IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 07.08.2019

Pronounced on : 05.06.2020

CORAM: The Hon'ble Mr.Justice N.Seshasayee

S.A.No.1178 of 2005

1.Sethuraman
2.Muthazhagan ...Appellants / Defendants 1 & 2

[2nd Appellant declared as major and his friend, guardian and mother Mathurambal discharged from the guardianship Vide order of Court dated 16/07/2019 made in CMP.No.27/2019 in SA.No.1178/2005)]

Vs.

1.Arulsamy
2.Andavan
3.Sivamalai
4.Jothi
5.Tamilselvi
6.Kalaiselvi ...Respondents 1 to 6
L.Rs of deceased plaintiff /
Appellants 2 to 7 /Plaintiff

Prayer:- Second Appeal filed under Section 100 of Civil Procedure Code against the Judgment and Decree of the Subordinate Judge's Court at Ariyalur, dated 2.11.2004 in A.S.No.6 of 2000, reversing the Judgment and Decree of the District Munsif Court at Jeyankondam, dated 16.9.1999 in O.S.No.371 of 1996.

For Appellants : Mr.A.Gouthaman

For Respondents : Mr.S.V.Jayaraman, Senior Counsel
Assisted by Mr.R.Bala Subramaniam
RR1 2,4,5,6
R3 not ready in notice

JUDGMENT

The defendants, in a suit for declaration of title and for consequential decree of injunction, who having succeeded before the trial Court but, suffered a reversal before the first Appellate Court, have preferred this appeal. Parties would be referred to by their rank before the trial Court.

2.The short sketch of the dispute alongside the evidentiary materials, which it may be stated are substantially admitted, is now provided.

A. Plaintiff's case

- The plaintiff's case is that a certain Gopal Padayachi owned a piece of land measuring 92 cents in Sy.No:227/4B. Out of this, under Ext.A-2 sale deed dated 30-03-1930, he sold 16 cents to his brother Thiruvengada Padayachi. On 03-07-1960, there was a partition among the children of Thiruvengada Padayachi, in which the suit property was allotted to the share of a certain Ramalinga Padayachi, one of the sons of Thiruvengada Padayachi. It may be stated that in the partition deed, the extent which Ramalingam was stated to have obtained is mentioned as 15 cents.

- Long thereafter, on 18.10.1995 under Ext.A.1 Ramalingam had sold 16 cents to the plaintiff. When he purchased the suit property, the plaintiff verified the revenue records and ascertained the title of the vendor. Since the purchase of the property, the revenue records have been mutated, and the plaintiff has been in possession and enjoyment of the suit property and has been paying all taxes and rates payable on the property.

- Alleging that the defendants posed certain threat to his title and possession, plaintiff had laid the suit for declaration of his title over the property he had purchased under Ext.A.1 and for an ancillary relief of prohibitory injunction.

B. The defendant's case:

- The case of the defendants is as follows; Gopal Padayachi, the original owner of the entire 92 cents in Sy.No.227/4B had a son named Rajalinga Padayachi. Rajalinga Padayachi became indebted to certain Duraisamy Mudaliar. To realise the debt, Duraisamy Mudaliar had laid O.S.No.132 of 1955 against Rajalinga Padayachi for recovery of money. That suit came to be decreed. These details are available in Ext.B-11 which is the copy of the suit register of O.S.132/1955. Subsequently, the decree holder laid E.P.No.1125 of 1955 for attachment and sale of few items of properties including the entire 92 cents in Sy.No.227/4B. On 30.11.1956, the sale was held, in which one Shanmuga Mudaliar became the successful purchaser. Ext.B.1 is the sale certificate in which item 4 is the entire 92 cents in Sy.No.227/4B.

- Thereafter, Shanmuga Mudaliar had moved the Execution Court with E.A.No.236 of 1957 for delivery. On 16.03.1957, delivery was effected as could be seen from

Ext.B.11 in O.S.No.132 of 1955. Within few months of taking possession, Shanmuga Mudaliar had sold the entire 92 cents in Sy.No.227/4B to a certain Chellaiah Padayachi under Ext.B.2 sale deed, dated 16.12.1957, eversince, Chellaiah Padayachi had been in pssession and enjoyment of the property and had been paying taxes and rates payable on the property.

- While so, on 04-01-1991, Chellaiah Padayachi died. On 21.10.1993, his children partitioned the properties under Ext.B-13, in which, 92 cents (of which the suit property is a part) comprised in Sy.No:227/4B came to be allotted to the share of the second defendant, the minor son of the first defendant.

The second defendant had filed a separate written statement but has substantially adopted the written statement of his father/first defendant.

3.1 Before the trial Court, both sides adduced oral and documentary evidence, some of which have already been referred to above. On the side of the plaintiff, he examined himself as P.W.1 and also examined his vendor Ramalingam as P.W.2 and three other witnesses. So far as the defendants are concerned, the first defendant examined himself as D.W.1 and he examined the Court auction purchaser under Ext.B-1 Shanmuga Mudaliar as D.W.2. He also examined D.W.3 and D.W.4, both of who are independent witnesses and owners of properties adjacent to the suit property. The trial Court also appointed a commissioner, whose reports came to be marked as Exts.C-1 and C-2.

3.2 Of the various documentary evidence produced, besides those to which reference has already been made herein above, the plaintiff has produced the patta and tax receipts of his vendor (P.W.2), the latest of which was in 1992. The defendants too has produced many tax receipts. They have also produced Ext.B-6, and also few other documents which would be referred to in the course of discussion below.

4.1 The trial Court endeavored an investigation in seeking proof of Ext.A.2, sale deed dated 30.03.1930, and it has held that inasmuch as the original document was not produced, the same cannot be held to have been proved in terms of Section 90 of the Evidence Act. Thereafter, it proceeded to probe into what the plaintiff claims as the relevant patta number and found that the same does not tally. Further, it found certain discrepancy vis-a-viz the total extent to which plaintiff's vendor Ramalingam was entitled to in terms of Ext.A.16 partition deed. It appears that under Ext.A.16, Ramalingam was alloted only 15 cents within 90 cents in Sy.No.227/4B. In the ultimate result, the trial Court dismissed the suit.

4.2 When the dispute reached the first appellate Court at the instance of the plaintiff, the Court found reasons to reverse the findings of the trial Court. Its line of reasoning is essentially founded on the fact that in Ext.B-2 sale deed, which was executed by one Duraisamy in favour of Chellaiah, no boundary description is given to the property in S.No:227/4B. It also relied on the testimony of P.W.2 and the report of the commissioner.

5. Hence, defendants 1 and 2 are before this Court. The appeal was admitted for considering the following substantial questions of law;

> (1)Whether the decree for declaration based upon the opinion of Commissioner regarding possession is valid in the eye of law?
>
> (2)By considering Exs.A-2 and A-1, whether the principle Nemo dat quod non habet(i.e. no one can have a better title than what he had) was applied properly?

6.1 Opening the argument for the appellants, their counsel laid thrust on the fact that at no time the purchaser under Ext.A.2 had taken possession of the property. From 1930, when D.W.2 purchased 92 cents in the Court auction sale held in 1957 (as evidenced by Ext.B-2), not a document was produced to demonstrate the title of Thiruvengada Padayachi, the purchaser under Ext.A.2 sale deed, and necessarily Ext.A.2 has come under a cloud of suspicion. It is not without reason that the trial Court was prompted to seek proof of Ext.A-2, in terms of Sec.90 of the Evidence Act. And, pursuant to his purchase under Ext.B-2 court-auction sale, D.W.2 had taken possession as could be known from the fact that under Ext.B.3, dated 24.04.1958 a lease deed was executed in favour of the judgment debtor in O.S.No.123 of 1955, and subsequently, on 05.09.1960 a possessory mortgage was created, which was later came to be redeemed in 1965. Yet another lease deed was executed in favour of one Govindasamy. Besides, he has also paid land tax, and to prove the same he has produced some documents under Exts.B17 to 20, which commences from mid 1970's. All along, the defendants and their predecessors in title have been in possession of the suit property. Since the date of Ext.A.1 in 1930, not only was the plaintiff not in possession of the suit property but, he had at no time during this interregnum objected to the possession of the defendants.

6.2 This apart, while describing the suit property, the plaintiff has indicated that it as a vacant land whereas, there is a building in the suit property with fencing on all sides, which the Commissioner has noted.

6.3 Turning to the first appellate Court's judgment, the learned counsel argued that the first Appellate Court has erred in adopting a legally impermissible course of relying on the Commissioner's report to enter a finding on plaintiff's possession of the suit property. Finding on a disputed possession of the suit property cannot be relegated to a commissioner, but has to be decided by the court. In all event, even if the plaintiff had acquired some title under Ext.A.1, backed by Ext.A.2 and Ext.A.16 yet, the defendants 1 and 2 have prescribed title to the suit property by adverse possession. He also relied on the Authority of U.Manjunath Rao Vs. U.Chandrashekar [MANU/SC/0956/2017], State Bank of India Vs. Emmsons International Ltd. [MANU/SC/0953/2011], Annakilu Vs. A.Vedanayagam and Others [(2007) 6 MLJ 1494(SC)], Sundaravalli Ammal Vs. Perumal [2011(6) CTC 21].

7.1 Refuting the aforesaid document, the learned senior counsel appearing for the plaintiff argued as below:

- Firstly, the argument on adverse possession by the defendants has to fail; It is founded on what was the law prior to 1963 and not post 1963. As per Article 63 of the Limitation Act, 1963, only title needs to be established and not possession, and only the defendants have to establish adverse possession. Secondly, in order the defendants prescribe title by adverse possession, this has to be both pleaded and proved. However, there are no pleadings on this aspect. The defense offered in this case as disclosed by the written statements is essentially on title and not on adverse possession, and even if it were to be presumed to exist, then the defendants are put to election as they cannot simultaneously sustain his inconsistent defenses. He relied on the authority in K.Gopalan (died) & others Vs. Muthulakshmi [2011(6) CTC 21]

7.2. So far as possession goes there is hardly any document to indicate that the auction-purchaser was in possession. Here, the auction purchaser himself as D.W.2 makes a categorical statement that he was never in possession of the suit property. When the vendor do not have possession, there is no way the purchaser could have obtained possession under Ext.B.2.

7.3 So far as the alleged reliance stated to have been made by the first Appellate Court on the Commissioner's report to enter a finding on possession is concerned, the Commissioner has reported a fact that he has witnessed during his spot-visit and has not made a statement on possession or its character. The first Appellate Court has merely drawn an interference from the same. However, neither any objection was filed to the Commissioner's report nor was the Commissioner cross-examined to dis-prove the fact noted down by him in his report.

8. The legal representatives of the plaintiff has sold the property to one Neduchelliyan pending appeal in 2012. The Civil Miscellaneous Petition No.4522 of 2017 is filed to implead the said Neduchelliyan. But since the plaintiff himself is seen sincerely defending the title he has parted with in favour of his pendete lite purchaser, impleading the very purchaser at this stage may not be necessary. The said Civil Miscellaneous Petition is not pressed by the appellants and hence dismissed.

Of discussion & decision:

9. The second of the substantial question of law, squarely will resolve the issue. The admitted basic premise is that, a certain Gopal Padayachi owned 92 cents in Sy.No:227/4B. According to the plaintiff, in 1930, this Gopal Padayachi had sold 16 cents out of 92 cents to his brother Thiruvengada Padayachi. In the written statement it was pleaded that this assertion of the plaintiff is not true. A copy of the sale deed is marked as Ext.A-2. Its a registered document, and as per the proviso to Sec.68 of the Evidence Act, it is not necessary to prove a registered document unless its execution is specifically denied. The trial court has held that this document was not proved since what was produced was a certified copy to which Sec.90 of the Evidence Act could not apply. But Sec.90 is a commonsensical provision which enables proof of ancient documents aged more than 30 years, since no life can remain immortal. A document admittedly executed and registered in 1930 is required to be proved in 1996 when the suit was laid. The only connect between the title of the plaintiff and Ext.A-2 sale deed is P.W.2, the vendor of the plaintiff and one of the sons of the purchaser under Ext.A-2. During his entire cross examination, it was not even suggested to him that his father had never purchased under Ext.A-2 sale deed. Now, this has to be read along with a patta in Ext.A-3 in favour of P.W.2 which covers an extent of 0.06.0 h or approximately 15 cents. There was no cross examination on Ext.A-3. And there are several tax receipts in favour of P.W.2, but not one of them was pointedly cross examined.

10. While revenue records by themselves are not document of title, they taken along with an assertion of title based on other documents of title would go to fortify a claim of title. Now, civil cases are decided on preponderance of probabilities and law does not prescribe whether the court should adopt deductive logic or inductive logic for organising and

appreciating the evidence. A perusal of the testimony of P.W.2 goes to establish that patta and tax receipts indeed have been proved literally unopposed, and if that is so, could it have been possible without pivoting it on another document in Ext.A-2 sale deed. As stated earlier, the plaintiff has no immediate competency to speak about Ext.A-2 as he is only a purchaser from the son of the purchaser under Ext.A-2, and when P.W.2 was in the witness-box it was not even suggested to him that his father had never purchased any extent under Ext.A-2. Rule of probability strongly preponderates a possibility that the assertion of plaintiff's mode of derivation of title could only be true, and this court subscribes to that view and holds it thus.

11. This has to be now placed on a plane where the Court auction sale as evidenced by Ext.B-1 sale requires a place to be fitted in. Primarily, a court auction sale does not carry a warranty of title. And, hence when the title of the property sold in court-auction is challenged, then the burden is on one who asserts that the judgement-debtor whose property was brought to sale, had title to the property when the property was sold in court-auction. This in essence shifts the burden on the defendants who rely on Ext.B-1 to show that Rajalingam (son of the original owner Gopala Padayachi), had title to the entire 92 cents in S.No:227/4B when the property was sold in Court auction. Once this Court has found that Ext.A-2 is a reliable document, and when the defendants did not establish that Rajalingam had title to the entire 92 cents including the 16 cents covered in Ext.A-2, plaintiff's title traceable to Ext.A-2 cannot be defeated.

12. The learned counsel for the appellant attempted to highlight actual physical possession of the suit property, but here the Commissioner informs the court that only a foundation is available when he visited the property besides a small shed. But, irrespective of it, if the defendants intends to supercede the title of the plaintiff on grounds of possession, then they ought to have pleaded and proved adverse possession, but they have done neither, and hence any rear guard action to prove it would fade into insignificance for want of pleadings.

13. Both sides have produced authorities, but the case can be, and indeed has been decided on more fundamental principles of procedure than that which are founded on the intricate questions of adverse possession.

14. In the result the appeal is dismissed and the judgment and decree of the Subordinate Judge's Court at Ariyalur, dated 2.11.2004 in A.S.No.6 of 2000, is hereby confirmed. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

tsg

To:
1.The Subordinate Judge, Ariyalur

2.The District Munsif, Jeyankondam

S.A.No.1178 of 2005

VD (CO)
kk 5/1