

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON:29.01.2019

DELIVERED ON:18.03.2019

CORAM

THE HONOURABLE MS.JUSTICE P.T.ASHA

S.A.NO.662 OF 2018

&

C.M.P.NO.20309 OF 2018

1.Meenatchi Ammal
2.G.Lakshmi Narayanan
3.Ramalingam
4.Rajalakshmi
5.Chandra

...Appellants/Plaintiffs

Vs

1.Alamelu Ammal
2.Balakrishnan
3.Rajalakshmi

...Respondents/Defendants

PRAYER:

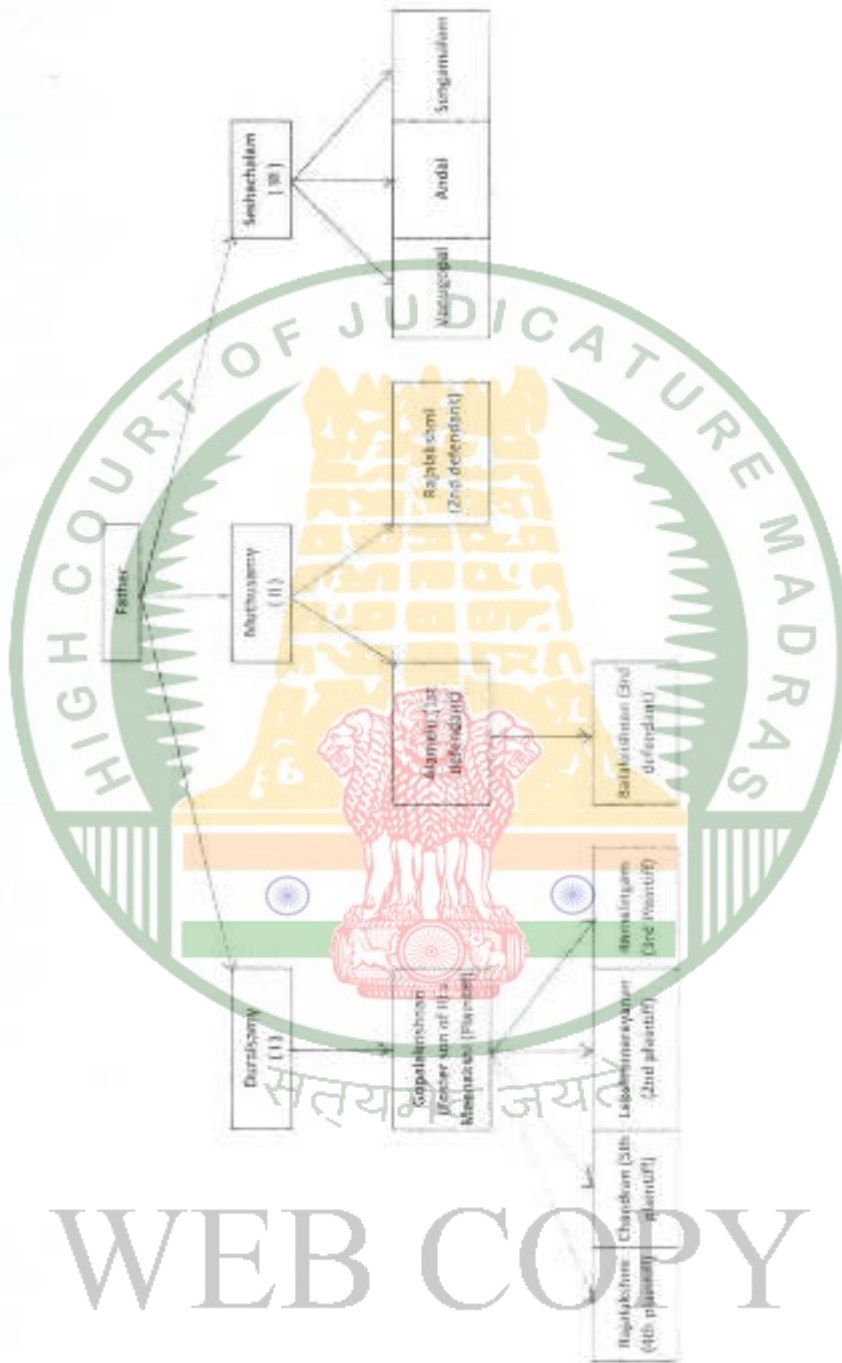
Second Appeal is filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 09.03.2018 made in A.S.No.79 of 2016 on the file of the Principal Subordinate Judge, Cuddalore reversing the Judgement and Decree dated 19.09.2016 made in O.S.No.190 of 2012 on the file of the Principal District Munsif, Cuddalore.

For Appellants : Mr.D.Ravichander

For Respondents : Mr.Arun Anbumani
(Caveator)

JUDGMENT

The plaintiff in a suit for declaration and injunction is the appellants before this Court. The genealogy herein below is being given for ease of understanding the relationship between the parties.



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2.The parties are referred to in the same array as in the suit. It is the case of the plaintiff that in or about 1950 Muthusamy, indicated as II in the genealogy above, gifted the suit properties and other properties to Gopalakrishnan the son of Duraisamy, indicated as I in the genealogy above. The legal heirs of the said Gopalakrishnan are the plaintiffs. It was their case that Muthusamy had only two daughters and therefore brought up his brothers' son Gopalakrishnan as his foster son and it is for this reason that, he had gifted the properties to the said Gopalakrishnan. From the date of the gift the said Gopalakrishnan has been in continuous possession and enjoyment of the suit property and had also been dealing with the properties through registered documents. The plaintiffs would therefore contend that they had perfected title by adverse possession.

3.It was their further case that on 09.04.1959 there was a registered partition deed between Duraisamy and Gopalakrishnan in which the properties were allotted to Gopalakrishnan and described as Schedule-B recognising his title to the same. It is their further case that Muthusamy had thereafter executed a Will in which he had excluded the suit properties which once again confirmed that the suit properties had been allotted to the share of Gopalakrishnan. Thereafter, the plaintiff would contend that on 29.01.1975 there was a partition between Gopalakrishnan and the plaintiffs and on 09.06.1979 Gopalakrishnan had executed a registered mortgage deed in favour of the government of Tamil Nadu for a crop loan availed by him.

4.On the death of Gopalakrishnan on 04.06.2009 intestate, the plaintiffs have become the joint owners of the suit properties. They have been cultivating on the said lands and in the Thane Cyclone that had swept the coast of Tamil Nadu on 30.12.2011, the Cashew crops were completely destroyed and the 2nd plaintiff had received the compensation for the same. The plaintiffs have been enjoying the properties as absolute owners and all of sudden in the middle of June 2012 the 3rd defendant attempted to trespass into the suit property. The plaintiffs would contend that even assuming that Muthusamy had retained some semblance of right to the suit properties the same had got extinguished. In view of the disturbances by the 3rd defendant the plaintiffs were constrained to file the present suit.

5.The written statement was filed by the 1st defendant and the same was adopted by the 3rd defendant. The defendants, at the outset, would deny the claim of the plaintiffs with reference to the oral gift being executed by Muthusamy had in favour of Gopalakrishnan. It is their case that when Muthusamy died the funeral pyre was lit by the son of Seshachalam (indicated as III in the genealogy) one Venugopal Naidu. The

defendants would contend that the brothers had owned 14.78 acres in Akkathimapuram and 12.84 acres in Ranganathapuram. This extent was partitioned between Gopalakrishnan and Venugopal Naidu. Muthusamy who had a 1/3rd share had released it in favour of the two and this property has been described as A-Schedule and B-Schedule in the written statement.

6.It is the case of the defendants that it is this property that was being enjoyed by the said Gopalakrishnan and Venugopal Naidu. The partition between Duraisamy and Gopalakrishnan will not confer any title on Gopalakrishnan. It is the further case of the defendants that on 12.12.1962 Muthusamy had executed a will in favour of the 3rd defendant in respect of 18 acres of land and house sites. The suit properties were deliberately left out since Muthusamy owned lands apart from the lands bequeathed in favour of the 3rd defendant. In 1965, Muthusamy was afflicted with paralysis and was completely bed-ridden.

7.Therefore, the 1st defendant, the daughter of Muthusamy had to shift her residence to be next to her father and mother along with her husband and son, 3rd defendant herein. Till 1974, the 1st defendant's husband was taking care of the lands after that they had returned to the husband's village leaving behind the 3rd defendant to take care of his grand mother and the properties. Since Gopalakrishnan owned adjacent lands and as the 3rd defendant was very young and Muthusamy's wife was aged, the 1st defendant and her husband had requested Gopalakrishnan to take care of the suit property along with his lands and the understanding was that the profits from the land would be shared 50:50.

8.It is the further case of the 1st defendant that she had raised cashew in the suit property in the year 1990 and they had also started yielding fruit in the year 1997 when the cyclone "Thane" had destroyed the fruit bearing tree, it was only when the compensation was being distributed the defendants had come to learn about the manipulation of the revenue records by Gopalakrishnan who was a Village Munsif.

9.The 1st defendant and the 2nd defendant orally partitioned their property and the suit property was allotted to 1st defendant share and ultimately by registered settlement deed dated 01.07.2010 the defendant had settled the property on the 3rd defendant. The defendants on coming to know about manipulation of the revenue records had immediately filed a complaint with the Police, but, however they had not proceeded since the issue was Civil in nature. Therefore sought for the dismissal of the suit.

10.The plaintiff had filed a reply in which they had in very clear terms stated that their claim to the suit property was only by way of an adverse possession. The plaintiff has made the following statement in their reply statement:

"The only point to be decided in this suit is whether the plaintiffs and their predecessor, Gopalakrishnan has prescribed title by adverse possession."

11.Besides the above statement they had further pleaded that on 09.04.1959 from out of the B-Schedule mentioned in the written statement an undivided half share which belong to Duraisamy was given as Sridhana by him to his daughter Dhanalakshmi, who in turn sold the same to one Kanagarathinam Ammal on 16.03.1998. On the very same day Venugopal Naidu had also sold his share to Kanagarathinam Ammal. The B-Schedule property in the written statement is not in the possession of the plaintiffs and as regards the A schedule property survey Nos.9/2, 9/3, 9/4, 9/5 and 9/14 belongs absolutely to Duraisamy under the partition deed dated 09.04.1959. In 1976 other properties were divided orally between Venugopal Naidu and Gopalakrishnan in which, Gopalakrishnan was allotted properties in survey Nos.1/3, 3/2B, 4/1B, 4/2A, 7/1A, 7/1C, 7/2. The plaintiffs would contend that the defendants cannot attack the settlement deed as it is ancient document.

12.The learned Principal District Munsif, Cuddalore had originally framed four issues and thereafter, after hearing the arguments of the parties had come to the conclusion that the issues which require to be decided were entirely different and proceeded to recast the issues at the time of pronouncing Judgement. The following are the recasted issues:

- i)Whether the plaintiffs have perfected title by an adverse possession?
- ii)Whether the defendants 1 and 2 have title to the suit property?
- iii)Whether the 3rd defendant gets a right by reason of the settlement deed executed in his favour?
- iv)Whether the plaintiffs was in permissive occupation?
- v)Whether the plaintiffs are entitled to the relief?
- vi)Whether the plaintiff's are entitled to an alternative relief?
- vi)What other reliefs the plaintiffs are entitled to?

13.The learned Judge has clearly stated that the evidence has been let in on these very recast issues and arguments have also been addressed on these issues and therefore the learned Judge proceeded to return his findings on the above issues by Judgement dated 19.09.2016. The learned Judge had decreed the suit declaring the right of the plaintiffs to the suit property

and granting the decree for injunction. The said Judgement and decree was taken up on appeal by the defendants 1 and 3 to the Principal Subordinate Judge, Cuddalore in A.S.No.79 of 2016. The learned Subordinate Judge reversed the Judgement and Decree of the Trial Court and held that the plaintiffs had not proved their right to the adverse possession pleaded by them and was therefore not entitled to the decree.

14.It is challenging the said Judgement and Decree the plaintiffs are before this Court. Heard Mr.D.Ravichander, learned counsel for the plaintiffs and Mr.Arun Anbumani, learned counsel for defendants 1 and 2. The learned counsel appearing on behalf of the appellants would contend that Muthusamy had executed a will in the year 1962 which is marked as Ex.A.12, without including the suit properties which clearly prove that Muthusamy had acknowledged the oral gift made by him in favour of Gopalakrishnan. He would further argue that the compensation in respect of the damage to crops during the cyclone has also been given only to the plaintiffs and not to the defendants.

15.He would further argue that Ex.B.10 settlement deed had been executed by the 1st defendant in favour of her son the 3rd defendant only for the purpose of creating documents and this is evident from the fact that the same has not been acted upon. He would also draw the attention of the Court to the evidence of P.W.1 wherein she had admitted that she does not possess any documents to show that she had the right to the suit property but Gopalakrishnan if not from the date of the gift deed by Muthusamy at least from 1975 the plaintiffs have been in continuous possession of the suit property.

16.He would attack the Judgement and Decree of the Subordinate Judge on the ground that the learned Judge has totally overlooked the admissions of the D.W.1 and the contradictions with reference to the tracing of the title and also the fact that the said Gopalakrishnan had been dealing with the property would clearly show that the gift executed in favour of the Gopalakrishnan has been executed and acted upon and therefore they are entitled to the decree as prayed for by reversing the Judgement of the learned Subordinate Judge.

17.They would also raise the ground that when the defendants had come forward with the contention that they had put Gopalakrishnan in permissive occupation of the suit property the Court below ought to have raised an issue and decided upon the nature of possession by the said Gopalakrishnan.

18.Per contra, Mr.Arun Anbumani, learned counsel appearing on behalf of the defendants would contend that the plaintiffs

who comes forward with the case that they have perfected title by adverse possession should have prove the same and in this attempt they had miserably failed. He would further argue that Section 123 of the Contract Act prohibits an oral gift. He would argue that the partition was also brought into existence only after the death of Muthusamy taking advantage of the fact that Gopalakrishnan was Village Munsif.

19.Patta has been issued in favour of the defendants as early as in the year 1974 and kist receipts which has been marked as Ex.B.3 was also available with the defendants upto the year 1974, which was the year till which the 1st defendant and her husband had stayed back in the suit village taking care of the lands. Ex.B.9 kist series would also amply demonstrate that the suit properties in the possession of the defendants.

20.The counsel would further argue that if the oral gift was true then kist receipts would not have been issued in favour of the defendants. Therefore, he would contend that the appeal deserves to be dismissed and the Judgement and Decree of the Appellate Court be confirmed.

21.Heard the arguments on either side and perused the records. From a reading of the plaint it is seen that the plaintiff had come forward with a claim over the suit property on the basis:

A) The oral gift deed by Muthusamy in favour of Gopalakrishnan. and

B) Prescribing title by adverse possession.

The said stance is mutually destructive as the plaintiffs have to elect whether they are claiming title to the property on their own right or whether they recognise the third party's title to the suit property and claim prescriptive title, having taken such contradictory stand in the plaint, in the reply statement the plaintiff had come forward with a clear and categoric case that they have perfected title to the suit property and that they were claiming title only by way of an adverse possession.

22.Having taken this defense the burden is upon the plaintiffs to prove the same. The plaintiffs staked independent right to the defendants property openly and would have to prove their enjoyment and possession of the properties for over the statutory period. The plaintiffs have to prove the point of time from which their possession had turned hostile to that of the actual owner since it is the case of the defendants that they had permitted the said Gopalakrishnan to cultivate in their lands on their behalf as they were absentee landlords therefore the period at which this permissive possession of Gopalakrishnan had turned adverse to that of the original owners has to be

proved by the plaintiffs in which exercise the plaintiffs have miserably failed.

23.The plaintiffs have not been able to show possession for over the statutory period and it an established principle of law that the plaintiffs have to succeed on the strength of their case and not the weakness of the defendants. Once the plaintiffs have taken defense that they have perfected title they must let in evidence to show their continuous possession and this onus has not been discharged by the plaintiffs.

In the said circumstances, I find no substantial Question of Law that has been made out in the above Second Appeal and I also find no infirmity in the order passed by the learned Principal Subordinate Judge in A.S.No.79 of 2016 reversing the Judgement and Decree in O.S.No.190 of 2012. In the result, the Second stand dismissed and the Judgement and Decree in A.S.No.79 of 2016 stand confirmed. There shall be no order as to costs. Consequently, connected Civil Miscellaneous Petition is also closed.

Sd/-

Assistant Registrar(CS III)

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Sub Assistant Registrar

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To,

1. The Principal Subordinate Judge,
Cuddalore.
2. The Principal District Munsif,
Cuddalore.

+1cc to Mr.D.Ravichander, Advocate, S.R.No.25467

+1cc to Mr.Arun Anbumani, Advocate, S.R.No.24918

S.A.No.662 of 2018 &
C.M.P.No.20309 of 2018

KAN (CO)
CS/26/07/2019