



SA(md)No.597 of 2016

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED: 14.09.2022

CORAM: JUSTICE N.SESHASAYEE

S.A.(MD)No.597 of 2016

Durairaj

.... Appellant/Appellant/1st Defendant

Vs.

1.Rajammal

....1st Respondent/1st Respondent/Plaintiff

2.Tahsildar,

Kovilpatti,

Office of the Tahsildar,

Near All Women's Police Station,

Kovilpatti

... 2nd Respondent/2nd Respondent/2nd Defendant

Prayer : Second Appeal is filed under Section 100 of Code of Civil Procedure, against the decree and judgment dated 11.02.2016 rendered in A.S.No.1 of 2015 on the file of the Subordinate Court, Kovilpatti, confirming the decree dated 17.10.2014 rendered in O.S.No.11 of 2012 on the file of the District Munsif Court, Kovilpatti.

For Appellant : Mr.A.Shahul Hameed

**For Respondents : Mr.V.Karthikeyan
for Mr.V.Perumal for R1
Mrs.K.Christy Theboral,**



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Additional Government Pleader
for R2

JUDGMENT

The defendant, who lost the suit for declaration and for consequential relief of prohibitory injunction successively before the Courts below is the appellant herein. For narrative convenience, the parties are referred to by their rank before the trial Court.

2. The dispute is over the title to 1.27 acres of dry land in Survey No.256/4, Iyyaneri Village, Kovilpatti Taluk, Tuticorin District. The case of the plaintiff is as follows:

- The suit property originally belonged to a certain Sannasi. On his demise, the property devolved on his son, the first defendant. While so, some 30 years prior to the institution of the suit, the first defendant had orally sold the suit property to a certain Perumalsamy, the husband of the plaintiff herein. The patta for the property too has been issued in his name. While so, on 12.11.2010 vide Ext.A.2, Perumalsamy settled the suit property in the name of his wife.
- Since the sale by the first defendant in favour of the plaintiff's husband



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Perumalsamy was an oral sale, the first defendant began to interfere with the title of the plaintiff. Indeed, he had approached the second defendant for transfer of patta in his name. The second defendant vide Ext.A.3 issued notices for holding an enquiry on the application of the first defendant.

Apprehending that the first defendant might obtain a patta in his name, the plaintiff laid the suit.

3. The first defendant in his written statement has alleged:

- That the suit property originally belonged to his father Sannasi, and that Sannasi died on 01.05.1978 as can be seen from Ext.B.3 Death Certificate, that Sannasi left had behind his surviving only son, the first defendant herein, and two daughters, both of whom go by the name 'Mariammal'. Till 04.02.2010, patta for the property stood in the name of Sannasi as could be seen from Ext.B.1.
- Be that as it may, the first defendant had fallen sick and has left the village, to be under the care of his daughter. As a consequence, the suit property remained fallow. Hence, he nominated the plaintiff's husband Perumalsamy more as a caretaker to cultivate the property on his behalf. Taking advantage of the same, Perumalsamy had clandestinely obtained



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Ext.A.1-Patta in his name. On coming to know of the same, the first defendant approached the Tahsildar for re-transfer of patta in his name and the Tahsildar too issued Ext.A.3 notices but the plaintiff's husband has not appeared for enquiry. Indeed, the first defendant has also approached the Taluk Legal Services Committee as could be seen from Ext.A.4, but the plaintiff's husband has not responded to the notice issued by it.

- Ext.A.2-Settlement Deed is a creation of the plaintiff's husband and that it would not confer any title on the plaintiff.

The first defendant had also made a counter claim seeking declaration that Ext.A.2-Settlement Deed is null and void.

4.1 The dispute went to trial, before which both sides adduced oral and documentary evidence. For the plaintiff, she examined herself as P.W.1 and examined P.W.2 and P.W.3 as independent witnesses to prove the alleged oral sale by Sannasi in favour of the plaintiff's husband. She had produced Exts.A1 to A5, of which Ext.A2, settlement deed has already been introduced. The only document, which Perumalsamy relies on for supporting his title for executing Ext.A2 is Ext.A1, computerized patta in his name dated 13.07.2010.

For the defendants, the first defendant examined himself as D.W.1 and he also



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examined certain Samuel as D.W.2. On his side, he had produced as many as eight documents, and they are marked as Ext.B1 to Ext.B8. Of these documents, Ext.B1 is another computerized patta in the name of Sannasi dated 04.02.2010.

4.2 On appreciating the evidence before it, the trial Court decreed the suit. The line of reasoning of the trial Court is essentially founded on Ext.A.1 patta issued to the husband of the plaintiff. The Court has also taken exception to the fact that the first defendant has not produced any document to substantiate that the suit property continued to be in his possession, and that he has not produced any patta in his name and in the names of his sisters and decreed the suit.

5. When the suit reached the first appellate court in A.S.No.1 of 2015, at the instance of first defendant, the first appellate court concurred with the trial court and and relied on the testimony of P.W.2, an independent evidence, who had deposed that the plaintiff's husband had been cultivating the land for about 28 years. Turning to the counter claim of the first defendant, the Court has reasoned that the first defendant has not filed any police complaint alleging that Ext.A2-settlement deed executed by the plaintiff's husband in her



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favour is incompetent and dismissed the counter claim.

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6. Hence, this second appeal at the instance of the first defendant. This Second appeal was admitted on 16.09.2016 for considering the following substantial questions of law:

i) Whether the plaintiff can succeed in the suit for declaration of title merely on the basis of oral sale?

ii) Whether the plea of oral sale and adverse possession can go together to sustain the suit for declaration of title?

iii) When the oral sale was in favour of the husband of the plaintiff, whether, the oral sale could be considered by the Court, in the absence of the examination of the party to the contract or sale, and making such a party available for cross examination?

iv) Whether an oral sale can be decided in favour of a person, setting up such an oral sale, merely on preponderances and probabilities of a case, without the examination of the legality and sustainability and the proof of an oral sale?

v) When the patta in respect to the disputed property stood in the name of the deceased father of the real owner, whether the



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change of patta in the name of a third person, without issuing any notice to the legal heirs of the deceased, is an act of fraud committed by a party to the document, and so, whether the Court is right in relying upon such a patta, procured without notice to the parties.”

7. Heard both sides. The learned counsel for the appellant/first defendant argued:

- That both the Courts below have wrongly fixed the burden of proof on the first defendant to prove his title. While the plaintiff asserts that the first defendant's father had sold the property to the plaintiff's husband orally in her testimony as P.W.1, she would depose that the said sale is for a value of Rs.4,800/-. When any sale of the immovable property is above the value of Rs.100/-, necessarily the Sale Deed has to be registered under Section 17 of the Registration Act, 1908. But, admittedly, no sale deed had been registered.
- The plaintiff has now come out with alternative and inconsistent pleas namely a title based on oral sale in favour of her husband and also adverse possession. However, during trial, she is put to election and the line of oral evidence that she has adduced is essentially pinpointed to the fact that she has opted to establish her title through oral sale and not by



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adverse possession.

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- In fitness of things the plaintiff should have examined her husband.
- Here, it is the case of the first defendant that he had let the plaintiff's husband, Perumalsamy to cultivate on his behalf. Therefore, even if the plaintiff has pleaded adverse possession, she has to prove that she has been in possession of the property hostile to the interest of the first defendant. While the Courts below have taken exception to the fact that the first defendant had not mutated the patta, after the demise of his father Sannasi, Perumalsamy's patta is also not contemporaneous but only was of the year 2010. Ext.A1, patta is dated 13.07.2010, and if only the case of the plaintiff is that the oral sale had taken place some 30 years prior to the filing of the suit, then the plaintiff ought to have explained why no patta was obtained immediately. Here, the Courts below have failed to consider that Ext.B1-Patta, which is few months prior to Ext.A1-Patta. The very fact that Ext.A1-Patta was obtained shortly prior to execution of Ext.A2-Settlement deed indicates that it is procured for the purpose of executing Ext.A2.
- If the alleged oral sale fails, then the presumption is that the title continues to be of the first defendant. The burden is heavily on the plaintiff to substantiate her cause of action which has not been done. So



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far as the first defendant's failure to challenge the counter claim is concerned, technically he can even ignore Ext.A2 for he is not a party to the said document. After all, it is a straight contest between the first defendant and Perumalsamy and when once the oral sale is not proved, any thing that flows out of it also cannot be construed as having been proved.

8. The learned counsel appearing for the first respondent submitted that even though P.W.1 in her cross-examination had deposed that the consideration passed for oral sale of the property is Rs.4,500/-, she has been consistently making the statement that for about 30 years prior to the institution of the suit, the property stood in the name of Perumalsamy, and that the tax has also been paid by her. P.W.2 also supports the statement that the property has been in enjoyment of Perumalsamy. He added that even if the Court finds that the oral sale alleged by the plaintiff is not acceptable, the plaintiff has established the perfection of her title by adverse possession.

9. This Court may not be able to appreciate the defence offered by the learned counsel appearing for the first respondent / plaintiff. First, a plea based on title and also on adverse possession cannot coexist though it is permissible in law.



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In all such situation, a party pleading is put to election but the way the plaintiff has approached the case indicates that she has not given up both. This would imply that the inconsistent pleas will internally destroy each other's efficacy.

10. Turning to the oral sale alleged, as was very rightly submitted by the learned counsel appearing for the appellant that when once the sale consideration exceeds anything more than Rs.100/-, then it must be only under a registered document. Secondly, the plaintiff asserts in her cross-examination that patta has been mutated in the name of Perumalsamy and he has been paying kist for about 30 years, yet the patta that is produced before this Court is dated 13.07.2010, some two years prior to the institution of the suit. Indeed, Ext.A1-Patta was obtained by Perumalsamy some four months prior to the execution of Ext.A2-Settlement Deed dated 12.11.2010. It would amaze any reasonable mind as to how the Revenue Officials could ever mutate the patta, when the property admittedly stood in the name of Sannasi. After all, the patta is not a document of title. Hence, the Court cannot ignore the pre-existing title in the name of Sannasi and after his life that of his son, the first defendant herein.



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11. At this juncture, the learned counsel appearing for the first respondent also submitted that the plaintiff has all along been in possession and at least, her possession must be protected.

12. Turning to the last leg of the learned counsel's argument on the aspect of the possession, this Court finds it difficult to share whatever that was submitted before this Court. P.W.2, had deposed that he was in his adolescence at the time when the alleged oral sale had taken place, but barring this, he is not competent to speak to any facts to the nature of the possession. There is nothing on record to do so.

13. In fine, this Second Appeal is allowed and the judgment and decree of the first Appellate Court in A.S.No.1 of 2015 on the file of the Sub Judge, Kovi;patti is set aside. No costs.

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Index:Yes/No

Internet:Yes/No

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To

1. Subordinate Court, Kovilpatti
2. District Munsif Court, Kovilpatti.



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N.SESHASAYEE., J.

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