

**(2009) 04 MAD CK 0535**

**Madras High Court (Madurai Bench)**

**Case No:** S.A. No. 943 of 2002

C. Velu and 2 Others

APPELLANT

Vs

P. Subramanian

RESPONDENT

**Date of Decision:** April 23, 2009

**Acts Referred:**

- Evidence Act, 1872 - Section 68
- Transfer of Property Act, 1882 - Section 123

**Citation:** (2009) 6 CTC 78

**Hon'ble Judges:** R. Mala, J

**Bench:** Single Bench

**Advocate:** S. Subbiah, for the Appellant; V. Sitharanjandas, for the Respondent

**Judgement**

R. Mala, J.

This Second Appeal has been filed against the decree and judgment dated 29.11.2001, rendered in A.S. No. 38 of 2001 on the file of the Principal District Judge, Sivagangai, confirming the decree and judgment dated 12.04.2001, rendered in O.S. No. 65 of 2000 on the file of the District Munsif of Ilayangudi. The gist of averments in the Plaintiff is as follows:

The suit properties are originally owned by one Santhana Konar. He died leaving behind his wife Meenakshi Ammal as sole legal heir. The Plaintiff purchased the suit property from the said Meenakshi Ammal for Rs. 9,250/- on 01.12.1998. In pursuance of the sale, Patta has been changed in the name of Plaintiff, the Patta Number is 1427. From the date of purchase, the Plaintiff has been enjoying the property by paying kist. The Defendants have no manner of right and possession over the property. But on 25.05.2000, the Defendants attempted to interfere with the peaceful possession and enjoyment of the Plaintiff, which has been prevented by the Plaintiff. Hence, he constrained to file a Suit for declaration of title and injunction and prayed for a decree.

2. The gist and essence of Written Statement filed by the First Defendant, adopted by Second and Third Defendants is as follows:

The Suit is not maintainable both in law and on facts. It is true that originally the suit properties and some other properties belonging to one Santhana Konar. But the Defendants denying that the wife of Santhana Konar by name Meenakshi Ammal sold the suit properties to the Plaintiff on 01.12.1998 by means of registered Sale Deed and after purchase, the Plaintiff changed the Patta into his name and he is in possession and enjoyment of the same. The above facts are concocted story. The said Meenakshi Ammal, wife of Santhana Konar has no manner of right, title or interest in the suit properties. She was not in possession and enjoyment of the suit properties. Patta for the suit properties was not in the name of Meenakshi Ammal. So, the Sale Deed executed by the said Meenakshi Ammal in favour of the Plaintiff is not valid one. After purchasing the said properties, the Plaintiff had influenced the Revenue Authority to transfer the Patta for the suit properties in his name. The Revenue Officials also without making any proper enquiry and without sending any notice, have transferred the Patta in favour of the Plaintiff, even though the Patta was in the name of Rakkammal, mother of the First Defendant. The First Defendant has submitted his objections to the Tahsildar, Ilayankudi. Then, Tahsildar made an enquiry and cancelled the order passed by him in T.P.T. Number 639 of 1998-99, dated 21.12.1998 and transferring the patta in favour of the First Defendant on 24.09.1999. The said Santhana Konar has purchased the properties including the suit properties from one Nagar Kani Rowther and Sundaraj Pillai by means of registered Sale Deed, dated 17.12.1955. He was in possession and enjoyment of the said properties. Then the said Santhana Konar had orally gifted some properties to Karakkal, daughter of Udayammal; sister of Santhana Konar; some properties to Rakkammal, sister's daughter of the Santhana Konar i.e. one Irulayee Ammal and remaining properties i.e. the suit properties to Rakkammal, mother of the First Defendant. Thereafter, the said donees-Karakkal, Rakkammal and another Rakkammal were in possession and enjoyment of the respective properties gifted to them by the Santhana Konar. Patta also been transferred in favour of the respective donees. The said Rakkammal has been in possession and enjoyment of the suit properties by paying kist in her name. The mother of the First Defendant Rakkammal had got several other properties. In 1998, she wanted to settle some properties on his son, the First Defendant herein, she executed a registered Settlement Deed, dated 14.09.1998, in favour of the First Defendant including the suit properties i.e. Survey No. 132/9, measuring 0.18.0 ares. Second item of suit property in Survey No. 132/11 measuring 0.02.0 ares is adjacent to the first item i.e. Survey No. 132/9. Since the second item of suit property is very meagre in extent and situated in adjacent to item-1, it is not considered as a separate property and for convenient enjoyment, it is also considered as part and parcel of item-1 and is being enjoyed accordingly. Hence, on the ground and practically there are no two items of suit property as alleged in the Plaintiff. So, the Sale Deed in favour of the

Plaintiff is not valid and the Plaintiff has no right, title or interest in the suit properties under the alleged Sale Deed executed by Meenakshi Ammal. When Meenakshi Ammal herself has no right to the suit properties, she cannot convey any right over the suit properties to the Plaintiff. The Plaintiff has not come to the Court with clean hands. No cause of action for the Suit. So the Plaintiff is not entitled for any relief. Hence, he prayed for the dismissal of the Suit.

3. The Trial Court after considering the averments in both Plaintiff and Written Statement, framed seven issues and. considering the oral evidence of P.Ws. 1 and 2, D.Ws. 1 and 2, Exs. A1 to A4, Exs. B1 to B5 and come to the conclusion that the Plaintiff is the owner of the suit property. Since he is in possession of property, the Trial Court has decreed the suit as prayed for in the Plaintiff. Against that, the Defendants have preferred an Appeal. The First Appellate Court framed five points for consideration and come to the conclusion that the Plaintiff is in possession and enjoyment of the same and he is the owner of the properties. Hence, the First Appellate Court has confirmed the decree and judgment of the Trial Court and dismissed the Appeal. Against that, the present Second Appeal has been preferred by the Defendants.

4. The substantial questions of law arises in the Second Appeal are as follows:

1. Whether the recitals in the Settlement Deed tracing out the title through the maternal side can disprove the case of the Defendant that the suit property was given by her brother?

2. Is not the possession and enjoyment of the other properties by the sisters of the settler, under an oral family arrangement be not an evidence to support the case of the beneficiary under the very same family arrangement, in respect to the other properties of the same settler?

3. Is not the non-examination of the vendor of the Plaintiff could be fatal to the case of the purchaser in his suit for declaration of title?

5. The Respondent as a Plaintiff filed a Suit for declaration of title and injunction stating that he has purchased the properties from Meenakshi Ammal, who is the wife of Santhana Konar. Admittedly, he is the owner of the properties. Since the Appellants/Defendants attempted to interfere in his possession on the basis of Settlement Deed executed by the First Defendant's mother, which was successfully prevented by the Respondent/Plaintiff and constrained to file a Suit.

6. The learned Appellants Counsel would contend that originally the suit properties owned by one Santhana Konar, who is having four sisters and his wife is Meenakshi Ammal, who is the vendor of Respondent/Plaintiff and they are not having any issues. So, the ownership of the properties is admitted by both sides.

7. The Appellant Counsel would contend that during the life time of Santhana Konar, since he is not having any issues except his wife, he had gifted the properties to his

sister and sister's daughters. The suit properties are orally gifted to Rakkammal, mother of the first Appellant by the Santhana Konar. From the date onwards, she was in possession and enjoyment of the same by mutation of Revenue Records and by paying kist. Since she wanted to settle the properties to her son and executed the Settlement Deed-Ex.B3 in favour of First Appellant. From the date of Ex. B3, the First Appellant is in possession of the property. Since he is in possession and enjoyment of the same, the Respondent herein has no right over the property. Both the Trial Court as well as the First Appellate Court have not accepted the plea of oral gift and family arrangement and decided that the Respondent is the owner of the property and decreed the Suit as prayed for. But it is not correct. Hence, he prayed for allowing of the Appeal and setting aside the judgment and decree passed by the Trial Court and First Appellate Court.

8. Per contra, the learned Respondent Counsel would contend that admittedly the suit properties owned by one Santhana Konar. His wife is Meenakshi Ammal. He has not having any children. Santhana Konar having four sisters. The case of the Appellants is that the Santhana Konar during his life time, has orally gifted properties to his four sisters. To prove the same, no one has been examined. Oral gift is not proved. At this juncture, one point of time he has pleaded oral gift and another point of time he has pleaded family arrangement. But, neither the oral gift nor the family arrangement has been proved by the Appellants. Hence, how the Rakkammal, mother of the First Appellant has become the owner of the property has not been proved by the Appellants. Merely because, Rakkammal executed Ex.B3, which is not confer any title over the property to the First Appellant. So, the Trial Court has considered all the aspects and proper perspective, come to the correct conclusion and decreed the suit. Hence, he prayed for the dismissal of this Appeal

Points 1 to 3:

9. The admitted facts of the case is that the suit properties are belonging to one Santhana Konar. His wife is Meenakshi Ammal. They are not having any issues. Santhana Konar died long ago. Santhana Konar having sisters by name Irulaye, Udayammal and Rakammal. But the Appellants has pleaded oral gift and family arrangement. Meenakshi Ammal has succeeded her husband's properties, she is the absolute owner of the properties. Since the First Appellant herein claiming title under oral gift and family arrangement, he ought to have prove the same. The third point is whether the non-examination of the Meenakshi Ammal is fatal. It is pertinent to note that to prove Ex. A4, one of the attestor of Ex. A4, Balasubramaniarn has been examined before this Court as P.W.2. It is well settled principles of law that admitted facts need not be proved. Here, the Defendants/Appellants herein has fairly conceded that the Sale Deed has been executed by Meenakshi Ammal, but they stated she is not having any right over the property. In the above said circumstances, execution of Ex. A4 has not been disputed by the Appellants. However, Ex. A4 has been proved by way of examining

purchaser/P.W.1 and attester of Ex. A4/P.W.2. So the non-examination of Meenakshi Ammal is not fatal.

10. It is well settled principles of law, the person who pleaded oral gift ought to have proved the same. It is also true, Defendant can raise inconsistent defence/plea. Here, the Appellants/Defendants has raised the plea, that during the life time of Santhana Konar, the suit property was orally gifted to Rakaye, the fist Defendant's mother and other properties to other sisters' daughter. In another place, he has stated during the life time of Santhana Konar, he made an oral family arrangement. The Defendants can raise inconsistent plea, but he must elect and choose one defence and what basis he got the property and prove the same. To prove the defence, the First Defendant/Appellant herein has examined as D.W.1 and one Muthiya has been examined as D.W.2, who is none other than the Village Administrative Officer through him Exs. B4 and B5 were marked. Admittedly, the Defendants herein have not even examine any independent witness to prove either oral gift or oral family arrangement. It is also pertinent to note that the Appellants herein have claiming title under Ex.B3-the Settlement Deed executed by his mother Rakayi Ammal. A person claiming title under the Settlement Deed, must prove the attestation as per Section 68 of the Indian Evidence Act. To prove the attestation, no one has been examined before this Court. So, the Appellants herein have miserably failed to prove Ex.B3-the Settlement Deed.

11. As already decided that the Settlement Deed has not been proved, so the recitals in the Settlement Deed cannot be looked into. The Defendant has traced the title through the maternal side can disprove the case of Defendant. Even though in Ex.B3, it was stated that the donar inherited the property through her maternal side and she is in possession and enjoyment. In the document Ex.B3 it was stated as follows:

But as already stated, Ex. B3 has not been proved by examination of attestors, which is required by law, so the document cannot be looked into. Hence, the recitals will not help the Court to decide the matter. Since Ex. B3 is not proved, the Appellants herein has not confer or derive any title under Ex. B3.

12. D.W.2-Village Administrative Officer has examined to show the Patta stands in the name of Fist Appellant's mother Rakaye through him "A" Register extract has been marked as Exs. B4 and B5. Mere mutation of Revenue Records and Patta to the property will not confer any right to the party holding Patta. The Appellants herein have not examined any witness to show that during the life time of Santhana Konar, he has given the suit properties to his sister as oral gift.

13. At this juncture, the Respondent Counsel would culled out some of the portion of oral evidence let in by D.W.1. In D.W.1 chief-examination, he himself stated "During life time of the Santhana Konar he has given some property to his wife Meenakshi Ammal and the other property to Rakkammal, daughter of Irulaye, Karakkal

daughter of Udayammal by way of written document". In cross-examination, he has stated that the suit properties has been enjoyed by Santhana Konar till his death. So the oral gift pleaded by the Appellant is false.

14. He also pleaded family arrangement. He has stated there is no document for the family arrangement. It is only an oral family arrangement. In chief-examination, he has stated that there is a written document for family arrangement. In cross-examination, he has stated that it is a oral family arrangement. He has stated that the family arrangement has been taken place in the presence of villagers, but no one has been examined before this Court. So the family arrangement pleaded by the Appellant is not proved by him. D.W.1 in his cross-examination, he himself has fairly conceded that there is no talking term between the first Appellant and the Respondent for the past 15 years.

15. Considering the same, the Appellant herein has miserably failed to prove either the oral gift or the oral family arrangement. Beside this, he has failed to prove Ex. B4-Settlement Deed by way of examining attester of the document as required by Section 68 of Indian Evidence Act. As per Section 68, the attestation of the Settlement Deed to be proved. As per Section 123 of the Transfer of Property Act for the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

16. Here while considering the evidence, D.W.1 in his statement he has stated oral gift, but in cross-examination he has stated the suit property was in possession of the Santhana Konar till his death. So the oral gift has not been accepted and acted upon. So, theory of oral gift has not been proved.

17. Moreover, the Appellant herein has raised the plea of family arrangement, as already stated, no one has been examined to prove that family arrangement, i.e. other persons, who are the beneficiary under the alleged oral family arrangement were not examined before the Court to show that there was a family arrangement during the life time of Santhana Konar, that suit properties has been allotted to Rakkammal, who is the mother of First Appellant herein. Hence, this Court concludes that the First Appellant has failed to prove that either the oral gift or the oral family arrangement.

18. It is true that the Respondent/Plaintiff filed a Suit for declaration and injunction, he ought to have prove the case. There is no quarrel over the proposition. To prove the same, the Respondent herein himself has examined as P.W.1 and filed Ex. A4-Sale Deed executed by Meenakshi Ammal, who is none other than the wife of the deceased Santhana Konar. Santhana Konar having no other issue except Meenakshi Ammal, who is his wife. After the death of Santhana Konar, Meenakshi Ammal

succeeded the property and she is in possession and enjoyment and executed the sale in favour of the Respondent, Patta has been changed in the name of Respondent as Patta No. 1427. Kist has been paid as per Ex. A2 (series). Ex.A3 is chitta. In that Patta No. 1427, the Survey Nos. 132/9 and 132/11 is in the name of Respondent herein. On the side of Appellants, to prove document Exs.B4 and B5-"A" Register Copy, D.W.2 was examined. Merely because, the Patta was in the name of Rakkammal. Which has not confer title to Rakkammal. But the Respondent herein has purchased the property from the lawful owner and in possession and enjoying the same by way of changing his Patta. That has been recorded by the Revenue Authority during the Jamabandhi, kist has been paid by the Respondent and kist receipt has been marked as Ex. A2 (series), it proved that the properties is in possession of Respondent herein.

19. In such circumstances, the arguments advanced by the learned Appellant Counsel to prove the possession, no document has been filed and evidence has not been sufficient is unacceptable one. So the First Appellate Court has come to the conclusion since the Respondent is an owner of the property, the possession follows title. Hence, he is in possession of the property is not correct. But the above argument is unacceptable one. It is true the Respondent herein has purchased from the lawful owner, possession follows title. But here, the Appellants herein has filed Ex. A3-Chitta for the fasli 1410 issued on 07.12.2000. In pursuance of that, he has paid the Kist-Ex. A2 (series). So, the Respondent herein has proved his title and possession. Hence, the Respondent is entitled to declaration of title and injunction as prayed for in the Plaintiff. The Trial Court and the First Appellate Court have considered all the aspects in proper perspective and come to the correct conclusion that the Respondent is entitled to declaration of title to the suit properties and injunction as prayed for in the Plaintiff. There is no infirmity in the decree and judgment of Trial Court and Lower Appellate Court, so, there is no reason for interfering in the judgment and decree of Trial Court and Lower Appellate Court. Hence, it is hereby confirmed. In fine, as already stated above, there is no infirmity in the decree and judgment passed by the Trial Court and Lower Appellate Court. So, there is no reason for interfering in the judgment and decree passed by the Trial Court and Lower Appellate Court. Hence, it is hereby confirmed. So the Second Appeal is dismissed. Considering the relationship of both parties, both the parties are directed to bear their own cost.