



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved :04.11.2020

Pronounced on :18.11.2020

CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.905 of 2009

and

M.P.No.1 of 2010

Arogya Sophine .. Appellant / 1st Respondent / Plaintiff

/versus/

1.Arogyasami ..1st Respondent / Appellant / 1st Defendant

2.Fathima @ Fathu .. 2nd Respondent/ 2nd Respondent/ 2nd defendant

Prayer: Second Appeal has been filed under Section 100 of the Civil Procedure Code against the judgment and decree of the learned Principal Subordinate Judge, Villupuram dated 30.01.2009 in A.S.No.46 of 2008 reversing the judgment and decree of the learned Principal District Munsif, Thirukkivilur dated 21.11.2007 in O.S.No.119 of 2005.

For Appellant : Mr.K.Sivasubramniam for
Mr.T.M.Hariharan

For Respondents: Mr.V.Raghavachari

J U D G M E N T

(The case has been heard through Video Conferencing)

The plaintiff is the appellant in this second appeal. The subject matter of the suit is two items of property morefully described in the 'B' schedule of the plaint. The suit initially filed for Declaration and Permanent Injunction. Later, the relief was amended for Declaration, Recovery of Possession and Mense Profits. The Trial Court decreed the suit. On appeal by the first defendant, the same was reversed. Hence, the Second Appeal is directed against the judgment and decree of the first appellate Court, which has set aside the judgement and decree passed by the Trial Court and dismissed the suit.



2.The suit laid by the appellant/plaintiff on the premise that she is the daughter of one Chinnappan. Her father and the first defendant Arokiyasami are sons of late Anthonyuthu. She purchased the 'A' schedule property from Anthonyuthu on 19/11/2004 and enjoying the same. The 'B' schedule property is the pathway and access to the 'A' schedule property. Arokiyasami (first defendant) and his wife Fathima @ Fathi (second defendant) objected her using the pathway in the 'B' schedule property. Hence, she purchased the 'B' schedule property from Anthonyuthu on 25/02/2005 to have access to 'A' schedule property. Knowing this, to cheat her, Arokiyasami illegally got a sale deed in his favour in respect of the 'B' schedule property from Anthonyuthu on 15/03/2005. The defendants on 15/09/2005 forcible trespassed into the 'B' schedule property and had cultivated paddy. Hence, the relief of declaration of title in respect of 'B' schedule property and recovery of possession and mense profit sought.

3.The respondents/defendants, who are husband and wife, contested the suit. They contended that, the suit property owned by Anthonyuthu. Apart from the father of the plaintiff Chinnappan and the first defendant Arokiyasami, there is one more son to Anthonyuthu by name Susai Kulanthai and two daughters by name Lourthmari and Gnanambal. The said Anthonyuthu is also alive. The properties were purchased in the name of the father out of the earnings of his three sons. The property was jointly enjoyed by the family members till misunderstanding between the brothers cropped. Hence, in the year 1983 in the presence of village elders the family properties were divided. Anthonyuthu did not seek share and the property was divided into three portions. Each of his sons were given one portion. The said family arrangement was reduced into writing and signed by the father, his three sons and witnesses. The document in respect of their respective share was also given to the respective sharers. As per the arrangement, the first item property in the 'B' schedule bearing S.No.78/4B6 to an extent of 0.50 cents and the second item property in the 'B' schedule bearing S.No.77/10 to an extent of 0.30 cents, out of 1.05 acres, was allotted to the first defendant. He has invested nearly one lakh rupees to dig borewell and obtained electricity connection in the first item property in the 'B' schedule. In the second item of the 'B' schedule, he has laid cement pipe to carry water for irrigation from the borewell in the first item. He is in possession and enjoyment of the 'B' schedule property for more than 20 years adverse to others. Thereby, he has also perfected the title over the 'B' schedule property by adverse possession. The 'B' schedule property was never a pathway for 'A' schedule property. It is an agricultural land under the first defendant cultivation. After the partition of the family property on 16/05/1983, the Anthonyuthu had no right in the 'B' schedule property. The father of the plaintiff had fraudulently



and cunningly mislead Anthonyamuthu and had got the sale deed registered on 25/02/2005 without any consideration. Hence, the plaintiff is not entitled for the relief prayed.

4.The trial Court framed the following issues:-

- 1.Whether the sale deed dated 25.02.2005 executed by Anthonyamuthu through the plaintiff in respect of 'B' schedule property is genuine and valid?
- 2.Whether the plaintiff was using the 'B' schedule property as pathway?
- 3.Whether the partition dated 16.05.1983 is genuine and valid?
- 4.Whether the items 1 and 2 of the 'B' schedule property allotted to the 1st defendant?
- 5.Whether the 'B' schedule property is in possession of the 1st defendant?
- 6.Whether the 1st defendant has perfected his title by adverse possession in respect of 'B' schedule property?
- 7.Whether the plaintiff is entitled for declaration and permanent injunction in respect of 'B' schedule property?
- 8.What other relief the plaintiff is entitled to?

5.Additional issues:

- 1.Whether the plaintiff is entitled for the relief of delivery of possession by defendants 1 and 2 in respect of 'B' schedule property?
- 2.Whether the averments of the plaintiff that defendants 1 and 2 trespassed into the suit schedule property on 15.09.2005 and cultivated is true?

6.Before the trial Court, two witnesses on each side were examined. 11 documents for the plaintiff and 13 documents for the defendants were marked. The Commissioner Report and Sketch were marked as Ex.C-1 and Ex.C-2.

7.The trial Court accepted the plea of the plaintiff that she had purchased the 'B' schedule property from Anthonyamuthu under sale deed Ex.A-1 and it is a valid purchase from its lawful owner. The contra claim of the defendants regarding the division among the family members in the year 1983 was found to be unbelievable, since after the alleged partition, the son of the defendants had purchased property under Ex.A-10 on 05/08/2004 from Anthonyamuthu. Inclusive of the property purchased by the plaintiff from Anthonyamuthu under Ex.A-1, the second defendant/wife of the first defendant had purchased from Anthonyamuthu, subsequently under Ex.A11. When all three are living under same roof, the defendants suppressing these



transactions had pleaded that in the family arrangement held on 16/05/1983 Anthonyimuthu relinquished all his right in the property and his three sons got divided his property falls to ground.

8.The trial Court held that the alleged partition chit Ex.B-2 is a truncated document without adequate and necessary details required. When the title holder Anthonyimuthu had executed several sale deeds and sold his properties under Ex.A-9 dated 19/11/2004 ('A'schedule property to the plaintiff), Ex.A-1 dated 25/02/2005 ('B' schedule property to the plaintiff), Ex.A-10 dated 05/08/2004 to Amalarasan (son of the defendants) and Ex.A-11 dated 14/03/2005 to the second defendant, all subsequent to the alleged partition on 16/05/1983, made the trial Court to reject the plea that Anthonyimuthu relinquished his right over the property and allowed his three sons to share his property and the alternate defence of adverse possession and perfection of title by prescription also held unsustainable, since the revenue documents filed by the defendants stand in the name of Anthonyimuthu and his wife Kannammal.

9.Hence, for these reasons the suit was allowed and decree of declaration and possession was granted. The trial Court permitted the plaintiff to proceed against the defendants for mense profit separately under Order 20, Rule 12 of CPC.

10.On appeal, the first appellate Court reversed the trial Court finding and allowed the appeal filed by the first defendant. The first appellate Court held that though the partition chit is not registered, it is admissible and proved to be duly executed through witnesses. Referring to the partition chit Ex.B-2 and the sale deeds Ex.A-9, it held that in S.No.77/10, out of 1.05 acres, 30 cents was allotted to the first defendant under Ex.B-2 and 0.25 cents had been allotted to the father of the plaintiff, remaining 49 ½ cents allotted to Susai Kulandai. The said portion was purchased by the plaintiff from Anthonyimuthu under Ex.A-9. Whiles, nothing remains with Anthonyimuthu to sell or alienate in S.No.77/10. Therefore, Anthonyimuthu had no right to sell 4 ½ cents, which is the 2nd item property in B schedule. Like wise, under Ex.B-2, the entire 0.50 cents in S.No.78/4 D 6 had been allotted to the first defendant. Therefore, Anthonyimuthu had no right to alienate 0.11 cents, out of 0.50 cents to the plaintiff which is the first item of 'B' schedule property. The first appellate Court held that the title and enjoyment over the 'B' schedule property had been proved by the first defendant through the evidence of DW-1 and DW-2 and had concluded that in the 'B' schedule property the plaintiff has no right.

11.The second appeal is filed challenging the first appellate Court judgment. On hearing the learned counsel appearing for the appellant and considering the written



3.The defendants, who claim that after the family arrangement and partition in the year 1983 Anthonymuthu had no right in the property is contrary to the sale deed dated 14/03/2005 (Ex.A-11) executed by Anthonymuthu in favour of the second defendant in respect of land in S.No. 78/4 D 6, which is the first item property in 'B' schedule. The feigned ignorance of first defendant about the sale deed Ex.A-11 in favour of his wife second defendant belies the case of the defendants that the family arrangement was acted upon and Anthonymuthu had no right in the suit property.

15.The first appellant Court had proceeding with the assertion that Ex.B-2 is valid and duly proved through witnesses. It had concluded that the defendants are in possession and enjoyment of the 'B' schedule property for more than 20 years. The first appellate Court has failed to note that the sparing parties are family members of Anthonymuthu and the property though alleged to have been divided under family arrangement during the year 1983, the revenue records never mutated as per the alleged family arrangement. Ex.B-2- partition chit is only part of the alleged arrangement. It is not the whole document reflecting the division among the three sons of Anthonymuthu. It is an unregistered document conveying right in immovable property. It is the property purchased by Anthonymuthu and no evidence to show that it is the joint family property. There is no explanation for excluding the daughters from the shares in the property. Despite all these inherent defect in Ex.B-2, the first appellate Court has held this unstamped, unregistered document in respect of immovable property as admissible and held the registered sale deed executed by Anthonymuthu in favour of the appellant/plaintiff as void.

16.According to the respondents/defendants, the partition was effected in the presence of elders and Anthonymuthu properties were divided among his three sons excluding Anthonymuthu by his consent. The terms of partition was reduced into writing in three parts. Ex.B-2 is one among it. This document being not registered as required under Section 17 of the Registration Act, 1908 is not admissible in evidence. Assuming that it was admitted for collateral purpose to objectively consider the rest of the documents, the rest of the documents like Ex.A-1, Ex.A-9, Ex.A-11 sale deeds executed by Anthonysami and dealing the properties as his own and Patta, Adangal and kist receipts which stands in the name of Anthonysami only belie the case of respondents/defendants that Ex.B2 was acted upon by the parties and does not support their case of partition in the year 1983.

17.The first appellate Court has miserably failed to follow the dictum of the Hon'ble Supreme Court rendered in Roshan Singh & Ors. V. Zile Singh & Ors. reported in 1989 (2) LW 98 which the Trial Court has referred and followed. The said case on facts



almost similar to the case in hand in which the Hon'ble Supreme Court has distinguished between the partition and mere list, which records a past transaction. Para 8 of the above said judgment reads as below:-

WEB COPY

"8. It is well-settled that while an instrument of partition which operates or is intended to operate as a declared volition constituting or severing ownership and causes a change of legal relation to the property divided amongst the parties to it, requires registration under S.17(1)(b) of the Act, a writing which merely recites that there has in time past been a partition, is not a declaration of will, but a mere statement of fact, and it does not require registration. The essence of the matter is whether the deed is a part of the partition transaction or contains merely an incidental recital of a previously completed transaction. The use of the past tense does not necessarily indicate that it is merely a recital of a past transaction. It is equally well-settled that a mere list of properties allotted at a partition is not an instrument of partition and does not require registration. S.17(1)(b) lays down that a document for which registration is compulsory should, by its own force, operate or purport to operate to create or declare some right in immovable property. Therefore, a mere recital of what has already taken place cannot be held to declare any right and there would be no necessity of registering such a document. Two propositions must therefore flow: (1) A partition may be effected orally, but if it is subsequently reduced into a form of a document and that document purports by itself to effect a division and embodies all the terms of bargain, it will be necessary to register it. If it be not registered, S.49 of the Act will prevent its being admitted in evidence. Secondary evidence of the factum of partition will not be admissible by reason of S.91 of the Evidence Act, 1872. (2) Partition lists which are mere records of a previously completed partition between the parties will be admitted evidence even though they are



unregistered, to prove the fact of partition."

18. It is not the case of the respondents that they had existing right in the suit property and that was resolved by the arrangement arrived on 16.05.1983 under Ex.B2. When such arrangement is not in respect of the existing right Section 17 r/w Section 49 of the Registration Act 1908 gets attracted. The said judgment of the Hon'ble Supreme Court after referring the Privy Council judgment and the earlier judgment of the Hon'ble Supreme Court has in negative observed as below:-

"13.....The true principle that emerges can be stated thus: If the arrangement of compromise is one under which a person having an absolute title to the property transfers his title in some of the items thereof to the others, the formalities prescribed by law have to be complied with, since the transferees derive their respective title through the transferor. If, on the other hand, the parties set up competing titles and the differences are resolved by the compromise, there is no question of one deriving title from the other, and therefore the arrangement does not fall within the mischief of S.17 r/w S 49 of the Registration Act as no interest in property is created or declared by the document for the first time. As pointed out by this Court, in Sahu Madho Das case, it is assumed that the title had always resided in him or her so far as the property falling to his or her share is concerned and therefore no conveyance is necessary."

19. Based on the Commissioner Report, who had noticed the 'B' schedule property under cultivation of the respondents/defendants at the time of his inspection, the lower appellate Court also went wrong in holding that the respondents/defendants had by adverse possession perfected their title. The Advocate Commissioner was appointed to note down the physical feature. He in his report had clearly stated that to reach 'A' schedule property, the access is only through 'B' schedule property. To claim right of adverse possession first it has to be proved that the possession is held expressly denying the title of the true owner. In the instant case, the true owner is Anthonymuthu. The first defendant have set up title on himself under Ex.B-2 unregistered partition chit. The second defendant have set up title based on Ex.A-11, alleged to have executed by Anthonymuthu, a larger extent in first item of 'B'



schedule property including the 0.11 cents sold by Anthonymuthu under Ex.A-9 which is anterior in point of time. They both together contradictory to the said claim also claim adverse possession over the 'B' schedule property based on long possession and enjoyment.

20. In T. Anjanappa and others -vs- Somalingappa and another reported in [2006 (7) SCC 570] , the Hon'ble Supreme Court has held that:

"12. The concept of adverse possession contemplates a hostile possession i.e a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person, who does not acknowledge the other's rights but denies them. The principle of law is firmly established that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of his title to the property claimed. For deciding whether the alleged acts of a person constituted adverse possession, the animus of the person doing those acts is the most crucial factor. Adverse possession is commenced in wrong and is aimed against right. A person is said to hold the property adversely to the real owner when that person in denial of the owner's right excluded him from the enjoyment of his property.

20. It is well-recognised proposition in law that mere possession however long does not necessarily mean that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of



the adverse possessor actually informing the real owner of the former's hostile action."

21. In the instant case the defendants admit that Anthony Muthu is the real owner. The title is in his name. They claim their title through unregistered document and also through a sale deed executed by Anthony Muthu. The unregistered document Ex.B-2 is inadmissible in evidence for want of registration. Ex.A-11 is not sustainable because it includes the 0.11 cents already alienated to the appellant/plaintiff under Ex.A-1. Adverse possession claim against the father by the son or against the ostensible co-owner has to be proved through unassailable evidence. In this case, the same is lacking. Therefore, for the reasons marshalled above, the first appellate Court judgment deserves to be set aside. Accordingly, the Substantial Questions of Law are answered in favour of the appellant. The trial Court judgment and decree confirmed, setting aside the judgment and decree of the first appellate Court.

22. In the result, this Second Appeal is allowed. No order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

ari

To:

1. The Principal Subordinate Court,
Villupuram.

2. The Principal District Munsif Court,
Thirukkivilur.

3. The Section Officer,
V.R. Section, High Court,
Madras.

+1cc to M/s.V.Raghavachari, Advocate, Vide S.R.No.36874

+1cc to M/s.T.M.Hariharan, Advocate, Vide S.R.No.37340

S.A.No.905 of 2009

and

M.P.No.1 of 2009

CNR (CO)
SB(12/08/2021)