

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.09.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

S.A.No.334 of 1999

1.Seerangan  
2.Shanmugam  
3.Palanisamy

.. Appellants/Defendants

-Vs-

Murugan

.. Respondent/Plaintiff

Second Appeal filed under section 100 of C.P.C against the judgment and decree dated 30.11.1998 made in A.S.No.1 of 1997 on the file of the Court of Sub-Judge, Dharapuram modifying the judgment and decree dated 07.11.1996 made in O.S.No.15 of 1996 on the file of the Court of District Munsif, Kangeyam.

For Appellants : Mr.A.Kandasamy  
for M/S.V.Ambika

For Respondent : No appearance

JUDGMENT

The defendants in the original suit are the appellants in the second appeal. The respondent herein filed the suit for the relief of declaration and recovery of possession in respect of the suit property.

2. The respondent / plaintiff based his claim on the contention that he purchased the suit property measuring 7 cents under a sale deed dated 11.02.1981 and the appellants/defendants, who do not have any title or right in respect of the suit property, has trespassed into the suit property and are residing therein and that hence, he was forced to approach the court with the suit for declaration and recovery of possession.

3. The suit was resisted by the appellants / defendants contending that the purchase made under the sale deed dated 11.02.1981 was made by the respondent

herein/plaintiff and the first appellant herein/first defendant jointly, but, however the sale deed was taken in the name of the respondent herein/plaintiff since the first appellant/first defendant was a Government servant; that subsequently two houses came to be constructed with the funds made up of the contributions made by the respondent herein/plaintiff and the first appellant herein/first defendant; that by mutual understanding each one was occupying one such house; that subsequently a partition was effected between the respondent/plaintiff and the first appellant/first defendant in which the suit property was divided in such a way that the first appellant/first defendant was allotted the southern half measuring 3 ½ cents and the house situated therein bearing Door No.10/89 whereas the plaintiff was allotted the northern half measuring 3 ½ cents with the house bearing Door No.10/88; that thereafter the respondent / plaintiff and the first appellant/first defendant were in possession and enjoyment of their respective shares in their own right and that hence the suit filed for a declaration of title in respect of the entire property and recovery of possession without indicating the portion over which the defendants trespassed into should be dismissed. It was also contended by the appellants/defendants in their written statement that in the partition effected by Panchayatdhar, not only the suit properties, but also the other properties of the family came to be divided between the respondent/plaintiff and first appellant/first defendant.

4. Based on the above said pleadings, necessary issues were framed and the learned trial Judge conducted a trial in which the plaintiff alone appeared as the sole witness (PW1) on his side and produced 10 documents marked as Exs.A1 to A10 whereas three witnesses were examined as Dws 1 to 3 and four documents were marked as Exs.B1 to B4 on the side of the appellants herein / defendants. The learned trial judge, on an appreciation of evidence held that the respondent herein/plaintiff did not provide a proper description of the suit property since the houses put up therein bearing Door Nos.10/88 and 10/89 were not shown in the schedule of properties. The learned trial Judge also accepted the plea of the appellants/defendants that the purchase was jointly made by the respondent herein/plaintiff and the first appellant/first defendant and that subsequently there was a partition in which they got ½ share each in the suit property along with a house in each one of such share. The learned trial Judge also held that the cause of action alleged, namely the alleged trespass made by the defendants on 24.07.1994 was not proved. Based on the said findings, the learned trial Judge non-suited the plaintiffs for the relief sought for in the plaint with the result, the suit was dismissed without costs by the trial Court by its judgment and decree dated 07.11.1996.

5. As against the said decree of the trial Court dismissing the suit, the respondent/plaintiff preferred an appeal on the file of the Sub-Court, Dharapuram (lower appellate Court) in A.S.No.1 of 1997. The learned lower appellate Judge held that the purchase made under the sale deed dated 11.02.1981 was the separate acquisition of the respondent herein/plaintiff. However, the learned lower appellate Judge accepted the case of the appellants / defendants that there was an arrangement of partition by which the northern portion of the suit property and the house situated therein bearing Door No.10 /88 was allowed to remain with the respondent herein/plaintiff, whereas the southern portion of the suit property measuring 3 ½ cents with the house therein bearing Door No.10/89 was allotted to the share of the appellant/first defendant and that the appellants/defendants were there in possession of the said property only by virtue of such a partition arrangement. The learned lower appellate judge also held that the house bearing Door No.10/89 belonged to the first appellant herein/first defendant. The learned lower appellate Judge also concurred with the finding of the trial Court that the respondent herein/plaintiff failed to prove the alleged trespass made by the defendants on 24.07.1994. Having rendered such finding, the learned lower appellate Judge, somehow or other, chose to allow the appeal in part and grant the relief of declaration not in respect of the northern portion alone, but in respect of the entire suit property. At the same time, the learned lower appellate Judge chose to disallow the plea for recovery of possession.

6. It is against the said decree of the lower appellate Court, the present second appeal has been filed by the appellants herein/ defendants in the original suit.

7. The second appeal was admitted on 25.04.2001 noticing the following to be the substantial questions of law involved in the second appeal:

"1. Whether the lower appellate Court is correct in law in granting a decree for declaration in respect of the house property even though the plaint schedule does not contain the same?

2. Whether the lower appellate Court is correct in law in granting the decree for declaration in respect of 0.07 cents of land in S.No.306C, Mettupalayam Village, Kangeyam Taluk, Erode District in spite of its findings that the plaintiff is entitled to the house on the northern side and 3 ½ cents of land appurtenant to the house?"

8. Though the respondent entered appearance and was represented by a counsel till the last hearing date, but on the date of last hearing, the learned counsel for the respondent/plaintiff chose to report "No instruction".

Hence, by order of this Court, the name of the respondent/plaintiff has been printed in the cause list and the appeal stands listed today for disposal. As there is no representation for the respondent/plaintiff, this Court has no other option than to hear the arguments advanced on the side of the appellants/defendants and dispose of the case after perusing the materials available on record. Accordingly, the arguments advanced by Mr.A.Kandasamy, learned counsel for the appellants/defendants are heard. The materials available on record are also perused.

9. Admittedly, the respondent herein and the first appellant/ first defendant are brothers. The respondent herein failed to get a decree as prayed for before the trial Court and the trial Court dismissed the suit in entirety. However, on appeal, the appellate Court granted the relief of declaration alone and negatived the prayer for recovery of possession. An extent of 7 cents of land comprised in S.No. 306C, Mettupalayam Village, Kangeyam Taluk, Erode District measuring East - West 60 feet and North - South 50  $\frac{3}{4}$  feet was purchased under a sale deed dated 11.02.1981. The respondent herein / plaintiff alone was shown as the purchaser under the said sale deed. The original sale deed has been produced and marked as Ex.A1. Based on the said sale deed, the respondent herein/plaintiff seems to have claimed that he is entitled to the entire extent of 7 cents. Based on a contention that the appellants herein/defendants trespassed into the suit property and are residing there, the respondent herein/plaintiff also sought a relief of recovery of possession.

10. The plea for declaration made by the respondent/plaintiff is met with the counter plea made by the appellants / defendants that the purchase was jointly made by the respondent herein/plaintiff and his brother first appellant/first defendant and that after such purchase, two houses one in the northern half and the other in the southern half came to be constructed by them; that after such construction, the respondent/plaintiff took the northern half with the house therein, whereas the first appellant/first defendant took the southern half with the house therein and that the said arrangement was subsequently confirmed in a panchayat, which resulted in a muchalika dealing with the division of the suit property and the other properties belonging to the brothers.

11. The learned trial Judge holding that the brothers jointly purchased the property, developed it and divided it between themselves; that the respondent/plaintiff was entitled to the northern half and the first appellant herein/first defendant was entitled to the southern half with the respective houses situated therein bearing Door Nos.10/88 and 10/89 and that hence the claim of the respondent/plaintiff to be entitled to the suit property in its entirety could not be sustained, negatived the prayer for declaration and also for

recovery of possession. The said decision of the trial Court was prompted by the further finding that the description of the property was not proper insofar as the houses admittedly put up in the suit property were not shown in the description of property in the plaint and that the alleged trespass on 24.07.1994 was not proved.

12. On appeal, the learned lower appellate Judge no doubt held that the purchase was made by the respondent/plaintiff alone under Ex.A1. However the learned lower appellate Judge chose to hold that the claim that the first appellant herein/first defendant to be entitled to half share in the suit property was admitted and that consequently the first appellant herein/first defendant was put in possession of the southern half of the suit property with the house situated therein bearing Door No.10/89 and that thereby the first appellant herein/first defendant became entitled to the same. Having taken such a decision, quite contrary to the same, the learned lower appellate Judge has chosen to grant the relief of declaration in respect of the entire suit property without restricting it to the northern half, which is admittedly in the possession of the respondent herein/plaintiff. As rightly pointed out by the learned counsel for the appellant herein/defendants, the said approach made by the lower appellate Judge shows lack of clarity and even non-application of mind.

13. The learned counsel for the appellants also pointed out the fact that the lower appellate Court having chosen to grant the relief of declaration in respect of the entire property, has declined the relief of recovery of possession which will show the conflicting opinions expressed by the lower appellate Court. When the lower appellate Court came to the conclusion that the first appellant / first defendant was entitled to the southern half of the suit property along with the house therein and the alleged trespass made by the defendants on 24.07.1994 was not substantiated by the respondent herein/plaintiff, besides the decision to dismiss the suit in respect of the prayer for recovery of possession, the prayer for declaration should also have been negatived. The description of the property was not proper and even in respect of the northern half which is in possession of the respondent/plaintiff, the cause of action has not been proved. Hence, the lower appellate Court ought to have dismissed the suit in entirety.

14. Viewed from any angle, the lower appellate Court seems to have committed a grave error in granting the relief of declaration while rejecting the relief of recovery of possession on the premise that the plaintiff was not entitled to the suit property in entirety and the cause of action alleged was not proved.

15. In view of the forgoing discussions, both the substantial questions of law formulated at the time of admission of the second appeal are bound to be answered in favour of the appellants and against the respondent holding that the lower appellate Court has committed an error in law in granting a decree for declaration in respect of the house also, when the plaint schedule does not contain the house situated in the land described as the suit property and that the grant of declaration in respect of entire 7 cents contrary to the findings that the first appellant/first defendant is entitled to the north eastern 3 ½ cents and that the alleged cause of action was also not proved, was quite contrary to the established principles of law.

16. In view of the answers given to the substantial questions of law, the inevitable result shall be the success of the second appeal. Accordingly, the second appeal is allowed. The decree of the lower appellate Court dated 30.11.1998 made in A.S.No.1 of 1997 is set aside. The decree of the trial Court dated 07.11.1996 made in O.S.No.15 of 1996 dismissing the suit shall stand restored and confirmed. However, there shall be no order as to costs.

sd/-  
ASSISTANT REGISTRAR (CO)

/ TRUE COPY /

SUB-ASSISTANT REGISTRAR

gpa

To

1. The subordinate Judge, Dharapuram
2. The District Munsif, Kangeyam
3. The Section Officer, VR Section,  
High Court, Madras

+1 CC to M/s.V.Ambika Advocate. SR.NO. 51096

S.A.No.334 of 1999

CO-TEJ  
JD 20/10/2015