

SUPREME COURT OF INDIA

T.K. Mohammed Abubucker (D) Thr. LRs.

Vs.

P.S.M. Ahamed Abdul Khader

C.A.No.5455 of 2002

(R. V. Raveendran J.)

22.04.2009

JUDGEMENT

R.V. Raveendran, J.

1. The defendants in a suit for declaration of title and possession are the appellants in this appeal by special leave. The said suit (O.S. No.72 of 1984 on the file of the Sub-ordinate Judge, Ramanathapuram), filed by the first respondent herein was dismissed by judgment dated 21.7.1987. The appeal (A.S. No.924 of 1987) filed by the first respondent was dismissed by a learned Single Judge of the Madras High Court by judgment dated 25.4.2001 and that decision was challenged by the first respondent in L.P.A. No.125 of 2001. The said appeal was allowed by a Division Bench of Madras High Court by its judgment dated 13.11.2001. For convenience, the parties will also be referred by their rank in the suit.

2. The plaintiff's case in brief: The plaintiff purchased Sy. No.407/2-B- 2 measuring 5 acres 11 cents in Kanjirangudi Village, Ramanathapuram District along with some other lands under sale deed dated 2.3.1982 (Ex.A4) executed by S.A.M. Liyakath Ali Khan and his three brothers and sister. The said land originally belonged to one S.A.M. Allah Pitchai Ambalam (for short `Allah Pitchai') who died issueless in the year 1967 survived by his brothers S.A.M. Mohammed Mustafa and SAM Mohammed Hamid Sultan and his nephew Mir Moinudeen, son of predeceased brother S.A.M. Hassan Hussain Pillai. Patta was transferred to the name of S.A.M. Mohammed Mustafa. S.A.M. Mohammed Hamid Sultan died subsequently leaving him surviving five children namely Liyakath Ali Khan, three other sons and one daughter. There was a partition dated 25.8.1981 (Ex. A3) among S.A.M. Mohammed Mustafa and the children of his two deceased brothers. In the said partition, the suit property among others was allotted to S.A.M. Liyakath Ali Khan and his three brothers and sister, and they sold it to the plaintiff. The patta which stood in the name of S.A.M. Mohammed Mustafa was transferred to the name of the plaintiff. The possession of the suit property was delivered to the plaintiff on the date of sale. Plaintiff carries on business in Hongkong. Defendants are the owners of the adjoining lands bearing Sy. No.404/4-B and 404/3 and taking advantage of the plaintiff's absence, encroached upon the entire suit

property and annexed it to their lands and also cut and removed the trees therefrom, necessitating the suit.

3. The defendants' case in brief: Neither plaintiff nor his predecessors had title or possession in regard to the suit property. The suit property as also the adjoining lands belong to the defendants, and they and before them their parents have been in possession thereof ever since 1940. The sale deed dated 2.3.1982 in favour of plaintiff was created to lay a false claim over the suit property. The plaintiff and his vendors, being influential and rich, had managed to secure the patta in their names in collusion with the revenue officials without notice to the defendants. Allah Pitchai to whom plaintiff attempts to trace title, had neither title nor possession over the suit property.

“The father of the defendants (Hameed Sultan) purchased 3 acres 19 cents in Sy. No.407/2-B as also the adjoining survey no.404/4-B from one A.M. Meera Sahib under sale deed dated 25.1.1940. The remaining extent in Sy. No.407/2-B earlier belonged to Kalimuthu Nadar and Subramanian Nadar and they sold it to one V.M. Wappa Sahib under deed dated 1.9.1940 who in turn sold it to defendants' mother Ayisha Bibi under sale deed dated 15.10.1941. On the death of their father in 1948 and mother in 1969, the defendants became the owners of the two portions of Sy. No.407/2-B in all measuring 5 acres 11 cents (assigned the sub-number as Sy.No.407/2-B-2 (suit property) and they are in possession and enjoyment of the suit property as absolute owners. The suit property and the adjoining property both belonging to defendants is encircled by a single fence. They have been paying the land revenue (kist) in regard to the said property from 1942-43.

Alternatively, by their long, open and exclusive possession and enjoyment asserting ownership, they perfected their adverse possessory title and consequently the suit was barred by limitation.”

4. The plaintiff examined his power of attorney holder as PW1 and marked as Ex.A1 to A12. Second defendant gave evidence as DW1 on behalf of the defendants, and got marked Ex.B1 to B30. The Court Commissioner reports and the sketch were marked as Ex.C1 to C3. After elaborate consideration of the evidence, the trial court dismissed the suit by judgment dated 21.7.1987 recording the following finding of facts:

“(a) The plaintiff failed to prove that his vendors had any title over the suit property and consequently, failed to prove his title.

(b) The two sale deeds dated 2.2.1932 [Ex.A7 & A8] in favour of Allah Pitchai did not establish the title or possession of Allah Pitchai in regard to survey no.407/2B- 2 measuring 5 acres 11 cents. Consequently his brothers' children who sold the suit property to plaintiff did not have title, nor could convey any title to plaintiff.

(c) The defendants had established their title to the suit property and possession with reference to deed marked as Ex.B1 to B7 and B8 to B30. Suit property falls under

patta no.355 and Ex.B8 to B29 established that the kist (land revenue) was paid by the defendants in regard to the suit property between 1943 to 1972. The adangal extract (Ex.R30) established their possession. The Court Commissioner confirmed that defendants were in possession.”

5. The appeal filed by the plaintiff was dismissed by the learned Single Judge by judgment dated 25.4.2001 confirming the finding of facts recorded by the trial court. The Division Bench of the High Court by its judgment dated 13.11.2001 allowed the Letters Patent Appeal filed by the plaintiff, and decreed the suit, thereby reversing the concurrent finding of facts recorded by the trial court and the learned Single Judge. The Division Bench recorded the following finding of facts:

“(i) The plaintiff had established his title to the property by showing that Allah Pitchai had purchased the property under Ex.A7 to A8 (both dated 2.2.1932); that after death of Allah Pitchai, there was a partition among his brother and nephews, and that the suit property was allotted to the share of S.A.M. Liyakath Ali Khan and his brothers and sister; and that they had sold the property to the plaintiff.

(ii) Apart from the title of Allah Pitchai being traced to the sale deeds dated 2.2.1932 (Ex.A7 & A8), two other documents (Ex.A13 & A14) produced by plaintiff and received in the Letters Patent Appeal under Order 41 Rule 27 CPC, showed that Allah Pitchai was in possession and he mortgaged the property under a deed dated 2.2.1932 in favour of Mannan Perumal Nadar, who had assigned the mortgage on 27.11.1939 in favour of one Thillavanammai. Though the defendants produced the kist receipt from 1943 to 1972, they did not produce the kist receipt from 1973 onwards. The plaintiff had produced the Adangal extract (Ex.A6) to show that he and his predecessors were in possession of the suit property from 1974 onwards. Thus previous possession was established.”

6. The Letters Patent Bench, by re-appreciating the evidence, has reversed the concurrent finding of facts recorded by the trial court and the first appellate court. In *Asha Devi vs. Dukhi Sao*¹, relied on by the Letters Patent Bench, this Court no doubt held that powers of letter patent bench is not limited to questions of law, and that it has the same power which the Single Judge has, as a first appellate court in respect of both questions of law and fact. But the said observations should be read with the further observations therein (by extracting from an earlier decision) which read as under:

"..... it will be open to the High Court to review even findings of fact in a Letters Patent Appeal from a first appeal heard by a learned Single Judge, though generally speaking the Letters Patent Bench would be slow to disturb concurrent findings of fact of the two courts below. But there is no doubt that in an appropriate case a Letters Patent bench hearing an appeal from a learned Single Judge of the High Court in a first appeal heard by him is entitled to review even findings of fact."

(emphasis supplied) The above view was reiterated in *Umabai vs. Nilkanth Dhandiba Chavan*² by observing that in the absence of cogent reasons, letters patent bench would not differ from a finding of fact recorded by a Single Judge. Where the trial court and the first appellate court have considered the evidence thoroughly and have based their concurrent findings on the evidence, the Letters Patent Bench should be slow in interfering with such findings. On a careful consideration of the facts of this case, we are of the view that interference by the Letters Patent Bench was not warranted.”

7. Though title to an immovable property is usually established by tracing it for a period of thirty years, many a time, the search and tracing is restricted to a minimum period of twelve years, presumably with reference to Articles 64 and 65 of *Limitation Act, 1963*. Further, where the title is traced to a grant or transfer by the government or a statutory development authority, as contrasted from a transfer from a private person, the search is not taken prior to such transfer/grant, even if such transfer/grant is within 12 years. Therefore in a suit for declaration of title filed in 1984, reliance on title deeds dated 2.3.1982 (sale deed) and 25.8.1981 (partition deed) would not establish title as that would trace title hardly for 3 years. To establish the title, it was necessary to trace it to a point beyond a minimum of 12 years before the suit. This became all the more necessary as the plaintiff did not have possession, nor were any revenue entries available to support the ownership or possession of plaintiff and his vendors for a period of 12 years and more, prior to the suit. Plaintiff's vendors claimed that their father and his brothers inherited it from Allah Pitchai and at a subsequent partition (which took place three years prior to the suit), they were allotted the suit property. Neither the plaintiff's vendor nor their father acquired the property under any deed of conveyance. In the circumstances, it became necessary for the plaintiff, to establish the title of Allah Pitchai to the suit property, so as to trace title for a continuous period of 12 years.

8. As noticed above, the trial court and the learned Single Judge held that the title and possession of Allah Pitchai was not established and consequently, the plaintiff's title could not be supported merely with reference to the sale deed executed in his favour on 2.3.1982 or the partition deed dated 25.8.1981 under which his vendors allegedly got title. The trial court considered Ex.A7 and A8 dated 2.2.1932 relied on by plaintiff to support the title in Allah Pitchai and pointed out that neither Ex.A7 nor in Ex.A8 gave the extent of land purchased by Allah Pitchai in Sy.No.407/2B nor established exclusive possession in Allah Pitchai. The Letters Patent Bench without considering the contents of Ex.A7 & A8 or analysing the reasons given by the trial court to reject Ex. A7 and A8, merely observed that Ex.A7 & A8 referred to Sy.No.407/2B and its total extent, and therefore Allah Pitchai's title was established with reference to Ex.A7 and A8.

9. Ex.A7 is a sale deed dated 2.2.1932 executed by one Seyed Madhar Sahib in favour of Allah Pitchai. The description of the property sold under the said deed is vague and inconsistent. The sale deed described the property sold in the following manner (translation from Tamil):

"What is sold is from out of Sy. no.403/3 (4 acres 44 cents), Sy. no.404/4 (3 acres 11 cents), Sy. no.407/2B (5 acres 32 cents) and Sy. no.408/3A (2 acres 24 cents) in all 15 acres 11 cents. Out of which 9 acres jointly held by Ayyam Perumal Nadar, Kalimuthu Nadar and Nachiammal should be excluded. Out of the balance, after excluding the 1/4th share of K.M. Mohammed Mohammed Thambi, Sehu Naiyna, and Mohammed Sadak, and the 5/8th share belonging to your joint family, the balance 1/8th share equivalent to one acre 5 and 6/16 cents belongs to me and that is the subject matter of the sale."

The description of the property shows that what was held by the vendor was an undivided 1/8th share in an extent of 6 acres 11 cents (which in turn was an undivided portion of 15 acres 11 cents). The 1/8th share in 6 acres 11 cents would be 76.375 cents and not one acre 5 and 6/16 cents. Further, as the extent sold was in four survey numbers. what is the extent that was sold from out of sy. no.407/2B was not mentioned."

10. The position is equally confusing in respect of Ex.A8 also, which is also a sale deed dated 2.2.1932 in favour of Allah Pitchai executed by one Mannan Perumal Nadar. This sale deed describes the subject matter of sale as : "My family's half share of 7 acres 16 cents, out of Sy. No.403/3 (4A 44C) Sy. No.408/3 (3A 56C) and 407/2 (6A 32C) in all 14A 32C." It gives the details of the property sold as : share in jointly held 12 acres of land consisting of Sy. no.403/3 (4 acres 44 cents), survey no.408/3 (2 acres 24 cents), in patta no. 354, and survey no.407/2B (5 acres 32 cents) in patta no.355; and Sy. no.407/2A (1 acre) and sy. no.408/3B (1 acre 32 cents) in all 7 acres 16 cents". What is relevant to be noticed is that the actual extent conveyed in Sy. No.407/2B is not mentioned. Nor does it refer to exclusive possession.

11. In fact, defendants do not dispute the fact that Allah Pitchai was the owner of sy. no.407/2A measuring 1 acre and sy. no.407/2B/1 (earlier part of Sy. No.407/2B) measuring 21 cents. Therefore, while Ex.A7 and Ex.A8 may be evidence to show that Allah Pitchai had purchased some part of survey no.407/2B, they do not show him to be the purchaser or owner of 5A 11 cents in sy. no.407/2B-2 (Sy.No.407/2B was subsequently subdivided and renumbered as sy. no.407/2B-1 measuring 21 cents and Sy. No.407/2B- 2, measuring 5 acres 11 cents). Ex.A7 and A8 can at best be evidence to show that Allah Pitchai purchased a portion of survey no.407/2B. This may mean that it evidences title to Sy.No.407/2B-1 measuring 21 cents which lies to the north of survey no.407/2B-2. Therefore, as rightly held by the trial court Ex.A7 and A8 are not of any assistance to establish the title or exclusive possession in regard to 5 acres 11 cents in survey no. 407/2B-2.

12. We may next refer to the possessory mortgage deed dated 2.2.1932 and deed of assignment of mortgage dated 7.11.1939 which the plaintiff produced under Order 41 Rule 27 and which was admitted into evidence by the Letters Patent Bench by marking them as Exs.A13 and A14. It is seen that Ex.A13 is a mortgage deed executed by Allah Pitchai in favour of Mannan Perumal Nadar on 2.2.1932 itself (that is on the same day on which Allah Pitchai purchased an undivided 7 acres 16 cents from Mannan Perumal Nadar in survey nos.

403/3, 408/3, 407/2B, 407/2A and 408/3B) mortgaging 15 acres 37 and 6/16 cents, including survey no.407/2B measuring 5 acres 32 cents. Ex.A14 is deed of assignment of the said possessory mortgage on 27.11.1939 by Mannan Perumal Nadar in favour of Thillavanammai. This would mean that Allah Pitchai was never in possession of sy. no.407/2B after 2.2.1932. There is absolutely no explanation as to whether Allah Pitchai redeemed the mortgage and got back possession of the property or how and to whom possession passed on from Thillavanammai. Ex.A13 & A14 instead of proving the title or possession, add to the confusion by showing that Allah Pitchai was never in possession. The marking of the mortgage deed and assignment deed as Exs.A13 & A14 at the stage of Letters Patent Appeal without any explanation or connecting or linking oral evidence, makes it difficult to accept these two documents as relevant documents. Resultantly, the finding of the trial court affirmed by the learned Single Judge that inspite of the sale deed dated 2.3.1982 in his favour or the earlier deeds (Ex.A3, A7 and A8), plaintiff had not made out title or possession in regard to sy. no.407/2B-2 measuring 5 acres 11 cents get fortified.

13. The Letters Patent Bench has observed that the plaintiff established possession by referring to the Adangal extract (Ex.A6) for the years 1974 to 1986. In view of the said Adangal extract, the Division Bench brushed aside the clear and categorical evidence contained in Exs.B8 to B29 which showed payment of kist by defendants in regard to patta no.355 which included survey no.407/2B-2 measuring 5A 11 cents from 1943 to 1974 and Ex.B30 which was an Adangal showing the possession of the defendants.

“But Ex.A6 may not really help the plaintiff to prove possession. Ex.A6 is said to cover the period 1974 to 1986, including 1984 to 1986, when suit by plaintiff was pending. That is Ex.A6 shows plaintiff as the person in possession in regard to the suit land when the suit was filed in 1984 and even thereafter. But plaintiff himself admits that even before the suit was filed in 1984, the defendants were in possession of the suit land and that he was not in possession when the suit was filed or thereafter. This is also supported by the evidence of the Court Commissioner who found the defendants in possession. Therefore, Ex.A6 showing that plaintiff was in possession from 1974 to 1986 cannot be believed or relied upon to establish the possession of plaintiff. On the other hand it lends support to the defendants' claim that plaintiffs and his predecessors being rich and influential persons, had managed to get their names entered in the revenue records belatedly and in collusion with the revenue officials. Be that as it may.”

14. The Letters Patent Bench overlooked the fact that a plaintiff in a suit for declaration of title and possession, can succeed only by making out his title and entitlement to possession and not on any alleged weakness in the title or possession of the defendants. It also overlooked the fact that the plaintiff did not step into the witness box and that none of his vendors and none of the neighbours/villagers, were examined. There was therefore no evidence about previous possession. In fact, plaintiff had deliberately withheld evidence as to the date from which the defendants were in possession.

15. The Letters Patent Bench also proceeds on the basis that the suit was dismissed on the ground of adverse possession of defendants. The trial court and the first appellate court on examination of the title found that plaintiff had made out neither title nor previous possession. They also found that defendants were in possession. The trial court and the first appellate court also noticed the significant fact that the plaint and the evidence of plaintiff are wholly silent as to when, that is in which year, the defendants allegedly encroached upon the suit property. The plaint merely stated that during the absence of plaintiff, the defendants had encroached the suit property in entirety. Neither the date, month or year is given. In that context, the trial court also observed that defendants should be taken as having established their adverse possessory title also and consequently, suit should be held to be barred by limitation. But even without the said finding, the suit was liable to be dismissed as neither title of plaintiff, nor previous possession of plaintiff, nor encroachment by defendants was made out. We are therefore of the view that Letters Patent Bench interfered with the well reasoned judgments of the trial court and first appellate court which were based on concurrent finding of facts, without justification, and in the absence of any clear and acceptable evidence. This was unwarranted.

16. For the foregoing reasons, this appeal is allowed, the order of the Letters Patent Bench is set aside, and the judgment and decree of the learned Single Judge confirming the dismissal of the suit is restored. Parties to bear their respective costs.

¹[AIR 1974 SC 2048]

²[2005 (6) SCC 243]