



S.A.(MD) No.811 of 2011

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 21.09.2022

CORAM : JUSTICE N.SESHASAYEE

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1.Abraham @ A.Jeevaraj
2.P.Kasivel @ Kannimariyal ... Appellants/Appellants/Plaintiffs

Vs

1.A.Villammal
2.A.Shanmugavel
3.T.Mookkammal
4.K.Abraham ... Respondents/Respondents/
Defendants

Prayer:- Appeal filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 25.03.2011 made in A.S.No.12 of 2010 on the file of the Sub Court, Paramakudi confirming the judgment and decree dated 09.12.2009 made in O.S.No.525 of 1995 on the file of the District Munsif Court, Mudukalathur.

For Appellants : Mr.S.Parthasarathy

For Respondents : Mr.K.Govindarajan for R4

: No appearance for R1 to R3



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JUDGMENT

1.1. This appeal is preferred by the plaintiffs in O.S.No.525 of 1995 on the file of the District Munsif Court, Mudukulathur. The suit was laid for declaration of their title and also for certain ancillary relief of injunction. The plaintiffs were unsuccessful both before the trial Court and also before the first appellate Court in their first appeal in A.S.No.12 of 2010 on the file of the Sub Court, Paramakudi. Hence the present appeal. Parties are referred to by their rank before the trial Court.

1.2. It may be stated that on 28.07.2006, the suit came to be disposed of by the trial Court. By this decree, the trial Court rejected the plaintiffs' prayer for declaration of their title over the suit property, but still granted a decree for injunction. Challenging the same, the plaintiffs herein had preferred A.S.No.71 of 2006 against that part of the decree denying them the relief of declaration of title, and the contesting fourth defendant had filed A.S.No.57 of 2006 challenging the decree of prohibitory injunction passed against him.



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1.3. Both these appeals came to be disposed of by a common judgment of the first appellate Court dated 25.09.2007, by which it remanded the matter back to the trial Court for the trial Court to make a finding as to whether the plaintiffs have prescribed title by adverse possession owing to the failure of the decree holders in O.S.No.268 of 1982 from taking delivery of the property pursuant to the said decree.

2. The dispute is over a property measuring 5.80 acres in S.No.257 of Orivayal Village in Ramanathapuram District. It is a dry land. The case of the plaintiffs runs as follows:

- The suit property originally belonged to a certain Ulagan and after his demise, it devolved on his son Andi @ Asirvadham. While so, Vide Ext.A.1-sale deed dated 05.09.1979, Andi sold this property to one Paulraj and Pushparaj.
- Be that as it may, the second defendant herein and his father claiming to have some interest in the suit property released their interest in the property vide Ext.A.6-release deed dated 30.09.1982. The first plaintiff herein is the son of Pushparaj and the second plaintiff is the



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wife of Paulraj. On 17.11.1995, both Pushparaj and Paulraj executed separate settlement deeds in favour of the first plaintiff and the second plaintiff vide Ext.A.10 and Ext.A.11 respectively. When these plaintiffs faced certain obstruction to their title, they laid the suit for declaration of title.

3.1 Defendants 1 to 3 remained ex-parte which included the second defendant, one of the co-executants of Ext.A.6-release deed. The suit was essentially contested by the fourth defendant. The fourth defendant would contend that the suit property originally belonged to certain Subramaniya Kudumban and three others, that on 29.08.1946, they created an *otti* (possessory mortgage) in favour of Arulanandam and Savarimuthu. Subsequently, the mortgagors laid O.S.No.268 of 1982 for redemption of the mortgage. In that suit, both Paulraj and Pushparaj, the purchasers under Ext.A.1 were also arrayed as defendants. The suit was decreed by the trial Court as could be seen from Ext.B1 and Ext.B.2. This decree was challenged by Paulraj and Pushparaj in A.S.No.159 of 1986 and that came to be dismissed. This is known from Ext.B.3 and Ext.B.4.



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3.2 The fourth defendant claims right under Subramaniya Kudumban. In essence, he contends that the present claim of the plaintiffs is barred by *res judicata* in view of the findings of the earlier round of litigation.

4. The dispute went to trial and before the trial Court both sides adduced oral and documentary evidences. The suit came to be dismissed by the trial Court, as it found that the issue as to plaintiffs' title cannot be agitated, as it is barred by the doctrine of *res judicata*, in view of the earlier litigation as evidenced by Ext.B.1 to Ext.B.4. When the suit was taken in first appeal by the plaintiff in A.S.No.12 of 2010 , the first appellate Court concurred with the findings of the trial court and dismissed the appeal.

5. This Second Appeal was admitted for considering the following substantial questions of law:

“i) Whether the Courts below are correct in law in dismissing the suit, when the plaintiffs/appellants herein have established title by way of adverse possession as per Ext.A.2 to Ext.A.12? and



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ii) Whether the principles of res judicata will apply when the plaintiffs/appellants herein were not parties to the earlier proceedings where the fourth respondent herein is a party?"

6. Mr.S.Parthasarathy, learned counsel for the plaintiffs/appellants herein made his submissions on two points in alternatively and they are:

a) The suit in O.S.No.268 of 1982 was laid for redemption of mortgage and the judgment passed therein is Ext.B.1. It could be seen from Ext.B.1 that the Court has identified the property belonging to Andi @ Asirvatham, the vendor of the plaintiffs, as lying to the north of the property in relation to which redemption was sought. Essentially, the present plaintiffs are not necessary parties to the redemption suit. Therefore, the finding as to the title in O.S.No.268 of 1982 can only be treated as incidental and ancillary to the relief sought and not one which is directly and substantially in issue in that suit.

b) Secondly, for invoking the doctrine of *res judicata*, the defendants ought to have placed the entire pleadings and not just the judgment as



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mandated by the ratio in *Syed Mohamed Salie Labbai (Dead) by LRs Vs. Mohamed Hanifa (Dead) by LRs and others* [1976 SC 1569]. However, the defendants, having taken up a plea of *res judicata*, producing merely the judgment in Ext.B.1 and hence the court did not have any opportunity to ascertain from the pleadings in O.S.No.268 of 1992 whether the findings of plaintiffs' title made in Ext.B.1 judgment is directly and substantially in issue in the present suit or otherwise.

- Alternatively, notwithstanding the decree in the suit for redemption, the mortgagors have not taken delivery of the property pursuant to the decree dated 11.02.1986. This was admitted by D.W.2 in that suit, a heir of a mortgagee, who remained ex-parte in O.S.No.268 of 1982. He is the son of Michael Udayar, and he had made a statement that no delivery had been taken.

The learned counsel added that it is incumbent upon the defendants to establish not just that they have obtained a decree for redemption of mortgage, but must also establish that they had obtained delivery of the property pursuant to the final decree passed in that suit.



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7. Mr.K.Govindarajan, learned counsel for the fourth respondent made the following submissions:

- The southern boundary given to the property in the redemption suit in O.S.No.268 of 1982 is a water body, and in Ext.A.1 also, the southern boundary is shown to be the water body. This implies, the plaintiffs herein claim title not to any property to the north of the suit property in O.S.No.268 of 1982, but to a property without any additional property to its north.
- Secondly, so far as the issue of *res judicata* and ratio in ***Syed Mohamed Salie Labbai (Dead) case*** are concerned, even if *res judicata* does not apply due to the failure on the part of the fourth defendant to produce the pleadings in O.S.No.268 of 1982, yet he had pleaded estoppel and hence the finding therein would bind the plaintiffs. Indeed the present plaintiffs had raised an identical dispute in the earlier litigation and the trial Court has framed at least two issues pertaining to the plaintiffs' title (Issue Nos.3 and 4 in Ext.B.1), and the trial Court has found the same against them. This finding is



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categorical and it binds the plaintiffs squarely, and the plaintiffs herein did challenge the decree in A.S.No.268 of 1982, but they did not prosecute it and the appeal itself was dismissed vide Ext.B.4-judgment in A.S.No.159 of 1986.

- Turning to the question as to whether the plaintiffs herein have prescribed title by adverse possession, this precisely was an issue in O.S.No.268 of 1982, and the Court has negated it and there is no pleading on the ground that the plaintiffs herein have perfected title by adverse possession in the present suit owing to the failure on the part of the defendants to take delivery of the property pursuant to the decree for redemption that they have obtained. He added that the plaintiffs are relying on a stray sentence in the testimony of D.W.2, wherein they said that delivery has not been taken, but the same D.W.2 reinforced the fourth defendant's case, when he makes a statement that the vendors of the plaintiffs indeed were cultivating the land for a bare two years and no more. If the totality of the evidence is taken into consideration, it would negate the contentions of the plaintiffs.



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8. Replying the aforesaid arguments, Mr.S.Parthasarathy, learned counsel arguing for the plaintiffs/appellants would submit that notwithstanding the fact that the first appellate Court vide its order of remand dated 25.09.2007 in A.S.Nos. 57 and 71 of 2006 had directed the trial Court to consider specifically if the plaintiffs have perfected title owing to the failure of the contesting defendants in taking delivery of the property pursuant to the decree in O.S.No.268 of 1982 constitute adverse possession, the trial Court misaddressed the entire issue in its judgment. In particular, it stated that even though the plaintiffs are in possession, they have not established their legitimacy of their possession, since they have not proved their title to the property. This literally begs the question.

9. After carefully weighing the submissions, this Court might have to hold that the plaintiffs are barred from re-agitating their title based on Ext.A.1, and even though the application of rule of *res judicata* cannot be applied owing to the failure of the fourth defendant to produce the entire pleadings in O.S.No.268 of 1982 for this Court to ascertain whether the finding as to



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the plaintiffs' title in O.S.No.268 of 1982, was directly and substantially an issue or was only an incidental and ancillary to the relief sought for in a redemption suit, yet a finding on it would estop the plaintiffs from re-agitating it. However, there is another part. This is founded on whether the plaintiffs have perfected their title by adverse possession owing to the failure of the decree holders in O.S.No.268 of 1982 to take delivery of the property. Here, the finding is that the plaintiffs indeed were in possession of the property. But the trial Court has not appreciated this aspect for considering which the first appellate court had remanded. Indeed the remand was made essentially on two grounds: (a) that the plaintiffs does not have title to the suit property; and (b) if delivery has been made and the decree is otherwise satisfied, there is no need for seeking delivery through the Court. When this matter reached the first appellate Court again, the focus was more on the plaintiffs' title to the property and not on the aspect as to the failure of the mortgagors to seek a delivery of the property through Court. Here, the testimony of D.W.2 is bit wobbling.



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10. The trial Court's finding appears to carry a certain internal contradictions. If the property has already been delivered by the mortgagees which in terms of Ext.B.2-decree passed in O.S.No.268 of 1982 and the decree is satisfied, then there would not be any need for the trial Court to enter a finding that the plaintiffs are in possession. Having entered it, then its statement that the decree has been satisfied is founded more on its presumption and surmises. However, when the matter reached the first appellate Court, the first appellate Court relied on Ext.B.5, a receipt executed by D.W.2, who is a descendant of the mortgagees, wherein he had categorically stated that the property has been delivered. When the property has been delivered by the mortgagee, necessarily there may not be any need for taking delivery through the Court, and if at all there is any dispute *vis-a-vis* Ext.B.5, then it could be only between the mortgagors and the mortgagees and not to the present plaintiffs, who have been held to be strangers to the property. Now, even though the plaintiffs were found to be in possession, it is not based on the title, and inasmuch as the property is a vacant agricultural land, and the presumption is that possession follows title.



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11. In fine, this Court does not find anything in the judgments and decrees of the Courts below as to warrant interference under Section 100 C.P.C. Accordingly, this Second Appeal is dismissed without costs.

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Internet : Yes

abr/CM

To

- 1.The Sub Judge,
Paramakudi.
- 2.The District Munsif,
Mudukalathur.
- 3.The Section Officer, VR Section,
Madurai Bench of Madras High Court,
Madurai.



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N.SESHASAYEE, J.

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