

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:07.10.2020

Pronounced :14.10.2020

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal Nos.115 and 116 of 2010
and
M.P.No.1 of 2010

1.Mangaiyarkarasi (deceased)
2.Deivasigamani
3.Ganesan
4.Vijayalakshmi
5.Pushpa

(Appellants 2 to 5 on recorded as LRS of the deceased 1st appellant vide order of Court dated 15.07.2015 made in M.P.No1 of 2015 in S.A.No.115 of 2010)

.. Appellants in
S.A.No.115 of 2010/
Appellants 2 to 6/
Plaintiffs 2 to 6

/versus/

1.Anandan
2.Kairunnissa

.. Respondents in
S.A.No.115 of 2010

1.Subramani
2.Mangaiyarkarasi (Died)
3.Ganesan
4.Deivasigamani
5.Pushpa
6.Vijayalakshmi

(Appellant 3 to 6 on recorded as Lrs of the deceased 2nd appellant vide order of Court dated 15.07.2015 made in M.P.No.1 of 2015 in S.A.No.116 of 2010)

.. Appellants in
S.A.No.116 of 2010

/versus/

Anandan

.. Respondent in
S.A.No.116 of 2010

Prayer in S.A.No.115 of 2010: Second Appeal has been filed under Section 100 of the Civil Procedure Code against the judgment and

decree dated 31.08.2009 made in A.S.No.42 of 2003 and Cross Appeal to A.S.No.42 of 2003 on the file of the Subordinate Judge, Ranipet, Vellore District reversing the judgment and decree dated 11.04.2003 made in O.S.No.131 of 1996 on the file of the District Munsif-cum-Judicial Magistrate, Arcot.

Prayer in S.A.No.116 of 2010: Second Appeal has been filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 31.08.2009 made in A.S.No.35 of 2007 on the file of Subordinate Judge, Ranipet, Vellore District reversing the judgment and decree dated 11.04.2003 made in O.S.No.143 of 1996 on the file of the District Munsif-cum-Judicial Magistrate, Arcot.

For Appellants : Mr.T.Dhanyakumar
(both cases)

For Respondents : M/s.R.T.Sundari for R1
(both cases) No appearance for R2

COMMON JUDGMENT

(The case has been heard through Vedio Conference)

0.66 cents land in S.No.39/1 at Kilminnal Village, Walaja Taluk, Vellore District is the subject matter of these two second appeals. Under a registered sale deed dated 07/02/1968, one Kairunnisa purchased the property from K.T.Haji Abdul Rashid Sahib and Kulsambi. Claiming title over the said property, two suits came to be filed. The first suit by Jayavelu (O.S.No.131/1996) and another by Anandan (O.S.No.143/1996). They both claimed Kairunnisa as their vendor. Alleging that she executed an agreement for sale in the year 1976 and a sale deed in the year 1979, Jayavelu sought for declaration of title and injunction. Alleging that she executed a registered sale deed in the year 1994, Anandan sought for declaration of title and recovery of possession.

2.The suit filed by Jayavelu Gounder before the Munsif Court, Ranipet in O.S.No.639/1994 was later transferred to the District Munsif Court, Arcot and renumbered as O.S.No.131/1996. Pending suit, Jayavelu died and his legal heirs got themselves impleaded to pursue the suit.

3.The case of the plaintiffs in the Suit O.S.No.131/1996 is that, Kairunnisa agreed to sell the suit property for Rs.11,000/- and received advance of Rs.2,000/- on 20/05/1976. After executing the sale agreement, she left to Bangalore handing over the possession and title document of the suit property to Jayavelu. On 20/05/1979, she received Rs.5,000/- towards part sale consideration and executed sale deed. She agreed to come for registration of the sale deed on receipt of

the balance sale consideration of Rs.4,000/-. Jayavelu later paid Rs.4,000/-, but Kairunnisa, due to her ill-health was not able to come to Arcot for registration. However, Jayavelu is in continuous possession of the property since 1979 without any interruption. While so, Anandan trying to forcefully take possession of the property claiming title over the property through a fraudulent sale deed executed by Kairunnisa in his favour. Hence, suit for declaration and permanent injunction. Anandan filed a counter suit O.S.No.143/1996 against Jayavelu and others for declaration of title and delivery of possession on the basis of the registered sale deed dated 18/10/1994 executed by Kairunnisa through her Special Power of Attorney Abdul Majeeth after receiving sale consideration of Rs.19,800/-.

4.The trial Court taking note of the fact that the suit property and contesting parties in both the suits are one and the same, conducted joint trial. Common evidence was recorded in O.S.No.131/1996 and the Court delivered common judgement. In O.S.No.131/1996 the Court dismissed prayer to declare title and granted permanent Injunction in favour of Jayavelu vagaiyara, in view of his possession admitted in the recital of sale deed dated 18/10/1994 executed by Kairunnisa in favour of Anandan and the admission of Anandan in his suit (O.S.No.143/1996) claiming recovery of possession.

5.The suit in O.S.No.143/1996 filed by Anandan for declaration of title and recovery of possession and the trial Court dismissed the suit. As a result, the declaration of title sought by Anandan as well as Jayavelu vagaiyar was dismissed. Injunction sought by Jayavelu Vagaiyara was allowed.

6.Anandan preferred A.S.No.35/2007 aggrieved by the dismissal of his suit in O.S.No.143/1996. He also filed A.S.No.42/2003, aggrieved by the decree of injunction granted against him in O.S.No.131/1996. In that appeal, Jayavelu Vagaiyara filed Cross Objection, on being aggrieved by the dismissal of their declaration of title relief. The first appellate Court allowed A.S.No.35/2007 and A.S.No.42/2003 filed by Anandan. It dismissed the cross appeal filed by Jayavelu Vagaiyara. Resulting in dismissal of the suit O.S.No.131/1996 filed by Jayavelu Vagaiyara and allowed the suit O.S.No.143/1996 filed by Anandan.

7.These second appeals are filed by Jayavelu Vagaiyara on the ground that, the lower appellate Court erred in reversing the trial Court finding regarding the possession. The fact that Kairunnisa, on execution of Ex.A-2 sale deed dated 20/05/1979, abandoned her right as owner has not been properly appreciated by the lower appellate Court. The possession of the suit property was given to Jayavelu by Kairunnisa as part performance

of the contract. The appellants are in possession and enjoyment of the property since 1979. The same is candidly admitted by Kairunnisa in Ex.B-2, the sale deed date 18/10/1994 executed in favour of Anandan. Having handed over the possession and transferred the title under Ex.A-2, Kairunnisa has no alienable right to execute sale deed in favour of Anandan, after lapse of 18 years. The trial Court, taking note of the suspicious circumstances under which the special power of attorney Ex.B-5 executed by Kairunnisa in favour of Abdul Majeeth, at Salem and the execution of sale deed Ex.B-2 through the special power agent to Anandan, rightly dismissed the suit for declaration and recovery of possession filed by Anandan. Whereas, the lower appellate Court has erroneously held the unregistered sale deed Ex.A-2 is inadmissible in evidence to decide title. The lower appellate Court failed to note that necessary stamp duty penalty was paid for deficit of stamp in respect of Exs.A-1 and A-2.

8.The Learned counsel for the appellants further contended that, in spite of proving through Exs.A-1, A-2 as well as Ex.B-2 that the possession of the Jayavelu vagaiyara was in consequence to part performance, the lower appellate Court erred in holding the plaintiffs in O.S.No.131/1996 are trespassers. The appellants have proved through documents that the vendor Kairunnisa handed over the possession of the suit property on receipt of part sale consideration and Jayavelu vagaiyara are in possession of the property for more than 18 years. Their continuous possession adverse to the title holder not taken into consideration by the lower appellate Court. Further, it did not frame any point regarding adverse possession for determination under Order 41 Rule 31 of CPC.

9.The Learned counsel for the appellants submitted that, the lower appellate Court erred in allowing the suit O.S.No.143/1996 filed for declaration of title and recovery of possession, which is per se barred by limitation. The vendor of Anandan had no alienable title as on 18/10/1994 after she sold the property to Jayavelu 18 years ago. So, the decree of declaration and recovery of possession in favour of Anandan passed in his suit O.S.No.143/1996 is perverse.

10.Per contra, the learned counsel for the 1st respondent / Anandan submitted that, the appellants' relief for declaration of title was based on Ex.A-1 and Ex.A-2. They relied upon Ex.A-5 to Ex.A-8 kist receipts and Ex.A-9 Adangal to prove possession. The possession admittedly being a permissive possession, the appellants are not entitled to a take the mutually contradictory plea of adverse possession. In the suit for declaration, based on derivative title, the plea of adverse possession raised at appellate stage along with the plea of title to the property under a document is self destructive.

11.The learned counsel for the 1st respondent herein submitted that the trial Court erred in holding that the 1st respondent failed to prove the valid execution of Ex.B-2 by examining the vendor or her special power of attorney. The same was rightly reversed by the lower appellate Court holding that Ex.B-2 is a duly registered sale deed. The validity of the registered documents not denied or disputed by the Executant Kairunnisa. Ex.B-5 special power of attorney deed registered at Salem Sub Registrar Office and Ex.B-2 sale deed registered at Arcot Sub-Registrar Office proved through DW-2 Munusamy, who is the attesting witness for both Ex.B-5 and Ex.B-2. After the purchase of the property for sale consideration of Rs.19,800/-, the mutation of revenue records, payment of kist for the property are proved through documents.

12. FINDING :

Declaration relief:

The contesting parties have laid suit for declaration of title tracing their title through Kairunnisa. The plaintiffs in O.S.No.131/1996 (Jayavelu Vagaiyara- appellants herein) rely upon unregistered , un-stamped documents Exs.A-1 and A-2 which are sale agreement and sale deed executed in the year 1976 and 1979 respectively. The plaintiff in O.S.No.143/1996 rely upon Ex.B-2, the registered sale deed executed in the year 1994 by Kairunnisa through her power agent.

13.The recital of the Ex.A-1 and Ex.A-2, indicate that Kairunnissa, had agreed to sell the suit property to Jayavelu for a sale consideration of Rs.11,000/- and had received Rs.2,000/- as advance on 20/05/1976 and the time for completion of contract was fixed as 20/06/1976. As per Ex.A-1, the said period is essence of contract. The case of the appellants herein is that Jayavelu paid advance of Rs.2,000/- on 20/05/1976 and three years later, a sum of Rs.5,000/- towards part sale consideration on 20/05/1979 and got Ex.A-2 executed by Kairunnissa. On that date, he also took possession of the suit property. For not registering the document, it is stated that Kairunnissa was not well at that time, so, she promised to come to Arcot later and get the document registered. This never happened. The said Kairunnisa though arrayed as first defendant in the suit O.S.No.131/1996 she remained ex parte. There is no proof for payment of balance sale consideration of Rs.4,000/- and reason for not registering the sale deed. Though PW-1 says that his father Jayavelu went to Bangalore and gave the balance to Kairunissa, it is an uncorroborated self-serving statement, without any documentary proof. PW-2-evidence is not supportive to the plaintiffs case. The appellants have not laid the suit for specific performance but for declaration of title based on unregistered, unstamped, unproved document Ex.A-2.

14.However, Kairunnisa in Ex.B-2 dated 18/10/1994 has referred about her agreement with Jayavelu in respect of the suit property and his failure to perform his part of contract within the time specified. She has sold the property to Anandan for a sale consideration of Rs.19,800/- with specific mentioning about the possession with Jayavelu and subject to that encumbrance, the sale deed is executed.

15.In view of these facts, the Courts below, after appreciating the documents and evidence, weighing the right of the agreement holder vis-a-vis the subsequent purchaser, had rightly rejected the declaratory relief sought by the appellants, since they have not attempted to complete the contract or enforce the contract in the manner know to law. After getting possession of the property on paying part consideration, the appellants predecessor Jayavelu had not evinced any interest to pay the balance sale consideration and get the contract complete to get the protection under Section 53 A of the Transfer of property Act, 1882. It is admitted by PW-1 son of Jayavelu that his father never expressed his ready and willingness to perform the remaining part of his contract or called upon the vendor to come and register the sale deed after receiving the balance sale consideration of Rs.4000/-.

16.It is also pertinent to point at this juncture that, the appellants while laying their suit O.S.131/1996 for declaration of title were aware of the fact that their vendor Kairunnisa had executed a sale deed in favour of Anandan through her special power of attorney. Based on the sale deed Ex.A-2, they failed to seek specific performance within the period prescribed under law and also not sought relief to declare the sale deed Ex.B-2 executed by Kairunnisa in favour of Anandan as invalid. They have pitted an unstamped unregistered document executed in the year 1979 against a duly registered sale deed of the year 1994 for the relief of declaration of title, without any attempt to enforce the terms of the documents executed in the name of Jayavelu.

17.Hence this Court finds no merit in the appeal against the dismissal of the appellants prayer for declaration of title.

18. Possession:

The trial Court on considering the evidence let by the parties, had held that appellants are in possession of the suit property since 1979. They have paid kist and adangal are in their name. Referring the relief of recovery of possession sought by the respondents herein in his suit O.S.No.143/1996, the trial Court held that the possession with Jayavelu vagaiyara is admitted, so granted permanent injunction against the respondents and his vendor. On appeal, the appellate Court has held that the appellants are squatting over the suit property

without the sale deed (Ex.A-2) registered. Therefore, their possession is wrongful possession. So their cross objection was rejected. A.S.No.35/2007 and A.S.No.42/2003 were allowed.

19.The facts pleaded and proved establish that Jayavelu entered into sale agreement with Kairunnisa on 20/05/1976. After three years, it is claimed that he was put in possession of the suit property by Kairunnisa on execution of sale deed in his favour on 20/06/1979. The said sale deed is an unregistered document. Section 17 (1) (b) of the Registration Act, mandates registration of sale deed of immovable property worth above Rs.100/-. The sale consideration shown in Ex.A-2 is Rs.11,000/-. Though the document is not a registered document, the Courts below have received it as evidence under Section 49 of the Registration Act, since it was produced for collateral purpose to prove part performance under Section 53A of the Transfer of property Act, 1882. However, the possession obtained under Section 53A of the Transfer of property Act, 1882 can be used only as a shield. It cannot be invoked for setting up title under unregistered document. To buttress this view, this Court rely on the Privy Council judgment Probodh Kumar Das & Others Versus Dantmara Tea Co. & Others reported in AIR 1940 PC 1, wherein it is held that

"..... the plaintiffs brought the present suit in which they seek to have it, declared that the Dantmara Tea Co. Ltd., and others have no right or title to the estate and are debarred from enforcing any right to the estate, including the right to sell tea under the export quota allotted to it or to transfer the quota rights to any person. They also seek an injunction. The defendants challenged the right of the plaintiffs to bring the suit and maintained that they had no title to sue. The Subordinate Judge rejected this plea and decided generally in favour of the plaintiffs but on appeal the learned Judges of the High Court were of the opinion that the suit was not maintainable and dismissed it.

It was conceded by the appellants at their Lordships' Bar that, apart from Section 53-A which was added by Amendment in 1929 to the Transfer of Property Act, 1882, they had no case. But, they contended that, notwithstanding that they had not chosen to sue for specific performance of the contract of 10th October 1931, and notwithstanding that they had taken no steps to complete their title, they were nevertheless entitled under Section 53-A actively to assert the rights of a proprietor in

virtue of the contract of 10th October 1931, and their possession. The position of the law under the Transfer of Property Act, 1882, before the addition to it of Section 53-A has on more than one occasion been expounded by their Lordships and reference may be made to the case in 61 IA 388, where the subject was fully discussed. It is clear that the appellants were well-advised in conceding that if they could not invoke Section 53-A, they were out of Court.

In their Lordships' opinion, the amendment of the law effected by the enactment of Section 53-A conferred no right of action on a transferee in possession under an unregistered contract of sale. Their Lordships agree with the view expressed by Mitter J. in the High Court that "the right conferred by Section 53-A is a right available only to the defendant to protect his possession".

20. The Privy Council in its judgment had referred "Treatise on Transfer of Property Act" by Sir Mulla, and had quoted that, 'Section 53 A is so framed as to impose a statutory bar on the transferor; it confers no active title on the transferee. Indeed, any other reading of it would make a serious inroad on the whole scheme of the Transfer of Property Act, 1882'.

21. Later, following the Privy Council judgment, three Judges Bench of the Supreme Court in Delhi Motor Co and others -vs- U.A. Basrurkar (dead) by his legal representatives and others reported in AIR 1968 SC 794, held that,

"6. In these circumstances, an argument was put forward on behalf of the firm that, though this contract to lease had not been registered, the firm could claim possession under it in view of the provisions of Section 53A of the Transfer of Property Act, because, in this case the Company would be debarred from enforcing against the firm any right in respect of that property of which the firm had already taken possession, viz., part of the Show-Room and a portion of the Balcony. In our opinion, this argument proceeds on an incorrect interpretation of Section 53A, because that Section is only meant to bring about a bar against enforcement of rights by a lessor in respect of property of which the lessee had already taken possession, but does not give any right to the lessee to claim

possession or to claim any other rights on the basis of an unregistered lease. Section 53A of the Transfer of Property Act is only available as a defence to a lessee and not as conferring a right on the basis of which the lessee can claim rights against the lessor. This interpretation of Section 53A was clearly laid down by their Lordships of the Privy Council in *Probodh Kumar Das v. Dantmara Tea Co.*, 66 Ind App 293=(AIR 1940 PC 1).

22. In O.S.No.143/1996, the respondents herein have sought for declaration of title and for recovery of possession. The respondents hold title for the property. Therefore, the appellants are bound to deliver the possession, since they are not entitled for injunction against the true owner. The predecessor of the appellants was put in possession of the suit property by the vendor as a part of performance of an agreement, which remain un-concluded. The appellants have failed to seek enforcement of the said agreement within the time prescribed under the statute. Taking advantage of the absentee landlord, has continue to be in possession wrongfully without paying the balance consideration and without getting the title transferred.

23. In *Alagi Alamelu Achi -vs- Ponniah Mudaliar* reported in AIR 1962 Madras 149, the Hon'ble Judge has held that,

"I am wholly unable to accept this contention. The question in the present suit is not whether the first defendant has a subsisting title. Once the lower appellate Court found that the plaintiffs' possession is wrongful, it immediately followed that such possession is not entitled to protection by an injunction, because such an order will be only assisting the plaintiffs in their wrongful possession. No court can by its own order help a party who is found to be in wrongful possession as against the lawful owner. The fact that if the lawful owner were to institute a suit, he might possibly fail on the ground that he was not in possession within 12 years of suit, could make no difference and that cannot, in my opinion, be a proper justification for the issue of an injunction virtually maintaining or advancing the wrongful act of the plaintiffs. I hold, therefore, that the lower appellate Court

went wrong in granting an injunction against the first defendant."

24.The above dictum had been followed by this Court in subsequent judgments reported in Kammavar Sangam through its Secretary R.Krishnasamy -vs- Mani Janagarajan reported in 1999 (III) CTC 304 and Muniammal -vs- Muthu Gounder (died) and 5 others reported in 2003 (1) CTC 475. Particularly, in Kammavar Sangam case, this Court has categorically held that, against true owner or as against the person having better title, a person claiming possessory title cannot get injunction.

25.To conclude, it is appropriate to extract the dictum of the Supreme Court reported in Prataparai N.Kothari -vs- John Braganza reported in JT 1999 (4) SC 443, which put lid to the issue in hand.

"..... it is quite obvious that the learned single Judge had not taken note of the principle of possessory title or the principle of law that a person who has been in long continuous possession can protect the same by seeking an injunction against any person in the world other than the true owner. It is also well-settled that even the owner of the property can get back his possession only by resorting to due process of law."(Italics supplied).

26.In the instant case, the appellants without title had sought for declaration of title. Based on wrongful possession had sought injunction against true owner. The lower appellate Court has rightly applied the law by allowing the appeals. In the common judgment by the lower appellate Court, O.S.No.131/1996 filed by the appellants herein dismissed and O.S.No.143/1996 filed by the respondent herein allowed.

27.For the reasons discussed above, this Court finds no error in the appreciation of facts and law by the lower appellate Court in its common judgment rendered in A.S.No.35/2007, A.S.No.42/2003 and Cross Appeal. Hence, both the Second Appeals in S.A.Nos.115 and 116 of 2010 are dismissed. No order as to costs. Consequently, connected Miscellaneous Petition is closed.

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Sd/-

Assistant Registrar(CS I)

//True Copy//

Sub Assistant Registrar

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To:

- 1.The Subordinate Judge, Ranipet, Vellore District.
 - 2.The District Munsif-cum-Judicial Magistrate, Arcot.
- +2ccs to M/s.T.Dhanyakumar, Advocate, Sr.No. 34533,34532
+1 cc to M/s.R.T.Sundari, Advocate Sr.No. 34208

S.A.Nos.115 and 116 of 2010
and
M.P.No.1 of 2010

GJ (CO)
RMP (07/05/2021)



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