

(2014) 06 MAD CK 0338

Madras High Court

Case No: Second Appeal No. 1203 of 2012 and M.P. No. 1 of 2012

A.P. Krishnaveni
Ammal

APPELLANT

Vs

Papiah Reddi

RESPONDENT

Date of Decision: June 18, 2014

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 14 Rule 5, 100

Citation: (2014) 6 CTC 27

Hon'ble Judges: Pushpa Sathyanarayana, J

Bench: Single Bench

Judgement

Pushpa Sathyanarayana, J.

The unsuccessful Defendants before the First Appellate Court have filed this Second Appeal against the Judgment and Decree dated 19.11.2011 passed by the learned Subordinate Judge, Tiruvallur, in A.S. No. 29 of 2000 wherein and by which the Judgment and Decree dated 24.7.2000 passed by the learned District Munsif, Tiruvallur, in O.S. No. 971 of 1989 filed for the relief of declaration of title and permanent injunction, was confirmed. The Plaintiff/sole Respondent herein filed O.S. No. 971 of 1989 for declaration of title to the Suit items and for permanent injunction restraining the Defendants and their men from interfering with his possession and enjoyment of the Suit items.

2. A brief narration of facts necessary for appreciating the contentions raised herein may be set out. According to the Plaintiff, he is in possession of the Suit items, viz., 0.23 Cents in S. No. 556/1B/1C/2B, measuring 0.15 Cents of Dry land in S. No. 525/2C/2B and an extent of 0.72 Cents of Dry land in S. No. 521/2B, comprised in Patta No. 422, in Uthukottai Village, Uthukottai Sub-District and Uthukottai Taluk, Tiruvallur District, as full owner by virtue of a registered Release Deed dated 26.12.1970 from his father, by paying Kist from 1971 onwards. It is stated that the Suit items are now comprised in Patta No. 335 from 1987 onwards under U.D.R.

Scheme and that the Plaintiff and the Defendants had effected acknowledgments of their respective share of properties in writing in Uthukottai Village during 1971 & 1977. In addition to that, the Plaintiff and the Defendants have also offered their respective properties as security before the Sub-Court, Tiruvallur, on 14.2.1981 for withdrawal of Compensation amounts in L.A.O.P. No. 29 of 1979 in which the Suit items were described as item V. It is also averred by the Plaintiff that the Defendants had acknowledged the Plaintiff's right and title to the Suit items in the said Security Bond and, therefore, they are estopped from challenging his right in the Suit items. The further case of the Plaintiff is that he has been cultivating groundnut crop every year in the Suit items. According to the Plaintiff, the Defendants have no manner of any right or interest or claim in the Suit items and since the First Defendant attempted to forcibly dispossess the Plaintiff on 3.12.1989, he filed the Suit for declaration of title and permanent injunction against the Defendants.

3. Resisting the Suit, the First Defendant filed Written Statement denying all the allegations stated in the Plaint. According to him, the registered Security Bond filed before the Sub-Court, Tiruvallur, came into existence under a different circumstance and they never intended to acknowledge the right of each as against another. The First Defendant also filed an Additional Written Statement contending that Item Nos. 1 & 2 of the Suit properties, viz., an extent of 0.30 Cents in S. No. 556/1 and an extent of 0.27 Cents comprised in S. No. 525 respectively, have been purchased by him under a registered Sale Deed dated 14.7.1950 and Patta also stands in his name in Patta No. 337. Besides, he contended that item No. 3 of the Suit Schedule was also purchased by him under registered Sale Deed. It was further alleged by the Defendant that he objected for transfer of Patta by Application dated 18.8.1972 addressing to the Tahsildar, Uthukottai and hence, the Released Deed dated 26.12.1970 will not confer any right upon the Plaintiff. According to him, he is in possession and enjoyment of the Suit properties and the Plaintiff is not entitled for declaration or for an injunction and sought for dismissal of the Suit.

4. In response to the Additional Written Statement, the Plaintiff, reiterating the stand taken in the Plaint and denying the contentions raised in Additional Written Statement, filed a rejoinder stating that the lands in Item Nos. 1 to 3 were purchased by his father. He has further stated that the First Defendant constructed his thatched roof sheds and hut with a well and compound wall running a poultry farm in his land comprising in Patta No. 159 of Uthukottai Village.

5. It is seen that pending the Suit, the First Defendant died and since the Defendants 2 to 6 were in possession and enjoyment of the assets of the deceased First Defendant as Legal Heirs, they were added as parties as per Order dated 17.11.1995 in I.A. No. 970 of 1995.

6. The learned District Munsif, Tiruvallur, on the basis of the above pleadings, proceeded with the trial of the Suit. The Plaintiff examined himself as PW 1 besides examining one Krishnaiah as PW 2 and marked 45 documents, viz., Exs. A1 to A45.

To nullify the evidence adduced on behalf of the Plaintiff, the Sixth Defendant examined himself as DW 1 besides examining one K. Shanmugha Reddy-DW 2 and marked Exs. B1 to B8.

7. The learned Trial Judge, appreciating the pleadings, as well as scanning the materials, found that the Plaintiff has proved his right by filing Exs. A16 & A43 and accordingly, decreed the Suit, by Judgment dated 24.7.2000, holding that the Plaintiff is entitled for declaration of title and permanent injunction. As against the same, the Defendants 2 to 6 preferred Appeal in A.S. No. 29 of 2000. Before the Lower Appellate Court, the Plaintiff filed Exs. A46 to A57-Kist Receipts for the period from 1960 to 1970. The Lower Appellate Court, on appreciation of the evidence and the materials available thereon, confirmed the Decree of the Trial Court dismissing the First Appeal. Feeling aggrieved, the Defendants are before this Court with the present Second Appeal.

8. This Court, by Order dated 27.11.2012, ordered notice returnable by four weeks. After several adjournments taken by both sides, heard the Mr. T. Murugamanickam, learned Counsel appearing for the Appellants and Mr. S. Parthasarathy, learned Senior Counsel for the Respondent and perused the records.

9. Now, the points to be decided in this Second Appeal are whether the Judgments of the Courts below wherein the validity of Ex. A16-Memorandum of Understanding, which was produced only at the time of trial, was upheld, and the concurrent finding holding that the Appellants/Defendants ought to have proved the possession of the Suit properties by appointment of an Advocate Commissioner, are vitiated.

10. From the materials available on record, it is seen that the Suit is filed by the Plaintiff for declaration of title on the basis of Ex. A1-Release Deed dated 26.12.1970 in which it is stated that the Suit properties, among other properties, were purchased by the Plaintiff's father out of the income derived from the sale of properties belonged to the Plaintiff's mother Kamalammal, who got the same by virtue of the Will dated 15.2.1929 executed by her grand father. It was also mentioned in Ex. A1 that the properties were purchased in the name of the First Defendant due to family circumstances. However, it was further stated that possession was with the Plaintiff's father only. The Suit properties were purchased in the name of the First Defendant by the Plaintiff's father under Exs. B4 & B5 dated 14.6.1951 and 14.7.1950 respectively. The said documents are only certified copies and the originals are with the Plaintiff as admitted in the evidence by PW 1. Be that as it may, the Defendants have deposed that the originals have been lost. Further, pursuant to Ex. A1, the Plaintiff got the Patta transferred to his name and has been in possession of the same. Learned Counsel Mr. Murugamanickam contended that the Plaintiff cannot get any right under Ex. A1-Release Deed as the releaser had no right in the property to do so. According to him, Release Deed could be executed only by a person having an interest in the property, in favour of another, who is already having a pre-existing right in the same property.

11. The learned Counsel appearing for the Appellants placed his reliance on the decision of this Court in *Asmath Kathu v. Lal Khan and others*, 2008 (4) LW 524, wherein in Paragraph 17, it has been observed as follows:

"The perusal of the aforesaid decisions would leave no doubt in the mind of the Court that a Release Deed is having the effect of relinquishing a persons right in a property in favour of one other person, who is already having pre-existing right in the same property; as a corollary it follows that a Release Deed cannot be executed as against the 3rd parties, who are totally unconnected with the Suit property earlier."

12. No doubt, Ex. A1 is a Release Deed executed by Chengaiah Reddy in favour of the Plaintiff. In this case, admittedly, the property was purchased by the Plaintiff's father in the name of the Defendant. But the Plaintiff and his father had been in possession and enjoyment of the Suit property and the Plaintiff's father had expressed his desire to release his right over the Suit property. In this regard, the relevant passage from Ex. A1-Release Deed is usefully extracted below:

13. The Release Deed also specifies three items of property in different Survey Numbers. A mere reading of Ex. A1 specifies in unequivocal and unambiguous terms that the releaser relinquished his rights to the Plaintiff. It is also relevant to mention that the Release Deed is not executed in favour of the third party but by the father in favour of his son. Therefore, as contended by the learned Counsel for the Appellants, Ex. A1 cannot be labelled as invalid document.

14. The Defendant in his Additional Written Statement, has pleaded that the Suit properties were purchased by him and Patta was issued in Patta No. 337. However, during the course of argument, the theory of benami was put forth by the learned Counsel for the Appellants. As there was no pleading regarding benami in the Written Statement, no specific issue was framed on the point of benami. Aggrieved, the Defendants had filed I.A. No. 2212 of 1999 before the learned District Munsif, Tiruvallur, to frame an additional issue on the question of benami and the same stood dismissed by Order dated 24.1.2000 which was challenged again before this Court in C.R.P. No. 871 of 2000. This Court, while dismissing the Civil Revision Petition vide Order dated 29.3.2000, had observed as follows:

"Admittedly, the Suit was filed in the year 1989 when the Benami Prohibition Act has already been enacted. Apart from this, the question of benami was not raised in the pleadings and only on the basis of certain stray sentences in the evidence of PW 1 during cross-examination, the Petitioners wanted to raise this issue and that too at the fag end of the litigation. The Lower Court is right in rejecting the Interlocutory Application. I do not find any illegality in the Order of the Court below."

15. From the above extracted portion of the Order, it is evident that as there was no pleading regarding benami in the Written Statement, the issue on the same was not allowed to be framed. Therefore, it is not necessary to discuss the said point which is

raised by the Appellants as one of the substantial question of law. In effect, the effort of the Defendants is to substitute their pleadings by subterfuge.

16. Further reliance was placed by the learned Counsel appearing for the Appellants on the decision in [J.K. Abdul Jabbar Rowther Vs. V.J. Mani Raj and Others](#), wherein in Paragraph 7, it has been observed as under:

"In this Appeal, it is vehemently contended by the learned Senior Counsel for the Appellant that the Trial Court has recast the issues without any Notice to the parties which has considerably prejudiced them. It is also argued that Issue No. 5 has been framed without any plea to that effect in the pleadings. We would straightaway point out that this contention is without merit inasmuch as a specific plea is raised in the Additional Written Statement of the First Defendant that the Suit is premature. Hence, the Trial Court is justified in framing that issue. We also find that the issues originally framed do not cover the entire dispute between the parties as adumbrated in the pleadings. The Court is always entitled to recast the issues before Judgment and it is not necessary to the Court to issue Notice to the parties when it finds that proper issues have not been framed. Particularly in this case, we find that the parties have let in evidence on all the issues as framed by the Trial Court at the time of Judgment and no prejudice has been caused to any of the parties. Order 14, Rule 5 of the Code of Civil Procedure empowers the Court to amend the issues or frame additional issues at any time before passing a Decree for the purpose of determining the matters in controversy between the parties. On the facts of the case, we find the issues as framed by the learned Trial Judge at the time of the Judgment are properly framed and they cover the entire controversy between the parties as set out in the pleadings and as brought out in the evidence."

17. Yet another decision relied on by the learned Counsel appearing for the Appellants is the Judgment of this Court in [Sirajudeen \(Died\) and 7 others Vs. Sethu Chettiar and 6 others](#), and more specifically, referred to Paragraph 20 in which the relevant passage reads as follows:

"Regarding possession of the Suit property, Mr. A. Sivaji, learned Counsel for the Appellant, by drawing my attention to the relief prayed for in the Suit, and also to the non-framing of specific issue regarding possession and specific finding by the Trial Court, would contend that the ultimate Decree for permanent injunction granted by the Trial Court cannot be sustained. It is true that the Plaintiff has filed the Suit praying for declaration that the Suit properly belongs to the Plaintiffs and the 2nd Defendant and also prayed for permanent injunction restraining the First Defendant in any way from interfering with the possession of the Plaintiffs and the 2nd Defendant. Though the learned Subordinate Judge has framed as many as 6 issues, there is no specific issue regarding possession of the Suit property by the Plaintiffs. Even though there is no separate issue regarding possession, admittedly, the Plaintiffs have made necessary averments not only with regard to the title, but also of their possession in the Suit property...."

18. In the instant case, admittedly, there was no pleading regarding benami raised in the Written Statement. This Court also, as stated above, had declined permission to frame an issue on the ground of benami. Hence, the above decisions are not applicable to the present case.

19. Now the next proposition to be discussed is that the burden of proof is on the Plaintiff to substantiate his pleadings irrespective of the weakness in the case of the Defendants. Burden of proof is determined by the affirmative portion of the pleadings of the parties.

20. Mr. S. Parthasarathi, learned Senior Advocate, who appeared for the Plaintiff/Respondent would submit that in order to prove possession of Suit properties, the Plaintiff had produced Kist Receipts from 1960 to 1970 which are marked as Exs. A. 46 to A. 57 for more than 12 years, which is prior to the execution of Ex. A1. The said Kist Receipts are marked in the Appeal Suit.

21. From a perusal of the materials available on record, it is seen that the Plaintiff had also filed Kist Receipts Exs. A10 to A14 and Exs. A32 to A. 42 though dated subsequent to Ex. A1 dated 26.12.1970, whereas, though the Defendants claimed to be in possession, have not produced any document to prove the same. The Kist Receipts, Chitta, Adangal Extract and Patta No. 422 and the Settlement Patta No. 335 filed by the Plaintiff would clearly go to show the continuous possession of the Suit property by the Plaintiff. In view of the above findings, the conclusions of the Courts below that the Plaintiff is in possession of the Suit property are correct and do not warrant any interference.

22. Further, a perusal of the records would also show that there was a Land Acquisition proceedings with respect to the lands of the Plaintiff and the Defendants. Prior to the same, there was a family arrangement between the Plaintiff and the First Defendant under Ex. A16 dated 26.3.1977 which decided the apportionment of Compensation between them. This was objected to by the learned Counsel for the Appellant stating that it cannot be looked into as there was no pleading regarding the same. At this juncture, it would be relevant to have a look at the Rejoinder filed by the Plaintiff wherein it has been pleaded as follows:

"The Defendant constructed his thatched roof sheds and hut with a well and compound wall for running a poultry farm in his land compressing (sic) in Patta No. 159 of the Uthukottai Village, after the written "Odambaddikkai" of 1977. Regarding the bifurcation of the lands everything has been properly recorded in the records of the Revenue Department."

23. Not stopping with that, the Defendant, based on Ex. A16, had executed a Settlement Deed dated 4.8.1988 in favour of his son under Ex. A31. Having acted upon Ex. A16, the Defendant is estopped from raising any objection regarding Ex. A16.

24. Learned Senior Counsel appearing for the Respondent placed his reliance on the decision of the Hon"ble Supreme Court in [Krishna Beharilal Vs. Gulabchand and Others,](#) , and more particularly, referred to Paragraphs 8 & 9, which read as follows:

"8.....To consider a settlement as a family arrangement, it is not necessary that the parties to the compromise should all belong to one family. As observed by this Court in [Ram Charan Das Vs. Girjanandini Devi and Others,](#) the word "family" in the context of the family arrangement is not to be understood in a narrow sense of being a group of persons, who are recognised in law as having a right of succession or having a claim to a share in the property in dispute. If the dispute which is settled is one between near relations then the settlement of such a dispute can be considered as a family arrangement - see [Ram Charan Das Vs. Girjanandini Devi and Others,](#) : [Ram Charan Das Vs. Girjanandini Devi and Others,](#) .

9. The Courts lean strongly in favour of the family arrangements to bring about harmony in a family and do justice to its various members and avoid in anticipation future disputes which might ruin them all - see Sahu Madho Das v. Pandit Mukand Ram and Anr."

25. Further more, the Plaintiff also claimed to have got the Patta in his name in Old No. 422 and New No. 335 from the year 1987 onwards. Though the Defendant had not denied the said fact, however, contended that he had objected to the issuance of Patta to the Plaintiff as per Ex. B6 dated 16.1.1971. Learned Senior Counsel for the Respondent contended that if really the First Defendant was the true owner of the property, he would not have waited from 1950 till he gave the objection in 1971 which is marked as Ex. B6. Learned Counsel appearing for the Appellants/Defendants could not give a convincing answer for the long wait. The First Defendant, though had sent his objections, had not seriously pursued it like a real owner. The Plaintiff seemed to have got the Patta only after thorough enquiry and the same is evident from the fact that the Plaintiff's father, Village Munsif and Village Karnam, Uthukottai, have deposed before the Sub-Registrar about the ownership and possession of the Suit properties based on which the Revenue Authorities have issued Patta after the execution of Ex. A1. The said depositions are marked as Exs. A17 to A19. The Defendants have not denied the said documents.

26. Coming to next contention raised by the learned Counsel for the Appellants that the Plaintiff had not got the source of income on the date of sale of Exs. B4 & B5, the same is only to be rejected for the reason that though the said contention sounds convincing at the first instance, a close scrutiny would reflect the cracks within. In the Additional Written Statement, it is pleaded that the Suit properties were purchased by the Defendant. However, the source of income has not been proved as the First Defendant would have been hardly 25 years at the relevant point of time. Whereas, the Plaintiff has categorically stated that his father and paternal uncle inherited several properties from their father and also from Plaintiff's mother, who got under a Will.

27. It is also clear from the evidence available on record that only from the income from those properties, the Suit properties were purchased and even the education and marriage and construction of house were done from the same. With a view to substantiate the said claim, the Plaintiff has mentioned about O.S. No. 93 of 1972 on the file of Subordinate Court, Thirupathi. The said facts are not denied by the Defendants and the Courts below also have accepted the same.

28. Learned Senior Counsel appearing for the Respondent/Plaintiff contended that the Defendants, despite having knowledge about execution of Ex. A1, have not challenged the same within the period of limitation. Since there is no complete pleading to this effect, the same is not considered. In substance, in any Civil case, the preponderance of probabilities of the facts and circumstances leads to the conclusion. In my opinion, the Courts below have clearly recorded a finding on the claim of title to the Suit property made on behalf of the Plaintiff. It is a settled principle that scope for interference with concurrent finding of fact while exercising jurisdiction under Section 100, C.P.C. is very limited. As the Plaintiff has established his right, title and possession to the Suit properties and since the Courts below being the final fact finding Courts, have concurrently held, and this being a Second Appeal filed under Section 100, C.P.C. against the concurrent Judgments, no substantial question of law would arise for consideration. There are no error of jurisdiction or law or perversity on the face of the records.

In view of the above discussions relating to principles under Section 100, C.P.C., I have no hesitation to hold that no interference is warranted to the concurrent finding of the Courts below. For the foregoing reasons, the Second Appeal fails and the same stands dismissed confirming the Judgments and Decrees of the Courts below. However, there will be no order as to costs. Consequently, connected Miscellaneous Petition is closed.