



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 19.02.2020

CORAM :

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

S.A. (MD) .No.157 of 2012

P.Saravanaperumal ..Appellant/ Respondent / Plaintiff

Vs.

1.Soundarakani

2.S.Ramraj

3.S.Lakshmanaraj ..Respondents /Appellants/Defendants

PRAYER : Second Appeal filed under Section 100 of Civil Procedure Code, against the Judgment and Decree in A.S. No.35 of 2011 on the file of the Additional District Judge, Fast Track Court No.II, Thoothukudi dated 06.08.2011 reversing the Judgment and Decree in O.S.No.8 of 2007 dated 02.11.2009 on the file of the District Munsif Court, Sathankulam.

For Appellant : Mr.S.Meenakshisundaram,
Senior Counsel
for M/s.Tamizh Law Firm

For Respondents : Mr.M.Vallinayagam,
Senior Counsel
for Mr.J.Ashok

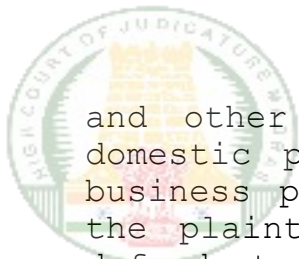
JUDGMENT

Aggrieved over the reversal finding of the First Appellate Court, the present Second Appeal has been filed.

2.The parties are arrayed in the Second Appeal, as per their own ranking before the Trial Court.

3.The brief facts leading to the filing of the Second Appeal is as follows:

The suit property originally belonged to one Arumuga Nadar @ Devasirvatha Nadar. He had two sons namely, Perumal Nadar and Mani Nadar. In between Perumal Nadar and Mani Nadar, there was a oral partition effected and the suit property was allotted to Mani Nadar. Mani Nadar, in-turn, sold the suit property to one Velayutha Nadar. After the death of Velayutha Nadar, his wife Vallithangammal, inherited the property and sold it to the plaintiff by virtue of sale deed, dated 11.06.1958. The plaintiff is in enjoyment of the property and also paid house tax and property tax. The first item of the suit property is a house bearing Door No.4/81



and other three items are adjoining property to the house for domestic purpose. As the plaintiff is residing in Chennai, for business purpose, let out the property to one Thangavel Nadar and the plaintiff used to visit his property during festivals. The defendants are the legal heirs of Perumal Nadar, is residing in the house situated adjoining to the suit property. They have no right over the suit property. On 11.02.2007, the defendants in order to grab the property, had made an attempt to encroach the property, which was resisted by the tenant of the plaintiff. Hence, the suit has been filed for declaration and for permanent injunction.

4. It is the contention of the defendants that admittedly the suit property belonged to one Arumuga Nadar @ Devasirvatha Nadar and he had two sons. But it is the contention that he has no son in the name of Mani Nadar, whereas, the name of other son is Sudalaimani, was adopted by Sivanthapillai Ammal, the sister of Arumuga Nadar. Sudalaimani has no right in the suit property. After the death of Arumuga Nadar, the properties devolved in favour of Perumal Nadar. After the death of Perumal Nadar, the entire properties were devolved upon the first defendant and she has executed a settlement deed in favour of the defendants 2 and 3 and they are in enjoyment of the property. Hence, they prayed for dismissal of the suit.

5. Based on the above pleadings, the Trial Court had framed as many as five issues. The parties went on trial. On the side of the plaintiff, P.W.1 to P.W.3 were examined and Exs.A.1 to A.19 were marked. On the side of the defendants, D.W.1 was examined and Exs.B.1 to B.6 were marked. Exs.C.1 to C.3 were also marked.

6. Based on the evidence and materials, the trial Court decreed the suit in favour of the plaintiff. In appeal, the First Appellate Court reversed the findings of the Trial Court, allowed the first appeal and dismissed the suit. Aggrieved over the same, the present Second Appeal came to be filed.

7. While admitting the second appeal, the following substantial questions of law have been framed for consideration :-

1. Whether the 1st Appellate Court below have not committed error of law in not taken into consideration and not given any reason for not taken into consideration the Court Exhibits Ex.C.1, Ex.C.2 and Ex.C.3 which clearly prove the factum of partition made and which is elaborately discussed and relied upon by the Trial Court ?

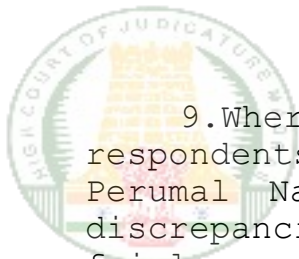
2. Whether the 1st Appellate Court below have not committed error of law in not considering Section 90 of the Indian Evidence Act relied on the



reported Judgment of this Hon'ble Court which made clear that if any document is thirty years old, the Court can very well draw a presumption as to its execution and also attestation and the 1st Appellate Court failed to take into consideration the Ex.A.1 the Original Sale Deed dated 11.06.1958 which is more than 30 years old document ?

3) Whether the 1st Appellate Court below have not committed error of law by shifting the burden of proof on the Appellant to prove the fact of adoption when it is well settled law that a person who seeks to displace the natural succession to property by alleging an adoption must discharge the burden that lies upon him by proof of the factum of adoption and its validity when Trial Court concluded rightly that the factum of adoption is not proved by the respondents who alleged the same ?

8.The learned Senior Counsel appearing for the appellant vehemently contended that the plaintiff has purchased the suit property under Ex.A.1 sale deed, dated 11.06.1958 from one Vallithangammal. Admittedly, the property originally owned by one Arumuga Nadar. He had two sons, namely, Perumal Nadar and Mani Nadar. Though it is the contention of the defendants that Mani Nadar is not his original son, whereas, one Sudalaimani Nadar was another son. At any event, the oral partition pleaded by the plaintiff, in between Perumal Nadar and Mani Nadar clearly established on the basis of the defendants pleadings. The defendants also admitted in the pleadings that apart from the suit property, other property of Perumal Nadar is available. Admittedly, the defendants also residing adjacently. These facts clearly establish the fact that oral partition was effected in between Perumal Nadar and Mani Nadar. The above facts have been clearly established. The documents namely, Exs.A.1 to A.19. Exs.A.2 to A.9, A.12 to A.19 clinchingly established the factum of possession by the plaintiff and from the year 1965, onwards, house tax and property tax have been paid by the plaintiff. These facts clearly prove the oral partition was effected. Similarly, the alleged adoption pleaded by the defendants have not been proved. Once the defendants themselves admitted that the suit property and other property of Arumuga Nadar, is in their enjoyment, the oral partition has to be presumed and P.W.2 and P.W.3's evidence also clearly proves that only the plaintiff is in possession of the suit property and the Commissioner's Report also proves the possession of the plaintiff. The Courts below not appreciated the facts thoroughly and hence, he prayed for allowing the second appeal.



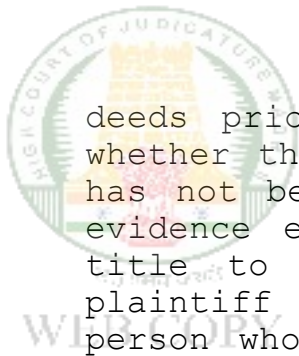
9. Whereas, the learned Senior Counsel appearing for the respondents would submit that the alleged oral partition between Perumal Nadar and Mani Nadar is not established. Though the discrepancies as to one of the son, the learned Senior Counsel fairly conceded that the above discrepancies is not relevant to decide the appeal. Whereas, the oral partition has not been established, title to the property has also not been established. The alleged sale in favour of Velayutha Nadar by Mani Nadar has not been established. No documents were filed in this regard. That apart, the vendor Vallithangammal was very much alive at the time of Trial, but she was also not examined. Further the documents filed on the side of the plaintiff is not sufficient to prove the alleged possession. It clearly shows that the oral partition in between Perumal Nadar and Mani Nadar have not been proved, as contended by the plaintiff. Hence, it is submitted that the First Appellate Court has properly appreciated the evidence and dismissed the suit, the same does not require any interference. Hence, he prayed for dismissal of the second appeal.

10. I have perused the entire materials.

11. The suit is filed by the plaintiff for declaration and permanent injunction in respect of the suit property. The plaintiff has relied on Ex.A.1 sale deed, dated 11.06.1958. The plaintiff claims to have purchased the property from one Vallithangammal. The main contention is that the suit property originally belonged to one Arumuga Nadar and his two sons, namely, Perumal Nadar and Mani Nadar had partitioned the property orally. The property allotted to one Mani Nadar was sold to Velayutha Nadar. After his death, his wife Vallithangammal sold the property to the plaintiff. Therefore, the contention of the plaintiff is that he is the owner of the property.

12. The contention is that the original owner namely, Arumuga Nadar @ Devashirvatha Nadar had two sons, namely, Perumal Nadar and Mani Nadar, which is not disputed. Since the plaintiff claims title over the suit property, based on oral partition between his two sons, to prove the title, oral partition has to be established by the plaintiff. Absolutely, there is no evidence whatsoever on record to prove that the oral partition was effected between the two sons of Arumuga Nadar. It is curious to note that the plaintiff claims title only on the basis of purchase made by him. It is the specific contention that the property has been sold by Arumuga Nadar's son namely, Mani Nadar to Velayudha Nadar, to show that title has been conveyed by the said Mani Nadar in respect of his divided or un-divided share, there is no document whatsoever filed. It is also to be noted that the vendor Vallithangammal was very much alive during the Trial. She was also not examined by the plaintiff.

13. It is further to be noted that the plaintiff is also
<https://hccsrecorder.gov.in/services> of the title deeds. He has not verified any title



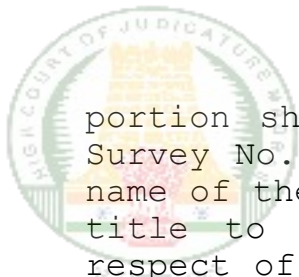
deeds prior to purchase of any property. Such being the fact, whether the title has actually passed to Velayudha Nadar or not ? has not been established. From the above, in the absence of any evidence either to prove the oral partition and also passing of title to Velayudha Nadar, merely on the basis of Ex.A.1, the plaintiff cannot succeed in respect of declaration relief. The person who seeks declaration relief based on title, entire burden lies on him to prove the title, how the title passes on to his vendor. Whether his vendor has acquired any title by the original owner or not ? has not been established. Such being the matter, merely on the basis of Ex.A.1, the plaintiff cannot succeed.

14.The learned Senior Counsel appearing for the Appellant also placed much reliance on the Commissioner's Report and Plan. Though the Commissioner's report indicate that the plaintiff and the defendants were residing within the suit property, such report alone cannot be a piece of evidence to prove the oral partition. The oral partition has to be proved by reliable evidence and it cannot be inferred merely on the basis of Commissioner's report, which was filed at a later point of time.

15.It is the further contention of the plaintiff, he has been in possession of the property. The Commissioner plan clearly shows that apart from the house property, there are vacant sites surrounding the house property. It is to be noted that once the plaintiff has failed to establish the title to the entire suit property, the possession of the vacant site cannot be presumed by the Courts.

16. It is the contention of the learned Senior Counsel appearing for the Appellant that the plaintiff is in possession of the property. To prove his possession, he has filed the documents Exs.A.1 to A.19. On perusal of Exs.A.7 to A.9 clearly shows that the plaintiff has paid property tax and house tax, for the year 1965 and 1968. These facts clearly show that the plaintiff is in fact in possession of the house property. Further Ex.A.12 is a patta issued in the name of the plaintiff in respect of Survey No.181/2B. The patta was issued in the year 1995. On perusal of the above documents with other evidence, particularly, P.W.2, in his evidence has clearly spoken that the house tax is in the name of the plaintiff, for more than 50 years and the Door Number of the property is 4/81 and P.W.3 also in his evidence has spoken about the possession. P.W.3 has further deposed in his evidence that he is in possession as a tenant of the plaintiff's house. It is to be noted that the possession of P.W.3 is not disputed by the defendants, whereas, the only contention is that he is in possession of the said house, with the permission of the defendants. There is no motive whatsoever established against P.W.3 for supporting P.W.1.

17. In this regard, considering the documents Exs.A.7, A.8, A.12 and evidence of P.W.2, this Court has to necessarily hold that the plaintiff is in possession of the house property and also the



portion shown as green in Commissioner's Report and Plan, namely, Survey No.181/2B in respect of which a patta is also issued in the name of the plaintiff. Though the plaintiff has not established his title to the entire property, he established his possession in respect of house bearing Door No.4/81 and vacant site in respect of survey No.181/2B which is shown in green colour in Commissioner's plan. Therefore, the plaintiff's possession has been established in the above two items only. Though the Commissioner's report also pointed out that the vacant site is also in possession of the plaintiff, it is to be noted that admittedly, the title to the property is not established. When the title is not with the plaintiff and the defendants being the legal heirs of the original owner, who are the title holders of the property. Being the original owner's possession, there cannot be any permanent injunction against the real owners.

18. In respect of entire vacant site and possession cannot be presumed merely on the basis of Commissioner's report. In respect of house and vacant site, in respect of, which Ex.A.12 issued relating to Survey No.181/2B, plaintiff's possession has been established. Though the possession is established, it is to be noted that the title to the property has not been established, there cannot be any permanent injunction against the real owners even in respect of house and vacant site, situated in south of the house shown in the Commissioner's plan.

19. In such view of the matter, the suit is for declaration and permanent injunction and the title has not been established the declaration relief has to fail. However, in view of the settled position, in respect of house property and vacant site situated on the south of the house property more fully shown in green colour in the Commissioner's plan, the plaintiff cannot be evicted except by due process of law. Whereas, other vacant lands shown in the Commissioner's report, the plaintiff cannot claim any right over the property as title has not been established. In view of the above the possession follows title, in the given case, the defendants are the title holders, who are the legal heirs of the original owners. Such being the position, the judgment of the First Appellate Court, dismissing the suit cannot be found fault with.

20. In respect of second substantial question of law framed by this Court, though the sale deed is of the year 1958, the presumption under Section 90 can be applied regarding the execution of document and not regarding the contents. Therefore, merely because the document is of the year 1958, the title cannot be inferred on the basis of old documents. As far as the adoption is concerned, the First Appellate Court has placed burden on the plaintiff to prove the adoption rather than the defendants.

21. It is well settled law that a person who plead adoption [~~https://www.hcscs.gov.in/hcscs/~~](https://www.hcscs.gov.in/hcscs/) nature of disposing the person from the natural



succession to the property, the entire burden lies on them, who plead adoption to prove the same. Therefore, the finding of the Trial Court placing the burden on the plaintiff is not correct.

22. As discussed above, the plaintiff has not established title to the property whether the adoption is valid or true, it is not relevant to decide the subject matter of *lis*. In view of the above discussions, the second appeal is dismissed. Once again, reiterated that the plaintiff cannot be dispossessed from the house property bearing Door No.4/81 and the vacant site situated on the south of the house property, more fully, mentioned in Commissioner's plan and shown in green except by due process of law.

23. With the above observation, the Second Appeal is dismissed. However, there shall be no order as to costs.

Sd/-

Assistant Registrar (CS-III)

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Sub Assistant Registrar(CS)

rm
To

1.The Additional District Judge,
Fast Track Court No.II,
Thoothukudi

2.The District Munsif,
Sathankulam.

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The Record Keeper, (2 copies)
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.TAMIZH LAW FIRM, Advocate (SR-7321[F]dated 20/02/2020)

+1 CC to Mr.J.ASHOK, Advocate (SR-7240[F] dated 20/02/2020)

Judgment in

S.A. (MD) .No.157 of 2012

19.02.2020

VB(21.05.2020) 7P 7C

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