



S.A.No.593 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 18.11.2022

PRONOUNCED ON: 09.01.2023

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.593 of 2019
and C.M.P.No.9998 of 2019

G. Krishnamoorthy (Deceased)

1. G.Mani

2. G.Ganesan

G.Damodaran (Deceased)

G.Parthasarathy (Deceased)

G.Sankar (Deceased)

3. D.Kasthuri

4. D.Sekar

5. D.Boopathy

6. D.Kothandan

7. D.Chokkan

(Strike out as per order dated 15.02.2018
in C.M.P.No.56 of 2017)

8. P.Mallika

9. P.Selvi

10.P.Rudrakumar

11.P.Maheshkumar

12.S.Lalitha

13.S.Prakash

1/29



S.A.No.593 of 2019

14. S.Thinesh

15. K.Santhi

16. K.Sangeetha

17. K.Vignesh

18. G.Amsakumar

19. G.Pushpavathy (Deceased)

...Appellants

Vs

M.Sankaran

... Respondent

Prayer: Second Appeal is filed under Section 100 of C.P.C against the judgment and decree dated 23.10.2018 made in A.S.No.251 of 2016 on the file of the XVII Additional Judge, City Civil Court, Chennai reversing the judgment and decree dated 17.06.2016 made in O.S.No.8300 of 1996 on the file of the V Assistant Judge, City Civil Court, Chennai

For Appellants : Mr.K.Lavan

For Respondent : Ms. Rita Chandrasekar
for Ms.R.Meenakshi

JUDGEMENT

The defendants are the appellants before this Court. The facts which has culminated in filing of the above second appeal are herein below set out briefly and the parties are referred to in the same ranking as before the V

2/29



S.A.No.593 of 2019

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Assistant Judge, City Civil Court, Chennai in O.S.No.8300 of 1996. The suit was originally filed on the original side of this Court in C.S.No.159 of 1992 and thereafter, when the pecuniary jurisdiction of the Civil Courts had been enhanced, the above suit was transferred to the file of the V Assistant City Civil Court, Chennai.

2. Plaintiffs' case:

(i) The plaintiff had filed the above suit seeking a declaration that the plaintiff is the owner of the rear portion of the Second schedule of the suit property and to direct the defendants to deliver the vacant possession of the same to the plaintiff.

(ii) It is the case of the plaintiff that he is the absolute owner of the property which is morefully described in the First schedule of the suit property. Defendants 1, 2, 4 to 6 are the sons of late Gangadharan Naicker and the 3rd defendant is the son-in-law of Gangadharan Naicker. The plaintiff would submit that the suit properties originally belonged to the joint



S.A.No.593 of 2019

WEB COPY

family of Ellaiappa Naicker and his brother, Madurai Naicker. The brothers had partitioned the properties and in the partition, the property on the East was allotted to the share of Ellaiappa Naicker and the immediate west to the said Madurai Naicker. After the death of Ellaiappa Naicker, the properties devolved on his son Gangadharan Naicker, the father of the defendants 2, 4 to 6. Originally, the suit was filed only against the defendants 1 to 3 and later, the legal representatives of the other sons of Gangadharan Naicker and his daughters were impleaded. On 16.10.1963, Gangadharan Naicker along with his wife, Pushpavathi had sold the properties to one Punnaivana Natha Varma @ Punniya Koti, who shall hereinafter be referred to as Punniya Koti. The sale was executed by the said Gangadharan Naicker for himself and as the guardian and father of the minors. In the year 1974, Punniya Koti died leaving behind him surviving his wife, Lakshmi Ammal. The said Gangadharan Naicker thereafter died on 30.10.1985 nearly 11 years after the death of Punniya Koti. Lakshmi Ammal in turn had sold the properties under a registered Sale Deed dated 30.01.1980 in favour of the plaintiff and possession of the properties was also delivered to him. Since then, the



S.A.No.593 of 2019

WEB COPY

plaintiff has been in absolute possession and enjoyment of the First schedule of suit properties.

(ii) Meanwhile, Madurai Naicker and his wife had died issue less and therefore, his properties situate to the East of the suit properties fell to the share of Gangadharan Naicker. It appears that the legal representatives of Gangadharan Naicker had partitioned the said properties after the demise of their father. It is the further case of the plaintiff that as regards the property on the West, 2 portions were sold out and only 3 portions remain. The plaintiff would further submit that the defendants, who are occupying the property west of the First schedule property, started claiming a right in the rear portion of the suit property. They had also issued a legal notice, which was suitably replied by the plaintiff. Thereafter, there has been no further action on the side of the defendants. However, during the month of January 1992, once again attempts were made by the defendants to enter possession of the rear portion of the First schedule property. The plaintiff had immediately lodged a police complaint and the police authorities had



S.A.No.593 of 2019

WEB COPY

advised the defendants not to precipitate the matter further. The defendants gave an assurance to the police authorities that they would not trespass, however the said undertaking has been observed in breach. They had trespassed into the suit properties on 07.02.1992 at around midnight and put up 7 huts thereon. Though a complaint was lodged with the police authorities, they had not taken any action and therefore, the plaintiff was constrained to file the above suit for the reliefs stated therein. The plaintiff would submit that the subject matter of the suit is only the rear portion of the First schedule property, which has been described as the Second schedule property in the plaint. The recovery was sought for the portion marked as ABCD in the plan annexed to the plaint, which is in the illegal occupation of the defendants. Therefore, the suit.

3. Written statement of defendants:

The 5th defendant had filed a written statement, which was adopted by the defendants 1 to 4, wherein they had denied the very sale in favour of Punniya Koti. It is their contention that the sale was only executed as a



S.A.No.593 of 2019

WEB COPY

security for the loan that the said Gangadharan Naicker had borrowed to pay up the dues to the Bank. They had contended that the signature of their mother, namely, the 23rd defendant is not the signature found in the Sale Deed and that apart, she had not been made as a party in the suit (the written statement was filed before the other defendants were impleaded as defendants). The understanding between Gangadharan Naicker and Punniya Koti was that the properties would be re-conveyed to Gangadharan Naicker on Gangadharan Naicker. re-paying the loan to Punniya Koti. The parties had agreed that the time would not be the essence of the contract. Therefore, it is their contention that the said Punniya Koti was holding the properties in trust. While so, Punniya Koti has passed away and his wife in total breach of the agreement between the parties had sold the properties to the plaintiff under a Deed dated 30.01.1980. The plaintiff, who has no title to the properties, cannot seek to recover the same from the defendants. They had also raised a plea of non-joinder of necessary parties. Therefore, they prayed that the suit be dismissed. The written statement filed by the other defendants is more or less on the same lines wherein they had raised the



S.A.No.593 of 2019

defense that the sale was only a sham and nominal one, since it was executed as a security for the loan executed by Punniya Koti to Gangadharan Naicker. The defendants 12 to 15 had taken a plea that the possession of Punniya Koti in the suit property was only as a tenant, consequently they had also sought to have the appeal dismissed.

4. **Trial Court:**

(i) The learned trial Judge on considering the evidence on record had framed the following issues:

- i. *Whether the suit is bad for non-joinder of necessary parties?*
- ii. *Whether the plaintiff is entitled to the declaration as prayed for?*
- iii *To what relief?.*

Thereafter, the following additional Issue was framed on 07.10.2005:

Whether the plaintiff is entitled for delivery of vacant possession or not?



S.A.No.593 of 2019

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Once again, additional issues were framed on 18.10.2006, which are as follows:-

(i) *Whether the sale deed is not executed*

by Pushpammal?

(ii) *Whether the suit is not maintainable?*

(ii). The plaintiff had examined himself as P.W1 and Exs.A1 to A25 were marked on his side. The Advocate Commissioner's report-Ex.C1 was also marked during the cross examination of P.W1. The 1st defendant examined himself as D.W1, 12th defendant as D.W2, 16th defendant as D.W3 and the 4th defendant as D.W4. They had, on their side, marked Exs.B1 to B21.

(iii). The learned V Assistant Judge had proceeded to dismiss the suit on the following reasonings:

a) *The property described in Ex.A1 and Ex.A4 were different, inasmuch as the sale*



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S.A.No.593 of 2019

in the year 1963 under Ex.A1 did not contain the T.S.No or the Survey No., Paimash No or Block No, further Ex.A1 did not contain the correct schedule of property.

b) The learned Judge had further observed that Ex.A1 contains a recital about the discharge of the loan to the Bank and Ex.A4 would also recite about the discharge, which only goes to show that the Sale Deed-Ex.A1 was intended only as a security.

c) The plaintiff has not produced the proof to show that the loan had been discharged. Although Ex.A4-Sale Deed contains a recital about the discharge and the return of the documents to the plaintiff, however P.W1 in his cross examination would depose that the documents set out in Ex.A4-Sale Deed had not been handed over to him.



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S.A.No.593 of 2019

d) *The learned Judge has also observed that Gangadharan Naicker has signed his full name in Ex.A1 whereas in Ex.B10 and B18, he has signed only as Gangadhar.*

e) *The signature in Ex.A1 is that of Pushpavathi and not Pushpavathi Ammal and the learned Judge has also found fault with the plaintiff for not cross examining D.W1 (the 23rd defendant). He further observed that although Exs.A1 and A4 had been denied, the plaintiff had not taken any steps to examine the witnesses to the document. He had also found fault with the non-joinder of Lakshmi Ammal as party to the proceedings.*

f) *The Court below further held that since the plaintiff was unable to produce the proof to show that Lakshmi Ammal was the wife of Punniya Koti and as there were no revenue records for the period of Ex.A1(1963) and Ex.A4 (1968) the same would clearly show that*



S.A.No.593 of 2019

the plaintiff is not in possession of the property. That apart when the suit was pending before this Court, the plaintiff had taken out an interlocutory application in I.A.112 of 1992 in C.S.No.159 of 1992 for an injunction restraining the defendants from interfering with his peaceful possession and enjoyment of the property, which appears to contradict the relief claimed by the plaintiff, namely, recovery of possession.

5. Appellate Court:

Aggrieved by the said judgment and decree of the trial Court, the plaintiff had filed an appeal in A.S.No.251 of 2016 on the file of the XVII Additional Judge, City Civil Court, Chennai. The appellate Court had framed the following points for consideration:

1) Whether the trial Court was right in arriving at a conclusion that the schedule in Exs.A1 and A4 were not mentioned properly?



S.A.No.593 of 2019

2) *Whether the defendants are entitled to dispute the execution and recitals of Ex.A1?*

3) *Whether the defendants are estopped under Section 92 of the Indian Evidence Act from agitating beyond the recitals of Ex.A1?*

4) *Whether the judgment and decree of the trial Court in O.S.No.8300 of 1996 dated 17.06.2016 is liable to be set aside on the grounds raised by the appellant?*

Ultimately, the learned Judge observed that the defendants were unable to prove that the sale in favour of Punniya Koti under Ex.A1 was never intended to be acted upon and was only offered as a security. Ex.A1-Sale Deed has been executed in the year 1963 and there is no proof on the side of the defendants to show that they had discharged the loan to Punniya Koti and another factor that had swayed the mind of the Appellate Court to reverse the judgment and decree of the trial Court was Ex.A25, the partition deed that was executed between the defendants and their mother, Pushpavathi in respect of the properties situate on the western side of the First schedule property wherein there is a recital that all the properties



S.A.No.593 of 2019

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belonging to the family of Gangadharan Naicker have been partitioned under the deed and the deed is silent about the properties of Ellaiappan Naicker, which according to the defendants continue to belong to them. That apart, the schedule in the deed clearly shows that the property on the east is the property that had been allotted to Elliappan Naicker. That apart, the learned Judge had relied upon the report of the Advocate Commissioner, who has clearly opined that the huts in the second schedule property are of recent origin and further, the defendants are not residing in the second schedule of property. Therefore, the appellate Court had proceeded to reverse the judgment and decree passed by the V Assistant Judge, City Civil Court, Chennai in O.S.No.8300 of 1996 and allow the appeal. It is against this judgment and decree that the present second appeal has been filed.

5. Substantial questions of law:

This second appeal has been admitted on the following substantial questions of law:



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S.A.No.593 of 2019

(i) When admittedly execution of Ex.A1 sale deed is disputed by the appellants, and the same was not proved as per Section 72 of the Evidence Act, whether the lower court is right in relying upon Ex.A1 sale deed to grant the relief of declaration in respect of the suit property in favour of the respondent?

(ii) When execution of Ex.A1 is denied by the appellants and the execution of Ex.A1 was not proved in a manner known to law, whether the lower appellate court is right in holding that Ex.A1 is 30 years old document hence the presumption has to be drawn?

(iii) When execution of Ex.A1 is denied by the appellants and execution of Ex.A1 was not proved by the respondent in a manner known to law, whether the lower appellate court is right in invoking section 91 and 92 of the Indian Evidence Act and say that the appellants are estopped from deposing beyond the recitals of Ex.A1?



S.A.No.593 of 2019

(iv) *Whether the lower appellate court has committed an error of law by shifting the burden of proof on the appellants to prove their plea as to Ex.A1 forgetting the principle that the respondent/plaintiff who claims ownership to the suit property under Ex.A1 has to prove the same?*

(v) *Whether the first appellate court finding that advocate commissioner report can be used for proving possession over the suit property is correct or not?*

(vi) *When the appellants disputed the execution of Ex.A1 and A4 in their written statement and additional written statement, whether the courts below failed to frame the issues recording the validity of execution of Ex.A1 and Ex.A4 and give a specific finding thereon?*

6. Submissions:

(i) Mr.K.Lavan, learned counsel appearing for the appellants would place his arguments on the fact that Ex.A1-Sale Deed was a



S.A.No.593 of 2019

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conditional one. In order to prove the same, the executant of the document, namely, the 23rd defendant had been examined as D.W1. However, the plaintiff had not chosen to cross examine her for over 3 years and on her death, an application was moved to echew the evidence of D.W1, which was also done. That apart, he would submit that the plaintiff has not let in any evidence whatsoever to prove his possession of the suit schedule properties. He would contend that Ex.A1 is a forged document (such statement has not been pleaded even in the written statement). He would submit that it is an admitted case that the suit schedule properties are the ancestral properties of Gangadharan Naicker and once the same are ancestral properties, he had no right to alienate the properties belonging to his sons. He would also plead that the non-joinder of necessary parties like Lakshmi Ammal were fatal to the case. The complaint copy which has been marked as Ex.A5 is not accompanied with the C.S.R from the Police Department and therefore, it does not prove the alleged trespass or the execution for filing of the above suit. He would rely upon the evidence of P.W1 who during his cross examination has clearly admitted that the revenue records have not been



S.A.No.593 of 2019

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mutated to Punniya Koti. He would further draw the attention of the Court to Exs.B4 to B9 all of which are addressed to Gangadharan Naicker in respect of the Urban Land Tax, which would go to show that the sale never intended to be acted upon. He would further submit that P.W1 has contradicted the statement made by him in his chief examination. In the chief examination although he has claimed to be in possession, in his cross examination, he specifically denied the fact that he was in possession till 07.02.1992. Therefore, the learned counsel would submit that there was no cause of action for filing of the suit. Further, the description of the properties in Ex.A1 is very sketchy whereas in Ex.A4 it is much more elaborate than the earlier Sale Deed-Ex.A1. The burden of proof which has been cast upon the plaintiff has not been satisfactorily discharged and the suit is bad for non-joinder of necessary parties. That apart, an adverse inference has been drawn from the non-examination of D.W1. He would submit that non-production of original parent documents by the plaintiff would give credence to the defense that the mortgage was not discharged by Punniya Koti, since one of the components of the sale consideration as



S.A.No.593 of 2019

WEB COPY

described in Ex.A4 is the settlement of the dues to the Bank. He would submit that the appellate Court has erred in holding that the documents like ration card and other evidence would go to show that it is the defendants who are in possession of the suit properties. The learned counsel would further submit that the plaintiff has not proved his case and the appellate Court is in error in reversing the well considered judgment and decree of the trial Court.

(ii) In order to substantiate his contentions, the learned counsel for the appellants has relied on the following judgments:

Sl.No.	Citations
1	<i>1999(3) SCC 573 : 1999 SCC Online SC 294 [Vidhyadhar Vs.Manikrao and Another]</i>
2	<i>2015 (14) SCC 450 : 2015 SCC Online SC 251 [State of Madhya Pradesh Vs.Nomi Singh and Another]</i>
3	<i>2008 (4) SCC 530[Thiruvengadam Pillai Vs.Navaneethammal and Another]</i>
4	<i>2014 (2) SCC 269 [Union India and Others Vs.Vasavi Cooperative Housing Society Limited and Others]</i>
5	<i>1996 (8) SCC 357 [Lakhi Baruah and Others Vs.Padma Kanta Kalita and Others]</i>
6	<i>1996 (3) SCC 596 [Dev Raj (Dead)Through Lrs Vs Harbans Singh (Dead) Through LRs]</i>



S.A.No.593 of 2019

Sl.No.	Citations
7	2013 (9) SCC 319 [State of Andhra Pradesh and Others Vs.Star Bone Mill and Fertiliser Company]
8	2010 (2) CTC 198 [Natarajan Vs.Paramasivam]

He would further submit that the recitals in Ex.A1-Sale Deed would itself go to show that the same is a conditional one in as much as Ex.A1 mandates that the deceased Punniya Koti should discharge the loan to the Bank. Therefore, the learned counsel would plead that the appeal be allowed and the judgment and decree of the trial Court be restored.

(iii) Per contra, Ms.Rita Chandrasekar, learned counsel for the respondent would submit that there is no pleading that the mortgage has been discharged. Additional documents have been placed thereafter. She would submit that in Ex.A2 which is a Town Survey Register, the name of Punnia Koti has been entered as the owner of the property which would go to show that the revenue records had been mutated in favour of Punniya Koti. The said exhibit would further show that the existence of tiled house in the property. Ex.A18-Encumbrance certificate for the period from



S.A.No.593 of 2019

WEB COPY

01.01.1963 to 31.05.1982 does reflect the sale in favour of the plaintiff by Lakshmi Ammal. Ex.A1-Sale Deed dated 16.10.1963 has been executed not only by Gangadhara Naicker but also his wife for himself and as his guardian of his children and also by his wife Pushpavathi Ammal. Further, she would submit that the description of the properties particularly the boundaries in Exs.A1 and A4 are one and the same. She would further submit that non- examination of D.W1 is not fatal to the plaintiff's case. The proof affidavit of D.W1 had been filed on 11.10.2007 and from 02.11.2007, the cross could not be proceeded with, as there was an interlocutory application was pending. She would therefore contend that the defendants have not been able to prove that the sale in favour of Punniya Koti was only by way of a security and once they have been able to prove their case, the recitals in the deed has to be taken in note. Therefore, Ex.A1 was only intended to be a sale. That apart, she would submit that no action has been taken by the defendants to seek a re-conveyance during the lifetime of Gangadharam Naicker, who had died in the year 1985 nearly 22 years after the execution of Ex.A1. Therefore, she would submit that the plaintiff who



S.A.No.593 of 2019

had purchased the property under Ex.A4 from the wife of Punniya Koti is the absolute owner of the suit schedule property and the Commissioner's report which shows that the encroachment is of a recent origin clearly substantiate the case of the plaintiff and therefore, the judgment and decree of the appellate Court cannot be found fault with and it can be sustained.

7. **Discussions:**

The admitted facts of the case is that the properties originally belonged to Ellaiappa Naicker and his brother, Madurai Naicker and in a partition between the two, the suit First schedule of property was allotted to the share of Ellaiappa Naicker and the property to the west of the First Schedule was allotted to the share of Madurai Naicker. Ellaiappa Naicker had died leaving behind him surviving his son, Gangadharan Naicker, the father of the defendants 1 to 4 and his daughters, who have been subsequently impleaded as parties. Madurai Naicker had died issue less and his property also fell to the share of Gangadharan Naicker. Gangadharan Naicker under Ex.A1-Sale Deed had sold the property to Punniya Koti. The



S.A.No.593 of 2019

plaintiff would contend that the sale was only by way of a security for the loan borrowed by Gangadhara Naicker to settle the dues of the Bank. However, the defendants have not let in any evidence whatsoever to substantiate their plea that there was an oral agreement between the Gangadharan Naicker and Punniyakoti that the property would be re-conveyed to Gangadharan Naicker upon Gangadhara Naicker re-paying the loan to Punniya Koti. Admittedly, till his death in the year 1985, there is no proof to show that Gangadhara Naicker had discharged his loan to Punniya Koti assuming that the sale was a conditional one. In fact, till the filing of the suit and thereafter, there is nothing to show that the loan had been discharged. Therefore, the defendants have failed to prove their case, which is contrary to the recitals in Ex.A1. The Trial Court has presumed the case of the defendants that the sale is a conditional sale has been proved on account of the recital in the Sale Deed about the purchasers settling the dues of the Bank. The appellate Court has rightly reversed this conclusion of the trial Court. The plaintiff has purchased the property from the wife of Punniya Koti and the Sale Deed would contain the recitals about the



S.A.No.593 of 2019

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mortgage in favour of the Bank and its discharge. The fact that the sale is an absolute one is further evident from a perusal of Ex.A25, which is the partition deed that had been effected amongst the defendants and their mother. The recitals in the document would clearly indicate that the suit properties did not belong to the family on 10.11.1988 since the recital in Ex.A1 is as follows:-

“பொது குடும்பார்த்தமாக இருந்த யாவற்று
சொத்துக்கள் யாவும் நாம் பாகம் செய்து
கொண்டுவிட்டபடியால் பாகம் செய்து கொள்ள வேண்டியதாக
உள்ள சொத்துக்கள் யாதொன்றும் இல்லாததால் அவர்
அவர்கள் பாகச் சொத்துக்களை அவர் ஜாஸ்தி, கம்மி
லாபமுள்படி அடைந்து கொள்ள வேண்டியது”.

Further in Ex.A25, there is a reference to the partition and it is stated that the property, which was allotted to the share of Madurai Naicker had ultimately devolved on Gangadharan Naicker and it is that property which has been partitioned. One of the boundaries to the “C” schedule property is that of the plaintiff on the East. Therefore, it is very clear that the defendants had in the year 1988 itself confirmed the sale that had taken



S.A.No.593 of 2019

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place in the year 1963. Therefore, the conclusion of the appellate Court that the sale is an absolute sale in favour of the plaintiff's purchasers has to necessarily be upheld and substantial questions of law (i) to (iii) are answered against the defendants. The appellate Court has considered the evidence on record to arrive at a conclusion that Ex.A1 had been executed by Gangadharan Naicker and his wife, Pushpavathy for themselves and on behalf of the minors with the intent of selling the properties to Punniya Koti. Since the defendants had taken out a plea which runs contra to the recitals in the document, the onus is upon them to prove the same. Ultimately, the defendants have not been in a position to rebut the evidence given by the plaintiff. Therefore, the substantial question of law No.(iv) is also answered against the defendants. Ex.A4 was sought to be disbelieved by the trial Court only on the ground that T.S.No, Block No. and Survey No. which is not found in Ex.A1 is introduced in Ex.A4. The trial Court has ignored the boundary description. In this regard, the lower appellate Court has considered the boundaries in both the deeds to come to the conclusion that the property which has been conveyed under Ex.A1 is the very same



S.A.No.593 of 2019

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property, which is the subject matter of Ex.A4. The lower appellate Court has considered the conclusion of the trial Court regarding Exs.A1 and A4 and has rendered a finding that Exhibits A1 and A4 were validly executed documents. The appellate Court has held that a perusal of Exs.A1 and A4 would clearly show that the property sold under Exs.A1 and A4 are one and the same. Therefore, the substantial question of law No.(vi) is also answered against the defendants. Ex.A2-the original town survey register stands in the name of Punniya koti and there is a reference to a tiled house in the said document. The plaintiff has also produced Exs.A3 to A9, which are the original property tax receipts standing in the name of Punniya Koti and Lakshmi Ammal. Ex.A10 is the entry for ownership intimation to the plaintiff. Exs.A11 to A14 would show that the public outgoings stand in the name of the plaintiff and his predecessors-in-title. As already stated one of the boundaries in the “C” schedule in Ex.A25 also narrates the name of the plaintiff. The appellate Court has considered the evidence of D.W1 who has admitted that the plaintiff is in possession of the suit property. In these circumstances, since the evidence has been considered by the lower appellate



S.A.No.593 of 2019

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Court in detail to arrive at a conclusion that the plaintiff is entitled to the decree as prayed for, this Court sitting in Second Appeal under Section 100 of Civil Procedure Code does not propose to re-appreciate the evidence on record. The Commissioner's report clearly shows that there are 7 unfinished huts in the property not occupied by anyone and the same does not even have doors to it. The defendants have themselves admitted that they are not in possession of the same. The Commissioner's report has been considered as one more piece of evidence to show the physical features of the property. The substantial question of law No.(v) regarding the possession is also answered against the defendant. Further, the judgments relied upon by the learned counsel for the appellants/defendants would not be applicable to the facts of the instant case. In the above circumstances, the Second Appeal is dismissed and the judgment and decree of the lower appellate Court is confirmed. No costs. Consequently, connected miscellaneous petition is closed.

09.01.2023



S.A.No.593 of 2019

Index : Yes/No

Speaking order/non-speaking order
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To

1. The XVII Additional Judge, City Civil Court, Chennai
2. The V Assistant Judge, City Civil Court, Chennai
3. The Section Officer, V.R.Section, High Court, Madras.



WEB COPY



S.A.No.593 of 2019

P.T.ASHA, J.,

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S.A.No.593 of 2019
and C.M.P.No.9998 of 2019

09.01.2023