Court, Gudiyatham. Since the defendant / Perumal died pending appeal, his legal representatives were brought on record as respondents 2 to 6. The plaintiff / appellant also died pending appeal and his legal

representatives were brought on record as appellants 2 to 7. Since the appeal was filed by the plaintiff against the rejection of the relief of possession alone, the lower Appellate Court did not re-examine the issue relating to title. The defendants or his legal representatives, who had suffered a decree had not filed an appeal against the decree of the Trial Court granting a declaration of the title in favour of the plaintiff. The lower Appellate Court concluded that the so called admissions relied upon by the Trial Court to deny the relief of possession were quoted out of context. The lower Appellate Court also found that the defendant, as plaintiff, has filed O.S.No.172 of 2016 pertaining to the very same property seeking relief of injunction claiming, that he has been in possession of the property. Considering the evidence on record, the lower Appellate Court came to the conclusion that the plaintiff who had succeeded in getting a relief of declaration before the Trial Court is also entitled to declaration of possession. On the said conclusion, the lower Appellate Court allowed the appeal and declared the suit in its entirety. Aggrieved, the legal representatives of the defendant have come up with this second appeal.

5. I have heard Mr.N.Manokaran, learned counsel appearing for the appellant.

6. Mr.N.Manokaran would vehemently contend that the Courts below erred in granting a decree for declaration of title, despite the fact that the plaintiff has pleaded a case of Benami, which is prohibited under the Prohibition of Benami Property Transactions Act, 1988. He would further contend that there was no evidence to prove the alleged oral partition, which came to be recorded under Ex.A2 dated 22.04.1974. The learned counsel would also contend that the lower Appellate Court was wrong in concluding that the decision of the Trial Court regarding possession was based on stray admissions made by P.W.1 and P.W.2.

7. As regards the contention of the learned counsel regarding oral partition and the plea of Benami, I do not think he could re-agitate the issue in this second appeal, since the original decree granting a declaration of title made by the Trial Court was not challenged by the defendants by filing an appeal or even a cross appeal before the lower Appellate Court. The Trial Court granted a decree for declaration after upholding the validity of Ex.A2 dated 22.04.1974. The Trial Court had also taken note of Exs.A4 to A11(Revenue documents) in which, Pattas have been issued to the brothers, individually. The evidence of P.W.4, the Village Administrative Officer wherein, he had deposed that the plaintiff and his brothers were divided

and revenue documents have been issued in favour of the brothers as per the partition arrangement made between them was also considered by the Trial Court in granting a decree for declaration. As already pointed out, neither the defendant nor his legal representatives had chosen to challenge the decree for declaration by filing an appeal or cross appeal therefore, the decree for declaration granted by the Trial Court has become final and it is not open to the legal representatives of the defendant, who are the present appellants to challenge or question the decree for declaration in this second appeal.

8. As regards the bar of plea regarding Benami, I find that the plaintiff did not claim title based on the purchase made by him in the name of his father. Though he pleaded that the suit property was purchased by him in the name of his father, he had conceded the title of the father and had claimed right over the property only under the oral partition evidenced by Ex.A2 dated 22.04.1974. I do not think the bar enacted under the Prohibition of Benami Property Transactions Act, 1988 could be invoked to non-suit the plaintiff in the peculiar circumstances of the case where, the plaintiff concedes the title of the alleged Benamidhar and seeks to establish his title under the partition that had taken place after his death.

9. On the question of possession, no doubt, there are certain admissions made by P.W.1 and P.W.2 regarding possession and above admissions militate against the very prayer in the suit. The lower Appellate Court had analyzed the evidence of the plaintiff and his son and had found those admissions, which were the foundation for the Trial Court to reject the prayer for possession were taken out of context. The lower Appellate Court has also pointed out that the defendant, as a plaintiff in O.S.No.172 of 2006 had asserted that he was in possession of the property and therefore, the Trial Court was not justified in rejecting the prayer for possession. Mr.N.Manokaran would vehemently contend that such approach is not correct. No doubt, P.W.1 and P.W.2 have claimed that they are in possession of the property. The very suit has been filed for recovery of possession, the defendant has no right to be in possession in one capacity of the other. The defendant had also asserted his possession in O.S.No.172 of 2006. Even in the written statement filed in the present suit, the defendant has not pleaded that he was not in possession of the property. He would claim that that there was no oral partition and he continued in possession. Therefore, the plaintiff is not entitled to recovery of possession of the entire property.

10. In the light of said pleadings and in the absence of any evidence on the side of the defendant, I am of the opinion that

the lower Appellate Court was fully justified in coming to the conclusion that so called admissions were out of context and cannot be relied upon to non-suit the plaintiff, in so far the relief of recovery of possession is concerned. The findings of the lower Appellate Court are based on tangible evidence available on record and they cannot be termed as perverse. I do not see any question of law much less a substantial question of law in order to enable this Court to entertain this appeal. Hence, this second appeal fails and it is accordingly dismissed. Consequently, connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

To:-

- 1.The District Munsif Court,
Gudiyatham.
- 2.The Sub Judge,
Gudiyatham.

+1cc to M/s.N.Manokaran, Advocate Sr.89304

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srg 24/08/2020

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