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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 06.12.2021

DELIVERED ON : 17.12.2021

CORAM:

THE HONOURABLE MR.JUSTICE R. PONGIAPPAN

S.A.No.207 of 2010

and

M.P.No.1 of 2010

1.Raj Mohamed

2.Habi Rahman

3.Jabar Sait

... Appellants/Respondents/Plaintiffs

Vs

Pushpa Ammal

... Respondent/Appellant/5th Defendant

Prayer : The Second Appeal is filed under Section 100 of C.P.C. against the judgment and decree dated 19.10.2009 passed in A.S.No.59 of 2009 on the file of the Principal District Court, Villupuram, reversing the judgment and decree dated 29.09.2008 passed in O.S.No.168 of 2000 on the file of the I Additional Sub Court, Villupuram.

For Appellant : Mr.S.Sriram
for Mr.K.Goviganesan

For Respondent : Mr.A.P.Neelamegavannan

JUDGMENT

The plaintiffs in O.S.No.168 of 2000 on the file of the I Additional Subordinate Judge, Villupuram are the appellants herein. Before the said Court, they filed the above referred suit as against the respondent and four others seeking the relief of declaration in respect of item Nos.1 to 3 of the suit schedule property, declaring that the plaintiffs are the absolute owners of those properties and for recovery of possession.



2. By judgment and decree dated 29.09.2008, the learned Additional Subordinate Judge, Villupuram, allowed the suit partly and granted the relief in respect of item No.3 of the suit schedule property. In respect of item Nos.1 and 2, the suit was dismissed. Aggrieved over the said findings, the fifth defendant alone preferred an appeal in A.S.No.59 of 2009 on the file of the Principal District Judge, Villupuram. By judgment and decree dated 19.10.2009, the learned Principal District Judge, Villupuram had allowed the appeal filed by the fifth defendant and dismissed the suit in entirety. Being dissatisfied over the said findings, the plaintiffs are before this Court with the second appeal.

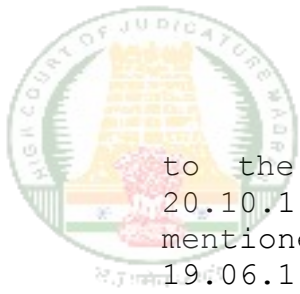
3. For the sake of convenience, hereinafter the parties are called as per their respective litigative status before the trial Court.

4. The laconic averments made in the plaint are as follows:

(i) The suit schedule properties were originally belonged to one Abdul Rowther, son of Khadhar Sha Rowther of Aragandanallur Village. The said Abdul Rowther had three sons, viz., (1) Mohammed Hanifa Rowther/first plaintiff, (2) Kuppaithai Rowther and (3) Syed Mohammed. He had a daughter too by name Rasiya Begum. It was unfortunate that all the three sons of Abdul Rowther were deaf and dumb and were thus handicapped. The Kuppaithai was died in the year 1978 without any marriage. While in a sound disposing state of mind, the said Abdul Rowther executed a registered Will in favour of his sons and the grandchildren namely, the plaintiffs 2 to 4 on 16.09.1969. As the first plaintiff and other sons were deaf and dumb and as they were physically handicapped, one M.S.Kamurutheen was appointed as guardian to the sons of Abdul Rowther. In fact, the said Kamurutheen, who is the brother's son of Abdul Rowther had to act only as the guardian. He had no power of alienation in respect of the suit schedule property.

(ii) The said Kamurutheen leased out the schedule mentioned properties to his brother Abdul Salam. Thereafter, the said Abdul salam was in possession of the schedule mentioned properties as a lessee. Even this occupation is disputed by the plaintiffs. They ignore such a right.

(iii) The said Abdul Salam died in or about 1989. The legal representatives of the above said Abdul Salam said to have executed a sale deed in favour of one Mappillai Mohideen on 01.12.1993 without any right. The said Mappillai Mohideen sold the first and second Items of the schedule mentioned properties



to the defendants 1 to 4 by means of a sale deed dated 20.10.1994. Again he sold the third item of the schedule mentioned property in favour of the fifth defendant on 19.06.1995. The defendants have no title, right or interest over the properties. The alienations made by Kamurutheen and Abdul Salam are not binding upon the plaintiffs.

(iv) Mentioning the above facts, the plaintiffs issued a notice to the defendants on 03.04.2000 and the same was suitably replied by the defendants on 28.04.2000. Since the original Will is in the custody of Kamurutheen, the plaintiffs have filed the registration copy of the Will. Since the defendants are trying to construct superstructure in the suit properties, the plaintiffs are before this Court for the relief stated supra.

5. The averments found in the written statement filed by the fifth defendant are as follows:

(i) It is not correct to state that the suit property belonged to one Abdul Rowther, son of Khadhar Sha Rowther. The execution of the Will dated 16.09.1969 is denied. Abdul Salam was never in occupation of the suit property as a lessee, hence it is denied that he is a lessee in the suit property. The suit property was originally 'Tharisu Land' and encroached by Abdul Salam and he was in possession and enjoyment of the suit property for the period of 30 years. As a true owner, patta was assigned in the name of Abdul Salam. After the death of Abdul Salam, his legal representatives sold the suit property to one Mappillai Mohideen on 01.12.1993. He was in possession and enjoyment of the suit property without any interference, till it was sold to the fifth defendant on 19.06.1995. The sale effected by the legal heirs of the Abdul Salam and Mappillai Mohideen is valid in law and the plaintiffs do not have any right or objection over the same.

(ii) Hence, the suit property was enjoyed peacefully, openly to the knowledge of the plaintiffs by Abdul Salam and Mappillai Mohideen. After due revenue enquiry, patta for the suit property has been changed in the name of the fifth defendant. The other averments found in the plaint are all false. Based on the above said pleadings, the learned I Additional Subordinate Judge, Villupuram framed necessary issues and tried the suit.

6. On the side of the plaintiffs, two witnesses were examined as P.W.1 and P.W.2 and 16 documents were exhibited as Exs.A1 to A16. Similarly, on the side of the defendants, three witnesses were examined as D.W.1 to D.W.3 and 10 documents were



exhibited as Exs.B1 to B10. Apart from those documents, the revenue records pertain to the suit schedule properties were marked as Exs.X1 to X12.

7. Having considered the materials placed before him, the learned I Additional Subordinate Judge, Villupuram concluded the suit that the plaintiff is entitled to the relief in respect of Item 3 of the schedule mentioned properties. In the appeal preferred by the fifth defendant, the learned Principal District Judge, Villupuram held that the findings arrived at by the trial Court is not found to be correct and allowed the appeal. Ultimately the suit filed by the plaintiffs had been dismissed.

8. Aggrieved over the said findings of the Court below, the plaintiffs in the suit are before this Court with the present second appeal. At the time of admission, this Court had formulated the following substantial questions of law:

(1) Whether the Lower Appellate Court is correct in reversing the judgment of the trial Court on the ground that the defendant and her predecessors prescribed their title by adverse possession when the same has not been pleaded or claimed by the defendant and more particularly when the title of the plaintiffs itself is denied?

(2) Whether the Lower Appellate Court is justified in non-suited the plaintiffs without considering Exs.X1 to X12, which will substantiate that the grand father of the plaintiffs were the owner of the suit properties?

9. Heard the learned counsel appearing on either side and perused the materials available on record.

10. It is the case of the plaintiffs that the suit schedule properties were originally belonged to one Abdul Rowther, son of Khadhar Sha Rowther. He blessed with three sons and one daughter. Among which, the first plaintiff is one of his sons. The second son Kuppaiathai died in the year, 1978 without any marriage. The name of the other son is Syed Mohammed and daughter is Rasiya Begum. The further case of the plaintiffs is that all the three sons born to Abdul Rowther were deaf and dumb and were thus handicapped. On 16.09.1969, he executed a Will through which, he bequeathed the suit schedule properties to and



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in favour of his sons and grandsons/plaintiffs 2 to 4. Since the first plaintiff and the other sons were deaf and dumb and were physically handicapped, one M.S.Kamurutheen, who is the brother's son of Abdul Rowther was appointed as the guardian to the plaintiffs 2 to 4.

11. The sum and substance of the case of the plaintiffs is that they derived the title over the suit schedule properties by succession. On the other hand, it is the case of the defendants that the Government, after recognising the possession of one Abdul Salam, granted patta and thereby the vendor of the fifth defendant derived title in respect of the suit schedule property. The submission made by the learned counsel appearing for the respondent is that for the property owned by the Government, Abdul Rowther executed a Will and also the alleged Will dated 16.09.1969 has not been proved in terms of Section 68 of the Indian Evidence Act.

12. It is true that, in order to prove the Will dated 16.09.1969 none of the persons, who has signed as a witness in the said Will, was examined on the side of the plaintiffs in terms of Section 68 of the Indian Evidence Act. Therefore, it was concluded that the alleged Will stated by the plaintiffs has not been proved in accordance with law. Secondly, in order to know whether the suit schedule properties belongs to the Government or not, it would be necessary to see Exs.A11 and A12 pertains to the year, 1961, which are the notices sent by the Tahsildar to Abdul Rowther alleging that the said Abdul Rowther is an encroacher in respect of the suit schedule properties, who is none other than the father of the first plaintiff. In the said notice it was stated that the suit property, viz., Survey No.162/9 is a 'Government Poramboku'. Further in respect of the nature of property, the Tahsildar, Thirukovilur was examined as D.W.3. He gave evidence stating that the suit schedule properties were initially classified as 'Punjai Tharisu' and only in the year, 1979 through the proceedings in No.T.K.T.539/79, the said property was assigned to one Abdul Salam by giving patta, who is none other than the father of the vendor of the defendants. Therefore the materials available on the side of the plaintiffs will not prove the title of Abdul Rowther. Since the present suit has been filed for the relief of declaration and recovery of possession, it is for the plaintiffs to prove their case by exhibiting relevant documents. In this occasion, it would be necessary to see the judgment of the Hon'ble Apex Court reported in (2014) 2 SCC 269 (Union of India and others vs. Vasavi Co-op. Housing Society Ltd. and others). The relevant paragraphs are extracted hereunder:



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"15. It is trite law that, in a suit for declaration of title, burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff.

17. At the outset, let us examine the legal position with regard to whom the burden of proof lies in a suit for declaration of title and possession. This Court in *Moran Mar Basselios Catholicos v. Thukalan Paulo Avira* reported in AIR 1959 SC 31 observed that:

"20. ... in a suit [for declaration] if the plaintiffs are to succeed, they must do so on the strength of their own title."

19. The legal position, therefore, is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. We are of the view that even if the title set up by the defendants is found against (sic them), in the absence of establishment of plaintiff's own title, plaintiff must be non-suited."

13. The principles set out in several of the judgments in support of the case on hand, as rightly pointed out by the learned counsel appearing for the respondent, the plaintiffs have not produced the relevant documents that the suit schedule properties were belonged to one Abdul Rowther. Therefore, in the absence of title, the alleged Will dated 16.09.1969 executed by the said Abdul Rowther is not at all showing any prima facie case in favour of the plaintiffs. On the other hand, in the absence of any material evidence, the plaintiffs as a successor of Abdul Rowther, are not entitled to the relief of declaration and recovery of possession.

14. Though the Lower Appellate Court came to the conclusion that the defendants and their predecessor prescribed the title by adverse possession, being the reason that the plea of adverse possession has not been taken in the written statement, it is not necessary for the Lower Appellate Court to go into the depth of the defendants' case. It is the case of the fifth defendant that her predecessor Abdul Salam was provided with the patta in



the year, 1979. After assigning the suit properties in favour of Abdul Salam in 1979, he became the absolute owner of the suit schedule properties. In the said circumstances, the question of adverse possession and other things not at all arise. But here it is a case that without seeing the same, unnecessarily the lower Appellate Court held that the fifth defendant is entitled to the suit schedule property by way of adverse possession. In fine, in the light of the above discussions stated supra, there is no substantial questions of law arises in this appeal.

15. Accordingly, this Second Appeal stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

SD/-
ASSISTANT REGISTRAR

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SUB ASSISTANT REGISTRAR

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To

1.The Principal District Judge,
Villupuram.

2.The I Additional Subordinate Judge,
Villupuram.

Copy to

The Section Officer,
V.R.Section, High Court, Madras-104.

+1cc to Mr.K.Goviganesan, Advocate Sr.68086

S.A.No.207 of 2010

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