



S.A.No.553 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on 13.02.2024	Judgment Pronounced on 08.03.2024
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THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.553 of 2017
and C.M.P.Nos.13172 of 2018 & 13492 of 2017

R.Kaliyaperumal

..Appellant

Vs.

Nanda Thirumal

..Respondent

PRAYER: The Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 16.02.2017 passed in A.S.No.70 of 2013 by the Principal Subordinate Judge, Tindivanam, reversing the judgment and decree dated 22.11.2013 passed in O.S.No.29 of 2009 by the District Munsif -cum- Judicial Magistrate, Vanur.

For Appellant : Mr.V.Ayyadurai
Senior Counsel
for Mr.V.Balamurugane

For Respondent : Mr.V.Ragavachari
Senior Counsel
for Mrs.V.Srimathi



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JUDGMENT

This Second Appeal has been filed against the judgment and decree dated 16.02.2017 passed in A.S.No.70 of 2013 on the file of the Principal Subordinate Judge, Tindivanam, reversing the judgment and decree dated 22.11.2013 passed in O.S.No.29 of 2009 on the file of the District Munsif -cum- Judicial Magistrate, Vanur.

2.The plaintiff, who suffered a reversal finding at the hands of the First Appellate Court, in a suit for declaration and permanent injunction, is the appellant herein.

3.The parties are described as per their litigating status before the Trial Court.

4.The case of the plaintiff is that he had purchased the suit property on 02.11.2007 from one Venugopal and that ever since the said date, he has been in peaceful possession and enjoyment of the same. According to the plaintiff, the suit property is comprised in S.No.354 and there was a resurvey



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in the year 1924, the property was assigned Resurvey No.231/2A measuring 2.96 acres and subsequently, it was again resurveyed and assigned S.No.267/1A. The total extent available in S.No.354 namely the suit property is 4 acres and 13 cents. According to the plaintiff, the said property belonged to one Srinivasa Gounder, who conveyed 2.81 acres in favour of Arumuga Gounder on 14.10.1911. Srinivasa Gounder also settled 1 acre and 32 cents in favour of Throwpathiamman Temple and after the above mentioned sale/gift, the said Srinivasa Gounder had no right in the suit property. Arumuga Gounder sold 1.32 acres to Murugappa Gounder, being the southern side of the property and to Lakshmiammal, 1.49 acres, being northern side, in and by sale deeds dated 07.02.1914 and 19.04.1918. The sons of Lakshmiammal had borrowed money from Venugopal and the said Venugopal had filed a suit in O.S.No.303 of 1931 and the property of Lakshmiammal was brought to sale in public auction and Venugopal was the successful auction purchaser, who also obtained delivery of possession from the Executing Court on 06.02.1939. Subsequently, the said Venugopal has also mutated the revenue records in his favour and thereafter, he sold the property to the plaintiff. However, the defendants are trying to stake a claim in the suit property purchased by the plaintiff from the said Venugopal and



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therefore, the suit has been filed for declaration of title and injunction to protect the possession of the plaintiff.

5.The defendant filed a written statement stating that the suit property originally belonged to his great grandfather, Srinivasa Gounder who had orally gifted 1.32 acres in S.No.354 to Throwpathi Amman Temple. The sale deeds in favour of Arumugam and Lakshmiammal are denied. According to the defendant, the Srinivasa Gounder was in possession of the remaining extent of 2.2 acres and he died leaving behind his son, Adhimoolam who was in possession of the suit property during his lifetime and subsequently, the said Adhimoolam also died, leaving behind his six sons as his legal heirs. Out of the said six sons, two of the sons by name Venugopal and Nandhagopal died leaving behind their heirs and the suit property was partitioned amongst the surviving legal heirs on 07.06.1973. In the said partition Deed, the suit property was allotted to the share of Jayaraman and Thirumal who subsequently divided the properties in and by a Partition Deed dated 15.12.2003 and the suit properties were allotted to the share of Thirumal. The partition deed has been attested by the plaintiff.



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6.It is the specific case of the defendant that the plaintiff is not entitled to the relief of declaration or permanent injunction. The decree obtained by Venugopal is also denied and the averment that Venugopal took delivery of the property through Court is also denied. According to the defendant, the plaintiff has no title to suit property and consequently he is neither entitled to relief of declaration nor entitled to the relief of permanent injunction.

7.The Trial Court, after assessing the oral and documentary evidence adduced by the parties, decreed the suit. On appeal by the defendant, the First Appellate Court placing reliance on Section 110 of Indian Evidence Act held that the defendant had proved possession and enjoyment of the suit properties and on the contrary, the plaintiff had not proved title and possession of the suit property and reversed the judgment and decree of the Trial Court and dismissed the suit.

8.Aggrieved by the reversal findings, the plaintiff has come up by way of this Second Appeal. On 11.10.20017, the above Second Appeal was admitted on the following substantial questions of law:



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a) Whether the appellate Court has erred in law in having failed to consider the fact that the plaintiffs vendor has purchased the suit property and took delivery by Court auction sale in E.No.63 of 1935 in O.S.No.303 of 1931 (Exs.A5 and A6) and the plaintiff who purchased the property from the auction purchaser available by Ex.A8, Sale Deed has derived valid title and the only remedy available to the defendant is to challenge the decree passed in O.S.No.303 of 1931?

b) Whether the Appellate Court has not followed the settled proposition that once court auction sale is confirmed, auction purchaser becomes absolute owner from the date of Court auction sale and then the property was sold to the plaintiff. Hence the judgment of the appellate Court is against law and no facts?

c) Whether the appellate Court is right in rejecting the claim of title, in spite of the production of antecedent title deeds and documents to prove possession and when admittedly the defendant who has not produced any document of title except the self serving document styled as partition deed?



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d) Whether the Appellate Court is right in denying the title declaration relief when the plaintiffs vendor has purchased the suit property under Court auction sale and the failure of the Appellate Court in not following the setting legal position that title follows possession?

9.I have heard Mr.V.Ayyadurai, learned Senior Counsel for Mr.V.Balamurugane, learned counsel for the appellant and Mr.V.Ragavachari, learned Senior Counsel for Mrs.V.Srimathi, learned counsel for the respondent.

10.Mr.V.Ayyadurai, learned Senior Counsel for the appellant would state that the First Appellate Court has misapplied the provisions of Section 110 of Indian Evidence Act, instead of applying Sections 102 to 104 of the Indian Evidence At. The learned Senior Counsel would also state that merely because the plaintiff has attested as one of the witnesses to the document, knowledge of contents cannot be imputed or by such mere attestation. He would also state that having purchased the property in a Court auction and having filed an anterior registered document, prior to the alleged partition deed under which alone the defendant claimed title, the plaintiff was entitled to a decree as prayed for.



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11.He would also place reliance on the decision of the Hon'ble Supreme Court in *Ella Ammal Vs. Kothambu Amal* reported in **2011 (6) CTC 282** with regard to effect of a party attesting a document and relevance of the same in a case of this nature.

12.The learned Senior Counsel also placed reliance on the decision of the Hon'ble Supreme Court in *R.Ve.Venkatachala Gounder Vs. Arulmughu Viswesarasami & V.P.Temple and Another* reported in **(2003) 8 SCC 752** where the Hon'ble Supreme Court held that in a suit for recovery of possession based on title, the plaintiff has to prove his title and satisfy the Court that he is entitled to dispossess the defendant from possession of the suit property and that in a suit for recovery of possession based on title once the plaintiff is able to create a high degree of probability so as to shift the onus on the defendant to discharge his onus and in the absence thereof, the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title.



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13.He would also place reliance on the judgment of the Division Bench of the Bombay High Court in ***The Secretary of State for India in Council Vs. Chimanlal Jamnadas and Others***, reported in ***ILR Bom 357*** where Section 110 of the Indian Evidence Act has been discussed and held, when it would be relevant and when it would apply. He would also state that the Trial Court had rendered a categorical finding that the plaintiff had proved his possession of the suit property by filing Kist receipts and also by producing the delivery receipt issued by the competent Court in Executing proceedings in Ex.A6. He would also rely on Ex.A7 which is the confirmation of sale dated 25.11.1935 in favour of the plaintiff's vendor. He would also point out that the defendant, even in the written statement, had accepted the settlement in favour of the Temple, namely Throwpathiamman Temple. The learned Senior Counsel would conclude his arguments stating that the partition deed under which the defendant claimed right was only a self serving document and lost all weight when pitted against a registered deeds prior in point of time, right from 1914 onwards.

14.Per contra, Mr.V.Ragavachari, learned Senior Counsel appearing for the respondent would state that the defendant had established possession



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of the property right from 1973 and necessary revenue records have also been exhibited before the Trial Court. However, the plaintiff has failed to establish any document to show possession after 1973.

15.He would also place reliance on the decision of the Hon'ble Supreme Court reported in *Tirumala Tirupathi Devasthams Vs. K.M.Krishnaiah* reported in (1998) 3 SCC 331 and state that the plaintiff has not been able to correlate the suit property with the confirmation of sale and delivery receipt in Ex.A6 and Ex.A7. The learned Senior Counsel therefore prayed for dismissal of the Second Appeal, no interference being warranted with the findings of the First Appellate Court.

16.I have carefully considered the rival submissions advanced by the learned Senior Counsel on either side and also perused the materials placed before me.

17.The specific case of the plaintiff is that his vendor had purchased the suit property under a Court auction sale and Ex.A6 is the delivery receipt dated 06.02.1939, confirming the handing over of the possession of the suit



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property to the plaintiff. Ex.A7 is the order confirming the sale dated 25.11.1935. The plaintiff has purchased the property in Ex.A8 dated 02.11.2007 from the auction purchaser, Venugopal Chetty and ever since the year 2008, the plaintiff has been in possession and to evidence the same, he has filed Kist receipts which have been marked as Ex.A36 and Ex.A37. The plaintiff has also exhibited Patta Book in the name of the vendor in Ex.A9 and Kist receipts right from 1951 onwards to 1990 in the name of Maragadha Ammal, who is none else than the wife of Venugopal Chettiyar, the auction purchaser. The plaintiff has also chosen to file the Gift Deed in favour of Throwpathiammal Temple, Ex.A1 and sale deed in favour of Arumuga Gounder conveying 2.1 acres in Ex.A2. Arumuga Gounder has sold a portion of the property measuring 1.32 acres to Mrugappa Gounder under sale deed dated 07.02.1914 and the same has been exhibited in Ex.A3. Ex.A4 is the sale deed under which Lakshmi Ammal purchased 1.49 acres out of total 2.19 acres. The sale certificate issued in O.S.No.303 of 1931 has been marked as Ex.A4 and thus, I am able to see that the plaintiff has filed not only title deeds but also records to evidence possession of the suit property right from 2007 when he had purchased the property and also prior to that, beginning even the year 1914.



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18.Though the defendant in the written statement has admitted that there has been a gift in favour of Throwpathi Ammal Temple in S.No.354, the case of the defendant is that there was no sale by Srinivasa Gounder in favour of either Arumuga Gounder or Lakshmiammal. However, I find from the registered sale deeds that the said claim of the defendant is factually incorrect. The sale deeds in favour of Arumuga Gounder in Ex.A2 and in favour of Murugappa Gounder in Ex.A3 and in favour of Lakshmi Ammal in Ex.A4 have all been duly exhibited by the plaintiff. The plaintiff has also filed the Court proceedings to evidence, the factum of borrowing, the decree leading to execution proceedings and subsequent purchase by Venugopal Chetty and also that the Court has sold the property in auction to Venugopal Chetty and has delivered possession to him besides also issuing the confirmation of sale in his favour.

19.Though Mr.V.Ragavachari, learned Senior Counsel would contend that the plaintiff has not been able to correlate the survey numbers mentioned in the suit property with the anterior title documents, I feel that such an exercise would be wholly unnecessary for the simple reason that the



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defendant admits the original title at the hands of the said Srinivasa Gounder.

His specific defence is that the Srinivasa Gounder had only gifted 1.32 acres to Throwpathiammal Temple and thereafter, he did not effect any sale and he was in enjoyment of the suit property and by way of intestate succession, the property has gone to the hands of his legal heirs and again, the next generation heirs have partitioned the said available property amongst themselves under which the respondent claims title.

20. In the light of overwhelming documentary evidence adduced on the side of the plaintiff to show that Srinivasa Gounder had not only gifted the property to Throwpathiamman Temple, but had also conveyed portions of the property to Arumuga Gounder and Murugappa Gounder and in turn Arumuga Gounder sold to Lakshmiammal and subsequently, the suit in O.S.No.303 of 1931 had been filed which came to be decreed and the decree was also put in execution in E.P.No.63 of 1935 and under the said auction proceedings, the vendor of the plaintiff became entitled to the suit property in Court auction sale. Moreover, the plaintiff has also filed documents to show that they have been in physical possession by production of Patta Book, Kist receipts.



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21.Per contra, the defendant claims right only from 1973 under a registered Partition Deed amongst the legal heirs claiming under Srinivasa Gounder. But the Srinivasa Gounder had no right in the suit property, having conveyed all available extent, the partition deed is only a farce and cannot be looked into for any purpose. All mutation of revenue records in favour of the defendants are only in pursuance of the said partition deed.

22.The other aspect that needs to be addressed is to the attestation of the document, Ex.B3 by the plaintiff himself. The law is well settled that merely because a party signed as a witness to a document, the said witness cannot be imputed with knowledge of contents of the document, unless there is substantial evidence adduced to show that he by attesting the document, had knowledge of the contents also. In this regard, I follow the ratio laid down by the Hon'ble Supreme Court in *Ella Ammal Vs. Kothambu Ammal* reported in **2011 (6) CTC 282**.

23.The learned Senior Counsel for the respondent would also attempt to sustain the finding of the First Appellate Court with regard to application



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of Section 110 of Indian Evidence Act. Section 110 of Indian Evidence Act
is extracted hereunder:

“110.Burden of Proof as to ownership.

when the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”

It is clear that in terms of Section 110 of Indian Evidence Act, a person who disputes ownership of any property by another, is required to prove that other is not an owner, if such person is in possession of property. I am unable to see how the said provision would even apply to the facts of the present case. P.W.1 and P.W.2 have only spoken about the partition deed about which they have been confronted during cross-examination, and it does not amount to admission of the defendant's possession.

24.Per contra, the plaintiff has established not only his title but also possession, by production of revenue records pursuant to the sale deed and it is found that the plaintiff has been in possession of the suit property on the date of filing of the suit. Therefore, the First Appellate Court has erroneously



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applied Section 110 of Indian Evidence Act to non suit the plaintiff. Further, the First Appellate Court has also totally disregarded the documentary evidence filed by the plaintiff to establish physical possession being with the plaintiff and his predecessors in title and interest for several years together. Thus, the First Appellate Court has committed material irregularity in reversing the well considered and well merited findings of the Trial Court, which is based on oral and documentary evidence available on record. The First Appellate Court has proceeded to render a finding which is even against the pleaded case of the parties, thus, requiring interference under Section 100 of Code of Civil Procedure.

25.For all the above reasons, the substantial questions of law are answered in favour of the appellant herein and in fine, the Second Appeal is allowed. There shall be no order as to costs. Consequently, connected Civil Miscellaneous Petitions are closed.

08.03.2024

Index : Yes/No
Speaking Order/Non-Speaking Order

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P.B.BALAJI., J.

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To

- 1.The Principal Subordinate Judge, Tindivanam.
- 2.The District Munsif -cum- Judicial Magistrate, Vanur.
- 3.The Section Officer, V.R.Section, High Court, Madras.

Pre-delivery judgment made in

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