

(1998) 10 MAD CK 0134
In the Madras High Court

N. Balasubramania Pattar and Another	APPELLANT
Vs	
S. Kandasamy Pathar (died) and Others	RESPONDENT

Date of Decision : 23-10-1998

Acts Referred:

Citation : (1999) 2 MLJ 367

Hon'ble Judges : A. Ramamurthi, J

Bench : Single Bench

Judgement

A. Ramamurthi, J.—The aggrieved defendants have preferred the Second Appeal against the judgment and decree in A.S.No. 32 of 1985 on the file of Sub Court, Nagapattinam dated 18.10.1985.

2. The case of the plaintiff is as follows: The plaintiff filed a suit for declaration as well as recovery of possession. The suit property is a shop situate in Poonthottam bazaar. The 1st defendant is none other than the plaintiff's father's brother's son. The 2nd defendant is the son of the 1st defendant. The father of the plaintiff did when he was young and, as such, the plaintiff and Narayanasamy Pathar were residing jointly and looking after the family business. There was partition on 17.7.1957, in which the suit property fell to the share of Narayanasamy Pathar, who is the plaintiff's father's brother. There was misunderstanding between Narayanasamy Pathar and the 1st defendant and as such, Narayanasamy Pathar was residing with the plaintiff for a period of 10 years, the plaintiff was looking after Narayanasamy Pathar. Even under the partition deed, no house property was allotted to the plaintiff. Narayanasamy Pathar has promised to construct a house to the plaintiff, but he could not carry out the same. Because of this, Narayanasamy Pathar executed a settlement deed in favour of the plaintiff on 26.2.1969 and the plaintiff has also accepted the same and he was put in possession and enjoyment of the property. The assessment was also transferred in the name of the plaintiff and he has been paying the house tax as well as electricity charge. Moreover, he has also rented out the front portion to three persons for the purpose of running a tailor shop fruit shop and sweet stall. There

is also a trust in the family of the plaintiff and Narayanasamy Pathar. According to him, he has been doing daily pooja and also conducting "Krithigai" festival during every month of "Panguni" During the last days of Narayanasamy Pathar, taking advantage of his old age, the 1st defendant joined him in March 1973. The 1st defendant gave trouble to the plaintiff for recovery of the property. On 14.12.1973 when the plaintiff was not available in the property, the 1st defendant, his father and the relatives have trespassed into the property and the son of the plaintiff was driven out and demolished the name board and removed it and illegally occupied their property. The plaintiff gave a complaint in the police station also and in the criminal case, the 1st defendant and his father were convicted, but in the appeal, the conviction was set aside.

3. Narayanasamy Pathar subsequently filed a suit against the plaintiff for permanent injunction the it lie should not cut the trees standing in the family property. The said Narayanasamy Pathar get an order of injunction also. Subsequently, he also interfered in the right of the plaintiff and thereafter, the plaintiff proceeded against Narayanasamy Pathar and obtained a decree. Later, Narayanasamy Pathar died and the case was continued by the 1st defendant. Only then, the, 1st defendant filed a document as if Narayanasamy Pathar executed a conciliation deed. The said document is not valid under law and it has not come into force. There is a finding that the settlement deed it true, valid and binding and, as such, the principle of resjudicata is also applicable. It appears that Narayanasamy Pathar has now settled the property in favour of the 1st defendant and it is not a valid document. The plaintiff has also claimed mesne profits at the rate of Rs. 100 per month for a period of three years.

4. The defendants resisted the suit, denying the various allegation made in the plaint. The settlement deed was taken by the plaintiff fraudulently from Narayanasamy Pathar. It has not come into force and possession of the property was also not given to him. Narayanasamy Pathar alone was in possession of the property and thereafter the 2nd defendant got possession of the same. The alleged trespass dated 14.12.1973 is also not correct. The settlement deed also has been subsequently cancelled. Narayanasamy Pathar executed the Will in favour of the 2nd defendant 00 25.3.1974 then he was in a sound and disposing state of mind and the house tax is also paid only by the 2nd defendant.

5. The trial court framed issue and on behalf of the plaintiff, P.Ws.No. 1 to 4 were examined and Exs.A-1 to A-26. were marked. On the side of the defendants, D. Ws. 1 to 4 were examined and Exs.B-1 to B-9 were marked. The trial court decreed the suit in favour of the plaintiff and aggrieved against this, the defendants preferred A.S.No. 32 of 1985 on the file of Sub Court, Nagapattinam and the appeal was also dismissed, granting two months" time for delivery of possession. Aggrieved against this, the defendants have preferred the Second Appeal.

6. The appellants raised the following substantial question of law:

Whether the courts below are right in holding that the plaintiffs is entitled to the suit properties on the basis of Ex.A-2 settlement deed, when admittedly the properties originally belonged to the joint family, consisting of the defendants and their father, and further, in the light of Ex.B-1 cancelling the settlement deed Ex.A-2 and the plaintiff having not come to court within three years from the date of Ex.B-1.

7. After the filing of second appeal, the plaintiff died and respondents 2 to 8 were impleaded as legal heirs. The points for consideration are:

- (1) Whether the plaintiff is entitled to the relief of declaration and recovery of possession?
- (2) Whether the settlement deed dated 26.2.1969 is true, valid and binding?
- (3) Whether the will dated 25.3.1974 is true, valid and binding?
- (4) To what relief?

8. Points 1 to 4: suit property is a shop situated in poonthottam bazaar. The 2nd defendant is the son of the 1st defendant. One Narayanasamy Pathar is the father of the 1st defendant. The plaintiff is the brother's son of Narayanasamy Pathar. There was partition on 17.7.1957, in which admittedly the suit property fell to the share of Narayanasamy Pathar. There was misunderstanding between the 1st defendant and his father and actually Narayanasamy Pathar was looked after only by the plaintiff for a period of nearly ten years. Narayanasamy Pathar executed a settlement deed in favour of the plaintiff under Ex.A-2, dated 26.2.1969 and the plaintiff also accepted the same and he was put in possession of the property. The assessment was also transferred in his name, as seen from Exs.A-3 and A-4. The demand notice is Ex.A-5. The plaintiff has been paying the house tax as well as the electricity charges and according to him, he had rented out some portions to three persons on monthly rent.

9. The learned Counsel for the plaintiff contended that when Narayanasamy Pathar was in an advanced age, the 1st defendant joined him in March, 1973 and began to give trouble to the plaintiff. On 14.12.1973 when the plaintiff was not available in the property and only his son was available, the 1st defendant and his father and other persons trespassed into the property and the son was driven out of the shop and the name board was demolished and illegally occupied the property. Although the plaintiff gave a complaint in the police station and in the criminal case, the 1st defendant and his father were convicted, but in the appeal it was set aside.

10. The learned Counsel for the appellants contended that the settlement deed was a sham and nominal document and it has not come into force. They further stated that the settlement was taken out of coercion and undue influence. The 2nd defendant alone was examined as D.W.1 in the case, whereas the 1st defendant was not at all examined. D.W.I must have been aged about 13 or 14 years at the time of Ex. A-2 and as, such, he must not have any personal

knowledge with reference to the circumstances, under which this document was executed by Narayanasamy Pathar. D.W.2 is said to be the scribe of Ex.A-2 and he also did not state that Ex.A-2 was taken by the plaintiff under coercion and undue influence. Subsequently the cancellation document was also written Ex.B-1 and later the Will was also executed by Narayanasamy Pathar in favour of D.W.I under Ex.B-3. There was also publication under Ex.B-2 and even therein, there is no whisper that Ex.A-2 was taken under the circumstances stated by the appellants. There were subsequently number of suits between the parties. Some of the suits were filed by the 1st defendant and his father against the plaintiff herein and some other suits were filed by the plaintiff herein against the 1st defendant and his father. Ex.A-12 is the certified copy of the judgment in O.S.No. 457 of 1974. The relevant portion has been extracted by the trial court, wherein Narayanasamy Pathar himself admitted the execution of the settlement deed Ex.A-2 and possession of the property was also given to P. W. 1. The aforesaid circumstances would clearly establish that there is no force in the contention of the defendants.

11. A perusal of Exs.A-13 to A-19 also would disclose that Ex.A-2 has been projected as a title deed by P.W.1 in these litigations. The plaintiff has filed documents to show that the property continued to be in his possession till the date of trespass viz., 14.12.1973. Now, the defendants have also filed documents under Exs.B-4 to B-9 and stated that they are in possession of the property for a very long time. The plaintiff came to know about Ex.B-1 only in court proceedings between the parties. There is also no recital in Ex.B-1 to the effect that Ex.A-2 was taken by the plaintiff under different circumstances. Both the courts below have rightly come to the conclusion that Ex.A-2 is a true and valid document and the same was accepted and acted upon. When this being the state of affairs and no revocation power has been reserved in the said document, the subsequent revocation under Ex.B-1 is not valid. After the execution of Ex.A-2, Narayanasamy Pathar had no right in the property and, as such, he has no power, whatsoever, to will away the property under Ex.B-3 and in pursuance of the same, D.W.1 would not get any valid title to the property. The plaintiff has positively established that the plaintiff alone has got title to the property.

12. The learned Counsel for the defendants contended that the defendants are in possession and enjoyment of the property for more than the statutory period and they have also prescribed the title. Even according to the plaintiff, since 14.12.1973 the defendants are in possession and enjoyment of the property, the defendants contended that the plaintiff ought to have filed the suit within a period of three years has no force. P.Ws.3 and 4 were also tenants of the shops and they stated that they have taken the property from the plaintiff and they were paying the rent. It is only when the defendants were able to establish that they continue to remain in possession hostile to the knowledge of the plaintiff for more than the statutory period, then alone they would be entitled to prescription of title by adverse possession. Now in the present case, the suit was filed as early as 1985 i.e., within a period of 12 years from the date of the trespass. When the

title of the property has been established by the plaintiff and as the defendants have failed to establish their adverse title to the property, naturally the plaintiff would be entitled to claim recovery of possession of the property also. Under the circumstances, both the courts below have rightly come to the conclusion that the plaintiffs is entitled to the declaration as well as recovery of possession. So far as the mesne profits are concerned, it was awarded at the rate of Rs. 30 per month and there is no serious objection in respect of the same. Both the courts below concurrently held that the defendants have not established their prescribed title and on the other hand, the plaintiff has proved title to the property, is entitled to recovery of possession and there is no reason to interfere in the findings of the courts below.

13. For the reasons stated above, the Second Appeal fails and is dismissed with costs. Time to vacate two months.