



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.02.2022

CORAM:

THE HONOURABLE Mr. JUSTICE S.S.SUNDAR

S.A. No.464 of 2017

and

C.M.P. No.11668 & 11669 of 2017

1. Kandappan @ Kandasamy

2. Rajendran

3. Nagarajan

... Appellants/Defendants

Versus

1. Dhanalakshmi

2. Munusamy

.. Respondents/Plaintiffs

Second Appeal is filed under Section 100 of Civil Procedure Code, 1908, to set aside the judgment and decree dated 31.07.2012 made in A.S. No.25 of 2011 by the Subordinate Judge, Dharmapuri confirming the decree and judgment dated 28.04.2011 made in O.S. No.134 of 2008 on the file of the District Munsif, Dharmapuri.

For Appellants : Mr. M.Elango

For Respondents : Mr. A.E.Ravichandran

JUDGMENT

The defendants are the appellants in this Second Appeal. Aggrieved by the judgment and decree of the trial Court in O.S. No. 134 of 2008 on the file of District Munsif Court, Dharmapuri and the judgment and decree passed in A.S. No.25 of 2011 on the file of Sub-Court, Dharmapuri, this Second Appeal is preferred.

2. Brief facts that are necessary for the disposal of the second appeal are as follows:

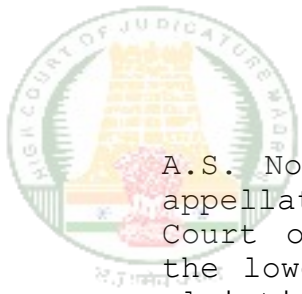
The respondents 1 and 2 in this appeal filed a suit in O.S. No.134 of 2008 on the file of the District Munsif Court, Dharmapuri for declaration of title and recovery of possession in respect of suit property which is described as a property in Thoppur village, Dharmapuri District in Survey No.352/2B1 measuring an extent of 0.87 cents. The suit is also for a



mandatory injunction to direct the defendants to restore the property as it exists on the western side and southern side. The case of the respondents in the plaint is that the suit property originally belonged to one Marimuthu who inherited the property from his ancestors. It is stated that the legal heirs of Marimuthu entered into a registered partition deed dated 11.11.1993 and that the suit property was allotted to one of the legal heir of Marimuthu by name Devaraj. The plaintiffs have stated that they have purchased the property from the said Devaraj and his wife under registered sale deed dated 21.07.2004. It is the further case of the plaintiffs that they took possession of the property and were in enjoyment of the property by doing cultivation. It is stated that the revenue records were mutated in favour of the plaintiffs. The plaintiffs have admitted that the defendants have unlawfully encroached the suit property by putting up hut and getting electricity service connection in the name of the second defendant when the second plaintiff was at Mumbai due to his employment. It is also admitted by the plaintiffs that they gave a complaint before the Revenue Officials and that they came to know that a suit in O.S. No.166 of 2005 had been filed by the defendants before the District Munsif Court, Dharmapuri in respect of the same property. The suit was contested by the appellants mainly on the ground that the suit property, in entirety, was handed over to the first defendant by one Devaraj and Arumugam by receiving a sum of Rs.7,000/- from the first defendant and that the suit property is in the enjoyment of the first defendant as owner of the property. It is also stated that the first defendant has put up super structure for his residence and obtained electricity service connection and he is in possession and enjoyment for more than 27 years.

3. It is stated in the written statement that the first defendant was doing cultivation by taking water from neighbouring lands belonged to the first defendant. The case of the plaintiffs that the defendant have encroached the property, was specifically denied by the appellants in their written statement. The trial Court decreed the suit as prayed, after specifically holding that the suit property belongs to the plaintiffs by virtue of the registered sale deed. The case of the plaintiffs in entirety was accepted by the trial Court on the basis of the documents produced by the plaintiffs. Though no issue was framed with regard to adverse possession, the lower Court dealt with the issue elaborately and held that the defendants have not proved adverse possession. Stating that the case of the plaintiffs was established based on the documents, the lower Court decreed the suit as prayed for.

4. Aggrieved by the judgment of the lower Court, the appellants / defendants in the suit have preferred an appeal in



WEB COURT

A.S. No.25 of 2011 before the Sub-Court, Dharmapuri. The lower appellate Court has also confirmed the findings of the trial Court on every issue. From the oral and documentary evidence, the lower appellate Court held that the property belongs to the plaintiffs and that the plea of adverse possession raised by the defendants against the plaintiffs is not proved in the manner known to law. Though it is not specifically pleaded by the defendants in the written statement, an unregistered mortgage was filed under Ex.B1. The lower appellate Court found that the document Ex.B1 is a document required to be registered and that the said document is not admissible. Assuming that the case of the respondents under Ex. B1 is established, the lower appellate Court further found that the appellants cannot plead adverse possession. The lower appellate Court dismissed the appeal with cost. As against the judgment and decree of the lower appellate Court confirming the judgment and decree of the lower Court, the above second appeal is preferred by the defendants in the suit.

5. Learned counsel appearing for the appellants referred to the pleadings and submitted that the defendants have specifically pleaded that they have got absolute title to the property not only under Ex.B1 but also by prescribing title by adverse possession. Learned counsel submitted that the defendants have produced several documents to prove their possession under document Ex.B1 and therefore, the Courts below ought to have held that the plea of adverse possession is established by the defendant. Learned counsel also submitted that the lower appellate Court failed to frame necessary issues, appreciate evidence and consider evidentiary value of several documents filed by the appellants. Since the substantial questions of law raised by the appellants are slightly different, this Court has to decide the appeal on the basis of the arguments advanced by the learned counsel for the appellants.

6. First of all, it is to be noted that the title of plaintiffs' predecessor's in interest is specifically admitted by the appellants. However, in the written statement it is pleaded that the first defendant obtained possession from one Arumugam and Devaraj by paying a sum of Rs.7,000/-. Since the appellants are in possession and enjoyment of the property, it is stated that they have prescribed title by adverse possession. The case of plaintiffs claiming title to the property is supported by the document of registered sale deed dated 21.07.2004 and the documents to prove the title of predecessor's in interest of plaintiffs. It is stated by the plaintiffs that there was a mortgage originally in favour of second defendant and that they have executed a sale deed during the mortgage was in force. The documents produced by the plaintiffs would show that the plaintiffs have proved their case of title which was concurrently held by the Courts below. The case of defendants in



the written statement is contrary to evidence adduced by them. In the written statement, it is not stated under what document the defendants / appellants came to be in possession of the property. The case of defendants that they obtained possession by paying a sum of Rs.7,000/- to the predecessor in title, cannot be believed.

7. The case of appellants is that they have prescribed title by adverse possession based on a document under Ex.B1. It is admitted that the document Ex.B1 though titled as "மகதூல் சாகுபடி ஒப்பந்த பத்திரம்", the correct nomenclature of the document is admitted by the counsel appearing for the appellants himself as mortgage. It is to be seen the plea of adverse possession is contrary to the plea of possession under Ex.B1. When the defendants / appellants admit that the property had been mortgaged by the original owners in favour of defendants and that the said mortgage is time barred, the plea cannot be treated as a plea of adverse possession. When a party admits his possession as mortgagee, there is no question of claiming adverse possession as against the original owner. Therefore, the case of the appellants that they have prescribed title on the basis of Ex.B1 admitting mortgage is not sustainable. Secondly, the document Ex.B1 is neither registered nor stamped. In such circumstances, it is not admissible to prove an existing mortgage. If there had been a mortgage under registered document and it is established that the mortgage was not redeemed within the period prescribed, the mortgagor cannot file a suit for redemption of mortgage. Therefore, the remedy of mortgagor to get back possession is lost. However, the position is different when a plea of adverse possession is raised by the defendants. The document filed by the appellants under Ex.B1 itself would dis-entitle the defendants to raise a plea of adverse possession.

8. The Courts below have specifically dealt with the issue regarding adverse possession and found that the appellants have not established adverse possession by proper pleading and proof. Admittedly, the appellants have not even stated in the written statement as to when their possession become adverse to the plaintiffs. Mere enjoyment of property by the defendants for any number of years will not entitle them to set up a plea of adverse possession without a specific plea and proof as to the requirements in law. When the defendants failed to establish adverse possession and the plaintiffs have established title by necessary documents, the Courts below have no other option but to decree the suit for declaration. The plea of adverse possession on the basis of an invalid document of mortgage cannot be recognized as possession of mortgagee cannot be regarded as adverse as against the real owner who is not entitled in law, to be in possession. In other words, a person



who lawfully comes into possession as a mortgagee cannot claim that his possession is adverse against the mortgagor. Even otherwise, a plea of adverse possession must be adequate in continuity in publicity and a person who pleads adverse possession has to show that when his possession became adverse so that the starting point of limitation against the owner can be determined. As it was held by the Courts below, mere plea of possession without a plea that the possession was adverse or hostile to the real owner, the appellants cannot succeed. It is established that the appellant's possession can never be hostile against the real owner when they themselves admit a mortgage Ex.B1.

9. Learned counsel appearing for the appellants relied upon the judgment of the Hon'ble supreme Court in the case of Rukmani Ammal and another Vs. Jagdeesa Gounder, reported in 2006 (1) SCC 65. The relevant portion of the said judgment is extracted hereunder:

" In the case in hand, Annamalai was the owner of the property. He mortgaged to defendant No.1 in 1962 and since then defendant No.1 was in possession of the property as mortgagee. Annamalai then sold part of the property to the plaintiff in 1964 and the sale-deed recited the factum of mortgage by the owner to defendant No.1. In a suit for recovery of money by defendant No.1 against Annamalai, a decree was passed and in execution proceedings, the property was purchased by the mortgagee (defendant No.1) in 1966. The auction was confirmed and sale certificate was issued in favour of defendant No.1 on September 5, 1966. The submission of defendant NO.1 is well founded that thereafter she did not continue to remain mortgagee but became absolute owner or claimed to be the absolute owner of the property. As held by this Court in the cases referred to hereinabove, once the mortgagee is claiming to be an absolute owner of the property, his/her status as mortgagee comes to an end and his / her possession becomes adverse to the original owner. Even if such sale is voidable (and not void), it will not alter legal position and adverse title of the original mortgagee continues and if the period of twelve years expires, he / she becomes owner of the property by adverse possession."

10. From the facts as seen from the judgment of the Hon'ble Supreme Court, one Annamalai was the absolute owner of the property and the said Annamalai mortgaged the property by way of a usufructuary mortgage in favour of the first defendant Rukmani Ammal by a document dated 27.06.1962 for a sum of Rs.400/-. The first defendant was put in possession as a



mortgagee. It is also admitted that the first defendant later instituted another suit for recovery of money and obtained a decree. It is further admitted that the suit property was brought to sale in execution of the said money decree. The first defendant purchased the property with the leave of Court and sale was confirmed. After taking delivery of possession from Court, the property was subsequently sold by the first defendant in favour of the second defendant. The plaintiff who has purchased the property from original owner Annamalai in the year 1964, filed a suit. The question that arise before the Hon'ble Supreme Court was therefore whether the possession of first defendant as mortgagee after the sale in his favour, will be adverse to the plaintiff. As held by the Hon'ble Supreme Court, the possession of the mortgagee seizes to be one under the mortgage when he purchased the property in the Court auction sale. Though the plaintiff has purchased the property from the original owner, it is held that the first defendant has prescribed title by adverse possession. The said judgment has no application to the facts in the present case where the appellants have admitted the ownership and title in favour of original owner and possession under the unregistered mortgage cannot be adverse to the original owner. No other legal issue is argued before this Court.

11. Since the submissions of the learned counsel appearing for appellants are unsustainable, this Court finds no other substantial question of law that arises for consideration in this appeal. Thus, the Second Appeal is dismissed with costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (CS IV)

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Sub Assistant Registrar

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To

1. The Subordinate Judge, Dharmapuri.
2. The District Munsif, Dharmapuri.

+1cc to Mr.M.Elango, Advocate, S.R.No.8387
+1cc to Mr.A.E.Ravichandran, Advocate, S.R.No.8399

S.A. No. 464 of 2017

CA (CO)
GN (24/05/2022)