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SA(MD)No.12 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 11/07/2024

CORAM

The Hon'ble Mr.Justice **G.ILANGOVAN**

SA(MD)No.12 of 2024

and

CMP(MD)Nos.2580 and 7646 of 2024

Kannammal : Appellant/Respondent/
Defendant

Vs.

Manikandan : Respondent/Appellant/
Plaintiff

PRAYER: Second Appeal is filed under Section 100 of the Civil Procedure Code, to set aside the judgment and decree passed in AS No.11 of 2022 on the file of the Sub Court, Theni, dated 17/08/2023 reversing the judgment and decree passed in OS No.62 of 2020 on the file of the District Munsif, Theni, dated 01/03/2022.

For Appellant : Mr.R.Suriyanarayanan

For Respondent : Mr.G.Kannan

JUDGMENT

This second appeal is filed seeking to set aside the judgment and decree passed in AS No.11 of 2022 by the file of the Sub Court, Theni, dated 17/08/2023 reversing the judgment and decree passed in OS No.62 of 2020 on the file of the District Munsif, Theni, dated 01/03/2022.



SA(MD)No.12 of 2021

2. The plaint averments:-

The suit property belongs to one Rajathi @ Rajathiammal. She executed a registered Will on 05/09/2005 in favour of her brother's children namely the plaintiff and the defendant. She died on 08/03/2006. The Will came into effect and as per the Will, the plaint schedule property belongs to the plaintiff and the ground floor belongs to the defendant. They are in separate possession of their respective properties. In the Will, in page No.4 it is stated that the ground side in the ground floor belongs to the defendant. In the same page, it is also stated that the upper floor belongs to the plaintiff. A suit in OS No.136 of 2013 was filed by the defendant as plaintiff in respect of the ground floor and the suit property, for permanent injunction. But that was withdrawn by the defendant. Later, the defendant started demanding the sale of suit property in her favour. But the plaintiff refused. Now she is making attempt to interfere into possession. So the suit is laid for permanent injunction and for costs.

3.The defendant filed a written statement stating that the Will, dated 05/09/2005 is admitted. The death of Rajathiammal is also admitted. But the title of the properties as mentioned by the plaintiff is disputed.



SA(MD)No.12 of 2021

Originally, the property belongs to one Rajathiammal and her sister Kanniammal. Kanniammal was spinster, who executed relinquishment in favour of the Rajathiammal. So Rajathiammal became the absolute owner of the properties. During the time of illness of Rajathiammal and Kanniammal, the defendant was taking care of them. So, Rajathiammal executed the Will bequeathing the entire property in her favour. But the plaintiff made trouble and threatened Rajathiammal. So because of that only Rajathiammal executed a Will bequeathing the upstairs portion to the plaintiff. But in the very same page, she made a condition that both the plaintiff and the defendant must enjoy the property without creating any problem with each other and if not, the defendant must pay Rs.50,000/- to the plaintiff and the plaintiff must be removed from the ownership and the defendant and her children are entitled for the entire properties.

4.After the death of the Rajathiammal, the plaintiff never in possession of the property. The defendant is in enjoyment and possession of the suit property on the ground floor. She is living in the ground floor and in the upstairs portion her maternal Aunt by name Kanniammal is staying there. Because of the continuous trouble made the defendant, he paid Rs.50,000/- in the presence of



SA(MD)No.12 of 2021

Panchayatars and after receiving the money, he removed himself from the ownership. After that upstairs portion is in the enjoyment of the defendant by letting out and mortgaging the properties.

5.The suit filed in OS No.136 of 2013 was withdrawn at the instance of the Panchayatars, since the plaintiff undertook that the he will not make any trouble to the defendant. So, it was allowed to be dismissed for default.

6.On the basis of the pleadings, the trial Court formulated the following issues:-

"(1)Whether the plaintiff is in possession and enjoyment of the suit property?

(2)Whether the plaintiff has released his right over suit property on 17/03/2009?

(3)Whether this suit is maintainable without declaration of title?

(4)Whether the plaintiff is entitled to the relief of perpetual injunction against the defendant as he prayed for?



WEB COPY



SA(MD)No.12 of 2021

*(5)To what other reliefs plaintiff
is entitled?"*

7.To substantiate the contention on the part of the plaintiff, one witness examined and marked 6 documents on his side. On the side of the defendant, two witnesses examined and seven documents marked.

8.At the end of the trial process, the trial court dismissed the suit without any costs.

9.Against which, A.S No.11 of 2022 was preferred by the plaintiff before the Sub Court, Theni. The appellate Court allowed the appeal and decreed the suit as prayed for with costs.

10.Against the reversal findings of the first appellate Court, this second appeal has been preferred by the plaintiff.

11.Heard both sides.

12.At the time of admission, the following substantial questions of law were framed.



SA(MD)No.12 of 2021

(1)Whether the plaintiff is in possession and enjoyment of suit property?

(2)Whether the plaintiff has released his right over the suit property on 17/03/2009?

(3)Whether this suit is maintainable without declaration of title?

(4)Whether the plaintiff is entitled to the relief of perpetual injunction against defendant as he prayed for?

(5)To what other reliefs plaintiff is entitled?

13.Before we go into the disputed issue, let us straightaway go to the recitals in the Will, dated 05/09/2005 under Ex.A1. The relevant portion is extracted in vernacular language.

“நான் உயிருடனிருக்கும் வரை பின்கண்ட என் சொத்தை நான் அனுபவித்தும், நான் இறந்த பின்னர், என் தம்பி மகள் கண்ணம்மாளும், என் தம்பி மகன் மணிகண்டனும், எவ்வித ஈடு, ஒத்தி, விற்கிரயம் போன்ற புந்த பராதீனம் செய்யாமல், வாடகைக்கு விட்டோ, அல்லது



SA(MD)No.12 of 2021

நேரில் குடியிருந்து அனுபவித்துக் கொள்ளவேண்டியது கீழ்க்கண்ட சொத்தில், தரைப்போர்சன் மனையை மட்டும் என் தம்பி மகனும் தேவராஜ் மனைவியுமான கண்ணம்மாள் என்பவர் அடைந்து கொண்டும் மேற்படி மனையின் மேல்மாடி போர்சன் மனையை மட்டும் என் தம்பி மகனும் மேற்படி கண்ணம்மாளின் சகோதரனுமான மணிகண்டன் என்பவன் அடைந்து கொண்டும் கீழ்க்கண்ட சொத்தில் குடிநீர் குழாய், லெட்ரீன், மாடிப்படிக்கட்டு, மொட்டைமாடி ஆகியவற்றை மேற்படி கண்ணம்மாளும் மணிகண்டனும் பொதுவில் வைத்து அனுபவித்தும் மேற்படி சொத்தில் தற்சமயம் உள்ள மின இணைப்பை மேற்படி கண்ணம்மாள் வைத்து கொண்டு மேலமாடிப் போர்சனுக்கு தனி மின் இணைப்பை கண்ணம்மாளும் மணிகண்டனும் சேர்ந்து பொதுவில் செலவழித்து வாங்கிக் கொள்ளவேண்டுமென்றும், கீழ்க்கண்ட சொத்தில் அக்காவும் தம்பியுமான மேற்சொன்ன இருவரும் அவர்களுடைய கடைசி காலம்வரை ஒற்றுமையுடன் இருந்து அனுபவித்துக் கொண்டு, பின்னர் மேற்சொன்ன கண்ணம்மாளும் மணிகண்டன் இருவர்களுடைய வாரிசுகளும் சர்வசுதந்திரமாய் சகலபாத்தியங்களுடன் ஆண்டனுபவித்துக் கொள்ளவேண்டியது.”

14.The recital make the right of the parties here. Only life interest is created in favour of the plaintiff and the defendant and not the absolute right. Subject to the life interest only, they can enjoy the property till their life time without making any encumbrances, sale, etc. But against the recital, now it appears that the



SA(MD)No.12 of 2021

parties are entering into the issue. One suit was filed by the defendant against the plaintiff in OS No.136 of 2013. Later, it was withdrawn.

15. According to the appellant namely the defendant, the suit filed was withdrawn when a promise was made by the plaintiff that he will not make any trouble and disturbance to her. But this is disputed by the plaintiff. We need not concentrate much on that point. Suffice to say that only life interest is created in favour of the parties.

16. Not only that, another condition was imposed upon them. The vernacular language of the relevant portion is extracted hereunder:-

“என் ஆயுள் காலத்துக்கு பின்னால்
அவ்வாறு மேற்படி இருவரும் மேற்சொன்ன
பிரகாரம் கீழ்க்கண்ட சொத்தை
ஒற்றுமையுடன் இருந்து அனுபவிக்க தவறும்
பட்சத்தில் மேற்படி கண்ணம்மாள் அவளின்
தம்பியான மேற்படி மணிகண்டனுக்கு ரூபாய்
50,000/- ஐம்பதாயிரத்தை சில
மத்தியஸ்தர்களின் முன்னிலையில் கொடுத்து
மேற்படி மணிகண்டனை கீழ்க்கண்ட
சொத்திலிருந்து விலக்கி விட்டு கண்ணம்மானும்
அவருடைய வாரிசுகளும் கீழ்க்கண்ட சொத்தை
அனுபவித்துக்கொள்ள வேண்டியது.



SA(MD)No.12 of 2021

17.The right conferred upon the defendant namely the appellant herein to exercise the right of preemption. Though it cannot be called as 'preemption' in strict sense, they can claim the right of getting the release by paying amount in the presence of some mediators.

18.Reading of the Will also clarify the position. The stage on which this right of claiming the release by payment of money can be exercised by the appellant. The relevant vernacular portion is extracted hereunder for better appreciation.

“அதற்காக மேற்படி கண்ணம்மாள் மேற்படி
மணிகண்டனிடம் சண்டை சச்சரவுகள் எதும்
போடமல், மனச்சாட்சிக்கு
விரோதமில்லாமல் இருவரும்
ஒற்றுமையுடன் இருந்து கீழ்க்கண்ட சொத்தை
பொதுவில் அனுபவித்துக் கொள்ள வேண்டியது
எனவும், மேற்படி மணிகண்டனுக்கு திருமணம்
நடைபெற்று அவர் தன் மனைவி மக்களுடன்
கீழ்க்கண்ட சொத்தில் குடியிருந்து
வரவேண்டியதெனவும், கண்ணம்மாள் என்பவள்
மேற்படி தொகையை கொடுத்து மணிகண்டனை
விலக்க நினைத்து வேண்டுமென்றே சண்டை
சச்சரவை ஏற்படுத்தக்கூடாதெனவும்.



SA(MD)No.12 of 2021

19. Reading of this portion makes the position clear that both should not enter into the issue against their conscience. Conscience is the deciding factor to resolve the issue. Now, it appears that both are disowning their responsibility and entering into the issue.

20. During the course of argument, the learned counsel appearing for the respondent has submitted that after the marriage of Manikandan, issue arose between the wife of Manikandan and the defendant. Because of that only, trouble has arisen between them. Now whatever, it may be, it is the out of the court issue.

21. It is a case of the appellant that in view of the trouble created by the plaintiff, she exercised the option of claiming release by paying Rs.50,000/- in the presence of some mediators. But absolutely, there is no evidence to show the same. It was not even shown before the trial court as well as the appellate court. The non payment of Rs.50,000/- and the release can also be clarified or confirmed by way of subsequent develop.

22. The respondent filed CMP(MD)No.7646 of 2024 under Order 41 Rule 27 CPC seeking permission of this court to produce the additional evidence.



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SA(MD)No.12 of 2021

23.It is a notice issued by the appellant to the respondent herein during the pendency of the proceedings, on 02/02/2004 stating that she got a right of preemption. That right of claiming release on payment of Rs.50,000/-. Even though she already paid the amount, she is also ready to pay another sum of Rs.50,000/- and the respondent must release his right in the upstairs portion. So, this clarifies and confirms the findings of the trial court that no such release actually took place between the parties.

24.More-over, regarding the release, it can be effected by way of a registered document. Because the amount is fixed at Rs.50,000/-, that oral release is not permissible under law. The appellant cannot claim the oral release against the statute. Now, she has to work out her remedy through proper steps either by way of exercising the right in the presence of the mediators or as per law, if so advised.

25.The finding of the fact recorded by the trial court and the appellate court and this court will not stand in the way of exercising the right by the appellant, but subject to the conditions imposed in the Will.



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SA(MD)No.12 of 2021

26.As mentioned above, the guiding factor is the conscience of the parties. Who made trouble may be out of place. Here, it make a decision on that issue, since it may create unnecessary prejudice to the parties if the proceedings or steps are taken by the appellant by exercising the right. So, I consciously avoiding the issue.

27.Now coming back to the issue, as stated above, the appellant was given right in the ground floor. The respondent is in the first floor. Now, it has been brought to the notice of this court that the second and third portions were constructed by the appellant. But the respondent would submit that he has also contributed money towards it. Absolutely, there is no issue and evidence on record. So we need not discuss about this matter. We will concentrate in the ground floor and first floor.

28.In the light of the above said discussion, we will go to the argument advanced by both sides.

29.The learned counsel appearing for the appellant would submit that the plaint has been drafted as if absolute right is conferred upon the plaintiff. Only



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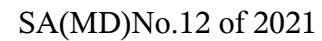


SA(MD)No.12 of 2021

possession is now under issue. Even as per the admission made by the plaintiff, he is not staying in the suit property, but due to the job nature he is working in Chennai. The tenants are in possession and so constructive possession was pleaded by the plaintiff; When the plaintiff is not in possession of the property and that too when the title is under dispute, the finding recorded by the trial court is corrected; But the reversal has been rendered by the appellate court without taking into all these factual issues. In the circumstances of the case, the respondent ought to have filed the suit for recovery of possession; granting of injunction when the plaintiff is not in possession per se illegal.

30.Per contra, the learned counsel appearing for the respondent would submit that when the Will is not disputed and the confirmation of right is not disputed, question of claiming declaratory relief does not arise.

31.During the course of the hearing, some other development also brought to the notice of this court. According to the appellant, the respondent was removed from the possession, taking advantage of the appellate court decree, the respondent locked the first floor and



"4.The appellant claims that she is in possession of the property both in the ground floor and in the first floor. However, the respondent claims that he is in possession of of the property in the first floor. Therefor, this Court is of the considered opinion that the appellant and the respondent shall not interfere in each other's possession until the disposal of this second appeal. To make it clear, the appellant shall be in possession of the ground floor and the respondent shall be in possession of the first floor. Neither of the parties should disturb each other's possession. This interim order will not influence the Court while passing the final judgment."



SA(MD)No.12 of 2021

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32.In-spite of that, the interim order was not complied. So, another CMP(MD)No.2580 of 2024 was filed by the appellant herein to comply the above said order.

33.In the affidavit, it has been stated by the appellant that in the ground floor, there is a tenant. The respondent trespassed into the third floor, which was in her possession and occupation. In view of the above said only, interim order was passed. She is also ready to vacate the tenant in the first floor, so that the respondent may occupy the first floor. So, direction was sought to the respondent herein to occupy the first floor. But in the notice, dated 02/02/2024, she has admitted that she is in occupation of the third floor. So, it is seen that the third floor is in his occupation. When there is a definite stand taken by the appellant that the respondent may occupy the first floor, then his right to occupy the same cannot be now agitated.

34.Even at the time of hearing, via media was suggested between the parties, but that was not accepted by both of them.

35.The spirit of the Will must be given proper respect and enforced. The Will of the executor is that



SA(MD)No.12 of 2021

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both must live in harmony with each other. The appellant should not evict the respondent herein against her conscience as stated above. Similarly, it is the duty cast upon the respondent herein to maintain peace and harmony with the appellant and if it is not carried on, then causality of loosing the right over the property hangs upon the respondent. The respondent also duty bound to respect the spirit of the Will. The respondent has no right to disturb the possession of the appellant in the ground floor. To whom the second and third floor, it will beyond the scope of the suit and it is a matter for consideration or a compromise between the parties. As stated above, both sides should not interfere into the other possession and enjoyment.

36.The plaint description of the property also misleading. The plaint has been filed as if the entire buildings starting from the ground floor upto fourth floor is in the occupation and the possession of the respondent. But it is admitted by the respondent himself that the entire property was not in his possession. So, the appellate court also did not properly appreciate this issue, granted decree entirety, which caused problem now as stated by the appellant. If at all, the respondent is entitled for permanent injunction only in respect of the



SA(MD)No.12 of 2021

first floor. In this context, as stated above, the factum of the possession also to be considered.

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37.No doubt that there is no documentary or oral evidence to show that the plaintiff is in possession in any one of the floors, but when the right has been given and it is also recognized by the appellant by way of filing CMP(MD)No.7646 of 2023, it is not proper on the part of the appellant to say now that the respondent has no right to occupy the first floor. It is the duty of the appellant to permit the respondent herein to occupy the first floor. Equally, it is the duty of the respondent to permit the appellant to occupy the ground floor. Possession may be physical or constructive. Changing of revenue records will not confer any absolute possessory right in favour of the appellant. In fact, in the Will, it has been stated that in respect of the first floor, both must take and spend money for getting service connection, etc.

38.In the light of the above said, I am of the considered view that the possession of the appellant should not be construed as a trespasser. Accordingly, all the substantial questions of law are answered.



SA(MD)No.12 of 2021

39.In view of the above said discussion, the judgment of the appellate court requires modification. Accordingly, it is modified in the following terms.

40.In the result, this second appeal is **partly allowed**. The judgment and decree of the first appellate court is modified to the effect that the appellant should not interfere into the respondent's possession and enjoyment of the first floor of the suit property otherwise than under the right conferred upon her in the Will, dated 05/09/2005. No costs. Consequently, connected Miscellaneous Petitions are closed.

11/07/2024

Index:Yes/No
Internet:Yes/No
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To,

- 1.The Sub Judge,
Theni.
- 2.The District Munsif,
Theni.
- 3.The Section Officer,
VR/ER Section,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY



SA(MD)No.12 of 2021

G.ILANGOVAN, J

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SA(MD)No.12 of 2024

11/07/2024