

(2009) 11 MAD CK 0136

In the Madras High Court

Case No : Second Appeal No's. 1264 and 1305 of 1995

Ganthimathi Ammal

APPELLANT

Vs

Saprudin and Others

RESPONDENT

Date of Decision : 05-11-2009

Acts Referred:

Limitation Act, 1908 — Article 142
Limitation Act, 1963 — Section 31
Registration Act, 1908 — Section 17

Citation : (2009) 11 MAD CK 0136

Hon'ble Judges : M. Jeyapaul, J

Bench : Single Bench

Advocate : Emily Venkatesan, in S.A. No. 1264/95 and respondent in S.A. No. 1305/95, for the appearing parties; K. Chandramouli for A. Muthukumar for respondents in S.A. No. 1264/95 and appellants in S.A. No. 1305/95, for the Appearing Parties

Judgement

M. Jeyapaul, J.—The plaintiff filed a suit for recovery of possession of the property in S. No. 1282/1 as against the defendants in O.S. No. 39 of 1989. Having suffered a decree for recovery of possession both before the Trial Court as well as before the appellate court, the defendants have preferred S.A. No. 1305 of 1995. The plaintiff, who laid a suit for permanent injunction with respect to the remaining part of the property in S. No. 1282/1, having been non-suited by the Trial Court as well as by the first appellate court, preferred S.A. No. 1264 of 1995.

2. To avoid confusion, the parties are referred to as plaintiff and defendants as the case may be as the plaintiff has filed S.A. No. 1264 of 1995 and the defendants have filed S.A. No. 1305 of 1995.

3. The plaintiff in both the suits has contended that the property comprised in S. No. 1282/1, Ward No. 1, Block No. 31 measuring 56106 sqft absolutely belonged to one Kulandaivelu Chettiar who purchased the same by means of a registered

sale deed dated 12th October 1946 from one Govindasamy Nadar and his minor son Ramaian and another unnamed minor son. The patta for the property stands in the name of Kulandaivelu Chettiar who died leaving behind his wife Gandhimathi as the only legal heir. The plaintiff Gandhimathi Ammal, being the sole heir of Kulandaivelu Chettiar, has been in possession and enjoyment of the suit property. The defendants, taking advantage of the fact that they are residing closeby the suit property, encroached upon 2223 sqft in S. No. 1282/1. The remaining extent of the suit property has been in possession and enjoyment of the plaintiff. Therefore, the plaintiff has filed a suit in O.S. No. 39 of 1989 praying for recovery of possession of 2223 sqft in S. No. 1282/1 and for permanent injunction with respect to the remaining portion of the property.

4. In the written statement, the defendants, having disputed the ownership of Kulandaivelu Chettiar, have contended that the original owner Paramathal, wife of Marimuthu Nadar, who purchased the entire extent of the suit property under the registered sale deed dated 27.5.1907, usufructuarily mortgaged the suit property in favour of one Gulam Hyder Saheb for a sum of Rs. 2000/= under a deed dated 16.12.1930. The said document was not registered and was also not duly attested. Neither Paramathal nor her son Govindasamy Nadar ever redeemed the property from the usufructuary mortgage and recovered possession thereof. After the demise of Gulam Hyder Saheb, his only son Mohamed Ghouse continued to enjoy the suit property. After the death of the only son of the usufructuary mortgagee Gulam Hyder Saheb, his brothers viz., Gudumiyan, Sheik Khader, Mohamed Razak and Mohamed Hanif got into possession of the entire property and had been in enjoyment of the same. After the death of Mohamed Hanif, his son, the first defendant, got into possession of the entire property and has been enjoying the same. The defendants deny the allegation that they trespassed upon the suit property taking advantage of the proximity of their property in S. No. 1282/2. They have also been in possession adversely to the right, title and interest of Paramathal and her son Govindasamy Nadar. Therefore, the defendants sought for dismissal of both the suits.

5. The Trial Court, having adverted to the evidence on record in O.S. No. 39 of 1989, rejected the plea of the defendants that Paramathal usufructuarily mortgaged the entire suit property under the deed dated 16.12.1930 in favour of Gulam Hyder Saheb. It also held that the plaintiffs got right and title over the suit property under the sale deed dated 12.10.1946, rejecting the plea of the defendants that they have been in possession and enjoyment of the suit property for over the statutory period. The Trial Court, ultimately, granted a decree for delivery of possession as prayed for by the plaintiff in O.S. No. 39 of 1989. The first appellate court concurred with the findings of the Trial Court and rejected the plea of the defendants that the suit is barred by limitation under the old Limitation Act. It has also been held that Ex.D1, the alleged usufructuary mortgage deed, was fabricated by the defendants for the purpose of the suit. Having held that the defendants encroached upon a portion of the suit property only a few days earlier to the suit, dismissed the appeal preferred by the

defendants in A.S. No. 226 of 1993 and upheld the finding of the Trial Court that the plaintiff was entitled to a decree for recovery of possession.

6. The Trial Court, in O.S. No. 202 of 1989, having adverted to the various documents produced on the side of the defendants, arrived at a decision that the defendants have been in possession and enjoyment of the suit property and that, therefore, the plaintiff is not entitled to an order of injunction. The first appellate court, in A.S. No. 10 of 1993, confirmed the verdict of the Trial Court basing reliance upon various documents produced by the defendants to show their possession and confirmed the findings of the Trial Court.

7. The following substantial questions of law have been framed while admitting the second appeals.

S.A. No. 1264 of 1995:

1. Whether the refusal of injunction in favour of the appellant is proper, since the property in dispute is a vacant site?

2. Whether the lower appellate court has erred in dismissing the appeal when the usufructuary mortgage set up by the defendant has not been accepted?

S.A. No. 1305 of 1995:

Whether the lower appellate court has correctly appreciated Exs.A1 and B25 in holding possession in favour of the plaintiff?

8. Learned Counsel appearing for the plaintiff would contend that the sale deed Ex.A1 dated 12.10.1946 would show that the plaintiff's husband Kulandaivelu Chettiar purchased the entire suit property from Govindasamy Nadar and his minor sons. The documents filed on the side of the defendants do not reflect the suit survey number. Therefore, much reliance cannot be placed on the various House Tax Receipts produced by the defendants. The courts below have categorically held that Ex.B1 dated 16.12.1930, the alleged usufructuary mortgage deed, executed by Paramathal in favour of Gulam Hyder Saheb was found to be a fake document. Therefore, the defendants cannot claim any right over the suit properties on the ground that they have been in possession of the same based on the usufructuary mortgage alleged to have been executed by Paramathal in favour of the defendants' predecessor. It is also contended that the old Limitation Act, 1908 would not apply to the case on hand as the suits have emanated only after the new Limitation Act, 1963 was enacted. As the defendants have not shown before the courts below that they have perfected title to the suit property by long adverse possession and enjoyment of the same, they cannot acquire any title to the suit property.

9. Learned Senior Counsel appearing for the defendants would submit that the plaintiff has not filed any document to prove her possession. The documents produced on the side of the defendants would establish that they have been in possession and enjoyment of the suit property. As per Article 144 of the Indian

Limitation Act, 1908 read with Section 31 of the Limitation Act, 1963, the suit filed by the plaintiff seeking recovery of possession is hopelessly barred by limitation, as twelve years period for claiming delivery of possession had lapsed long prior to the coming into effect of the present Limitation Act, 1963. At any rate, Ex.B2 marked in A.S. No. 10 of 1993 in O.S. No. 202 of 1989 and Ex.B25 marked in O.S. No. 39 of 1989 would seal the fate of the case as the husband of the plaintiff had relinquished his right in the suit property as he had lent his name benami. It is his further submission that the usufructuary mortgage created under Ex.A3 by Govindasamy Nadar as on 8.7.1942 was not discharged so far. Therefore, he would submit that the plaintiff has no right in the suit property and she has also failed to establish that she has been in possession of the suit property.

10. Both the courts below in both the suits have categorically held that Ex.B1, the alleged usufructuary mortgage deed dated 16.12.1930, is a concocted document. On a careful perusal of Ex.B1, it is found that the defendants have surreptitiously made an attempt to correct the Block Number, Survey Number and the extent of the property. As rightly held by both the courts below in both the suits, the defendants have made an attempt to project Ex.B1 as though Paramathal the original owner of the property, even during her life time, chose to usufructuarily mortgage the suit property to the predecessor of the defendants by name Gulam Hyder Saheb. That apart, a mortgage deed is required to be attested and registered. Neither was Ex.B1 attested nor was it registered as mandated by law. Further, the sale deed, Ex.A1 dated 12.10.1946 specifically refers to the usufructuary mortgage created in favour of one Kalabamudai Servai of Nagapattinam. If at all there had been any usufructuary mortgage created by Paramathal in favour of Gulam Hyder Saheb, Ex.A1 would have some reference thereto. For all these reasons, I find that both the courts below in both the suits, have rightly held that Ex.B1 cannot be relied upon for any purpose as it is not only a concocted document but also an inadmissible document in the eye of law.

11. Both the courts below in both the suits have held that the suit property was sold in favour of Kulandaivelu Chettiar, husband of the plaintiff by Govindasamy Nadar and his minor son Ramaian and his another unnamed minor son having got the property from Paramathal under Ex.A1 dated 12.10.1946. On a perusal of Ex.B22 marked in A.S. No. 10 of 1993 in O.S. No. 202 of 1989 at the appellate stage and Ex.B25, the very same document marked in O.S. No. 39 of 1989, it is found that Kulandaivelu Chettiar, who purchased the suit property under Ex.A1, relinquished all his rights in the suit property in favour of A.M.P. Subbaraya Chettiar as the said property was purchased in the name of Kulandaivelu Chettiar only as a benami of A.M.P. Subbaraya Chettiar.

12. The learned Counsel appearing for the plaintiff would submit that the said document dated 17.6.1957 was not produced from proper source. Secondly, no relinquishment deed could be executed to disown the right in the property acquired under benami transaction.

13. Firstly, it is found that the aforesaid document is not a original document produced from the custody of the defendants. The defendants are entitled to secure a certified copy of any document for that matter to challenge the right and title projected by the plaintiff. It is found that Ex.B25 marked in O.S. No. 39 of 1989 is a duly stamped and registered document. The extinguishment of right under the aforesaid deed was registered as contemplated u/s 17 of the Registration Act. Therefore, I am not inclined to accept the submission made by the learned Counsel appearing for the plaintiffs that there cannot by any extinguishment of the right acquired under benami transaction.

14. Ex.B25 marked in O.S. No. 39 of 1989 completely seals the fate of the case of the plaintiff that the plaintiff got this property through her husband who purchased it under Ex.A1.

15. On a careful analysis of Ex.A1 and Ex.B25, it is found that Kulandaivelu Chettiar, the husband of the plaintiff was only a name lender for the benami transaction clinched by A.M.P. Subbaraya Chettiar. A.M.P. Subbaraya Chettiar got back the right and title to the suit property purchased by him benami in the name of Kulandaivelu Chettiar, the husband of Gandhimathi Ammal, the plaintiff herein under Ex.B25 dated 17.6.1957 marked in O.S. No. 39 of 1989. Therefore, the plaintiff has not derived any right or title to the suit property from her husband Kulandaivelu Chettiar, who has lent his name for the purchase of the suit property by A.M.P. Subbaraya Chettiar under Ex.A1 dated 12.10.1946 and relinquished the entire right and title to the said property in favour of A.M.P. Subbaraya Chettiar himself under the aforesaid relinquishment deed, Ex.B25.

16. The courts below in the suit in O.S. No. 202 of 1989, on a careful perusal of the field register extract, house tax receipt, property tax receipt and land revenue receipt, has categorically given to a finding that the defendants have been in possession and enjoyment of the property described in O.S. No. 202 of 1989. It is not in dispute that the entire property in Survey No. 282/1 measures 56106 sqft. The suit for recovery of possession was filed for 2223 sqft and the suit for permanent injunction was filed for the remaining extent. The plaintiff, has not produced any document to show that she has been in possession and enjoyment of the suit property. The aforesaid voluminous documents referred to by the courts below would establish that the defendants have been in possession and enjoyment of not only of the property described in O.S. No. 39 of 1989 but also the property described in O.S. No. 202 of 1989.

17. Ex.A1 would refer to the sale of the property subject to the usufructuary mortgage created in favour of Kalabamudai Servai. The husband of the plaintiff was burdened with the liability of discharging the said usufructuary mortgage. The existence of usufructuary mortgage implies the enjoyment of the property by the usufructuary mortgagee. The usufructuary mortgage created in the name of Kalabamudai Servai has been marked as Ex.A3 in O.S. No. 39 of 1989. There is no indication in Ex.A3 that the said usufructuary mortgage in favour of Kalabamudai Servai was discharged. PW1 would modestly attempt that he was

not aware whether the usufructuary mortgage created in favour of Kalabamudai Servai was discharged.

18. Though the husband of the plaintiff purchased the property under Ex.A1, the entire right and title flowed to the husband of the plaintiff got extinguished under the deed of relinquishment executed by him under Ex.B25 in O.S. No. 39 of 1989. Even at the time of execution of the sale deed Ex.A1, the possession of the suit property was with Kalabamudai Servai in his capacity as usufructuary mortgagee. There is no evidence to show that the said usufructuary mortgage in favour of Kalabamudai Servai was discharged. The plaintiff has not produced materials to establish that she had been in possession and enjoyment of the suit property. Whereas the defendants have filed documents to establish that they have been in possession and enjoyment of the suit property.

19. Though there is virtually no documents to show the possession of the suit property by the plaintiff, the Trial Court in O.S. No. 39 of 1989 and the first appellate court in A.S. No. 226 of 1993 have held that the plaintiff, having got the suit property from her husband, who purchased the same under Ex.A1, has been in possession and enjoyment of the suit property and just before the filing of the suit, the defendants trespassed upon the suit property and took possession of the same. The Trial Court in O.S. No. 39 of 1989 and the first appellate court in A.S. No. 226 of 1993 have failed to refer to Ex.B25 which completely extinguishes the right and title of Kulandaivelu Chettiar, the husband of the plaintiff, flowed under Ex.A1.

20. Though there is a reference in Ex.A1 that the possession of the property was handed over to Kulandaivelu Chettiar at the time of execution of the sale deed, the fact remains that the property was already usufructuarily mortgaged to Kalabamudai Servai under Ex.B3 dated 8.7.1942 marked in O.S. No. 39 of 1989. Therefore, when the document Ex.A1 was executed by Govindasamy Nadar and his minor sons, Kulandaivelu Chettiar would not have taken possession of the property. The entire case of the plaintiff received a jolt on production of Ex.B25 dated 17.6.1957 marked in O.S. No. 39 of 1989 to establish that the plaintiff has got no right from her husband as her husband Kulandaivelu Chettiar had completely relinquished his right and title in the suit property. To top it all, no document was filed to establish either Kulandaivelu Chettiar or the plaintiff has been in possession and enjoyment of the suit property.

21. A very interesting question of law was raised by the learned Senior Counsel appearing for the defendants. It is submitted by him that Articles 142 and 144 of the Limitation Act 1908 read with Sections 31 of the Limitation Act, 1963 would apply to the facts and circumstances of the case and not Articles 64 and 65 of the Limitation Act, 1963. The point he derives at is that the suit is barred by limitation even before the coming into force of the present Limitation Act, 1963 and therefore, no suit can be laid for delivery of possession invoking Articles 64 and 65 of the Limitation Act, 1963.

22. It is relevant to refer to Articles 142 and 144 of the Limitation Act, 1908 and Articles 64 and 65 and Section 31 of the present Limitation Act, 1963. The Indian Limitation Act, 1908 Description of Suit Period of Limitation Time from which period begins to run Article 142 For possession of immovable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession. Twelve years The date of the dispossession or discontinuance Article 144 For possession of immovable property or any interest therein not hereby otherwise specially provided for. Twelve years When the possession of the defendant becomes adverse to the plaintiff.

The Limitation Act, 1963 Description of suit Period of Limitation Time from which period begins to run Article 64 For possession of immovable property based on previous possession and not on title, when the plaintiff while in possession of the property has been dispossessed. Twelve years The date of dispossession Article 65 For possession of immovable property or any interest therein based on title Twelve years When the possession of the defendant becomes adverse to the plaintiff. The Limitation Act, 1963 Section 31: Provision as to barred or pending suits, etc. - Nothing in this Act shall, -

(a) enable any suit, appeal or application to be instituted, preferred or made, for which period of limitation prescribed by the Indian Limitation Act, 1908 (9 of 1908), expired before the commencement of this Act; or

(b) affect any suit, appeal or application instituted, preferred or made before, and pending at, such commencement.

23. The observation made by the Supreme Court in Saroop Singh Vs. Banto and Others, was referred in the later judgment in M. Durai v. Madhu and Ors. 2007 SAR (Civil) 157 which reads as follows:

The statutory provisions of the Limitation Act have undergone a change when compared to the terms of Articles 142 and 144 of the Schedule appended to the Limitation Act, 1908, in terms whereof it was imperative within twelve years preceding the date of institution of the suit. However, a change in legal position has been effected in view of Articles 64 and 65 of the Limitation Act, 1963. In the instant case, the plaintiff-respondents have proved their title and thus, it was for the first defendant to prove acquisition of title by adverse possession. As noticed hereinbefore, the first defendant-appellant did not raise any plea of adverse possession. In that view of the matter the suit was not barred.

24. Therefore, under the old law, in terms of Articles 142 and 144 of the schedule appended to the Limitation Act, 1908, the plaintiff is bound to establish not only his title but also his possession within 12 years preceding the date of institution of the suit. The aforesaid Articles had undergone a change in view of the enactments of Articles 64 and 65 of the Limitation Act, 1963. As per the present Limitation Act, 1963, the moment the plaintiff establishes his title, the burden shifts on the defendant to prove prescription of title by adverse possession.

25. Section 31 of the Indian Limitation Act, 1963 would apply only where the period of limitation prescribed under the old Act expired even before the commencement of the new Act.

26. As per the terms of Articles 142 and 144 of the old Limitation Act, the plaintiff was bound to prove his title as also possession within 12 years preceding the date of institution of the suit.

27. As the clear period of 12 years prescribed under Articles 142 and 144 of the old Limitation Act spans upto the institution of the suit, the period of Limitation prescribed therein will not apply to the suits filed after 12 years from the date of expiry of the old Limitation Act. Section 31 of the Limitation Act 1963 would apply only in case where the clear period of limitation prescribed expired before the commencement of the present Act. As the period prescribed for claiming adverse possession does not automatically expire on the date of commencement of the new Act and the adverse possession of 12 years can be established preceding the institution of the suit, Section 31 of the Limitation Act, 1963 will not have any application to the facts of the case.

28. In the present case, these suits have been filed in the year 1989. Therefore, the submission made by the learned Senior Counsel appearing for the defendants that Articles 142 and 144 to the schedule appended to the Indian Limitation Act, 1908 alone would apply and not Articles 64 and 65 of the present Limitation Act, 1963 stands rejected.

29. At any rate, in the present case, the plaintiff is not in a position to establish her title to the suit property. Her possession also was not established by producing substantial materials. Whereas, the defendants have established that they have been in possession and enjoyment of the suit property. The plaintiffs are not entitled to declaration of title and delivery of possession in respect of part of the property in S. No. 1282/1 and also for permanent injunction in respect of the remaining portion of the property in the said survey number.

30. Therefore, the judgments passed in O.S. No. 202 of 1989 and A.S. No. 10 of 1983 by the Trial Court and the first appellate court respectively stands confirmed and consequently, S.A. No. 1264 of 1995 is dismissed. The judgments passed in O.S. No. 39 of 1989 and A.S. No. 226 of 1993 by the Trial Court and the first appellate court respectively stands set aside and consequently, S.A. No. 1305 of 1995 stands allowed. There is no order as to costs in both the appeals.