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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 01.04.2021

Pronounced On : 07.04.2021

CORAM

THE HON'BLE Ms. JUSTICE R.N.MANJULA

S.A.No.344 of 2010

and

MP.No.1 of 2010

Ranganatha Naicker

... Appellant/Defendant

Vs.

1.Kamalammal (Died)
2.Chandra Ammal
3.Ethiraj
4.Janakiraman
5.Selvaraj
6.Duraiaraj

... Respondents/Plaintiffs

[*RR3 to 6 brought on record as LR's of the deceased 1st respondent made in SA.No.344/2010 in memo SR.No.10623/21 vide Order of Court dated 30.03.2021 by R.N.M., J.)*]

PRAYER : The Second Appeal filed under Section 100 of C.P.C., against the Judgement and Decree of the learned Principal Subordinate Judge of Chengalpattu, dated 28.08.2009 in A.S.No.69 of 2008 confirming the Judgement and Decree of the learned District Munsif Chengalpattu, dated 31.03.2008 made in O.S.No.121 of 2001.

For Appellants : Mr.Vigneshwar
for Mr.V.Nicholas

For Respondent : Mr.K.Hariharan [RR2 to 6]

JUDGEMENT

(Heard through Video Conferencing)

This Second Appeal has been filed against the Judgement and Decree dated 28.08.2009 passed in A.S.No.69 of 2008 on the file



of the learned Principal Subordinate Judge of Chengalpattu insofar as confirming the Judgement and Decree dated 31.03.2008 passed in O.S.No.121 of 2001 on the file of the learned District Munsif Chengalpattu and praying to set aside the same.

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2. The appellant is the defendant.

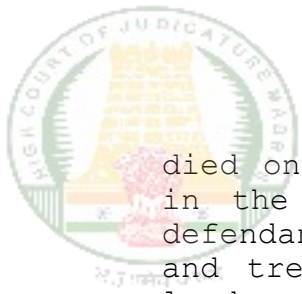
3. The suit Punja S.No.38/1 in Karayambedu Village, Chengalpattu Taluk consisted of 1.44 Acres. This originally belonged to Kuttiapa Naicker and Rathina Naicker who are brothers. Each of the brothers entitled to 72 cents out of 1.44 Acres. Rathina Naicker had 6 sons and 2 daughters. Rathina Naicker partitioned the properties through a partition deed dated 23.07.1928. In the partition, Kesava Naicker got 72 cents in S.No.38/1.

3.1 The other brother Kuttiapa Naicker had 2 sons and 1 daughter. He died interstate. His son Subbaraya Naicker and another son Varadappa Naicker had inherited 36 cents each in 72 cents belonged to Kuttiapa Naicker.

3.2 Varadappa Naicker had a son by name Elumalai Naicker. Both of them sold their share of 36 cents by virtue of a sale deed dated 15.09.1942 in favour of Subbaraya Naicker. So, Subbaraya Naicker became the owner of the said 72 cents. Subbaraya Naicker had a son Janakirama Naicker and Janakirama Naicker had a son by name Dakshinamoorthy Naicker. After the death of Janakirama Naicker, his son Dakshinamoorthy Naicker along with Kannammal (daughter of Kuttiapa Naicker) sold away 48 cents out of 72 cents in S.No.38/1 under a sale deed dated 29.03.1978 in favour of Venrasi Naicker. They sold the remaining 24 cents in favour of Marundasamy Naicker by virtue of a sale deed dated 29.06.1987. This Marundasamy Naicker is the son of 1st plaintiff, husband of 2nd plaintiff and the father of plaintiffs 3 to 6.

3.3 The defendant had filed a suit in O.S.No.460 of 1987 against Marundasamy and his father Venrasi Naicker for declaration of title for 96 cents in S.No.38/1, for permanent injunction for 86 cents out of 96 cents and for recovery of possession of 10 cents out of 96 cents. Though the defendant had title only for 72 cents, he filed a suit for 96 cents which included the suit property purchased by Marundasamy Naicker. In the said suit, the Court held that the plaintiff Ranganatha Naicker had no title to 24 cents. In O.S.No.460 of 1987, the defendant obtained exparte injunction with respect to 86 cents. It was in force till the suit was disposed on 27.10.1997. Thereafter, the suit was dismissed.

3.4 During the pendency of O.S.No.460 of 1987, Venrasi Naicker



died on 10.12.1989 and his legal representatives were impleaded in the said suit. After the death of Venrasi Naicker, the defendant took advantage of the helplessness of the plaintiffs and trespassed into the suit property and annexed it with his lands. So, the plaintiffs have filed the suit for declaration of their title and recovery of possession of 24 cents. Despite the suit in O.S.No.460 of 1987 was dismissed, the defendant did not deliver possession of the suit property to the plaintiffs though 3rd plaintiff demanded for possession on 26.01.2001. Hence the plaintiffs have filed this suit for declaration of their title and recovery of possession of the suit property.

The written statement of the defendant

4. The allegation that the suit in S.No.38/1 consisted of 1.44 Acres and it belonged to Kuttiapa Naicker and Rathina Naicker, was denied. Kesava Naicker was in enjoyment of 96 cents and the balance 48 cents in S.No.38/1 was in possession of Kannammal and Dakshinamoorthy. The said Kannammal and Dakshinamoorthy sold 48 cents on the south on 29.03.1978 to Venrasi Naicker. Venrasi Naicker, who had purchased 0.48 cents on the south has admitted the title of Kesava Naicker on the north in S.No.38/1. Kesava Naicker died leaving behind his two sons. Both the sons along with their children sold 96 cents in favour of this defendant by virtue of sale deed dated 05.09.1991. Marundasamy Naicker who is the son of 1st plaintiff had trespassed into 10 cents to the north of 48 cents purchased by Venrasi Naicker under the sale deed dated 29.03.1978. So, the defendant filed a suit in O.S.No.460 of 1987 against Marundasamy Naicker for possession of 10 cents. Since Marundasamy Naicker died, the plaintiffs were impleaded as his legal representatives. They have raised a contention with regard to a sale deed dated 29.06.1987 which involves the suit property. The vendors of Marundasamy Naicker did not have any title for the same. If really they had any title, they would have sold it on 29.03.1978 itself when the earlier sale was made. The alleged sale deed dated 29.06.1987 is affected by lis pendence and the vendors themselves did not have any title. The decision rendered in O.S.No.460 of 1987 is not final and the defendant has preferred an appeal over the same. The defendant and his predecessors have been in adverse possession and enjoyment of the suit property for more than statutory period and perfected their title over the same. The suit of the plaintiffs is barred by limitation. Hence the suit has to be dismissed.

5. During the trial, on the side of the plaintiffs, 2 witnesses were examined as P.W.1 & P.W.2 and Exs.A1 to A21 were marked. On the side of the defendant, 3 witnesses were examined as D.W.1 to D.W.3 and Exs.B1 to B5 were marked.



6. At the conclusion of the trial, the learned Trial Judge has decreed the suit as prayed for. Aggrieved over that, the defendant has preferred the first appeal and the first appeal was also dismissed by confirming the Judgement of the Lower Court. Now the appellant has filed the second appeal and the second appeal is admitted on the following substantial questions of law:-

1. Whether the plaintiffs are estopped from claiming right and title in respect of 24 cents which is on the north to their own property.?
2. Whether the suit is barred by limitation?

7. This appellant/defendant who was the plaintiff in the earlier suit in O.S.No.460 of 1987, has filed this suit against these plaintiffs and Marundasamy Naicker, son of the first plaintiff and Venrasi Naicker, husband of the first plaintiff for the reliefs of declaration, permanent injunction and recovery of possession. The relief of declaration relates to 96 cents in S.No.38/1 and the relief of injunction would relate to 86 cents out of 96 cents and recovery of possession in respect of 10 cents out of 96 cents.

8. The respondents/plaintiffs, who were the defendants in the earlier suit, have contested that the appellant herein was entitled to only 72 cents in S.No.38/1 and the remaining 24 cents belonged to Marundasamy Naicker by virtue of a sale deed dated 29.06.1987. After trial, the earlier suit in O.S.No.460 of 1987 was dismissed. The appellant/defendant who has preferred the first appeal challenging the Judgement and Decree passed in O.S.No.460 of 1987, has lost his appeal and the judgement has attained finality.

9. The contention of the appellant in this appeal is that the respondents/plaintiffs who were parties to the earlier suit were also contesting their title for the 24 cents out of 96 cents claimed by the appellant and hence they ought to have filed a suit for declaration at that time itself.

10. It is submitted by the learned counsel for the appellant that the claim of the respondents/plaintiffs is barred by limitation because they have not filed any suit for declaration of title or recovery of possession during the earlier suit proceedings itself and hence the appellant/defendant perfected his title to the entire suit property by adverse possession.

11. The earlier suit in O.S.No.460 of 1987 should be considered as pending until the first appeal was dismissed on 25.01.2002. The allegation of the respondents/plaintiffs in this suit is that during the pendency of the earlier suit, the



husband and the son of the first respondent/plaintiff died and the appellant took advantage of their helplessness and encroached the further 10 cents also and annexed the entire suit property of 24 cents along with his property and denied their title and possession. This is alleged to have happened on 26.01.2001 during which time, the earlier proceedings connected with the first appeal in O.S.No.460 of 1987 was pending.

12. This suit has been filed by the respondents/plaintiffs during the year 2001 itself. Even though the point of limitation was raised by the appellant/defendant before the Trial Court, no specific issue was framed on that. However, the First Appellate Court has framed a specific issue on the point of limitation and dealt the same. The First Appellate Judge has observed in his findings that while computing the period of limitation, the period during which the litigation was pending has to be excluded. If the appellant/defendant claims title through adverse possession, it should be established that from the day when he came into possession of the suit property to the knowledge of the plaintiffs, his possession was not objected by them and it was continuous. Had these respondents/plaintiffs remained exparte in the earlier suit filed in O.S.No.460 of 1987, it could be taken that the respondents/plaintiffs never objected to the adverse possession claimed by the appellant/defendant. The fact that these respondents/plaintiffs were party to the earlier proceedings in O.S.No.460 of 1987 and their active participation in the suit proceedings would show that the respondents/plaintiffs who were defendants in the earlier suit had never given up their right and they contested all through. Whoever claims title by adverse possession to a property, is presumed to be admitting the title of the other party.

13. The appellant/defendant was not allowed by the respondents/plaintiffs to encroach the suit properties without any objection. Since the appellant/defendant proceeded to encroach further 10 cents also, unmindful of the pending litigation in O.S.No.460 of 1987, the respondents/plaintiffs were prompted to file a separate suit in O.S.No.120 of 2001 for claiming the reliefs of declaration and recovery of possession. And this suit has been filed in the year 2001 itself. Since the respondents/plaintiffs never allowed the appellant/defendant to perfect his title by adverse possession without any objection, the appellant/defendant cannot claim that the suit of the respondents is barred by limitation. Or in other words, the appellant/defendant did not prove that he perfected title over the suit property by continuous and undisturbed possession over the same for more than the statutory period. Hence it is right to hold that the suit filed by the respondents/plaintiffs for the relief of declaration and recovery of possession is well



within the period of limitation.

14. The observation and finding rendered by the First Appellate Court on this aspect is a well analyzed one and it is in accordance with the law of limitation. In fact, there was an order of injunction granted in the earlier suit in O.S.No.460 of 1987 in respect of 86 cents which included the 14 cents of the suit property also and it was in force until the suit was dismissed on 27.10.1999. Since the appellant/defendant claimed title in respect of the suit property, which was denied by the Courts in the earlier suit in O.S.No.460 of 1987, it would have been sufficient for the respondents/plaintiffs to file a suit for recovery of possession alone.

15. But with abundant caution the respondents/plaintiffs has also claimed the relief of declaration. So, there is no logic in the argument of the appellant/defendant that the respondents/plaintiffs are estopped from claiming their right and title in respect of the suit property or that their suit is barred by limitation. The analysis and findings of the Court below on this aspect and as discussed earlier, does not suffer from any factual or legal infirmity and does not warrant any interference. Hence the substantial questions of law are answered against the Appellant.

16. In the result, the Second Appeal is dismissed and the Judgment and Decree of the First Appellate Court is upheld. No costs. Connected miscellaneous petition in M.P.No.1 of 2010, is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The Principal Subordinate Judge,
Chengalpattu.
2. The District Munsif Court,
Chengalpattu.



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

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+1cc to M/s.V.Nicholas, Advocate, S.R.No.22578

Pre-delivery Judgement
in
S.A.No.344 of 2010

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