



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Judgment Reserved on : 06.03.2019

Judgment Pronounced on : 04.10.2019

CORAM : **THE HONOURABLE Mr.JUSTICE N.SESHASAYEE**

S.A. (MD) Nos.453 & 454 of 2016

and CMP. (MD) Nos.4865 & 8766 of 2016

1.N.Lalitha Bai

2.Sharbie Soorial

3.George

4.Sharlit

5.Belsy Soorial

.... Appellants in both S.As /Appellants /
Defendants in O.S.No.429/2010

& Plaintiffs in O.S.No.189/2010

Vs.

Selvi

.... Respondent in both S.As/Respondent /
Plaintiff in O.S.No.429/2010

& Defendant in O.S.No.189/2010

Common Prayer: Second Appeals filed under Section 100 of the Code of the Civil Procedure against the judgment and decree dated 15.3.2016 made in A.S.Nos.95 and 96 of 2014 on the file of the Subordinate Judge, Kuzhithurai, confirming the judgment and decree dated 03.6.2014 made in O.S.No.429 of 2010 and O.S.No.189 of 2010 respectively on the file of II Additional District Munsif, Kuzhithurai.

For Appellants : Mr.P.Thiagarajan

For Respondents : Mr.K.N.Thampi

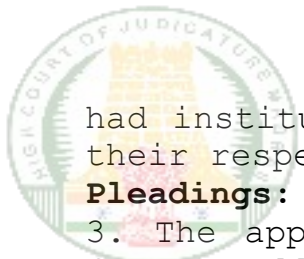
COMMON JUDGMENT

1.1 Two suits were filed. The first one was filed in O.S.No.189/2010 before II Additional District Munsif Court, Kuzhithurai by the appellants herein against the respondent for the cancellation of sale deed dated 21.5.1997, registered at the Kollemcode Sub Registrar Office, and for permanent injunction. The second suit is filed by the respondent herein against the appellants. This suit was laid *inter alia* for a decree of declaration and for recovery of possession after demolishing a newly constructed building in the suit property with past and future mense profits.

1.2 Both the suits were tried jointly by the trial Court and evidence was recorded in O.S.No.429/2010 filed by the plaintiff therein. The trial Court had partly decreed the respondent's suit in O.S.429/2010 and dismissed the appellants' suit in O.S.No.189/2010. The appellants therefore preferred two appeals to the first appellate Court in A.S.95 of 2014 and A.S.96 of 2014 before Sub Court, Kuzhithurai. Both the appeals were dismissed by a common judgement. Challenging these decrees, the appellants have preferred these appeals.

2. Since evidence was recorded in O.S.429/2010, which the respondent

<https://hcservices.ecourts.gov.in/hcservices/>



had instituted, in this judgement, parties would be referred to by their respective rank in that suit.

Pleadings:

3. The appellants in their (as plaintiffs) suit O.S.189/2010 laid for cancellation of a sale deed, has pleaded as below:

- The suit property is described as a plot having an extent 17 cents comprised in old S.F.No.4391 correlated to R.Sy.No.330/1B1 of Methukummal Village. This property is known by the name '*Valia Pazhanzhi Purayidom*'. It originally belonged to the family of the plaintiffs.
- There was a partition of the family properties Vide registered partition deed No.111/1980 of Parassalai Sub Registry, in which suit property came to be allotted to a certain Nesaian, consequent to which Nesaian obtained exclusive possession of the same, and enjoyed it till his death on 27.10.2001. The first appellant is Nesaian's wife, and other appellants are their children. On the death of Nesaian, the appellants succeeded to the suit property, and have been in continuous possession, and enjoyment of the suit property.
- The respondent has no right or possession over any portion of the suit property. While so, on 29.3.2010, the respondent attempted to trespass into the suit property on the strength of a sale deed dated 21-05-1997. On enquiry, the appellants learnt that the respondent had created the said sale deed dated 21.05.1997, fraudulently and by impersonating Nesaian, and had the said fabricated document registered at the Kollemcode Sub Registry as document No.50/1998. Nesaian had never been to the Sub Registry nor had he ever executed any such sale deed.
- Therefore, on 05-04-2010, the appellants obtained an attested copy of the sale deed dated 21-05-1997, and obtained entire knowledge about the same. Based on the said sale deed, no right or possession of the suit property had passed on to the defendant, and the plaintiffs have been in possession and enjoyment of the suit property with other properties of Nesaian as before.
- Since the respondent has attempted to trespass into the suit property on the strength of the impugned sale deed, it has become necessary to have the same cancelled.

Hence, the suit is laid for cancellation of the sale deed dated 21-05-1997, under which respondent makes a claim of title over the suit property and for permanent injunction.

4. In her written statement, the respondent has alleged :

- The suit property is part of a larger extent in R.Sy.No.330/1.



This property was jointly purchased by first appellant's husband Nesaian Nadar along with one Muthu Pillai. These two effected partition of the said property Vide a registered partition deed No.111/1980 of Parassala Sub Registry.

- In the said partition, Nesaian was allotted Plot No.1 having 35 cents, and Plot No.3 having 15 cents. Out of this, Nesaian himself had sold 15 cents in Plot No.3 to one Paul. So far as Plot No.1 is concerned, he sold the northern 10 cents to one Prasanth. Of the remaining, some areas were acquired by the Government on the western side of the suit property for the formation of a road for which Nesaian received compensation.
- On 21-05-1997, Nesaian sold the balance extent of 17 cents in Plot No.1 to the respondent herein. There is no impersonation as alleged. This plot that Nesaian sold to the respondent lies to the south of the plot sold to Prasanth. As per the sale deed, the respondent has become the absolute owner of the property and has taken possession of the same. She has put up an iron fence all around the suit property. She also effected mutation in the revenue records and has been paying necessary tax and rates payable for the suit property. After the sale deed, neither Nesaian, nor any of the appellants have any right over the same. In view of the said sale, none of the appellants could have ever inherited the suit property.
- The allegation that on 29.3.2010, the respondent attempted to trespass into the suit property is an invention intended to provide a fake cause of action for the appellants. Even if anyone has a semblance of any right over the suit property, the same was lost to them in view of the respondent acquiring title to the suit property by adverse possession also.

5.1 Subsequently, the respondent herein has filed O.S.429/2010 and in her plaint, she substantially pleaded the same facts that she had pleaded in her written statement in O.S.No.189/2010. In addition, she has pleaded:

- In June 2010, the appellants attempted to cut and remove the trees in the suit property and also attempted to pluck coconuts from the coconut trees in the suit property. Therefore, on 26.6.2010, the respondent had preferred a police complaint. However, no action was taken on that since fourth appellant herein is a police constable, and so also the wife of the third appellant. The respondent requested the appellants not to indulge in such mischief but that was of no avail.
- Along with the suit, plaintiff has filed I.A.No.694/2010 seeking an order of interim injunction, in which notice was ordered on the appellants. The respondent took notice on the appellants in the address that they had given in their plaint

https://hcservices.courts.gov.in/Services/189/2010 but they evaded notice. However, that did



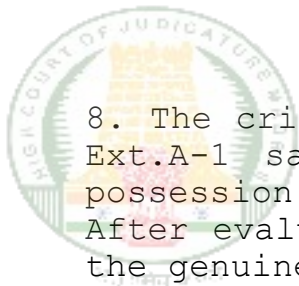
not prevent them from collecting loads of rubble and stones in the suit property and they began putting up a construction of a building, and also digging a pond therein. The respondent therefore, made yet another complaint to police and the police continued to be in a state of inaction. Therefore, the respondent took up an emergent Commission to note down the physical features of the suit property. Yet again the appellants evaded notice on it.

5.2 In the meantime, they had unlawfully trespassed in the suit property and put up a new construction in February, 2000, with no right in them to support the construction. Hence, suit is amended to include a prayer for declaration of title and for recovery of possession with mense profits from February 2011 at Rs.12,349/- per year and also for future mense profits.

6.1 In the written statement filed by the first appellant, she has admitted the joint purchase of the suit property by Nesaian and Muthu Pillai, and sale of 10 cents by Nesaian to one Devaprasath and another 15 cents to one Paul, and that he was in possession of the remaining extent of 25 cents. No part of this 25 cents was ever acquired by the Government. At no time, Nesaian sold 17 cents described as the suit property to the respondent and the same is a fraudulent document, fabricated by the respondent, by impersonating Nesaian. Be that as it may, the first appellant has constructed a house in about 8 cents in a suit property and has been residing there. The suit is a counter blast to the appellants' suit in O.S.No.189/2010.

6.2 In their additional written statement filed by the first appellant, it is pleaded that the respondent is a close relative of the appellants, and therefore she and her husband often used to visit the appellants. Taking advantage of this, the respondent and her husband had created a sale deed in their favour. The respondent has been out of possession as on 21.5.1997, and therefore the suit itself is barred by time.

7. As stated in the opening paragraph, both the suits were tried by the learned II Additional District Munsif, Kuzhithurai and evidence was recorded in O.S.429/2010. For the respondent/plaintiff she had examined herself as P.W.1, and had produced Ext.A1 to A9, of which, Ext.A1 is the sale deed impugned by the appellants. Ext.A2, dated is the partition deed under which Nesaian had obtained 50 cents. The respondent had examined P.W.3 Victoria, the scribe of Ext.A1 sale deed, and she speaks to the execution of the sale deed by Nesaian, and also about the attesting witnesses Raghavan Pillai and Velayudam Nair. P.W.2 is the younger brother of Nesaian and he also speaks about the execution of the sale deed. On the side of the defendants/appellants, the first appellant examined herself as D.W.1 and she has filed Ext.B1 to B3.

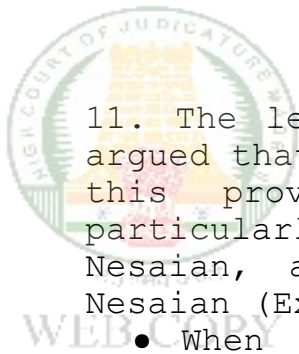


8. The critical question before the trial Court was to ascertain if Ext.A-1 sale deed was genuine, and if respondent had come into possession of the suit property on the strength of this sale deed. After evaluating the evidence before it, the trial court had upheld the genuineness of Ext.A-1 sale deed. Its line of reasoning is:

- Ext.A-1 sale deed is dated in 1997, Nesaian had died in January, 2010 and the suit is laid in April, 2010, some 12 years since Ext.A-1 came into existence. P.W.2, brother of the first appellant (and hence brother-in-law of Nesaian), himself has testified in support of Ext.A-1 sale deed, and there is no reason why he should speak against the interest of his own sister.
- While the respondent has proved Ext.A-1 by examining its scribe, the only witness associated with it and available to speak about it (since one of the attestors had died and the other attestors had become invalid to testify), the appellants had not produced any rebuttal evidence.
- On the appellants' plea of fraud, the pleading is not complete as it did not disclose how the appellants came to know that Nesaian was impersonated.
- Admittedly, the parent or the title document of Nesaian (Ext.A2) has been in the custody of the respondent, and this the explanations of the appellants that the husband of the respondent, who used to help Nesaian in paying tax and rates regarding the suit property might have stolen it from Nesaian's custody appear artificial.
- Turning to the aspect of possession, the trial Court has entered a finding that the appellants had force-entered the suit property and put up a house therein. Here it relied heavily on Exts.C-1 and C-2, the reports of the Commissioner, to come to the conclusion that they had pulled down an old barbed-wire fencing. Consequent to its finding, the trial Court decreed the suit in toto in favour of the respondent and dismissed the appellants' suit.

9. This decree of the trial Court came to be confirmed by the first appellate Court. The line of reasoning of the first appellate court is substantially the same as adopted by the trial court except that the first appellate court did not accept the evidence of P.W.2, the brother-in-law of Nesaian. Challenging these decrees, the present appeals are laid.

10. The appeals are not admitted yet and only notice before admission was ordered. Heard both counsel. And, both sides argued as if it were a final argument in an admitted case.



11. The learned counsel for the appellants (the heirs of Nesaian) argued that the respondent and her husband relatives of Nesaian, and this provided ample opportunities to the respondent, more particularly the husband of the respondent to frequently visit Nesaian, and exploiting these opportunities, the title deed of Nesaian (Ext.A-2) was removed. He further argued:

- When the appellants impugn the genuineness of Ext.A-1 as product of fabrication that before the Sub Registrar, Nesaian was impersonated, then the burden is squarely on the respondent to prove the genuineness of Ext.A-1. She, in fitness of things ought to have applied for an expert opinion on the disputed signatures of Nesaian in Ext.A-1. She did not however, resort to that procedure. Here, the Courts below were in error in believing in the genuineness of Ext.A-1 solely on the factum of production of Ext.A-2 (the title deed in favour of Nesaian) by the respondent.
- Secondly, Ext.A-1 sale deed was stated to have been executed in 1997. And, Nesaian died in 2001, the respondent however, transferred effected mutation in revenue record only in 2005. Why for 8 years since the date of Ext.A-1, and why during the lifetime of Nesaian, patta was not transferred, remains unexplained. And, till Nesaian's death, the respondent did not tried to claim any right in the property.
- Thirdly, under Ext.A-2 partition deed, Nesaian had obtained 50 cents. Out of which he had sold 25 cents in two plots of 15 cents and another 10 cents to two individuals. The balance that ought to be on lie is 25 cents, and the appellants have put up their house in the 8 cents. In the context of the construction, while the respondent has claimed mandatory injunction, there is no corresponding amendment to the plaint as regards the property in relation to which mandatory injunction was sought. Reliance was placed on the authority in **Arulmighu Kothandaramasamy Koil Thirupuvanam V. Vairam** [2012 (I) CTC 708].

12. Per contra, the learned counsel for the respondent would argue:

- The foundation of the case of the appellants is pivoted in fraud, - a fraud in which the respondent has caused impersonation of Nesian for executing Ext.A-1 and having it registered. Here the following aspects are critical.
- The pleading of the appellants is woefully short of the requirements of Order VI Rule 4 CPC. Reliance was to the ratio in **Bijendra Nath `Srivastava V. Mayank Srivatsava** [(1994) 6 SCC 117], **Afsar Sheikh V. Soleman Bibi** [(1976) 2 SCC 142], **Bishundeo V. Seogeni Rai** [AIR 1951 SC 280], and, **K.Kanakarathnam V. A.Perumal** [AIR 1994 Madras 247 (DB)].



- Secondly, under Sec. 60 of the Registration Act, there is a presumption in favour of genuineness of a registered document. However, no attempt was made to rebut the presumption by the appellants. Reliance was placed on the ratio in **Bhagat Ram V. Suresh** [AIR 2004 SC 436].

WEB COPY

- So far as the discrepancy now alleged as regards the availability of an of only 17 cents when it ought to be 25 cents, the same was never pleaded. Nor any attempt was made by the appellants to have the entire property measured.
- So far as the timing of the construction of the residential building is concerned, the appellants themselves have admitted it in ground No:10 of their Appeal Memorandum in A.S.96/2014 where a categorical statement was made that the construction was made after the institution of the suit.

13.1 Primarily, this Court's jurisdiction to intervene in the decree passed by the first appellate Court is circumscribed by the statutory limitation in Sec.100 CPC. All that have been pleaded, proved and now argued before the Court below are essentially on a question of fact as to if Ext.A-1 is fraudulent. On this, both the Courts below have entered a finding in favour of the respondent. The only point where, the appellants attempted to indicate that there indeed exist a substantial question of law is the failure of the respondent to take out a Commission in the face of the pleadings of the appellant that Ext.A-1 is a product of fabrication. This is chiefly an aspect touching on burden of proof. It needs to be stated that it is not always mandatory that the genuineness of an impugned document should always require an expert's opinion. The respondent has proved Ext.A-1 in the best way possible: By examining P.W.3. She has tried to summon the attesting witnesses to Ext.A-1, it turned out that one of the attesting witnesses had died, and another had become invalid, and became incapable of giving evidence. Law does not require a litigant to do that which it is impossible for him to do. Here, the circumstance that attends Ext.A-1 cannot be overlooked. This is all about the respondent having custody of Ext.A-2 partition deed under which Nesaian had derived exclusive right over the suit property and others. Between 1997 and 2010 where was this document? The appellants here have spun a theory of respondent/her husband might have stealthily removed it from the custody of Nesaian, but, this, in the absence of any convincing evidence, can only be considered as a story lifted straight from a fairy-tale. It needs to be emphasised here that this allegation of respondent or her husband had engaged in document-lifting itself has emerged only in the additional written statement of the appellant, possibly to fill an obvious lacuna in the original strategy of the appellants.

13.2 Considering the proof of Ext.A1 in the manner attempted by the respondent, alongside her custody of Ext.A2, do create a strong



probability that Ext.A1 is a genuine document. The burden therefore is on the appellants to rebut it, and here this Court recods that the appellants have done anything more than making an allegation of impersonation.

13.3 Turning to the arguments of the appellants that patta was mutated belatedly, some 8 years after Ext.A1 sale deed is concerned, it must be stated that patta is not a document of title, but it is only a document that supports title.

14. Here on the defense of the respondent founded on Sec.60 of the Registration Act, this Court struggles to accept this argument. The authority in **Bhagat Ram V. Suresh** [AIR 2004 SC 436], does not make a positive statement that Sec.60 of the Registration Act creates a presumption in favour of the genuineness of a registered document. All that it states is that there is a presumption in terms of Sec.114 of the Evidence Act, that all that are statutorily required to be complied with by the Registering Authority for registering a document have been so complied with, and no more.

15. To conclude this Court, notwithstanding the long narration as above, does not find that these appeals involve any substantial questions of law and does not find any merit in these appeals. Accordingly, both the appeals are dismissed the judgment and decree dated 15.3.2016 made in A.S.Nos.95 and 96 of 2014 on the file of the Subordinate Judge, Kuzhithurai, is hereby confirmed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

DS/CM

To:

1.The Subordinate Judge, Kuzhithurai

2.The II Additional District Munsif, Kuzhithurai.

COPY TO:The Section Officer, (2 COPIES)

VR Section, High Court of Madras, Madurai Bench.

+2CC'S to M/s.K.N. THAMPI, Advocate (SR-91474, 91475)

+2 CC to M/s.P.THIAGARAJAN, Advocate (SR-91566, 91567)

Pre-delivery Judgment in
S.A.(MD) Nos.453 & 454 of 2016

04.10.2019

SMA/24/01/2020/8P/9C