



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.01.2022

PRONOUNCED ON : 07.06.2022

CORAM

THE HON'BLE MRS.JUSTICE J.NISHA BANU

SECOND APPEAL NO.986 OF 2006

AND

M.P.NO.1 OF 2006 (STAY)

Loganathan

.. Appellant/Appellant/Defendant

Vs

1. Sengeni (Deceased)

.. Respondent/Respondent/Plaintiff

2. Sadayappan

3. Neelavathi

4. Raji

5. Kamala

6. Mangalakshmi

7. Amudha

.. Respondents 2 to 7 legal heirs of R1
/Plaintiff

[Respondents 2 to 7

brought on record as LRs of the deceased

sole respondent vide order of court dated 03/08/2017

made in M.P.No.1 to 3 of 2015

in S.A.No.986 of 2006]

Prayer : Second Appeal filed under Section 100 of CPC., against the decree and judgment and decree dated 15.09.2005 in A.S.No.121 of 2004 on the file of Additional Sub Court, Tindivanam, confirming the judgment and decree dated 30.07.2004 passed in O.S.No.6 of 1999 on the file of Additional District Munsif, Tindivanam.

For Appellant

: Mr.P.B.Balaji

For respondents

: Mr.S.Kaithamalaikumaran
for R2 to R7
R1- died.



JUDGMENT

This Second Appeal is filed by the defendant in O.S.No.6 of 1999 against the decree and judgment dated 15.09.2005 in A.S.No.121 of 2004 on the file of Additional Sub Court, Tindivanam, whereby, the lower appellate court, confirmed the judgment and decree dated 30.07.2004 passed in O.S.No.6 of 1999 on the file of Additional District Munsif, Tindivanam.

2. At the time of admission of this Second Appeal, the following substantial questions of law were framed by this court:-

"(a) Whether the title to the suit property under Ex.B.6 in favour of the appellant's father could be challenged by the respondent through Exhibit A.1 in his favour ?

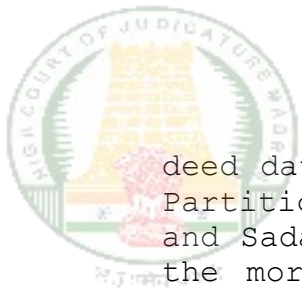
(b) Whether the Courts below are right in granting the relief of injunction to the respondent without being in possession prior to the suit or on the date of filing of the suit ?

(c) Whether the title and possession of the appellant claimed through Exhibits B.1 to B.6 have been properly considered and decided by the courts below ?

(d) Whether the findings of the Courts below are perverse and liable to be interfered with by this court ?"

3. The suit in O.S.No.6 of 1999 was filed by the Plaintiff for declaration of title, permanent injunction and for recovery of possession. The brief facts of the case of the plaintiff is that the suit property originally belonged to one Velliappan who had two sons viz., Karupan and Gopal and the suit properties devolved on Karupan, who sold to Plaintiff by way of registered sale deed Ex.A.1 dated 28.08.1995. From the date of sale deed, Plaintiff is in possession and cultivating the land. He is paying the kist and revenue records are in the name of plaintiff. Since the defendant tried to trespass into the plaintiff's suit property, O.S.No.6 of 1999 was filed before the Additional District Munsif, Tindivanam.

4. In the written statement filed by the defendant, it is submitted that Velliappan is the son of Desingu and Velliappan had 5 brothers who are Sadaiyan, Raman, Subban @ Subburayan, Sengeni and Narayanan. Velliappan had no right over suit property. The defendant submitted that he had purchased the suit property on 16.06.1995 vide Ex.B.6. It is also stated that the suit properties belonged to Sadaiyan. Sadaiyan sold an extent of 0.75 acre which he acquired as his share and by the exchange



deed dated 16.05.1955 with Narayanan, it was given to defendant. Partition has been effected between the families of Velliappan and Sadaiyan. Sadaiyan was the owner of the suit property and by the mortgage deeds and exchange deed, it is clearly seen that Velliappan was never the owner of the property. According to the defendant, Ex.A.1 is a forged one. The suit property was partitioned among the sons of Sadaiyan and Sadaiyan's sons Dhanapal and Kamalakannan who sold the same through Ex.B.6 to the defendant. According to the defendant, the plaintiff has no right or possession over the suit property.

5. Based on the above pleadings, appropriate issues were framed by the trial court. In order to prove their cases, both parties let in oral as well as documentary evidence. On the side of the plaintiff, P.Ws.1 to 3 were examined and as many as 5 documents were exhibited. On the side of the defendant, 4 witnesses were examined and as many as 9 documents were exhibited. Having considered all the above materials, the trial court held that the plaintiff is in possession of the suit property. The trial court further held that the defendant was in unlawful possession of the suit property and the suit was decreed as prayed for.

6. Aggrieved over the decretal of the suit, the defendant filed A.S.No.121 of 2004 before the Additional Sub Court, Tindivanam.

7. The First Appellate Court on going through the entire evidence and facts, confirmed the trial court judgment and thereby, dismissed the appeal filed by the defendant.

8. Against the concurrent judgment of both the courts below, the defendant has come up with the present Second Appeal.

9. The grounds raised in the Second Appeal are that the courts below failed to appreciate Exhibits B.1 to B.6 which documents would prove the title and possession of the defendant. The courts below have failed to take into consideration the evidence of D.W.1 to D.W.4 in determining the vital points. The courts below failed to appreciate the point that appellant/defendant's father purchased the suit property under Ex.B.6. On the other hand, Ex.A.1 through which the plaintiff purchased the suit property does not confer any title, right or interest. The plaintiff was not in possession either on the date of suit or prior to the suit and as such the relief of injunction ought to have been declined by Courts below. The courts below failed to see that prior to 1943 there was partition between Sadayan and Velliappan and hence Sadayan is the owner of the property.



10. I have heard the learned Counsel for the appellant and the respondents and also perused the records carefully.

11. The learned counsel for the appellant/defendant submitted that the oral agreement between the sons of Velliappan viz., Gopal and Karuppan is only a self-serving claim and that the death certificate and legal heir certificate of Gopal, the son of Velliappan is not produced before this court. The earliest document Ex.B.3 dated 04.01.1943 has not been refuted by either side which clearly shows that Narayanan transferred his entire share in favour of his brother Sadayan and so Sadayan was entitled to 2 shares. Sadayan mortgaged 2.10 cents on 11.09.1948 under Ex.B.4 which was also discharged on 11.01.1951. It is argued by the learned counsel for the appellant that ever as per P.W.1's evidence, the suit schedule property of 0.35 cents is within the 0.80 cents mortgaged with him by Sadayan as early as in 1973. But the trial court brushed aside the oral and documentary evidence. The courts below has not taken into consideration the discrepancies with regard to boundaries as described in the schedule to the Plaint and the boundaries described on the side of the defendant. The courts below while accepting the oral transfer of the share of Gopal made in favour of Karuppan, the vendor of the plaintiff, failed to appreciate the ownership of the defendant with respect to the Sale deed executed by his two brothers in his favour with respect to 1 share of Sadayan, who as per the facts on record was entitled to 2 shares in Desingu's property. The identification of the property in question itself is having discrepancy and in such circumstances, the plaintiff could have taken the assistance of Advocate Commissioner to identify the property, but the plaintiff having refrained from doing so, will raise a question with regard to his bonafideness. There are no documents filed on the side of the plaintiff to ascertain the trespass by the defendant on 04.01.1999 and the application for amending the plaint and prayer for re-delivery of possession, has been filed only in 2000, a year after the alleged claim of trespass by the defendant.

12. The learned counsel for the appellant in support of his contentions relied on the following decisions :-

(1) Commissioner of Gift-Tax Vs. Kupulakshmi Ammal [(1988) 68 CTR 171]

(2) Shapanappa Basappa Dindawar Vs. State of Karnataka and others [(1996) 10 SCC 230]

The learned counsel referred to the term "exchange" in the decision reported in (1988) 68 CTR 171 (cited supra) and



submitted that the facts and circumstances of each case have to be looked into to decide the nature of the transaction. Further, by relying upon the decision reported in (1996 10 SCC 230) (cited supra), the learned counsel submitted that Section 118 of the Transfer of Property Act 1882 defines 'exchange' and provides that where two persons mutually transfer the ownership of one thing for ownership of another, neither thing or both things being money only, the transaction is called as 'exchange'.

13. On the other hand, the learned counsel for the respondent/plaintiff submitted that before the trial court, the plaintiff proved his claim through Ex.A.1 and also by examining the attesting witness as P.W.2. Further, the defendant has taken contradictory stand with regard to the title of the suit property in their written statement. The plaintiff by marking documents in Ex.A.2 Patta and Ex.A.5 Kist receipts for the suit property proved his possession and the plaintiff has perfected his claim over the suit property. The learned counsel further held that the trial court has considered the evidence in detail and decreed the suit in favour of the plaintiff and the plaintiff is entitled for recovery of possession of the suit property from the defendant. The lower appellate court confirmed the findings of the trial court and dismissed the appeal filed by the defendant.

14. The learned counsel in this regard relied on the decision reported in R.VE.Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P. Temple and another [(2003) 8 SCC 752] wherein, it is held by the Honourable Supreme Court that in second appeal, instead of advertng to that question, High Court proceeding on the assumption that the suit property belonged to the defendant and framing certain questions as substantial questions of law which had actually not arisen as substantial questions of law based on the concurrent findings of the courts below, therefore, the second appeal can be entertained only on a substantial question of law and not otherwise.

15. The learned counsel for the respondent/plaintiff prayed this court that concurrent judgments of the courts below is to be confirmed and the second appeal is to be dismissed.

16. Admittedly, partition has been effected between the families of Velliappan and Sadaiyan. The plaintiff claimed that the suit property was inherited by Velliappan as his 1/6th share in the ancestral property and the property was obtained by his son Karupan. The trial court, on going through the entire evidence, held that an extent of 6.50 acres is the ancestral



property of Desingu and Velliappan and Vellippan got 1.08 acre as his 1/6th share. Ex.A.1 sale deed clearly shows that the property was obtained by Karuppan as his share in the ancestral property. Based on Ex.A.1 and the evidence of P.Ws.1, 2 and 3, the trial court held that the plaintiff's vendor had right over the suit property. The trial court by taking note of Ex.B.1 and Ex.B.4 mortgage deeds held that area and description of the properties in the mentioned exhibits do not match with the suit property. The trial court disregarded the admission of P.W.1 that the property mortgaged through Ex.B.1 is the suit property because P.W.1 was aged 70 years and the documentary evidence overrides the oral evidence. The trial court pointed out that the defendant was in unlawful possession based on the evidence of D.W.1 and D.W.2 and decreed the suit as prayed for. The lower appellate court, on going through the plaint pleadings, written statement of the defendant, evidence let in before the trial court and the findings of the trial court, held that once plaintiff is able to create high degree of probability to shift onus on defendant, it is for the defendant to discharge his onus. On finding of fact, when the plaintiff succeeded in shifting onus on the defendant, the burden of proof on plaintiff stood discharged to the defendant. But the defendant has not let in any contra evidence to disprove the claim of the plaintiff. The lower appellate also held that the sale deed dated 28.08.1995 obtained by the plaintiff is legally valid.

17. It will be pertinent to point out that under Exhibit B.5, the exchange was for an extent of 0.25 acre belonging to Narayanan, an extent of 1.08 acre belonging to Sadayan. This unequal exchange deed has not been explained by the appellant/defendant. The contention of the learned counsel for the appellant/defendant is that though the value of the properties covered under two documents differ, still the transaction satisfies the requirement of an exchange and therefore, exchange deed should not have been rejected. However, this contention does not merit acceptance since with reference to exchange, the case of the plaintiff is that this document was clandestinely brought into existence to defeat the rights of the plaintiff and it is not a genuine document. But on analysis, the finding of the courts below is that the exchange deed is a genuine document.

18. Insofar as the other contention regarding non examination of Kesavan who is the son of Narayanan is concerned, it is settled law that best evidence available must always be produced before the court for appreciation. The examination of Kesavan if would have offered it could have been best evidence. The withholding of the best evidence would go to show that the same is detrimental to the interest of the case of the defendant



and that is why he is not examined. The trial court is bound to draw adverse inference, accordingly, it has been rightly concluded that the defendant failed to prove the title to the suit property.

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19. The next contention of the learned counsel for the appellant/defendant is concerned, the plaintiff should stand on his own legs and he cannot pick up holes in the case of the defendant and they cannot claim relief based on that. In this regard, the learned counsel relied on the the legal proposition laid down in the decision reported 1999 1 MLJ 769 [Periasamy vs Joseph Nadar]. It is further contended that when the identity of the property is in dispute, recovery of possession should not have been ordered in favour of the plaintiff but the trial court should have given order for appointment of Advocate Commissioner.

20. While answering the above contention, it is necessary to observe herein that the only question is whether the plaintiff has placed convincing evidence to prove his title and whether the trial court has laid its judgment upon the same. When the suit property is described by four boundaries and with their particular survey number and when the same is not reflected in the document of the defendant, the defendant cannot contend that the suit property and the property of the defendant refers to the same property.

21. The trial court has laid upon the evidence of the plaintiff, the recitals in the sale deed of the plaintiff, the evidence of the attesting witness to the sale deed, the admission made by DW1 during the cross examination and the admitted fact regarding partition between the vendors of the sale deed. That apart, patta and the kist receipts are also relied upon. In such view of the matter, the trial court as well as the First Appellate Court have examined the factual aspects in the light of the documents placed before it. Any further discussion on factual aspect would only be a repetition. Therefore, this court does not find any merit in the grounds raised in this second appeal and the findings of the courts below cannot be said to be perverse. Accordingly, the substantial questions of law framed are answered against the appellant/defendant.

22. In the result, the Second Appeal is dismissed. The decree and judgment dated 15.09.2005 in A.S.No.121 of 2004 on the file of Additional Sub Court, Tindivanam, confirming the judgment and decree dated 30.07.2004 passed in O.S.No.6 of 1999 on the file of Additional District Munsif, Tindivanam, is



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confirmed. No cost. Consequently, the stay granted in M.P.No.1 of 2006 stands vacated.

Sd/-
Assistant Registrar(CS-VIII)

//True Copy//

Sub Assistant Registrar

nvsri

To

1. The Sub Judge,
Additional Sub Court,
Tindivanam.
2. The Additional District Munsif,
Tindivanam.
3. The Section Officer,
VR Section,
High Court, Madras.

+1cc to M/s.P.B.Ramanujam, Advocate, S.R.No.32366

+1cc to Mr.S.Kaithamalaikumaran, Advocate, S.R.No.32368

SECOND APPEAL No.986 of 2006

AK-II(CO)
RLP(21/06/2022)