



S.A.No.1426 of 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20..03..2023

Coram

THE HON'BLE MR JUSTICE V. LAKSHMINARAYANAN

Second Appeal No.1426 of 2011

and

M.P.No.1 of 2011

Dhanavel Samudiyar

..... Appellant / Respondent / Plaintiff

-Versus-

1.Sarangapani Samudiyar

2.Rajasekaran

..... Respondents / Appellants / Defendants

Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 30.03.2011 made in A.S.No.46 of 2010 on the file of the learned Additional Subordinate Judge, Panruti, partly modifying the judgment and decree dated 19.10.2010 made in O.S.No.257 of 2002 on the file of the learned District Munsif, Panruti.

For Appellant : *Mr.P.Mathivanan*

For Respondents : *Mrs.R.Meenal for RRI & 2*



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JUDGEMENT

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The plaintiff appeals against the judgement and decree of the Court of the Subordinate Judge, Panruti, in A.S.No.46 of 2010 in partly modifying the judgement and decree in O.S.No.257 of 2002 on the file of the District Munsif, Panruti, dated 19.10.2010.

2. There was one Govindasamy Samuttiyar, who was twice married. Through his first wife - Kuppayee, he had a son by name Sarangapani Samuttiyar, who is the 1st defendant. The 2nd defendant - Rajasekaran is the son of Sarangapani Samuttiyar. The said Govindasamy Samuttiyar had an other wife Arambu Ammal through her, he had 3 daughters viz., (i) Vaijendimala, (ii) Rajeswari and (iii) Jothi. The entire dispute relates to a sale made by Arambu Ammal, Vaijendimala, Jothi @ Jothi Lakshmi on one hand in favour of one Dhanavel Samuttiyar (plaintiff) and Rajeswari, who sold her property to Rajasekaran Son of Sarangapani Samuttiyar.

3. The suit was not filed for partition but, for bare injunction based on possession. The trial court had decreed the suit on the ground that the 1st defendant had failed to prove that there was a partition between Arambu Ammal and her daughters and that the property fell to the share of 2nd defendant's vendor viz., Rajeswari. The first appellate court though gave a



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finding that the partition had not been proved but granted a curious decree of permanent injunction in favour of plaintiff in respect of $\frac{3}{4}$ share and $\frac{1}{4}$ th share in favour of defendants. For ready reference, the decree is extracted hereunder:-

“2. வாதிக்கு தாவா சொத்தில் $\frac{3}{4}$ பாகம் பொருத்து நிரந்தர உறுத்துக்கட்டளை பரிகாரம் கிடைக்கத்தக்கது என்று உத்தரவிடப்படுகிறது,
3. தாவா சொத்தில் $\frac{1}{4}$ பாகத்தை பொருத்து வாதிக்கு கிடைக்கத்தக்கது ஆல்ஸ் என்று உத்தரவிடப்படுகிறது.”

4. I am afraid the judgements of both the courts below are absolutely perverse. The trial court forgot that it is for the plaintiff, who comes to the court with the suit for injunction to prove the possession and that the defendant can take all sorts of defences in order to dislodge the case. The plaintiff had entered the witness box and he had stated that apart from the sale deed, he does not have any proof to show that he is in possession of the property. The buck should have stopped there. If the plaintiff fails to prove the case, especially, in a suit for bare / permanent injunction, the suit should have been dismissed. Instead, the trial court took pains in order to find out the lacuna in the case of the defendants and since the defendants did not prove the partition in Arambu Ammal's family with her daughters and had further failed to prove that the suit property fell to the share of his vendor Rajeswari, it decreed the suit. This turns the concept of burden of proof on its head and therefore, it had been rightly reversed by the first appellate court.



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5. Had the matter stopped there nothing further needs to be added. The first appellate court has confirmed the finding that partition has not been proved and that the plaintiff/respondent has not been able to substantiate his possession. Having done so, it has granted a curious decree as set forth above. If the partition is not proved, the appellants and the respondent became co-owners. It is too well settled to reiterate but nonetheless has to be reiterated here that there cannot be injunction amongst co-owners. The remedy ought to have been one to file a suit for partition.

6. The other curious argument that was taken by the respondent before the first appellate court that the sale dated 24.08.1995 was hit by lis pendens since the suit in O.S.No.80 of 1996 and O.S.No.38 of 1996 presented by Arambu Ammal against Sarangapani Samuttiyar and vice versa were pending. Section 52 of the Transfer of Property Act, does not prevent a sale by a party pending a lis. All it states is that the sale that has been made, will be subject to the result of the suit. In fact, in the suit filed by Arambu Ammal, the present suit property was not a subject matter of lis. It was only shown as a schedule in the suit for partition filed by Sarangapani Samuttiyar as against Arambu Ammal. It is also on record that the suit filed by Sarangapani Samuttiyar as against Arambu Ammal came to be dismissed. Therefore, the question of the sale being hit by lis pendens does not arise here. All that the courts below had



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to consider was whether the plaintiff was in possession. The admission of the plaintiff that he has no proof, apart from his sale deed, that he is in possession, should suffice for the suit to be dismissed. Unnecessarily the courts below have gone into the issue of title which is not necessary in a suit for injunction. It is true that the court can incidentally touch upon the title when it has not been seriously denied or in case, where the court has to give a finding if possession follows title. When the partition has not been proved and as already stated above, both of them are co-owners that discussion was utterly unnecessary.

7. Now, I frame the following substantial question of law:-

"Whether the decree of the Lower Appellate Court in granting 3/4th share of injunction in favour of the plaintiff and 1/4th share of injunction in favour of the defendants is sustainable?"

8. As already discussed, the parties had not proved the partition said to have been taken place between Arambu Ammal and her daughters. Consequently, the plaintiff and the defendants are co-owners. Their only remedy should have been to file a suit for partition. Having not been done and a mere suit for injunction having been presented, I am of the view that it is not sustainable. This is a case where the Decree of the trial Court is also equally not sustainable since the plaintiff has not proved his possession and therefore,



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the Decree could not have been granted. Similarly, the Lower Appellate Court could not have granted the Decree for injunction in terms of the shares purchased by the parties. Therefore, the judgment and Decree of the Lower Appellate Court have to be set aside and it is accordingly set aside. This now gives an opportunity to the Court to look at the judgment and Decree of the trial Court which is also not sustainable.

9. In exercise of the power under Order 41, Rule 23 of CPC, I hold that the decree and judgement of both the trial court as well as the first appellate court are unsustainable. Hence, while dismissing the appeal, in exercise of the power under Order 41, Rule 33 of CPC, decree and judgement of both the courts below are set aside and the suit stands dismissed on the ground that the plaintiff has not proved his possession.

In fine, the Substantial Question of Law is answered accordingly against the plaintiff and the decree and judgement of both the courts below are set aside and the suit in O.S.No.257 of 2002 is dismissed. This Second Appeal is dismissed accordingly. Consequently, connected MP is closed. No costs.

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Index : yes / no
Neutral Citation : yes / no
Speaking / Non Speaking Order
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To

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- 1.The Additional Subordinate Judge, Panruti, Cuddalore District.
- 2.The District Munsif, Panruti. Cuddalore District.



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V.LAKSHMINARAYANAN, J.

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