

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 5.5.2005

C O R A M

THE HON'BLE MR. JUSTICE. S.K. KRISHNAN

S.A.No.1172 of 1994

and

C.M.P.No.13812 of 1994

Natesan

.. Appellant / Plaintiff

Ganesan

.. Respondent / Defendant

Second Appeal is filed under Section 100 C.P.C. against the judgment and decree dated 28.2.1994 passed in A.S.No.12 of 1990 on the file of the Subordinate Judge, Tiruvellur, which was preferred against the Judgment and decree in O.S.No.76 of 1986, dated 23.12.1989 on the file of the District Munsif Court, Tiruvellur.

For Appellant : Mr.M.V. Krishnan

For Respondent: Mr.M.Sriram

JUDGMENT

Aggrieved by the judgment and decree dated 28.2.1994 passed in A.S.No.12 of 1990 on the file of the Subordinate Judge, Tiruvellur, which was preferred against the Judgment and decree in O.S.No.76 of 1986, dated 23.12.1989 on the file of the District Munsif Court, Tiruvellur.

2. The averments made in the plaint are as follows:

a. The plaintiff Natesan, one Govindarajulu Reddy, the defendant Ganesan and one Natarajan are the sons of Narayana Reddy of Mavoor village. The said Govindarajulu Reddy passed away leaving behind his wife Babyammal and two sons. During the year 1975 i.e. on 13.7.1975 there was a partition effected between the four sharers as a result of that a Kur chit was written to effect the said partition. The plaintiff was allotted one share which is the subject matter of the suit. From the date of partition the plaintiff is in possession and enjoyment of his respective share. He is residing in the first item of the

property after constructing a hut thereon. He also enjoyed the second item of the property. Besides, he also enjoyed a wet land measuring to the extent of 0.34 cents which is shown as item in the plaint schedule.

b. The defendant who has no right or interest over the suit items he claims a previous claim over it. The plaintiff was threatened by the defendant to dispossess the property. However, the attempt was prevented by the plaintiff. Hence the plaintiff approached the court to prevent the defendant from interfering with his peaceful possession and enjoyment. To safeguard his interest and possession and title over the suit property the plaintiff sought for the relief of permanent injunction against the defendant in respect of the third item as shown in the plaint schedule.

3. The averments made in the written statement filed by the defendant are as follows:

a. The defendant denies that no partition was effected between the brothers on 13.7.1975. He also denied the execution of the kur chit which was alleged to have written on the same day. It is stated by the defendant that originally the suit properties and other properties were mortgaged to one M.K.Sundarraja Chetty and Chandrammal. Since the mortgage was not redeemed, the said Sundarraja Chetty and Chandra Ammal filed a suit for the recovery of the money. They filed a suit in O.S.No.487 of 1969 and the suit was decreed and as a result of that the properties referred to in the suit brought for sale by Court auction. One Dhanapal Chetty of Thiruvallur has purchased the suit property on 3.3.1979 under Court auction. He was in possession and enjoyment over the said property for some time and thereafter, the defendant purchased the suit property from him on 19.4.1972 under a registered sale deed. In pursuance of the sale deed dated 19.4.1972, the defendant was in possession and enjoyment of the same. The properties referred in the plaint schedule as well as the other properties are self-acquired properties of the defendant. Therefore, he purchased those properties from out of his own savings and income. Those properties are not the properties of the joint family properties. The plaintiff happens to be the brother of the defendant, the defendant allowed him to occupy and construct a small hut thereon. The plaintiff was in permissive possession by the defendant. Out of mercy, the defendant allowed the plaintiff to construct a house thereon and allowed him to remain there. The defendant disputes the claim of the plaintiff over the suit property. Actually, the defendant was enjoyed the second item of the suit property by storing manure and hay. Subsequently, since the plaintiff claims as a sole owner of the suit property and the same was brought to the knowledge of the

defendant thereby the defendant resisted the claim of the plaintiff. Actually, the defendant permitted the plaintiff to pay the kist on his behalf. Even though the plaintiff produced certain receipts and kist receipts, they would not create any title over the suit property in favour of the plaintiff. The non-production of the kur chit is fatal to the plaintiff's case. The defendant denied the alleged partition, which was entered by his brothers on 13.7.1975. The plaintiff is not entitled to the order of injunction against the true owner, the defendant. The suit filed by the plaintiff is not properly framed. The suit is liable to be dismissed.

b. The defendant has also filed an additional written statement, wherein, he denied the execution of the alleged kur chit. The members of the family have not joined in the execution and hence the document cannot be used alleging that there was a partition effected between the brothers. Moreover, the alleged documents were wantonly filed by the plaintiff at a belated stage. Further, the said document was not at all registered and it is not a valid document and the same is not admitted by the defendant.

4. At the time of admission, the following substantial questions of law were framed.

a. Whether the Court below ought to have followed the decisions reported in 1978 (1) M.L.J. 248, A.I.R. 1950 S.C.335, A.I.R.1958 S.C.706, 38 M.L.J. 313 and 1969 (1) Andhra Weekly Reporter 396 and ought to have held that Ex.A.14 was admissible evidence to prove the family arrangement of Kur chit and the plaintiff's possession?

b. Whether on the clear admissions of the defendant in his written statement admitting the plaintiff's possession of the suit property, the Courts below ought to have granted a decree for permanent injunction in favour of the plaintiff ?

5. The learned Counsel appearing for the appellant/plaintiff relied on the documents, namely, Exs.A1 to A5 and Ex.A.14. The Exs.A1 to A5 are the house tax receipts in respect of the first item of the suit property. The Ex.A.14 is the kur chit which was alleged to have been written on 13.7.1975 giving effect for partition among the family members.

6. Emphasising the substantial questions of law, the learned counsel appearing for the appellant/plaintiff would contend that the properties referred in Ex.B.1 sale deed, dated 19.4.1972 is a joint family properties and the sale deed was registered in the name of the defendant.

7. Further, the learned counsel would emphasise that the properties under 'B' schedule referred in Ex.A.14 was allotted to the plaintiff's share. From the date of the said allotment, i.e. 13.7.1975 the appellant/plaintiff was in possession and enjoyment continuously without any interruption.

8. Further, after the said allotment of share under Ex.A.14, the plaintiff constructed a hut thereon and lived there. This fact is also admitted by the defendant. Thereafter, the appellant/plaintiff paid house tax receipts to the first item of the properties. Further, he also paid the kist in respect of the second item. Without analysing the arrangement of partition that was taken place between the family members of late Narayana Reddy, the Courts below have erroneously held that Ex.A.14 was inadmissible one for want of registration. It is pointed out by the learned counsel appearing for the appellant/plaintiff that in the following decisions the principles of doubtless un-registered document can effect separation in status have been enunciated.

a. Mst. Rukhmabai, Vs. Lala Laxminarayan and others (AIR 1960 Supreme Court 335 (V 47 C 57)).

b. Kale and others Vs. Deputy Director of Consolidation and others (AIR 1976 Supreme Court 807).

c. R. Deivanai Ammal (Died) and M.K.Ramalingam Vs. G.Meenakshi Ammal and others (2005-1-L.W.343).

9. Further, the learned counsel appearing for the appellant/plaintiff would submit that in a decision of this Court, the similar point is also discussed in A.I.R. 1988 S.C.81, wherein, the learned Judge of this Court has held that the unregistered kur chit is admissible in evidence appreciating the said legal position, the learned Judge has allowed the second appeal by reversing the lower courts' findings.

10. Further, the learned counsel would contend that the defendant himself categorically admitted the permissive possession of the plaintiff. In such circumstances, it is pointed out by the learned counsel that the possession of the appellant/plaintiff in the suit property is not a wrongful possession. Since the appellant/plaintiff came into possession in the suit property is sustainable in law and also based on the allotment of shares given to the plaintiff under Ex.A.14, the defendant cannot dispossess the possession of the plaintiff from the suit property.

11. Further, the learned counsel for the appellant would contend that since the plaintiff is in permissive possession,

which is not a wrongful possession, based on the kurchit and therefore, the principle would not lend any support that a person in wrongful possession cannot seek injunction against the true owner.

12. Per contra, the learned counsel appearing for the respondent would contend that when the appellant has not filed any reply to the written statement as well as the additional written statement and in the absence of any pleadings, the appellant cannot now take the stand that the respondent has admitted the plaintiff's possession as permissive possession especially when there is no evidence even by P.W.1 regarding permissive possession

13. Further, the case of the appellant/plaintiff is that after the said allotment under Ex.A.14, the appellant/plaintiff constructed a hut thereon and lived there continuously till the filing of the suit. Further, he also paid house tax under receipts A1 to A5. It is pointed out by the counsel that the case stated by the appellant/plaintiff has categorically proved. Considering the recitals referred in Ex.B.1 that no such reference about the existence of building or hut was purchased by the defendant under the sale deed Ex.B.1. Considering the lawful possession and enjoyment of the suit property by the appellant/plaintiff continuously from the date of allotment of shares under Ex.A.14 in such circumstances the lower courts have not granted the relief of permanent injunction sought for by the appellant/plaintiff in respect of the suit properties.

14. Per contra, the learned counsel appearing for the respondent/defendant would submit that considering the entire aspects connected with legal principles as well as facts of the case of the defendant, both Courts after appreciating and analysing the matters in detail, have come to the definite conclusion that the appellant/plaintiff is not at all entitled to claim the relief of permanent injunction against the respondent/defendant in respect of the suit properties. At this juncture, the learned counsel for the respondent/defendant would contend the following:

a. That the alleged kur chit which was executed on 13.7.1975 as claimed by the appellant/plaintiff was not at all proved and established by the plaintiff.

b. Moreover all the shareholders are not signed in the alleged document.

c. Except the appellant no sharers signed in the alleged document have come forward to speak about the recitals referred

to in the said document with regard to allocation of respective shares to the sharers.

d. The appellant/plaintiff has not produced the alleged kur chit at the time of filing of the suit, whereas the said document filed only at a later stage.

e. The defendant does not admit the execution of the said document.

15. In such circumstances, the learned counsel appearing for the respondent/defendant would contend that unless otherwise the execution of the said document is satisfactorily proved and established by the appellant/plaintiff, such document cannot be admitted as an evidence in this case. Considering the above said legal position with regard to the admissibility of the said documents, the Courts below decided the case in a proper perspective and dismissed the suit by holding that the appellant/plaintiff was not at all entitled for seeking the relief of injunction over the suit properties.

16. Further, the learned counsel would contend that for proving the possession in respect of first item of the suit property, the appellant/plaintiff relied on Exs.A.1 to A.5 (House tax receipts) and contend that the same cannot be accepted for the reason that those receipts do not correlate to the house property. Apart from that, it is pointed out by the learned counsel that for proving the continuous and uninterrupted possession from 1975 till filing of the suit 1986 the appellant/plaintiff has not at all filed any documents. Unless otherwise the appellant/plaintiff proved the possession with sufficient materials, he cannot claim the relief of injunction against the defendant over the suit property. Further, the learned counsel pointed out that even though the scribe of the document was examined as P.W.2, he has not spoken anything about the facts relating to the allotment of respective shares and subsequent enjoyment of the parties in respect of their shares. In such circumstances, it cannot be considered that the appellant/plaintiff was in possession and enjoyment over the suit property. Whereas, the respondent/defendant to prove the valid purchase of the suit property under Ex.B.1 he has produced the relevant document Exs.B.1 to B.3. Further, the defendant also produced the other documents Ex.B.15 to B.35 kist receipts concerned to the landed property.

17. Further, the learned counsel pointed out that for the relief of permanent injunction, the plaintiff has to establish his possession and enjoyment of the suit property presume to the execution of Ex.A.14. It is pointed out by the learned counsel

that the appellant /plaintiff ha snot produced any relevant documents to establish the claim of possession over the suit property and not adduced satisfactory oral evidence in respect of his possession. In the absence of any materials with regard to claim of possession, the appellant/plaintiff cannot claim any relief of permanent injunction against the defendant.

18. Further, the definite case of the plaintiff is that he came into possession of the suit property as a true owner his presume of allotment of respective share under Ex.A.14. He ought to have established his title and possession over the suit properties. Unless otherwise he establishes the same, he cannot claim the relief of permanent injunction. In the absence of establishing the title and possession over the suit properties for his enjoyment from the date of allotment of share under Ex.A.14 dated 13.7.1975 till the filing of this suit in the year 1986, he cannot claim the relief of permanent injunction against the defendant.

19. On a careful analysis of the arguments advanced by the learned counsel appearing for the respondent/defendant, this Court finds some force in his contention. As pointed out by the learned counsel appearing for the respondent/defendant, since the appellant/plaintiff is miserably failed to prove his case in respect of his possession and enjoyment over the suit property from 1975 till the filing of the suit in 1986, and also considering the legal position, connected with the document under Ex.A.14, this Court is of the view that the Courts below have decided the case in a proper perspective. Under such circumstances, this Court does not find any valid reasons to interfere with the concrete findings arrived at by the Courts below.

20. In the light of the discussion held above, this court finds that there are valid and sufficient reasons available for rejecting the case of the appellant/plaintiff. The substantial questions of law are answered against the appellant.

21. In result, the second appeal fails and is dismissed. No costs. Connected C.M.P. is also dismissed.

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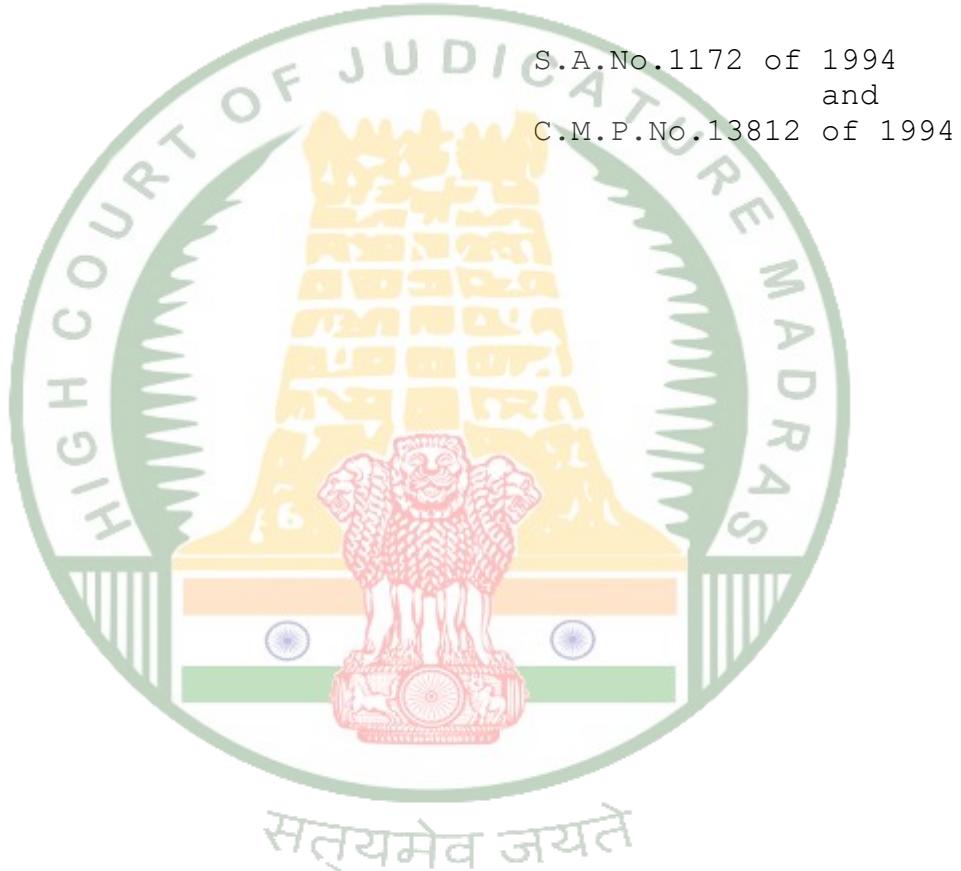
To

1. The Subordinate Judge  
Thiruvallur

2. The District Munsif  
Thiruvallur.

3. The Record Keeper, V.R. Section, High court, Madras.

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