

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09 / 07 / 2018

DELIVERED ON : 23 / 03 / 2020

CORAM:

THE HON'BLE MR.JUSTICE M.GOVINDARAJ

SECOND APPEAL NO.800 of 2008

A.Parasakthi (deceased)

1.A.Vagheesan

2.A.Jawahar

3.A.Subash Chandran

1 to 3 represented by their
Power of Attorney

S.Shanmugam Pillai

No.55-E/2, Reddiyar Colony

Kurinchipadi-607 302

Cuddalore Taluk & District

... Appellants/Plaintiff

Vs.

Gurusamy (deceased)

1.G.Sankupathi

2. G.Sasikumar

3. G.Chinna Pillai

... Respondents/Defendants

PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree dated 29.10.2007 made in A.S.No.60 of 2005 on the file of the Subordinate Judge, Chidambaram reversing the judgment and decree of the Trial Court in O.S.No.605 of 1990 dated 21.07.2005 on the file of the Principal District Munsif Court, Chidambaram and allow the second appeal with cost.

For Appellants : Mr.C.T.Mohan
Mr.A.Kuppu Swamy

For Respondent : Mr.M.Christopher

J U D G M E N T

The plaintiff has preferred the above Second Appeal, aggrieved over the judgment and decree of the Lower Appellate Court reversing the decree granted by the Trial Court.

2. For the sake of convenience, the parties are called as per their rankings in the suit.

3. Plaintiff filed a suit for declaration of title and mesne profits on the basis of sale deed dated 01.07.1934. Originally the suit property was purchased by the mother of the plaintiff, viz, Rajambal Achi. She died intestate in the year 1954 leaving behind the plaintiff and two of her brothers. Since the property was purchased by the mother, the plaintiff as her only daughter entitled to inherit the same. Her elder brother died in the year 1977 and she maintained her property through another brother viz Shanmugam Pillai. She had given Power of Attorney to the said Shanmugam Pillai to conduct the case also. The defendant has trespassed the property during August 1983 and refused to deliver possession inspite of repeated demands. She issued a legal notice on 01.12.1987, to which also the defendants failed and neglected to comply with the demand. Hence, she filed the above suit. During the pendency of the suit, the plaintiff and the first defendant died and their legal heirs were impleaded as parties to the suit.

4. The defendants denied the claim of the plaintiff and would contend that they came into possession through sale agreement dated 19.05.1973 executed by the plaintiff's elder brother namely, Dhandapani Pillai, wherein it was agreed to sell the property for a sale consideration of Rs.1500/- and an advance amount of Rs.1000/- was received. It was also agreed that the balance should be paid within six months. As agreed, the defendant paid the entire balance before November 1973. The possession was handed over to them and they are continuously in enjoyment without interruption for more than 12 years. The defendants claim that they are entitled to adverse possession and the plaintiffs have no right to claim title or possession to the suit property. The suit is barred by limitation and therefore the plaintiffs are not entitled to any relief.

5. The trial Court in consideration of the pleadings had framed 3 issues.

1. Whether the plaintiff is entitled to declaration of title
2. Whether the plaintiff is entitled to mesne profits.
3. To what other relief.

6. After discussing the oral and documentary evidence,

the Trial Court decreed the suit in favour of the plaintiff. On appeal Lower Appellate Court had framed the following points for consideration.

1. Whether the decree of the Trial Court is to be set aside.
2. Whether the defendants were in adverse possession.
3. Whether the suit is bad for non joinder of necessary parties
4. Whether the brother of the plaintiffs is the Power of Attorney is correct or not.
5. Whether the Trial Court failed to consider Ex.B1 marked by the defendants.
6. Whether there is any income from the property; and
7. For what other reliefs.

7. The Lower Appellate Court had found that the defendants are entitled to adverse possession and the suit is bad for non-joinder of parties and reversed the findings of the Trial Court and dismissed the suit. Aggrieved over the same, the plaintiffs preferred the Second Appeal and the same was admitted on the following questions of law.

"1. Whether the Lower Appellate Court committed error to give a finding of prescription by adverse possession when such an issue was not at all framed under Order XIV rule 1 C.P.C. In the Trial Court and thereby denial of fair justice to lead evidence both oral and documentary by the Appellants/Plaintiffs and if so whether the Lower Appellate Court judgment is liable to be set aside?

2. Whether the Lower Appellate Court committed error by not following the mandatory procedure laid down under Order 41 Rule 31 C.P.C at the time of determination of the appeal and thereby caused miscarriage of justice as against the Appellants?

3. Whether the Lower Appellate Court has failed to consider that the plea of adverse possession and retaining possession by operation of Section 53A-Part performance- of the Transfer of Property Act are inconsistent with each other and if so whether the Lower Appellate Court judgment is liable to be set aside?

8. Learned counsel for the appellants would contend that the Lower Appellate Court has failed to see that the plaintiff is the absolute heir of the mother in respect of her property as per Hindu Succession Act, 1956. Other than her no body else claimed title to the property not even her brother. Whereas, the first defendant who was a trespasser has questioned the title. When the document dated 01.07.1934 has been admitted,

by virtue of law of succession the plaintiff is the absolute title holder and any transaction between strangers, other than the true owner is not sustainable. In so far as the defendant has entered into an sale agreement and it did not culminate into any conveyance by registered sale deed, he does not have any title. Once he claim that he is the permissive occupant and was put in possession by the vendor, he cannot claim adverse possession. At the most, he is entitled only to file a suit for specific performance. Having failed to secure a perfect title, he is not entitled to deny the title of the plaintiffs. Infact, he had relinquished, abandoned or waived his rights, as early as in the year 1973, when he is said to have entered into a sale agreement. Further, the Trial Court has not framed the issue with regard to adverse possession, Power of Attorney and non joinder of parties. In that event, the Lower Appellate Court ought to have remanded the matter rather than deciding the same without taking additional evidence in this regard. He would rely on the judgments reported in the case of Vishwanatha Achari vs Kanakasabapathy, 2005 4 MLJ 61 (SC), Kadar Hussain vs. O.M.R. Selvaraj, 1997 1 CTC 559, Payasam Karuppannan vs. Viswananthan, 1997 (III) CTC 193 and Standard Chartered Bank and another vs. Custodian and another, AIR 2000 SC 1488.

9. On the other hand, the learned counsel for the respondents would contend that the plaintiffs mother died intestate leaving behind two sons and one daughter. All are having equal share in the property and plaintiff cannot claim independent title. After oral partition the elder brother of the plaintiff viz Dhandapani Pillai was allotted the said property. He entered into an sale agreement vide Ex.B1 stating that he is the absolute owner and put the 1st defendant in possession of the property and from that day onwards he is enjoying the property against the interest of the plaintiff, uninterruptedly for more than 12 years. Plaintiff having failed to prove the title is not entitled to declaration of title. Having failed to establish the title on her own strength, she sought to get the same finding pitholes in the case of the defendant. According to the plaintiff, the defendant has trespassed to the property in the year 1983, whereas the suit came to be filed in the year 1990 which is barred by limitation. Further, she filed a suit for declaration of title without a relief for recovery of possession. Therefore, the suit is hit by Or.II R.2 C.P.C and hence the finding of the Lower Appellate Court on the grounds of lack of title and adverse possession is valid and the judgment of the Lower Appellate Court does not warrant any interference. In support of his case, he would rely on the judgments reported in Union of India & Ors vs Vasavi Co-op Housing Society Ltd & Others, CDJ 2014 SC 006, Harikesavan (deceased) & another vs Purushothaman, CDJ 2012 MHC 4951 and Sayeda Akhtar vs. Abdul Ahad, CDJ 2003 SC 656. Learned counsel would further contend

that when enough evidence with regard to adverse possession of title has been adduced, with the available evidence, the Lower Appellate Court can decide the matter and need not be remanded back.

10. I have considered the rival submissions.

11. The narrow compass in which the above appeal has to be analysed is under the three substantial questions of law. The judgment of Viswanatha Achari vs Kanakasabapathy, 2005 4 MLJ 61, wherein it is held as under:

"...

9. A question was also formulated i.e. whether the lower Appellate Court is justified in dealing with issues other than those framed by the Trial Court and deciding the same in favour of the plaintiff depriving the defendant the opportunity to counter to plaintiff's evidence. It has been clearly stated that there was no issue framed regarding the adverse possession. The lower Appellate Court was not justified in deciding issues which were not framed. The High Court seems to have taken a view that there was no direct reference to the issue of adverse possession. But that is really of no consequence when the specific stand of the appellant was that there was no issue framed relating to adverse possession and, therefore, the First Appellate Court should not have recorded any finding on that regard. The Trial Court had not specifically framed any issue relating to adverse possession. Under Section 107 of the CPC, the Appellate Court has power to frame issue other than those framed by the trial Court. But here again the requirement is to refer them for trial. Consequentially, the defendant would have got opportunity to adduce evidence in that regard."

12. In the instant case also, even though there were many issues with regard to inheritance of title in favour of the plaintiff as well as prescription by adverse possession in favour of the defendant were existing, the Trial Court did not frame any such issue. In the same manner, even though the defendant had disputed the validity of Power of Attorney and maintainability of the suit for non joinder of parties, those issues were also not framed.

13. Since material issues were not dealt by the Trial Court, the parties were deprived from adducing evidence on those issues. The judgment relied on by the defendant in the case of Sayeda Akhtar vs Abdul Ahad CDJ 2003 SC 656, wherein it is held as under:

10. Furthermore, as indicated hereinbefore, the plaintiff sought for a decree for eviction against the defendant also on the ground of commission of nuisance. It is true that the trial court did not frame any specific issue therefore but a bare perusal of the judgment passed by the learned trial court will clearly demonstrate that the parties were aware thereabout and not only adduced evidence in that behalf but also advanced their respective submissions in relation thereto. The court of appeal formulated two specific questions; for determination of the appeal, one of them being:

"Whether the appellant had created nuisance in the premises in question"?

It was held:

"On the point of nuisance, though, no issue was framed by the lower court yet it is clear on the basis of relevant pleadings and evidence produced that the parties were well familiar with the existence of the said issues. Under the circumstances, in face of the want of framing of issues, the prejudice was not caused nor the proceedings were vitiated, it is not proper to remand the case back in view of the decision of the Supreme Court reported as AIR 1963 SC 884"

14. In the above case, the issue specifically addressed to a Rent control proceeding, wherein enough evidence was adduced on the issue of nuisance. The said judgment cannot be applied to a suit for declaration of title where the defendants claim prescription of title by adverse possession. Had the issue of adverse possession was framed, the parties could have adduced evidence and examined witnesses in respect of permissive occupation as well as adverse possession. Whereas, the Lower Appellate Court relying on the evidence of defendants rendered its finding. In the view of the matter, not framing an issue on adverse possession deprived the plaintiff from adducing evidence on that specific issue. In such circumstances, the duty of the Lower Appellate Court should be remitting the matter to the Trial Court. Therefore, the first question of law raised by the appellants is sustainable and answered in favour of the appellant / plaintiff.

15. As discussed earlier, the defendant rested his title on the basis of a sale agreement which did not culminate into a valid sale as per Sec. 54 Explanation III of the Transfer of Property Act. On the other hand, contrary to the said stand claimed adverse possession against the plaintiff. The defendant had not issued reply to the legal notice issued to the plaintiff claiming adverse possession. Then the issue to be decided is as to whether it is permissive occupation or adverse possession, the Lower Appellate Court should have framed the issue as a point for determination and answered the same and rendered its decision with reasons. The Division Bench of this Court in the case of K.M.M.Kadar Hussain vs. O.M.R Selvaraj and two others, 1997 1 CTC 559, it is held as under:

"...

11. We have gone through the judgment of the learned single Judge. We are of the view that the judgment is defective, in that the learned Judge has not followed the provisions under Order 41 Rule 31, C.P.C. As rightly pointed out by the learned Senior Counsel for the appellant, it is also incumbent on the part of the Appellate Court to raise points for determination just to clear up the pleadings and focus the attention of the court and of the parties on the specific and rival contentions, which arise for decision. One of us (AR. Lakshmanan, J.) sitting single, in Kannammal v. Kuppanna Gounder, (1996) 2 MLJ 550, following a Division Bench of this Court in Visalakshi Ammal v. Dhanalakshmi Ammal 1989 (2) L.W. 414 and for the reasons stated in the order, has set aside the judgment of the First Additional District Judge, Coimbatore and remitted back the matter to the said Court, to dispose of the appeal afresh on merits and in accordance with law and after affording opportunity to both the parties, within three months from the date of receipt of copy of the judgment."

16. The Lower Appellate Court had taken the issue of adverse possession alone as point for consideration, leaving out the issue of permissive occupation. If both the points were taken into consideration, it would have necessitated additional evidence. But deciding only on point on the available evidence is contrary to the mandate under Order 41 Rule 31 CPC. In so far as there was little or no evidence on those issues, it is proper to remit the matter to Trial Court. Likewise, not framing issues with regard to non-joinder of parties and validity of power of

attorney, the plaintiff was deprived of letting in evidence. In consideration of the above discussions, the second and third questions of law are answered in favour of the appellant.

17. Therefore, to avoid all these inconsistencies with regard to title, non-joinder of parties, permissive occupation and adverse possession and law of limitation, the Lower Appellate Court ought to have remanded the matter back to the Trial Court for framing the above issues for additional evidence. In so far as the decision of the Lower Appellate Court on the above issues without sufficient evidence is not sustainable.

18. In fine, the judgment and decree dated 29.10.2007 passed in A.S.No.60 of 2005 by the Subordinate Judge, Chidambaram and the judgment and decree dated 21.07.2005 passed in O.S.No.605 of 1990 by the Principal District Munsif, Chidambaram are set aside and the Second Appeal is allowed. Since relevant issues were not framed, the matter is remanded back to the Trial Court for framing all relevant issues, provide opportunity to both the parties to adduce evidence and to decide the matter afresh. No costs. Connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (ADI MDU)

//True copy//

Sub Assistant Registrar

kpr/tk

To

1. The Subordinate Judge, Chidambaram
2. The Principal District Munsif Court, Chidambaram

Copy To
The Section Officer,
VR Section, High Court, Madras.

+1cc to Mr.C.T.Mohan, Advocate SR.No.24571

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PA (CO)
GMY (22/10/2020)