

(2011) 06 MAD CK 0363
In the Madras High Court
Case No : S.A. No. 390 of 1998

Ella Ammal

APPELLANT

Vs

Kothambu Ammal

RESPONDENT

Date of Decision : 30-06-2011

Acts Referred:

Transfer of Property Act, 1882 — Section 3

Citation : (2011) 6 CTC 282

Hon'ble Judges : R.S. Ramanathan, J

Bench : Single Bench

Advocate : R. Srinivas, for the Appellant; R. Sunil Kumar, for the Respondent

Final Decision : Allowed

Judgement

R.S. Ramanathan, J.—The unsuccessful Defendant is the Appellant herein.

2. The Respondent/Plaintiff filed the suit for declaration and injunction or in the alternative for recovery of possession of the suit property.

3. The case of the Respondent/Plaintiff was that the suit property originally belonged to one Potti Ammal. The said Potti Ammal, married one Ponnan, who had two sons by name Kaliaperumal and Dhanapal. Dhanapal, died thirty years, earlier to the filing of the suit and the property was enjoyed by Kaliaperumal and Potti Ammal, as Ponnan died in the year 1950. The Respondent/Plaintiff purchased the property under a registered sale deed dated 04.08.1973, from Potti Ammal and Kaliaperumal and was in enjoyment of the same. As the Appellant/Defendant dispossessed the Respondent/Plaintiff, the suit was filed. The suit was originally filed for declaration and injunction or in the alternative, recovery of possession of the suit property.

4. The Appellant/Defendant contested the suit, stating that Ponnan, was the original owner of the suit property and through his wife Potti Ammal, he had one son by name Kaliaperumal and through his another wife, he had another son by name Dhanapal. The said Dhanapal, died leaving behind him his son by name

Rajagopal and the Appellant/Defendant purchased the property from Rajagopal and prior to her purchase, the property was enjoyed by Rajagopal and his mother. After the death of Ponnan, Kaliaperumal and Potti Ammal, left the Village and they were not in possession of the property and the property was in possession and enjoyment of Rajagopal and therefore, the Respondent/Plaintiff cannot claim right over the suit property.

5. It is further submitted that the suit property is not situated in S. No. 35/4 and it is situated in S. No. 235/3B. Even assuming without admitting that the Respondent/Plaintiff has got right over the suit property, the Appellant/Defendant also has got equal right in the suit property, as she purchased the property from the other heir of Ponnan viz., Dhanapal's son Rajagopal, and therefore, the suit filed for declaration is not maintainable.

6. Both the Courts have held that the Respondent/Plaintiff purchased the suit property in the year 1973, from Kaliaperumal and Potti Ammal and the Defendant's husband attested the sale deed dated 10.03.1983, wherein adjacent property was sold and in that sale deed, it has been stated that the eastern boundary is the property belonging to Kaliaperumal and the Defendant's husband has accepted the title of the suit property in favour of Kaliaperumal and therefore, the Appellant/Defendant cannot claim any right over the suit property and the Plaintiff has got title and the Defendant has no title and decreed the suit for recovery of possession, declaring the Plaintiff's right over the suit property and also directed the Defendant to hand over possession of the suit property. Aggrieved by the same, this Second Appeal is filed.

7. The following Substantial Questions of Law were framed at the time of admission of this Appeal:

- i) Whether a Plaintiff, who according to her own averments can be seen as one of the co-owners of the property, can be granted the relief of declaration of title and recovery of possession against a Defendant, who is shown in law as an another co-owner/ sharer?
- ii) Whether the Respondent/Plaintiff, who claims possession and title over poramboke lands can succeed without adducing any proof regarding her sole and exclusive physical possession of the same or that of her seller?
- iii) Whether a Court is justified and right in decreeing a suit for declaration of title in respect of a poramboke land, when no document or evidence to prove the title or possession of the Plaintiff or her predecessor is produced?
- iv) Whether a third party witness attesting the execution of a document could be held bound by the contents thereof?
- v) Whether just because a document of possession is subsequent to the filing of suit, the party producing the same can be held to have taken possession of the property subsequent to the suit? And whether a Court can disbelieve such a document only because it is subsequent to the suit?

8. Though five Substantial Questions of Law were framed by this Court at the time of admission of Second Appeal, only the following substantial questions of law arise for consideration in this Second Appeal:

i) Whether a Plaintiff, who according to her own averments is one of the co-owners of the property, can be granted the relief of declaration of title and recovery of possession against a Defendant, who is also another co-owner/sharer?

ii) Whether a third party attesting the execution of a document could be held bound by the contents thereof?

9. Mr.R. Srinivas, the learned Counsel appearing for the Appellant submitted that it is not in dispute that the property originally belonged to Ponnann and through his wife Potti Ammal, he had a son by name Kaliaperumal and through his another wife, he had a son by name Dhanapal. It is also not in dispute that the said Dhanapal, had a son by name Rajagopal and through Rajagopal, the Appellant/Defendant purchased the suit property.

10. Therefore, the learned Counsel contended that when the relationship is admitted, the Respondent/Plaintiff cannot claim any exclusive title to the suit property, as the said Rajagopal, was also a co-owner, along with Kaliaperumal and the Trial Court has found that the Appellant/Defendant was in possession of the suit property at the time of institution of the suit. Therefore, the Courts below should not have granted relief of declaration holding that the Respondent/Plaintiff is the absolute owner of the suit property and the Plaintiff must have been directed to file a suit for partition and for recovery of possession.

11. On the other hand, Mr. R. Sunil Kumar, the learned Counsel appearing for the Respondent submitted that the Plaintiff purchased the suit property in the year 1973 under Ex.A1, and the Defendant purchased the suit property under Ex.B1, in the year 1988, and from the year 1973, the Plaintiff was in possession of the suit property and after the purchase of the property by the Defendant, the Plaintiff was dispossessed. Moreover, the Defendant's husband attested the sale deed under Ex.A4, wherein, it has been stated that the eastern boundary of the property sold under Ex.A4, belongs to Kaliaperumal, the Plaintiff's predecessor in title and therefore, the Defendant's husband admitted the title of the Plaintiff's predecessor in title and therefore, it is not open to the Appellant/Defendant to question the title of the suit property.

12. The learned Counsel appearing for the Appellant submitted that though in Ex.A4, the Defendant's husband was the attesting witness, by attesting the document one cannot impute knowledge of the contents of the documents. Moreover, the attestor has only attested the signature of the executant and at the time of execution of Ex.A4, the Defendant has no right or title to the suit property and she acquired title only in the year 1988. Therefore, it cannot be stated that the Defendant's husband was aware of the contents of the document and he had knowledge, while attesting the document executed under Ex.A4

about its contents and hence, mere attestation will not amount to admission of title of the Plaintiff's predecessor in title to the suit property.

13. Heard Both sides.

14. As rightly pointed out by the learned Counsel for the Appellant, it is not in dispute that the property originally belonged to one Ponnan, who had two wives and through his wife Potti Ammal, he had a son by name Kaliaperumal and through his another wife, he had another son by name Dhanapal and the said Dhanapal, had a son by name Rajagopal. After the death of Ponnan, both Potti Ammal and Kaliaperumal, on one side and Dhanapal on the other side, enjoyed the property, as co-owners and in the absence of any pleading to the effect that the Kaliaperumal and Potti Ammal have ousted Dhanapal and his son from enjoyment of the suit property for more than the statutory period, Dhanapal and Rajagopal, continued to be co-owners of the suit property along with Potti Ammal and Kaliaperumal. Even after, the purchase of the suit property by the Plaintiff in the year 1973, the said Rajagopal, was in enjoyment of the suit property only as a co-owner. Therefore, Rajagopal, son of Dhanapal, is having 1/3rd share in the suit property and the Plaintiff was having 2/3rd share in the suit property.

15. It is also not pleaded that the Plaintiff and her predecessor in title have ousted Dhanapal and his son from enjoyment of the suit property. Therefore, in the absence of any ouster, Dhanapal and his son continued to be the co-owners of the suit property and therefore, the purchaser from Rajagopal, also continued to be the co-owner along with the Plaintiff.

16. Both the Courts have decreed the suit on the basis of Ex.A4, holding that in Ex.A4, the Defendant's husband admitted the title of the Plaintiff's predecessor in title to the suit property and therefore, the Plaintiff is entitled to declaration. Ex.A4, is the sale deed dated 10.08.1983, executed by one Kupuswamy, in favour of Iyyakannu, and the subject matter of the sale deed was the property, which is situated on the western side of the suit property. The Courts below have held that by attesting the documents, the Defendant's husband admitted the title of the Plaintiff's predecessor in title to the suit property.

17. As rightly contended by the learned Counsel for the Appellant on the date of execution of Ex.A4, the Defendant has no interest in the suit property. The Appellant/Defendant purchased the suit property in the year 1988, whereas Ex.A4, was dated 10.08.1983. No doubt, in Ex.A4, it has been stated that the eastern portion of the property, which was the subject matter of Ex.A4, belongs to Kaliaperumal. According to me, by attesting the document, it cannot be stated that the attesting witness have accepted the title of the owner of the adjacent property. Section (3) of the Transfer of Property Act, deals with meaning "attested" which is as follows:

the word " attested" in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other

person sign the instrument in the present and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time and no particular form of attestation shall be necessary

18. In my opinion, the attestation of an instrument does not by itself fix the witness with a knowledge of its contents. In the matter of Pandurang Krishnaji v. Markandey Tukaram the Judicial Committee observed as follows:

Attestation of a deed by itself estops man from denying nothing whatever excepting that he has witnessed the execution of the deed. It conveys, neither directly nor by implication, any knowledge of the contents of the document and it ought not to be put forward alone for the purpose of establishing that a man consented to the transaction which the document effects. It is, of course, possible that an attestation may take place in circumstances which would show that the witness did, in fact, know of the contents of the documents but no such knowledge ought to be inferred from the mere fact of the attestation

Mere attestation is not enough to involve the witness with knowledge of the contents of the deed, and that is equally true of the witnesses, who identify the executant before the Registrar"

19. Further, there is no evidence to the effect that the Defendant's husband was aware of the contents of Ex.A4, or the contents of Ex.A4, was read over to the attesting witness and with the knowledge of the same, the attesting witness has signed the document. Moreover, to bind the attesting witness from claiming any right to the property in which he was attesting witness, it must be proved that he was having any right over the suit property and he was aware of the contents of the document and with that knowledge, he attested the document.

20. In the present case on hand, on the date of execution of Ex.A4, the Defendant's husband had no right over the suit property and the Defendant purchased the suit property only in the year 1988. Further, there was no evidence to the effect that the contents of the document was brought to the notice of the attesting witness and in the absence of any such evidence, the attesting witness cannot be impede with the knowledge of the document. He only attested the signature of the executant and nothing more than that.

21. Therefore, both the Courts have erred in holding that by reason of attestation of Ex.A4, the Defendant's husband has accepted the title of the Plaintiff's predecessor in title to the suit property and therefore, the Defendant is estopped from disputing the title of the Plaintiff. Hence, both the Courts have erred in decreeing the suit for declaration and for directing recovery of possession of the suit property.

22. Thought both the Courts have concurrently held that the Plaintiff is entitled

to the decree, as the concurrent findings are erroneous, by applying the law erroneously, the findings can be interfered with in this Second Appeal. Therefore, the judgment and decree of the both the Courts are set aside and the Second Appeal is allowed and the suit is dismissed.

23. Having regard to the discussion stated above, the Substantial Question of law No. 2, is answered in favour of the Appellant, and I hold that by reason of attestation, the attesting witness is not expected to know the contents of the document in the absence of any evidence, that the contents of the document were read over to him and the attesting witness had some title over the property at the time of execution. As the Appellant also is having 1/3rd share in the suit property, the suit filed for declaration over the entire suit property is not maintainable and the Substantial Question of law No. 1 is also answered in favour of the Appellant.

24. In the result, the Second Appeal is allowed, the judgment and decree of the Courts below are set aside and the suit in O.S. No. 428 of 1998 is dismissed. Nevertheless, it is open to the Plaintiff to file the suit for partition of the property, if so advised. However, there shall be no order, as to costs. Consequently, connected Miscellaneous Petition is closed.