



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 30.04.2021

CORAM:

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

S.A.No.370 of 1998

1.Rayar
Natarajan (died)
2.Thavamani
3.Bhoopathy
4.Thanga Pappu

...Appellants 2 to 4/Defendants 2 to 4

vs.

Shanmuga Sundaram

... Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of Code of Civil Procedure against the Judgment and Decree dated 01.10.1996 and made in A.S.No.29 of 1994 on the file of the learned Subordinate Judge, Chidambaram confirming the Judgement and Decree dated 30.06.1994 made in O.S.No.490 of 1992 on the file of the District Munsif Court, Chidambaram.

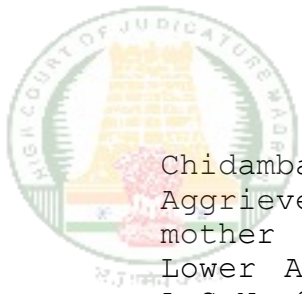
For Appellants : Mr.J.Antony Jesus

For Respondent : No appearance

JUDGMENT

This Second Appeal has been filed challenging the concurrent findings of the Courts below.

2. The first Appellant is the second defendant, the second Appellant is the mother of the first defendant and the third and fourth Appellants are the legal representatives of the deceased Natarajan who was the third defendant in the suit O.S.No.490 of 1992. The respondent/plaintiff filed a suit for declaration and injunction before the District Munsiff Court, Chidambaram in O.S.No.490 of 1992 seeking for declaration that he is the owner of the property bearing old S.No.100/2, New S.No.100/2B measuring 33 cents morefully described in the plaint schedule and he also sought for a consequential injunction against the defendants. The suit O.S.No.490 of 1992 was decreed in favour of the respondent/plaintiff by the District Munsiff Court,



Chidambaram by its Judgement and Decree dated 30.06.1994. Aggrieved by the same, the defendants in the suit as well as the mother of the first defendant preferred an appeal before the Lower Appellate Court namely Subordinate Court, Chidambaram in A.S.No.29 of 1994. The Lower Appellate Court by its Judgment and Decree dated 01.10.1996 in A.S.No.29 of 1994 confirmed the findings of the Trial Court and dismissed the appeal. Aggrieved by the same, this second appeal has been filed by the second defendant and the mother of the first defendant in the suit as well as by the legal representatives of the deceased third defendant in the suit.

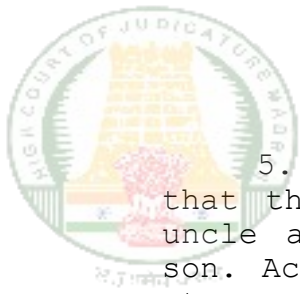
3. This Second appeal was admitted by this Court on 18.03.1998 on the following substantial questions of law:

"1. Whether the findings of the Courts below are vitiated in erroneously considering the evidence relating to adverse possession in the absence of any specific allegation in the plaint and in the absence of any pleading with reference to Ex.A2 to A37?

2. Whether the findings of the Courts below are vitiated by its failure to consider the suit as framed is not maintainable with reference to the larger extent of land claimed especially when the title deeds produced referred to only a smaller extent?

3. Whether the Courts below is right in not considering the sale deed Ex.B2 having regard to the indisputable facts that the 3rd defendant died during the pendency of the proceedings and by virtue of Section 43 of the Transfer of Property Act?"

4. It is the case of the respondent/plaintiff as seen from the plaint that he purchased the suit property measuring 33 cents in old S.No.100/2 and new S.No.100/2B from his mother Logambal ammal under a registered sale deed dated 28.11.1991 which has been marked as Ex.A1 before the Trial Court. According to him, originally the suit property belongs to his mother Logambal Ammal and father Chandrakasa Vandaiyar who were in possession of the same for atleast 45 years. It is also his contention that patta for the property also stood in the name of his mother Logambal Ammal as patta No.55. It is his case that though patta stood in the name of Logambal Ammal, Kist was paid in the name of Logambal Ammal and sometimes in the name of Chandrakasa Vandaiyar. It is also pleaded in the plaint that the plaintiff and his predecessors-in-title are in possession openly, continuously and without interruption for more than the statutory period, as prescribed title by adverse possession. It is also pleaded that his father is dead while his mother is living with him.

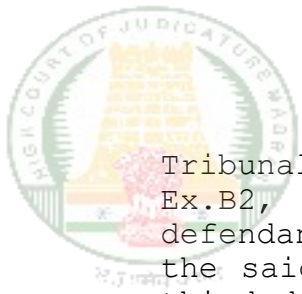


5. The respondent/plaintiff has also pleaded in the plaint that the third defendant Natarajan is the plaintiff's maternal uncle and the second defendant Rayan is the third defendant's son. According to the plaintiff, the first defendant is a total stranger to the plaintiff who does not have any title over the suit property and were never in possession of the same at any point of time. It is also pleaded in the plaint that the defendants are colluding together and claiming rights through invalid documents and trying to trespass into the suit schedule property and hence, the respondent/plaintiff was constrained to file the suit for declaration and for permanent injunction.

6. The case of the defendants in the suit is that the respondent/plaintiff is not the owner of the suit schedule property. According to them, the suit property originally belongs to one Kalyaniammal, wife of Thambusamy Valandaiyar who sold the same to the third defendant Natarajan under a registered sale deed dated 02.04.1939. According to them, the third defendant also took possession of the property and began to enjoy the same. According to the defendants, because of the close relationship, the third defendant allowed the sons of Logambal Ammal to assist him in the agricultural cultivation in his absence or his son. It is the case of the defendants that the third defendant permitted his son, the second defendant to execute a sale deed dated 25.09.1991 which was marked as Ex.B2 in favour of the first defendant. According to the defendants, right from the date of sale deed, the first defendant is in possession and enjoyment of the suit property as the absolute owner. It is the case of the defendants that the sale deed dated 28.11.1991 in favour of the respondent/plaintiff by his mother and other documents filed by them are fabricated documents.

7. Before the Trial Court, Gunasekaran who is representing his minor son Subash, the first defendant examined himself as DW1 and he has stated that Ex.B1 is the sale deed executed in favour of the third respondent Natrajan in the year 1939 and that, he had purchased the suit property in the name of his son Subash from the second respondent under a registered sale deed in the year 1992, Ex.B2. Ex.B3 & Ex.B4 are the kist receipts and Ex.B5 is the Voters' list. One Thiru Jayaraman has been examined as DW2 and Madhiyalagan has been examined as DW3 by the defendants.

8. The Trial Court has also observed in its Judgment and Decree dated 30.06.1994 that the respondent/plaintiff has purchased nine cents of land out of the suit property under Ex.A1 and the remaining 24 cents were in possession and enjoyment of his parents continuously, as seen from the kist receipts which were marked as Ex.A4 to Ex.A40 before the



Tribunal. It has also been observed by the Trial Court that Ex.B2, sale deed dated 29.05.1991 executed by the second defendant in favour of the first defendant does not reveal that the said sale deed was executed only with the permission of the third defendant. It is also observed in the Trial Court judgment that no opportunity was given to the plaintiff by the defendants in their cross-examination for getting any explanation from them with regard to Ex.B2 sale deed. The Trial Court has also observed that the second defendant has not attended the Court inspite of issuance of summons by the Court calling upon him to adduce oral evidence. The Trial Court has held that the respondent/plaintiff has proved through Ex.A43, Ex.A44 and Ex.A45 that he has been residing in Poonthottam village and Ex.A2 and Ex.A3 confirms that the respondent/plaintiff 's mother and father have been enjoying the suit property continuously from the year 1946.

9. The Lower Appellate Court has also observed while dismissing the appeal filed by the defendants that the second defendant under Ex.B2 had neither any right nor any title to convey the property in favour of the first respondent. More particularly, when the property so conveyed, even according to the second defendant stands only in the name of the third defendant as can be seen from Ex.B1 dated 22.04.1939 and that too, when the original owner was admittedly alive. It is also observed in the Lower Appellate Court judgment that neither the vendor under Ex.B2 that is the second defendant nor the original owner of the property so conveyed in favour of the first defendant namely the third defendant were examined on the side of the defendants to show that, the conveyance under Ex.B2 dated 29.05.1991 was valid and genuine. The Lower Appellate Court has also observed that no prudent purchaser will purchase a property by parting with a considerable amount of sale consideration without ascertaining about the fact in whose name the property stands. The Lower Appellate Court has also observed that it is also not the case of the defendants that the original owner namely the third defendant has empowered the second defendant to execute the sale deed in favour of the first defendant. Therefore, the Lower Appellate Court has also held that Ex.B2 sale deed executed in favour of the first defendant is not a genuine document. The Lower Appellate Court has also observed that the respondent/plaintiff has pleaded that he and his predecessors-in-title are in possession of the suit property openly, continuously and without interruption for more than the statutory period which required for adverse possession. The Lower Appellate Court once again reiterated the Trial Court's observation by finding out that despite the respondent/plaintiff attempted to examine the second and third defendants as witnesses under Order XVI Rule 14 of CPC, the second and third



defendants failed to participate in the proceedings by adducing oral evidence. The Lower Appellate Court has accepted the findings of the Trial Court that the sale deed executed by the second defendant in favour of the first defendant (Ex.B2) is invalid in the eye of law and Ex.B5 filed on the side of the defendants will not in anyway strengthen their case as respondent/plaintiff has proved his open and continuous possession of the suit property through a series of kist receipts along with Adangal extract together with corroborative evidence of independent witnesses.

10. Both the courts below have rightly appreciated the evidence available on record and only thereafter has granted the relief sought for by the respondent/plaintiff in the suit. No evidence has been adduced by the defendants in the suit to disprove that the respondent/plaintiff and his predecessors-in-title were not in possession of the entire suit schedule property ever since Ex.A2, sale deed dated 11.11.1946 in favour of Logambal Ammal, the mother of the respondent/plaintiff. Neither the second defendant nor the third defendant was examined as witness before the Trial Court and they failed to depose, despite the respondent's/plaintiff's best efforts to make them to depose as the notice sent by the Trial Court under Order XVI Rule 14 of CPC to the second and third defendants calling upon them to let in oral evidence remained unanswered, despite the receipt of the same by the second and third defendants. The kist receipts Ex.A4 to Ex.A40 have also been marked as Exhibits on the side of the respondent/plaintiff to prove that the respondent/plaintiff and his predecessors-in-title were in possession of the entire suit property ever since the date of Ex.A2 sale deed dated 11.11.1946. No contra evidence has been produced by the Appellants/defendants before the Trial Court to disprove the contention of the respondent/plaintiff.

11. Section 43 of the Transfer of Property Act, 1882 does not apply to the facts of the instant case. Section 43 of the Transfer of Property Act, 1882 reads as follows:

"43. Transfer by unauthorised person who subsequently acquires interest in property transferred.—Where a person fraudulently or erroneously represents that he is authorised to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.



Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option."

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It deals with transfer by unauthorised person who subsequently acquires the interest in any property transferred. The Appellants/defendants claim that during the pendency of the suit, the third defendant died and the second defendant inherited the rights of the suit property. According to them, since the second defendant has sold the property to the first defendant under the sale deed dated 29.05.1991, section 43 gets attracted. Further according to them, even assuming the early transfer made to the first defendant under the sale deed dated 29.05.1991 Ex.B2 by the second defendant is a fraudulent transfer, the second defendant having acquired ownership of the suit property subsequent to the death of the third defendant, the first defendant is entitled to hold over the same as absolute owner. The contention of the Appellants is rejected by this Court.

12. Section 43 of the Transfer of Property Act gets attracted only when the respondent/plaintiff had executed any sale deed in favour of the first defendant fraudulently and thereafter acquired rights in the very same property, but in the case on hand, it is not so. The respondent/plaintiff has not sold the property to the first defendant and therefore, section 43 of the Transfer of Property Act has no relevance to the facts of the instant case. If at all, the first defendant had contractual relationship only with the second defendant and there is absolutely no contractual relationship with the respondent/plaintiff.

13. It has been the consistent stand of the respondent/plaintiff as seen from the pleadings as well as from the evidence available on record that he and his predecessors-in-title are in continuous possession and enjoyment of the entire suit property measuring 33 cents ever since the date of sale deed Ex.A2 dated 11.11.1946. The Trial Court as well as the Lower Appellate Court has rightly appreciated the evidence available on record and only thereafter has decreed the suit in favour of the respondent/plaintiff.

14. Even under section 110 of the Indian Evidence Act, when the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner. In the case on hand, the respondent/plaintiff has produced documents in the form of kist receipts which were marked as Ex.A4 to Ex.A40 before the Trial court to show that he



and his predecessors-in-title were in possession of the property ever since Ex.A2 sale deed dated 11.11.1946, the burden of proving that he is not the owner is on the defendants who claim that the respondent/plaintiff is not the owner. Ex.B3, Ex.B4 & Ex.B5 are the documents filed by the defendants subsequent to the sale deed dated 29.05.1991 (Ex.B2) by which the first defendant claims to be the purchaser of the property from the second defendant. Those documents do not establish that the first defendant and his predecessors-in-title were in continuous possession and enjoyment of the suit schedule property ever since the date of sale deed dated 22.04.1939 (Ex.B1). Having miserably failed to discharge their burden by producing relevant documents, the Trial Court as well as the Lower Appellate Court has rightly rejected the contentions of the defendants/Appellants.

15. The substantial questions of law formulated by this Court at the time of admission of this second appeal are answered against the Appellants/defendants as there is no merit in this second appeal. Accordingly, the second appeal is dismissed. No costs.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

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To

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

Copy to:
The Section Officer,
V.R.Section,
High Court, Madras.

S.A.No.370 of 1998

MG(CO)
SU(07/10/2021)