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S.A(MD)No.365 of 2018

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 12.07.2024

Pronounced on : 08.08.2024

CORAM:

THE HONOURABLE MR.JUSTICE P.VADAMALAI

S.A(MD)No.365 of 2018

and

C.M.P(MD)No.10285 of 2018

1.Kaliyaperumal (Died)

2.Balaraman ... Appellants/Appellants/Defendants

(Memo, dated 12.07.2022 filed on 13.07.2022 in USR.No.18775 is recorded, as 1st appellant died and 2nd appellant, who is already on record, is recorded as LR of the deceased 1st appellant, vide Court order, dated 05.02.2024)

Vs.

C.Baskar ... Respondent/Respondent/Plaintiff

PRAYER :-

This Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 14.03.2017 made in A.S.No.38 of 2013 on the file of the Additional Subordinate Judge, Kumbakonam, confirming the judgment and decree dated 10.11.2010 made in O.S.No.88 of 2009 on the file of the II Additional District Munsif-cum-Judicial Magistrate, Kumbakonam.



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For Appellants : Mr.P.Thiagarajan

For Respondent : Mr.M.R.S.Prabhu

JUDGMENT

This Second Appeal is preferred against the judgment and decree dated 14.03.2017 passed in A.S.No.38 of 2013 on the file of the learned Additional Subordinate Judge, Kumbakonam, confirming the judgment and decree, dated 10.11.2010 passed in O.S.No.88 of 2009 on the file of the learned II Additional District Munsif-cum-Judicial Magistrate, Kumbakonam.

2. The appellants are the defendants and the respondent is the plaintiff in O.S.No.88 of 2009 on the file of the learned II Additional District Munsif-cum-Judicial Magistrate, Kumbakonam. The respondent/plaintiff filed the suit for declaration, recovery of possession and for mesne profits in respect of the suit property.

3. For the sake of convenience, the parties are referred as plaintiff and defendants as arrayed in O.S.No.88 of 2009 on the file of the learned II Additional District Munsif-cum-Judicial Magistrate, Kumbakonam.



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4. Case of the plaintiff:

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The suit property belonged to one Sarathambal, who was the maternal grandmother of the plaintiff. The said Sarathambal executed a registered settlement deed, dated 22.12.2005 in favour of the plaintiff. The said Sarathambal was the wife of elder brother of the 1st defendant. The 1st defendant was permitted to reside in the suit property. After the settlement deed, the plaintiff asked to hand over property, the defendants offered to hand over the northern side of vacant land as they are residing in the suit property. The plaintiff also permitted. But, the defendants did not hand over the offered northern side property and also they have not handed over possession of the suit property. So, the plaintiff filed the suit for declaration, recovery of possession and for mesne profits.

5. Case of Defendants 1 and 2:

It is wrong to aver that the suit property belonged to grandmother of the plaintiff. The suit property originally belonged to the ancestors of the 1st defendant. Sarathambal had no right or title over the suit property. On the basis of settlement deed executed by Sarathambal, the plaintiff cannot claim



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right over the property. The defendants are in possession of the suit property for more than 40 years. The defendants never stated that they would give northern side of their property. The grandfather of the plaintiff knew very well about the possession of the defendants over the suit property and hence, the defendants were entitled to the suit property by adverse possession. Hence, the suit is liable to be dismissed.

6. During trial, on the plaintiff's side three witnesses were examined as P.W.1 to P.W.3 and marked exhibits as Ex.A.1 to Ex.A.5. On the defendants' side two witnesses were examined as D.W.1 and D.W.2 and Ex.B. 1 to Ex.B.7 were marked.

7. After hearing both sides, the learned Additional District Munsif-cum- Judicial Magistrate, Kumbakonam decreed the suit in O.S.No.88 of 2009 by passing judgment and decree dated 10.11.2010. Aggrieved by the judgment and decree, the defendants preferred the Civil Appeal in A.S.No.38 of 2013 before the Additional Subordinate Court, Kumbakonam. The first Appellate Court after hearing both passed judgment dated 14.03.2017



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dismissing the appeal and confirmed the judgment and decree passed in
O.S.No.88 of 2009.

8. Challenging the judgment and decree of the First Appellate Court, the defendants have preferred this Second Appeal and the same has been admitted for file on 29.11.2023 on the following substantial questions of law:-

i) Whether the Courts below right in decreeing the suit on the ground that the defendants had not proved their title over the property?

ii) Whether the trial Court below right in decreeing the suit based on the xerox copy of a document produced by the respondent herein along with the plaint, which has not been marked as evidence in the suit?

iii) Whether the learned Subordinate Judge is right in dismissing the appeal filed by the appellants herein without considering the document filed by the appellants herein as additional evidence?

9. Heard both sides and perused the records in this Second Appeal.



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10. The learned counsel for the appellants/defendants has submitted that the 1st defendant Kaliyaperumal and the husband of Sarathambal namely Kunju are brothers. The plaintiff is the grandson of Sarathambal through her daughter. The 2nd defendant is the son of the 1st defendant. In fact, Sarathambal had no right or title over the suit property and hence, she had no right to execute settlement deed in favour of plaintiff, even for the sake argument, if any deed executed by Sarathambal, it would not bind on the defendants. The settlement is void document. The plaintiff averred that the Government issued patta to Sarathambal and it was not proved by the plaintiff, though the plaintiff produced only Xerox copy of patta even the same was not marked, the trial Court decreed the suit without any basis. The said Sarathambal stated in her evidence that the assignment was to her and her husband and therefore, the plaintiff willfully suppressed the patta issued by the government and they have not produced the same. Hence, the said Sarathambal had no right to execute the settlement deed. The trial Court came to the conclusion that the defendants are in permissive possession and they have not proved the adverse possession. The electricity connection is in the name of the defendants and they have been paying electricity consumption charges for the past 20 years. There was no oral agreement as alleged by the



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plaintiff that the defendants agreed to give the northern side of the land as they are residing in the suit property and the same was not proved by the plaintiff by let in evidence. The trial Court decreed the suit based on unmarked Xerox copy of the assignment order and also concluded that the defendants failed to prove their title over the property. It is a settled principle that the litigant who comes to Court for declaration must prove his case. In this case, the plaintiff failed to prove his case. The first Appellate Court also failed to consider the error committed by the trial Court and also not consider the document produced by the defendants. The Courts below have not considered the entire evidences and therefore, the Second Appeal may be allowed.

11. Per contra, the learned counsel for the respondent/plaintiff contended that the plaintiff's grandmother was issued assignment order by the government. The grandmother as P.W.2 clearly explained that the original assignment order got damaged in rain. The 1st defendant as D.W.1 admitted in his evidence that the suit property belonged to Sarathambal and hence, admission is the best evidence which need not be corroborated. There is no



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dispute regarding the settlement deed executed by Sarathambal. Both Courts below found concurrent findings based on facts and evidences. The defendants were permitted to reside in the suit property and their possession is permissive possession. Permissive possession could not be taken as adverse. Parties are relatives and so, where the relationship between the parties is one of fiduciary character, possession of one of such parties cannot be regarded as prima facie adverse to the other. Further, while the defendants claimed adverse possession, they have impliedly accepted the title of the plaintiff and her grandmother. Mere electricity consumption bills stood in the name of the 1st defendant would not be sufficient to prove their title. Moreover, the said receipts are all after the suit. Sarathambal was cross examined by the defendants, but nothing elicited in favour of the case of the defendants. Sarathambal clearly deposed in her evidence about the assignment of government and also the execution of settlement deed in favour of the plaintiff and also explained about the damage of original assignment order in the rain.

12. The learned counsel for the respondent/plaintiff has also submitted



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that the defendants vacated the suit property. After decree the plaintiff initiated execution proceedings in E.P.No.105 of 2011 in O.S.No.88 of 2009 and the possession of the suit property was delivered to the plaintiff by the Court Amin. Subsequent proceedings of the case have also to be looked into. The defendants never objected the initiation of delivery proceedings. Therefore, the defendant has no valid grounds in this Second Appeal. The factual findings of the trial Court as well as the first Appellate Court are based on the evidence on record. Concurrent findings could not be set aside unless the question of law decided favouring the appellant in the Second Appeal. The question of law could not be decided in favour of the appellant as they were factually decided by the Courts below. Therefore, this Second Appeal may be dismissed.

13. In support of his argument, the learned counsel for the plaintiff has relied on the following decisions of the High Court and Hon'ble Supreme Court.

"(1) 2012 -2 Law Weekly 301 (Muthammal & Ors /v/ Indirani Ammal)

(2) (2012) 8 Supreme Court Cases 516



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(Ahmedsshe (died) by LRs /v/ Sayed Ismail)

(3) (2020) 1 MLJ 837 (SC) (Shri Uttam Chand (D) /v/ Nathu Ram (D))

(4) (2011) 10 Supreme Court Cases 404 (State of Haryana /v/ Mukesh Kumar and others)

(5) 2021 (3) TNCJ 34 (Mad) (Karthikeyan & Ors /v/ Jayaraman (D))

(6) 2023(1) TLNJ 179 (civil) (Raja Gounder /v/ Sengodan M)

(7) (2023) 10 Supreme Court Cases 248 (K.M.Krishna Reddy /v/ Vinod Reddy And anr.)"

14. Heard the arguments of both sides and perused the material records of the case. It is the case of the plaintiff that the suit property was given to Sarathambal by the government by way of assignment order and Sarathambal executed the settlement deed in favour of the plaintiff, who is her grandson through her daughter. The relationship is not disputed by the defendants. The defendants stated that the trial Court decreed the suit on the basis unmarked Xerox copy of the assignment order. On perusal of finding of the trial Court, it has clearly appreciated the evidence of 1st defendant, who admitted in his evidence that the suit property belonged to Sarathambal by



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way of assignment order given by the government. As rightly argued by the plaintiff side, the admission is the best evidence which need not be corroborated. The 1st defendant as D.W.1 has deposed in his cross examination as “சாரதாம்பாளுக்கு அரசாங்கத்தில் தாவா இடத்தை கொடுத்திருக்கிறார்கள் என்பது சரிதான். சாரதாம்பாளுக்கு தாவா இடத்தை கொடுத்தது பற்றி நான் ஆட்சேபணை எதுவும் செய்யவில்லை. அவருக்கும் மனையாகத்தான் கொடுக்கப்பட்டது. அதில் சாரதாம்பாள் கூரை வீடு கட்டியுள்ளார். சாரதாம்பாள் பெயரில் வீட்டு வரி ரசீதுகள் உள்ளது என்பது சரிதான்.”. On the plaintiff's side, the original assignment order was not produced for which the plaintiff explained that the assignment order was ruined in rain. Sarathambal as P.W.2 has clearly deposed about the damage of assignment order in rain. Hence, the trial Court has correctly held that the suit property belonged to Sarathamabal.

15. On perusal of records, it is seen that the assignment order was issued in the year 1991, but the defendants claim that they are residing in the property for the past 40 years which is contra to his evidence. Admittedly, the 1st defendant/D.W.1 in his evidence clearly admitted that he has not objected the assignment order issued to the plaintiff's grandmother



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Sarathambal and also the husband of Sarathambal and the 1st defendant are brothers, his brother asked him to reside in the suit property. The

1st defendant as D.W.1 in his evidence deposed that ஸாரதாம்பாள் கணவரும் நானும் அண்ணன் தம்பிகள். அண்ணன் தம்பிகளுக்குள் நல்ல ஒற்றுமைதான். அண்ணன் தாவா வீட்டில் இருக்க சொன்னார்கள். From this evidence, it is clear that the defendants' possession is permissive possession. Considering the citations relied on by the plaintiff side, it is clear that when the defendants plead adverse possession they themselves accepted the title of the said Sarathambal, from whom the plaintiff derived title. Further, when permissive possession is established, there is no question of adverse possession.

16. On perusal of records, before 1991 the property is government property. The defendants claims adverse possession for 40 years, but they have not proved their adverse possession as against the government and also as against the plaintiff's grandmother Sarathambal. It is the definite case of the plaintiff that his grandmother Sarathambal was given suit property by way of the government assignment order and she executed a registered settlement deed. The plaintiff marked the settlement deed as Ex.A.3. On the plaintiff's



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side, the said Sarathambal deposed as P.W.2 who categorically deposed that she obtained the suit property from the government through assignment order and she executed Ex.A.2 - Settlement Deed in favour of the plaintiff out of love and affection. Therefore, the findings of the Court below is correct which is based on evidence adduced by the plaintiff side.

17.The plaintiff states that the defendants vacated and left the suit property. It is pertinent to note here that the plaintiff filed the execution petition in E.P.105 of 2011 in O.S.No.88 of 2009 and the suit property was delivered to the plaintiff by the court Amin and produced delivery athatchi by way of typed set. The defendants have not raised their finger to challenge the delivery. On perusal of delivery warrant, it is clear that the suit property was identified by the revenue authorities and the suit property seemed vacated and the suit property was delivered to the plaintiff on 14.11.2022. The revenue official, Court Amin and witnesses signed the delivery athatchi. The Courts below found concurrent findings based on evidence on record which need not require any interference by this Court by way of Second Appeal. The citations relied on by the respondents are squarely applicable to the facts of this case. Hence, the questions of law framed in this Second Appeal are



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answered against the appellants/defendants. Thus, this Second Appeal fails.

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18. In the result, the Second Appeal is dismissed. The judgment and decree dated 14.03.2017 made in A.S.No.38 of 2013 on the file of the Additional Subordinate Judge, Kumbakonam, confirming the judgment and decree dated 10.11.2010 passed in O.S.No.88 of 2009 on the file of the II Additional District Munsif-cum-Judicial Magistrate, Kumbakonam are confirmed. No costs. Consequently, connected Miscellaneous Petition is closed.

08.08.2024

NCC : Yes / No

Internet : Yes / No

Index : Yes / No

VSD

To

1. The Additional Subordinate Judge,
Kumbakonam.
2. The II Additional District Munsif-cum-Judicial Magistrate,
Kumbakonam.
3. The Record Keeper,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

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P.VADAMALAI, J.

VSD

Pre-Delivery Judgment made in
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