

(2003) 03 MAD CK 0135

In the Madras High Court

Case No : S.A. No. 1248 of 1990 and C.M.P. No's. 13833 to 13835 of 2002

Tuticorin Diocesan Trust Association, thro' its procurator at
Tuticorin and Others

APPELLANT

Vs

Thavamani and Others

RESPONDENT

Date of Decision : 21-03-2003

Acts Referred:

Evidence Act, 1872 — Section 101, 102, 103
Specific Relief Act, 1963 — Section 38

Citation : (2003) 2 CTC 478 : (2003) 2 MLJ 208

Hon'ble Judges : K. Gnanaprakasam, J

Bench : Single Bench

Advocate : P. Peppin Fernando, for the Appellant; V. Sanjeevi, for R2, for the Respondent

Final Decision : Dismissed

Judgement

K. Gnanaprakasam, J.—The plaintiff's suit is one for declaration and for permanent injunction. The plaintiff claims that the suit property originally belonged to one Alwar, who had settled the property in favour of his grand sons, Alwar and Perumal under Ex.A1, settlement deed dated 5.8.1929 and as the beneficiaries were minors at that time, their mother Pechikudumbachi was appointed as a guardian and she was entitled to enjoy the property till the minors attain the majority and on attaining majority, she has to hand over the property to the beneficiaries. Perumal, one of the beneficiaries, sold this property to Mahalingam under Ex.A2, sale deed dated 4.8.1954, who in turn sold the same to one Subramanian under Ex.A3, sale deed dated 4.9.1959 and Subramanian, in turn, sold the property to Alwar and Perumal, the original beneficiaries under Ex.A4, sale deed dated 26.9.1969. Thus, the property had once again come to the hands of the original owners, viz. Alwar and Perumal and they were enjoying the property and sold the same to the plaintiff under Ex.A5, sale deed dated 1.3.1982. The plaintiff took possession of the suit property and had reared certain trees and also stacked hay. Thus, the plaintiff and his

predecessors in titles have been in possession and enjoyment of the property for over 60 years and they have also perfected title by prescription.

2. The 1st defendant filed a written statement, which was adopted by the defendants 2 and 3, wherein, they have denied the sale in favour of the plaintiff and also the right of his predecessors in title. But, on the other hand, the defendants claim that the suit property belonged to Valliammal, wife of Subramanian and she has sold the same to the first defendant under Ex.B1, sale deed dated 17.8.1933 and since then, they have been enjoying the property. In 1983, when the third defendant was away from the suit village, the plaintiff stacked hay and cut and removed certain trees. The third defendant issued a notice to the plaintiff, to which, a reply was sent to him. It is stated that the plaintiff was never in possession of the property.

3. The trial Court did not accept the case of the plaintiff and dismissed the suit. On appeal, the lower appellate Court accepted the case of the plaintiff and allowed the appeal. Aggrieved by the same, the defendants have preferred this appeal.

4. Both the plaintiff and the defendants claim the suit property through the family of one Alwar. The plaintiff's case is that the suit property belonged to Alwar, who had settled the property in favour of his grand sons, Alwar and Perumal, under Ex.A1. Perumal, one of the beneficiaries, sold this property to Mahalingam, under Ex.A2, who in turn, sold the same to one Subramanian under Ex.A3 and Subramanian, in turn, sold the same to Alwar and Perumal, the original owners, under Ex.A4. Thus, the property had once again come to the hands of the original owners, viz., Alwar and Perumal and they were enjoying the property and sold the same to the plaintiff, under Ex.A5, sale deed dated 1.3.1982. According to the plaintiff, he and his predecessors in title have been in possession and enjoyment of the property for over 60 years and they have also prescribed title by presumption.

5. The first defendant claims to have purchased the property from one Valliammal, wife of Subramanian, under Ex.B1, dated 17.8.1933 and has been enjoying the same and in 1983, when the third defendant, who was looking after the property, was away from the suit village, the plaintiff stacked hay and also cut and removed the trees and he had issued a notice to the plaintiff, to which, a reply was sent to him.

6. This appeal was admitted on the following substantial questions of law:-

- i. Whether the appellate Court has not erred in not drawing an adverse inference on the plaintiffs non-examination of his vendor?
- ii. Whether the first appellate Court is correct in saying that the suit is not barred by limitation?

7. Heard the learned advocate for the appellants and the respondents.

8. Admittedly, the plaintiff and the defendants claim the suit property through the family of Alwar and the suit property changed several hands and it had once again come to the family of Alwar, under Ex.A4 in 1959 and they sold the same to the plaintiff under Ex.A5 in 1982. The plaintiff is able to substantiate his case through the documentary evidence, Exs.A1 to A5, how the property had come to his hands. On the other hand, the first defendant claims to have purchased the property from one Valliammal, wife of Subramanian, under Ex.B1, dated 17.8.1933, and the said Subramanian is the son of Alwar. But, however, Valliammars claim that she was the wife of Subramanian was challenged by the plaintiff on the ground that she was the wife of one Pothaiyan and they had a daughter, viz. Sankaranandam and filed Ex.A6, birth register extract, to prove the same. But, in Ex.B1, Valliammal is described as the wife of Subramanian. The trial Court, therefore, accepted the case of the first defendant that Valliammal is the wife of Subramanian, by placing reliance upon Ex.B1. But, the defendant has not established, how Valliammal got the suit property. The recitals in Ex.B1 is that it belonged to her husband Subramanian and there is nothing on record to show, how Subramanian got the suit property. But, on the other hand, Alwar, who is the father of Subramanian, had settled the suit property, in favour of his grand sons under Ex.A1 and subsequently, the property changed several hands and once again, it came to the family of Alwar and it was sold to the plaintiff. The documentary evidence produced on behalf of the plaintiff, Exs.A1 to A5, cogently establish that the plaintiff and his predecessors in title alone have owned and enjoyed the suit property and the defendant is not able to discredit the said claim and the defendant has also not offered any explanation, how Subramanian got the property.

9. The learned advocate for the appellants has submitted that the burden is upon the plaintiff to establish his title to the suit property and the lower appellate Court is not correct in shifting the burden upon the defendants. To substantiate his argument, he relied upon the decisions rendered by this Court in K.A.M. Meera Mohindeem (died) and 8 Ors. v. M. Ali Malik and 5 Ors. 2001 (3) CTC 228 and Natarajan v. R. Muthukrishnan, 2001 (4) CTC 513 and Periasamy Vs. Joseph Nadar, , wherein, on whom the burden of proof lies has been indicated. The burden of proof is always on the part of the plaintiff, who comes to the Court and there is no quarrel over the said proposition.

10. But, however, when both the parties have let in evidence, the burden of proof would assume secondary importance. Ramji Dayawala and Sons (P) Ltd. Vs. Invest Import,

11. In Lakhan Sao (Deceased) through Legal Heirs Vs. Dharamu Chaudhary, the Supreme Court has held, "6. The question of burden of proof at the end of case when both parties have tendered evidence is not of any great importance and the Court has to come to a decision on a consideration of all materials." The very same view was reiterated by the Supreme Court in the case of Arumugham (Dead) By Lrs. and Others Vs. Sundarambal and Another, wherein it was held,

"16. On the question of burden of proof we are of the view that even assuming burden of proof is relevant in the context of the amended provision of Section 100, CFC, the same would not be relevant when both sides had adduced evidence. It would be relevant only if a person on whom the burden of proof lay failed to adduce any evidence altogether".

12. In our case, both sides have adduced oral as well as documentary evidence and therefore, even if there is any observation by the lower appellate Court that the burden of proof lies on the defendants to prove that the plaintiff is not entitled to the suit property, that would not have any material bearing on the conclusion reached by the lower appellate Court.

13. In our case, the plaintiff through Ex.A1 to A4 has established that the suit property originally belonged to Alwar and the same was purchased by the plaintiff under Ex.A5. As the suit property is a "Grama Natham" and it is lying vacant, neither the plaintiff nor the defendants were able to file any other record to show, whether they are enjoying the property and also paid some tax to the Government, but, that will not take away the right of the plaintiff in the suit property.

14. That apart Ex.A1 is in anterior point of time than Ex.B1 and the said fact was also taken note of by the lower appellate Court, in coming to the conclusion that the plaintiff is entitled to the suit property and I do not find any error in the said finding. As the plaintiff is able to establish the title to the suit property, the mere non-examination of his vendor would not affect the right, claimed by the plaintiff and therefore, question No.(i) is answered in favour of the respondent.

15. With regard to question No. (ii), it could be seen that the plaintiff had established his title to the suit property. It is, no doubt, true that both the plaintiff and the defendants have not filed any document to show their respective possession to the suit property. But, however, Ex.A1, as we have already seen, is in anterior point of time than Ex.B1 and therefore, it could easily be presumed without any difficulty that the beneficiaries under Ex.A1, were in possession and enjoyment of the property and said possession was transferred subsequently to who have purchased the property, and therefore, the lower appellate Court is correct in coming to the conclusion that the plaintiff and his predecessors in title have been enjoying the property for well over a period of 12 years and therefore, the suit is not barred by time. As against the same, there is absolutely no material in favour of the appellants/defendants to hold that they are in possession of the suit property and therefore, their claim is rejected.

16. In the result, the second appeal is dismissed. No costs. All the CMPs are also allowed.