

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.03.2015

CORAM

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

Second Appeal No.94 of 2011 and
M.P.No.1 of 2011

Pakkirisamy ... Appellant
Vs.

Palanivel ... Respondent

Prayer:- This second appeal has been filed under Section 100 C.P.C., against the judgement and decree of the learned Principal Judge, Mayiladuthurai dated 14.06.2010 made in A.S.No.35 of 2009 reversing the judgement and decree of the learned Principal District Munsif, Mayiladuthurai dated 19.03.2009 made in O.S.No.19 of 2007.

For Appellants : Mr. S.Sounthar

For Respondent : No Appearance

JUDGEMENT

The plaintiff in O.S.No.19 of 2007 on the file of the learned Principal District Munsif, Mayiladuthurai, is the appellant herein.

The respondent herein is the defendant in the suit. The said suit was filed for permanent injunction to restrain the defendant from in any manner interfering with his peaceful possession and enjoyment of the suit property. By decree and judgement dated 19.03.2009, the trial Court decreed the suit as prayed for. As against the same, the respondent/defendant filed an appeal in A.S.No.35 of 2009 on the file of the learned Principal Subordinate Judge, Mayiladuthurai. By decree and judgement dated 14.06.2010, the First Appellate Court allowed the appeal thereby setting aside the decree and judgement of the trial Court and dismissed the suit. As against the same, the appellant/plaintiff is before this Court with this second appeal.

2.This second appeal has come up today for admission. I have heard the learned counsel for the appellant and I have also perused the records carefully.

3.This Court on 14.02.2011, ordered notice of motion. Despite service of notice, the respondent has not made appearance before this Court. Today also, there is no representation for the respondent. Hence, the respondent is set *exparte*.

4.The case of the plaintiff is as follows:-

The suit property was originally owned by one Mrs.Chinna Ponnu, who is a permanent resident of Singapore. Originally, she had let out the suit property for the purpose of cultivation to one Mr.Kathalingam. On 07.09.2001, Mrs.Chinna Ponnu was in need of money and therefore, she mortgaged the suit property for a sum of Rs.4,25,000/- and executed an unregistered mortgage deed in favour of the plaintiff. Mrs.Chinna Ponnu had failed to repay the said amount and to redeem the mortgage deed. Originally, the title deeds in the name of Mrs.Chinna Ponnu were all handed over to the plaintiff. Since, the mortgage was not redeemed, the plaintiff claims that he has become the absolute owner of the suit property and in such capacity, he further claims that he has been in possession and enjoyment of the suit property.

5.The respondent/defendant, in his written statement has stated that, he is the brother of the plaintiff. He states that he was in possession and enjoyment of the suit property and he has also been cultivating the suit property. He has further stated that

the plaintiff at times looked mentally ill and on those occasions, he left the house. On one occasion, he had taken the original title deeds from the house of the defendant. Thus, according to the defendant, the plaintiff is not in possession of the suit property and the further claim of the plaintiff that he is the absolute owner of the property on account of the money to be paid by Mrs.Chinna Ponnu to the plaintiff is false.

6.Based on the above pleadings, the trial Court framed appropriate issues. On the side of the plaintiff, three witnesses were examined including the plaintiff and on the side of the defendant, three witnesses were examined including the defendant. As many as 11 documents were exhibited on the side of the plaintiff and as many as 2 documents were exhibited on the side of the defendant.

7.Having considered all the above evidences, the trial Court decreed the suit, which was reversed by the First Appellate Court. That is how the appellant is before this Court with this second appeal.

8.The learned counsel for the appellant would submit that

on appreciating the documentary as well as oral evidences filed by the plaintiff, the trial Court found that the plaintiff is in possession of the property whereas, without properly appreciating these evidences, the First Appellate Court has reversed the decree and judgement of the trial Court. In my considered opinion, this contention cannot be accepted.

9.A perusal of the judgement of the First Appellate Court would go to show that the First Appellate Court has reversed the decree and judgement of the trial Court for sound reasons. First of all, though, it is alleged that the plaintiff paid Rs.4,25,000/- on 07.09.2001 and obtained an unregistered mortgage deed in his favour, the said document has not been produced in evidence at all. Absolutely, there is no explanation for the same. In the absence of the production of the primary evidence, namely, the document itself, any amount of oral evidence regarding the contents of the said document cannot be admitted and the same cannot be acted upon. Thus, payment of Rs.4,25,000/- and taking possession from Mrs.Chinna Ponnu has not been proved by the plaintiff at all.

10.Further, the plaintiff claims that since, Mrs.Chinna

Ponnu has not repaid the amount, the plaintiff has become the absolute owner. It is not understandable as to how the title would have been transferred to the plaintiff on the mere failure of Mrs.Chinna Ponnu to repay the mortgage amount and this has also not been clarified by the plaintiff. Since, an unregistered mortgage deed could be admitted in evidence for collateral purpose, to know the nature of the possession, the plaintiff has to prove the document in evidence. But, he has not done so.

11. So far as the possession is concerned, except the oral evidence, there is no other documentary evidence available for the plaintiff to prove his possession. Neither chitta nor any other revenue records have been produced to show that the plaintiff has been in possession and enjoyment of the suit property. The oral evidence of P.Ws.1 to 3 alone have been relied by the plaintiff to prove his case. The First Appellate Court has rejected the said oral evidences and has held that the plaintiff has not proved his case. This is essentially a question of fact and there is no question of law involved in this second appeal at all. Thus, I do not find any reason to interfere with the findings of the First Appellate Court.

12.The learned counsel for the appellant would submit that the defendant has not pleaded in clear terms as to how he has come to possess the suit property and under what right he claims possession. It is true that the defendant has not specifically pleaded as to how he is in possession of the suit property, and how his possession is legal. Further, he has also not produced any document to show that he is in possession of the property. But, at the same time, for the failure of the defendant to prove his case, decree cannot be granted in favour of the plaintiff because, the plaintiff has to either stand or fall on his own legs and he cannot try to take advantage of the loopholes and short comings of the case of the defendant. In other words, simply because, the defendant has not specifically pleaded as to how he is in the alleged possession of the suit property and simply because he has not proved that he is in possession of the suit property, this Court cannot decree the suit in favour of the plaintiff as prayed for because, one who prays for decree has to prove his case.

13.Above all, as I have already pointed out, absolutely,

there is no substantial question of law warranting admission of this second appeal. Further, I do not find any infirmity in the decree and judgement of the First Appellate Court.

14. In the result, the second appeal fails and accordingly, the same is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

13.03.2015

jbm

Index : Yes/No

To

1. The Principal Judge,
Mayiladuthurai.

2. Principal District Munsif,
Mayiladuthurai.

S.NAGAMUTHU,J.
jbm

Second Appeal No.94 of 2011

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