

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.02.2015

CORAM

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

Second Appeal No.447 of 2011

1.W.Daniel Victor Jawahar

2.Mrs.Juliet Mazinda

... Appellants/Plaintiff

Vs.

Mrs.W.Sheela

... Respondent/Defendant

Prayer:- This second appeal has been filed under Section 100 C.P.C., against the judgement and decree in A.S.No.276 of 2010 dated 10.01.2011, on the file of the learned V Additional Judge, City Civil Judge, Chennai in confirming the judgement and decree in O.S.No.7663 of 2008 dated 08.01.2010 on the file of the learned XV Assistant Judge, City Civil Court, Chennai.

For Appellants : Mr.V.Ragavachari
Mr.C.Dievasigamani for
For Respondent : Mr.S.Seshachalam

JUDGEMENT

The plaintiffs in O.S.No.7663 of 2008 on the file of the learned XV Assistant Judge, City Civil Court, Chennai are the appellants herein. The respondent is the sole defendant in the suit. The suit was filed for recovery of possession of the suit property from the defendant and for a decree to direct the defendant to pay a sum of Rs.3,000/- per month towards damages from September 2008 calculated @ Rs.100/- per day for the use and occupation of the suit property by the defendant and also to pay future damages until the possession is delivered to the plaintiffs.

2.The suit was dismissed by the trial Court by decree and judgement dated 08.01.2010. As against the same, the appellants herein have filed an appeal in A.S.No.276 of 2010 on the file of the learned V Additional Judge, City Civil Court, Chennai. By decree and judgement dated 10.01.2011, the First Appellate Court dismissed the said appeal thereby confirming the decree and judgement of the trial Court. Challenging the same, the appellants/plaintiffs are before this Court with this second appeal.

3.When this second appeal came up for admission on 26.04.2011, notice was ordered to the respondent. Today, on service of notice, the respondent has made appearance through learned counsel.

4.The learned counsel on either side submitted to this Court on 06.11.2014, to refer the matter for mediation. Accordingly, by order dated 06.11.2014, the second appeal was referred to the Tamil Nadu Mediation and Conciliation Centre for settling the issues by

mediation, if possible. The Assistant Registrar, Tamil Nadu Mediation and Conciliation Centre, High Court, Madras by letter dated 24.12.2014, has forwarded a report dated 08.12.2014 to this Court, wherein, he has stated that "Both parties appeared before the centre along with their counsels. Parties are unable to arrive at an amicable settlement. Hence the matter is sent back to the Hon'ble Court".

5. Thereafter, the matter was listed before this Court for hearing. I have heard the learned counsel for the appellants and the learned counsel for the respondent and I have also perused the records carefully.

6. The case of the plaintiffs is as follows:-

The second plaintiff is the wife of the first plaintiff. The defendant is the sister of the first plaintiff. The first plaintiff's father was one Mr. J. Washington. He died in the year 1983 leaving behind his wife, seven sons and one daughter. The respondent herein is the daughter. The respondent was given in marriage and since, she was deserted by her husband, she came back to her parental home and she started living with her mother. So far as the suit property is concerned, it was allotted by the Tamil Nadu Housing Board to the vendor of the first plaintiff and the sale deed dated 21.03.1997 (Ex.A.3) was executed by the Tamil Nadu Housing Board in the name of the vendor of the first plaintiff by name Mr. Prakash. Mr. Prakash had executed a general power of attorney in favour of one Mr. G. Saravanan under Ex.A.4 dated 05.06.1998. From the Power of Attorney Mr. G. Saravanan, the first plaintiff purchased the suit property out of his own funds by means of registered sale deed dated 08.02.1999 (Ex.A.5). The property tax has also been transferred in the name of the first plaintiff. Ex.A.6 dated 28.02.2007 is the property tax receipt. Thus, according to the first plaintiff, he is the absolute owner of the property in question.

7. It is the further case of the plaintiffs that since, the defendant had been deserted by her husband and since, she was a destitute, at her request, in the year 1980, the defendant was allowed to reside in the suit house as the permissive occupier along with her mother. Her mother also subsequently passed away. The respondent made a complaint to the police that she was harassed by the plaintiffs and others to vacate the suit property. A criminal case was registered which resulted in a charge sheet in C.C.No.150 of 2008 on the file of the learned X Metropolitan Magistrate, Chennai.

8. When the matter was pending before the learned X Metropolitan Magistrate, Chennai, the Tamil Nadu Womens Welfare Committee, mediated and the matter was amicably settled. The defendant has got no right to continue in occupation. When the plaintiffs issued a legal notice on 04.09.2008, to the defendant to vacate the suit house, she declined to vacate the same. She has also issued a reply notice under Ex.A.2 dated 18.09.2008 declining to vacate the suit property. Further, in the reply notice, the defendant had demanded a sum of Rs.15 lakhs from the plaintiffs to vacate the suit property. In those circumstances, the plaintiffs were forced to file the present suit.

9. In the written statement, the defendant admits that the first plaintiff is the brother of her. But according to her, their father Mr. Washington owned certain properties. The said properties were all sold and from out of the sale proceeds, the suit property was purchased by the first plaintiff and thus, the defendant has a share in the suit property. It is further contended that the defendant has been living in the said house as a permissive occupier. It is further contended in the written statement that the mother of the defendant issued a cheque on 08.09.1998 for herself on behalf of her sons for a sum of Rs.25 lakhs to the defendant towards her share in the assets of Mr. Washington and also as security for her peaceful possession and enjoyment of the suit property. The said cheque was dishonoured. Since, the said amount has not been paid, the first plaintiff and his brothers are bound to maintain her. Further, she is entitled to continue in possession of the suit property, it is contended.

10. It is further stated that when the case in C.C.No.150 of 2008 was pending before the learned X Metropolitan Magistrate Court, the first plaintiff and his brothers executed a letter of assurance to the Director of the Tamil Nadu Women Welfare Committee, Chennai undertaking to provide basic requirements regularly to the defendant. It is only in tune with the said assurance, the defendant has been in possession of the suit property and thus, according to the defendant, she is not a permissive occupier. Similarly, she is not a trespasser also. Thus, according to her, she is entitled to continue to be in possession of the suit property. She has further stated in paragraph No.6 of the written statement that she will vacate the hand over possession of the suit property only after receipt of the above cheque amount of Rs.25 lakhs from the first plaintiff and his 6 brothers and until such amount is paid, the first plaintiff and his brothers are bound to maintain her and therefore, she has got right to continue in possession. It is also stated that she is entitled for a sum of Rs.10,000/- per month towards her maintenance to be paid by the first plaintiff and his brothers.

11. Based on the above pleadings, the trial Court framed appropriate issues and called upon the parties to let in oral as well as documentary evidence. On the side of the plaintiffs as many as one witness was examined and 6 documents were exhibited. On the side of the defendant neither oral evidence nor documentary evidence was let in.

12. Having considered the above oral as well as documentary evidences, the trial Court dismissed the suit which was confirmed by the First Appellate Court. That is how the appellants are before this Court with this second appeal.

13. In this second appeal, on perusal of records and evidences available on record including the pleadings, I find that the following substantial questions of law are arisen for consideration:-

not been clearly proved by means of evidence by the plaintiffs ?

(2)Whether the Courts below were right in dismissing the suit when it is an admitted case of the defendant that she is prepared to vacate the house on account of the cheque amount of Rs.25 lakhs to be paid by the first plaintiff and his brothers ?

(3)Whether the Courts below were right in dismissing the suit when the first plaintiff and his brothers were refusing to pay a sum of Rs.25 lakhs to the defendant which makes out a different issue and which has not covered in the present suit ? and

(4)Whether the Courts below were right in dismissing the suit when there is no dispute regarding the title of the first plaintiff which is evident from the admission made by the defendant in the paragraph No.6 of the written statement ? "

14.The learned counsel for the appellants would submit that there is no denial of title for the property. He would further submit that Exs.A.3 to A.6 would clearly go to prove that the first plaintiff is the absolute owner of the suit property. It is the further contention that it may be true that the mother of the first plaintiff had given a cheque for Rs.25 lakhs to the defendant towards her share in the assets of Late Mr.Washington. Assuming that the same is true and the said cheque was dishonoured, according to the learned counsel, which gives raise to a different cause of action and which has got nothing to do with the suit property.

15.The learned counsel for the appellants would further submit that the letter of assurance given before the Tamil Nadu Women Welfare Committee by the first plaintiff and his brothers assuring to provide basic amenities to the defendant would not give raise to a right in favour of the defendant to continue in the suit house. The learned counsel would further submit that question of paying maintenance by the brothers to the sister would not known to the 'law of maintenance'.

16.At any rate, since, the defendant has got no right whatsoever to continue to occupy the suit house, the Courts below ought to have decreed the suit as prayed for. The learned counsel would further submit that ofcourse, it is true that there is some discrepancy in the period of occupation of the defendant in the suit property. According to the learned counsel, the period of occupation by the defendant may be relevant only for the purpose of deciding the quantum of damage to be paid by the defendant to the plaintiffs, on the basis of the plea of the plaintiffs and that cannot be a ground for the Courts below to deny the decree for declaration.

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17.The learned counsel would further submit that the defendant has tacitly admitted in her written statement that she is in

possession of the property and when it has been established that she is only a permissive occupier, the Courts below ought to have decreed the suit as prayed for the plaintiffs.

18.The learned counsel for the respondent/defendant would vehemently oppose this appeal. According to him, the first plaintiff has not proved his title at all. He would further submit that mere production of Exs.A.3 to A.6 would not amount to prove his title. It is his further contention that there is no oral evidence in respect of execution of Ex.A.5. The learned counsel would therefore submit that the first plaintiff has failed to prove his title for the property. He would also add that when a title of the first plaintiff is in dispute, the plaintiffs ought to have prayed for a decree of declaration of title also. He would further submit that the suit property was purchased out of the sale proceeds of the properties held by the Late Mr.Washington who is the father of first plaintiff and his six brothers and the defendant, and therefore, the defendant has got a share in the suit property. The learned counsel would further submit that there is discrepancy in respect of the period of occupation of the house by the defendant, which is evident from the admission made by the first plaintiff during cross examination.

19.The learned counsel for the respondent would further point out that during cross examination, the first plaintiff has admitted that for the past 6 months, the defendant is not in occupation of the house. If it is true, according to the learned counsel, the question of ordering delivery of possession by the defendant does not arise. The learned counsel would further submit that it is true that the defendant has not let in any oral as well as documentary evidence in this regard and that will not go to add any strength to the case of the plaintiff because, the plaintiff has to stand on his own legs or to fall otherwise. The learned counsel would further submit that the first plaintiff has assured to the Tamil Nadu Women Welfare Committee that he would maintain the defendant and he would also provide all basic amenities to her. The defendant is entitled to continue to be in possession of the suit property since, she is neither a permissive occupier nor a trespasser therefore, according to the learned counsel, the Courts below were right in dismissing the suit.

20.I have considered the above submissions.

21.At the outset, I would point out that the defendant has neither let in oral nor documentary evidence before the trial Court at the time of trial. Even in the written statement, there is no consistent plea taken by the defendant. In paragraph No.3 of the written statement, the defendant has stated that the suit property was purchased in the name of the first plaintiff, out of the sale proceeds of the property held by Late Mr.Washington, who is the father of the first plaintiff and the defendant. It is also stated that the suit property was purchased out of the share amount of the defendant alone. Thus, according to paragraph No.3 of the written statement, the suit property was purchased only out of the sale proceeds of the property held by Mr.Washington that too out of the share amount of the defendant. But, absolutely, there is no evidence to prove this contention. Further, there is no evidence to show that Mr.Washington had held any property and there is no evidence that the

said property was sold to anyone. There is no evidence that the suit property was purchased from and out of the said sale consideration. There is no evidence as to whether there was any share amount of the defendant out of said sale consideration and whether, the same was used for the purpose of purchasing the suit property. Thus, absolutely, there is no evidence to prove the contention of the paragraph No.3 of the written statement filed by the defendant.

22.The contention of the learned counsel for the respondent is that this cannot add to strengthen the case of the plaintiff because, the plaintiff has to stand on his own legs not on the others. In this case, the sale deed dated 08.02.1999 (Ex.A.5) stands in the name of the first plaintiff. Since, the sale deed is in the name of the first plaintiff and since, he has let in oral as well documentary evidence in respect of the purchase of the same before the trial Court, it has been held that the suit property belongs only to the first plaintiff.

23.In paragraph No.6 of the written statement, the defendant has stated that she is prepared to vacate the suit property provided, a sum of Rs.25 lakhs is paid by the first plaintiff and other brothers to her. Assuming that a cheque was issued by her mother to the defendant for a sum of Rs.25 lakhs, it is not known as to what for that amount was given to the defendant that too by her mother. It cannot be concluded in this suit that the first plaintiff is liable to pay any amount to the defendant on account of the above said cheque. Even assuming that some amount is due from the first plaintiff to the defendant, that will not give raise to the defendant to continue to be in occupation of the suit property.

24.As I have already pointed out, the suit house stands in the name of the first plaintiff and he has got clear title and therefore, the defendant cannot continue to be in occupation of the said house. The condition propounded by the defendant that she would vacate the house, if only, the cheque amount of Rs.25 lakhs is paid is not tenable. Further, the defendant has stated that she is entitled for Rs.10,000/- per month from the first plaintiff and the 6 brothers as maintenance to her. In my considered opinion, this issue also cannot be gone into in this suit. At the most, the same may give raise to a different cause of action which could be decided elsewhere and not in this suit.

25.So far as the assurance given by the first plaintiff before the Tamil Nadu Women Welfare Committee is concerned, assuming that such assurance was given, if there is breach, the defendant shall have a cause of action for a different kind of legal action to be taken against the first plaintiff and that has got nothing to do with the suit property and therefore, based on the said assurance given before the Tamil Nadu Women Welfare Committee, the defendant cannot claim that she is entitled to occupy the said house.

26.The Courts below have held that there is some discrepancy in the period of occupation of the house. Assuming that there is some discrepancy, that will be relevant only for deciding the quantum of damages to be paid by the defendant for use and occupation of the suit property and that discrepancy cannot in any manner non-suit the plaintiff so far as the prayer for recovery of possession is concerned. Thus, the conclusion arrived at by the Courts below that

the first plaintiff is not entitled for recovery of possession is not only perverse but also illegal.

27.Going by the close relationship between the parties, the learned counsel for the appellants would submit that the claim for damages to the tune of Rs.3,000/- per month from the defendant is given up. The said statement is recorded. So far as the future damages is concerned, in my considered view, if the defendant fails to vacate the house and hand over the vacant possession to the first plaintiff within a period of six months from today, the defendant shall be liable to pay damages @ Rs.3,000/- per month from the date of expiry of six months time granted and till possession is delivered to the first plaintiff.

28.In view of all the above discussions, I answer all the substantial questions of law framed herein above in favour of the plaintiffs and accordingly, I am inclined to set aside the decree and judgement of the trial Court which was confirmed by the First Appellate Court. Further, I hold that the first plaintiff is entitled for a decree for recovery of possession and for future damages alone.

29.In the result, the second appeal is partly allowed in the following terms:-

"The decree and judgement of the trial Court which was confirmed by the First Appellate Court is hereby set aside and the suit is partly decreed thereby directing the defendant to vacate and hand over vacant possession of the suit property to the first plaintiff, within a period of six months from today and in the event, the defendant fails to hand over vacant possession of the suit property to the first plaintiff within six months from today, the defendant shall pay a sum of Rs.3,000/- per month towards damages for the use and occupation of the suit property from the date of expiry of six months time granted herein and till the date of handing over possession to the first plaintiff. So far as the damages claimed by the plaintiffs for the past, for the use and occupation of the suit property till the date of the suit, the suit is dismissed. No costs."

Sd/-
Deputy Registrar

True Copy

Sub Assistant Registrar

To

1.The V Additional Judge,
City Civil Judge,
Chennai.

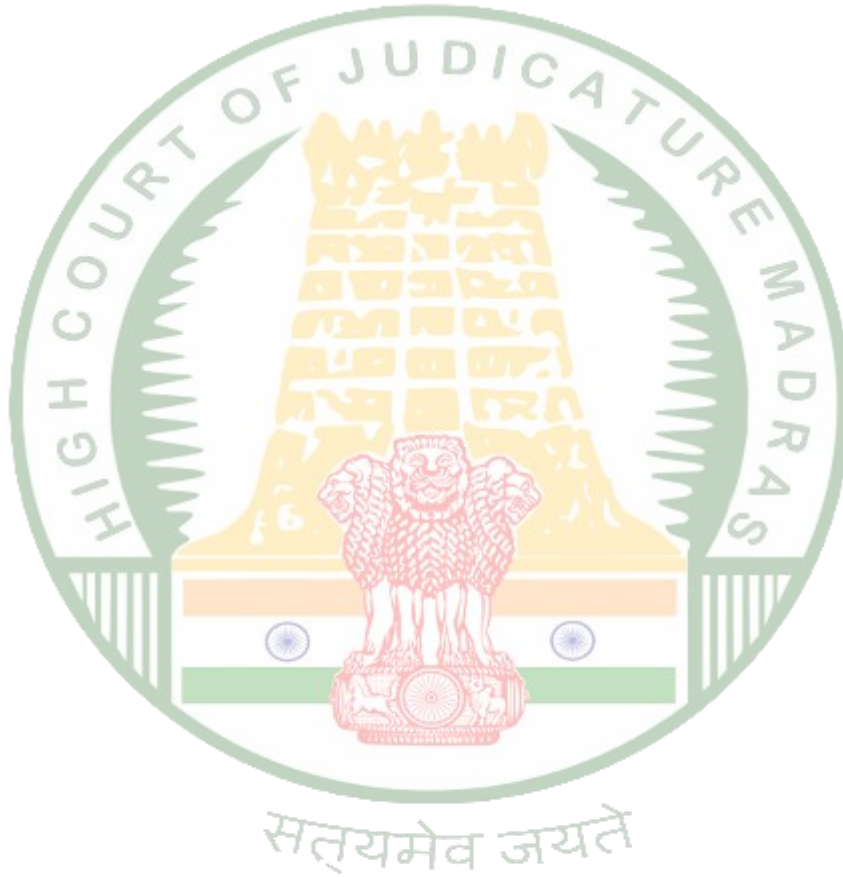
2.The XV Assistant Judge,
City Civil Court,
Chennai.

+1 cc to Mr.V.Raghavachari, Advocate,SR.6432

+1 cc to Mr.S.Seshachalam, Advocate,sR.6890.

tej(co)
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