

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE:5.2.2016

CORAM

THE HONOURABLE MR.JUSTICE T. MATHIVANAN

S.A.No.1899 of 1991

1.B.Selvam

2.S.Pushpa

....Appellants/Defendants

Vs.

1.Logambal (Deceased)

2.P.R.Ravi Sankar

3.S.Kalavathi

4.P.R.Sridhar

5.R.Latha

6.S.Sujatha

7.R.Ananthapadmanabhan

...Respondents/Plaintiffs

(Respondents 2 to 7 were impleaded as per order of this Court, dated 1.10.2015 and made in C.M.P.NO.394 of 2015).

Prayer : Second appeal is filed against the judgment and decree, dated 12.6.1991 and made in A.S.No.60 of 1990 on the file of the Court of the Subordinate Judge, Poonamallee confirming the judgment and decree of the court of the District Munsif, Poonamallee dated 30.4.1990 and made in O.S.No.2226 of 1985.

For Appellants : M/s.S.V.Jayaraman, Senior Counsel
for M/s.T.Thiagarajan.

For Respondents No.2 to 7 : Mr.T.Srinivasa Raghavan
for M/s.Srinivasa Raghavan Associates.

JUDGMENT

This memorandum of second appeal has been directed against the judgment and decree, dated 12.6.1991 and made in the appeal in A.S.No.60 of 1990 on the file of the learned Subordinate Judge, Poonamallee, confirming the judgment and decree, dated 30.4.1990 and made in the suit in O.S.No.2226 of 1985 on the file of the learned District Munsif, Poonamallee.

2.The appellants herein are the defendants in the suit whereas the first respondent (since deceased) is the plaintiff. The deceased first respondent had filed the above suit in O.S.No.2226 of 1985 as against the appellants 1 and 2 seeking a direction to the appellants/defendants to vacate and deliver vacant possession of the 'B' Schedule property to her and for granting permanent injunction as against the appellants/defendants from alienating or removing her movables specified under 'C' Schedule, which are lying in the 'A' Schedule property.

3.This suit was contested by the appellants/defendants by filing their written statement denying the averments of the plaint.

3a.After formulating necessary issues and on evaluating the evidences both oral and documentary, the learned District Munsif, Poonamallee, had proceeded to decree the suit as prayed for.

4.Having been aggrieved by the judgment and decree, dated 30.4.1990, the appellants/defendants had preferred an appeal in A.S.No.60 of 1990 on the file of the learned Subordinate Judge, Poonamallee.

5.After hearing both sides, the first appellate Court had dismissed the appeal on 12.6.1991 confirming the Judgment and decree of the Trial Court against which, present second appeal is filed by the defendants.

6.It is revealed from the records that on 5.12.2003 this appeal was disposed of by this Court on the ground that since the first respondent/plaintiff Logambal had died, no lis was in existence to decide the right of the appellants over the property of Logambal in the present suit.

7.They have filed a petition in C.M.P.NO.120 of 2015 for setting aside the order of dismissal of the appeal, dated 5.12.2013 as well as the order passed in C.M.P.No.13562 of 2003 and to restore the second appeal to its original file.

8.The petition in C.M.P.No.120 of 2015 was allowed on 19.3.2015 and thereby this second appeal was restored to its original file along with the petition in C.M.P.No.13562 of 2003. Subsequently, this petition in C.M.P.No.13562 of 2003 was dismissed as not pressed.

9.Further, it is divulged that the first appellant Selvam had filed a petition in M.P.No.13562 of 2003 under Order 22 Rule 1A of the Code of Civil Procedure to transpose him in the second appeal as respondent No.2. He had also

stated in the affidavit filed in support of the petition that he was informed that the first respondent/plaintiff Logambal had expired few months ago and he had confirmed such information only in the month of March 2003.

10.The respondents 2 to 7 herein, who are said to be the children and legal representatives of one Saraswathiammal, w/o. One Ramanujalu Reddiar, who is said to have purchased an extent of 2482 sq.ft. of the land comprised in S.No.338 at 17/6 Reddiarpalayam, Tambaram West, Chennai, from the first respondent/plaintiff for valuable consideration.

11.At a later stage another petition in C.M.P.No.394 of 2015 was filed by the respondents 2 to 7 seeking the permission of the court to implead themselves in the second appeal as the legal representatives of the deceased first respondent/plaintiff Logambal and the same was allowed on 1.10.2015.

12.In view of the order passed by this Court, the petitioners in C.M.P.NO.394 of 2015 got themselves impleaded in the second appeal as the respondents 2 to 7. They have stated that they are the legal representatives of the estate of the deceased first respondent/plaintiff Logambal.

13.Heard Mr.S.V.Jayaraman, learned Senior Counsel appearing on behalf of M/s.T.Thiagarajan, who is on record for the appellants and Mr.T. Srinivasa Raghavan, learned counsel appearing for M/s.Raghavan Associates, who is on record for the respondents 2 to 7.

14.This second appeal came to be admitted on the following substantial questions of law:-

a. Whether the respondent who claimed that she gave licence to the appellants to stay in the suit property, being the 'B' Schedule property proved the licence in the absence of which the suit must be dismissed?

b. Whether the first appellant is the adopted son of Mr.Radha Achari and the respondent, which is evidenced by the wedding card of the appellants, Ex.B-15 confirmed by the evidence of the first appellant and that of the respondent, and hence apart from being the son of Mr.Balu Achari, being the adopted son of Mr.Radha Achari, whether the first appellant is entitled for half share of the suit properties as per the provisions of the Hindu Succession Act, 1956? Whether the first appellant and the

respondent are entitled for equal shares in the suit properties?

15.Mr.S.V. Jayaraman, learned Senior Counsel has confined his arguments only on the first substantial question of law. In so far as the second substantial question of law is concerned, he has submitted that he had not pressed much on that issue. This Court, therefore finds that it may be better to confine the discussion only in respect of the first substantial question of law.

16.As it is seen from the plaint two properties have been described in the Schedule.

17.'A' Schedule of property has been delineated as under:-

"House with brick built wall and tiled roofing in the plot of land in Survey Number 338 of Tambaram, in the premises bearing Door No.6, Third Street, Reddiarpalayam, West Tambaram, within the Sub-Registration District of Tambaram, Saidapet Taluk."

18.The property under 'B' Schedule has been described as under:-

"One Room and a hall with brick-built wall and tiled roofing in the eastern portion of the 'A' Schedule property in Survey Number : 338 in the premises bearing door No.6, Third Street, Reddiarpalayam, West Tambaram, within the Sub-Registration District of Tambaram, Saidapet Taluk, bounded on the North."

19.It is an admitted fact that the ground in which the house had been built-up has been classified as 'Gramanatham' bearing S.No.338 situated at Tambaram Village.

20.It is also an admitted fact that the property described under 'B' Schedule forms part of 'A' Schedule property.

21.According to the deceased first respondent/plaintiff the 'A' Schedule property was originally belonged to her husband Radha Achari. She and her husband were living in the said house. Her husband Radha Achari had died 1 ½ years prior to the filing of the suit. Since she is the only legal heir and there is no issue, she had inherited this property. The first appellant/first defendant is the son of one Balu Achari, who is none other than the brother of Radha

Achari, who is the husband of the deceased first respondent/plaintiff. The second appellant is the wife of the first appellant.

22.It is the specific case of the deceased first respondent/plaintiff at the time of the death of her husband Radha Achari, the appellants/defendants came to her house, viz., 'A' Schedule property in October 1983 for the purpose of helping her physically in funeral and also in the performance of obsequies of the deceased Radha Achari.

23.The appellants/defendants had cooperated with the deceased first respondent/plaintiff in performing the obsequies in the plaint 'A' Schedule house and at that time, she had permitted the appellants/defendants in October 1983 to reside in the eastern portion of the 'A' Schedule property, which has been described as 'B' Schedule property.

24.After the completion of the obsequies and other ceremonies when the deceased first respondent/plaintiff had requested the appellants/defendants to go back to their house at 'Sunnambu Kalvai', they had refused to vacate the 'B' Schedule property.

25.Therefore, according to the deceased first respondent/plaintiff, the 'B' Schedule property was occupied by the appellants/defendants with her permission. Thereafter, she had issued a lawyer's notice on 30.11.1984 to the appellants/defendants to vacate the 'B' Schedule property after revoking the licence granted to them by the end of 31.12.1984. But they did not comply with the demand made by the deceased first respondent/plaintiff.

26.Besides this, her husband had left some movable properties like windows, doors, wooden rafters, wooden table, wooden charis, one bicycle etc., which have been described under the 'C' Schedule property.

27.In this regard, the deceased first respondent/plaintiff would state that the appellants/defendants were negotiating for the sale of the said movables and therefore, she had come forward with the above said suit seeking a decree directing the appellants/defendants to vacate and deliver the vacant possession of the 'B' Schedule property and also for permanent injunction against the appellants/defendants from alienating or removing the plaint 'C' Schedule property. But what the appellants/defendants would contend is that the properties described in the plaint was the joint property of Radha Achari and his brother Balu Achari, who is the father of the first appellant/first defendant.

28. According to the Appellants/defendants, the said Radha Achari (husband of the first respondent/plaintiff) and Balu Achari (father of the first appellant/first defendant) had been in joint possession and enjoyment of the suit property and as such both were entitled to the suit property equally.

29. He has also specifically contended that while the deceased first respondent/plaintiff is entitled to $\frac{1}{2}$ share, he is entitled to get the remaining $\frac{1}{2}$ share which was succeeded by him from his father Balu Achari. Therefore, he claims $\frac{1}{2}$ share in the suit property.

30. As per the case of the appellants/defendants, there had been a mediation in the village wherein the plaintiff was directed to have a division of the suit property into two equal shares and one such share was to be allotted to the first appellant/first defendant as the suit property was the joint property. But the deceased first respondent/plaintiff was reluctant to give his legitimate share in the suit property and further he would state that he is also entitled to get $\frac{1}{2}$ share in the movables described under the 'C' Schedule property.

31. Based on the pleadings of the parties concerned, the trial Court has formulated as nearly as seven issues for the better adjudication of the suit.

32. The deceased first respondent/plaintiff had examined herself as P.W.1 and during the course of her examination 31 documents were marked as Exs.A1 to A.31. On the other hand, the first appellant/first defendant Selvam had examined himself as D.W.1 and besides him two more witnesses were examined as D.Ws.2 and 3. During the course of their examination Exs.B1 to B15 were marked.

33. On appreciation of the evidences both oral and documentary, the trial Court had proceeded to grant relief in favour of the first respondent/plaintiff rejecting the contentions of the appellants/defendants.

34. The first appellate Court has also confirmed the Judgment of the trial Court after dismissing the appeal filed by the appellants.

35. Having been lost their case before the trial Court as well as the first appellate Court, the appellants stand before this Court with this second appeal.

36.It is obvious to note here that the Courts below have given concurrent findings directing the appellants to vacate the 'B' Schedule property and surrender vacant possession to the deceased first respondent/plaintiff.

37.Unfortunately, both the trial Court as well as the first appellate Court has not given any time limit to the appellants to vacate and hand over the vacant possession of the 'B' Schedule property to the first respondent/plaintiff.

38.With reference to the concurrent findings given by the courts below, this Court would like to have reference to the decision of the Apex Court in Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar and others (AIR 1999 SC 2213).

39.In this case, it has been specifically observed by a Division Bench of the Apex Court that the second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under this Section. The substantial question of law has to be distinguished from a substantial question of fact.

40.While speaking on behalf of the Division Bench, the Hon'ble Mr. Justice R.P.Sethi, in paragraph No.4 has observed as under:-

"4. It has been noticed time and again that without insisting for the statement of such substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Courts have been issuing notices and generally deciding the second appeals without adhering to the procedure prescribed under Section 100, Code of Civil Procedure, It has further been found in a number of cases that no efforts are made to distinguish; between a question of law and a substantial question of law. In exercise of the powers under this Section the findings of fact of the 1st appellate court are found to have been disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the Section must be strictly fulfilled before a second appeal can be maintained and no court has the power to add to or enlarge those grounds. The second appeal : cannot be decided on merely equitable grounds. The concurrent findings of

facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under this Section. The substantial question of law has to be distinguished from a substantial question of fact This Court in Sir Chunilal V. Mehta and Sons Ltd. v. Century Spinning and Manufacturing Co. Ltd, AIR (1962) SC 1314 held that :-

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views, If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

41.As afore stated, Mr. S.V. Jayaraman, learned Senior Counsel has not pressed the second substantial question of law. In so far as the first question of law is concerned, he has submitted that the plea of 'permissive occupation' taken by the first respondent/plaintiff was not satisfactorily proved and that the appellants/defendants had proved their part that they were having $\frac{1}{2}$ share in the properties specified in the plaint Schedule and that the first appellant/first defendant was the joint owner of the property as he had derived his father's $\frac{1}{2}$ share after his demise.

42.This Court has perused the judgment of the trial Court as well as the first appellate Court. Though as nearly as seven issues have been formulated by the trial Court for the better adjudication of the suit, the trial Court had mainly taken the issues Nos.1, 4 and 5 to decide the rights of parties over the suit property.

43.It is more significant to note here that the house site has been classified as 'Grama natham'. This has not been denied by the appellants/defendants. Exhibits A1 to A9 are the electricity receipts for having paid the electricity charges.

44.As observed by the trial Court, the above said receipts ranging from Exs.A1 to A9 have taken origin from

the year 1969 onwards. The house tax receipts have been marked as Exs.A17 to A25. It appears that these receipts were issued from the year 1974. Ex.A.28 is the letter addressed to the first respondent/plaintiff by the Tahsildar to produce some more documents for changing the assessment of house tax from the name of her husband to her name.

45.The Trial Court has fully satisfied that the suit property originally belonged to Radha Achari, who is none other than the husband of the first respondent/plaintiff. After his demise, the plaintiff had inherited the property. Though the defendants have marked as nearly as 15 documents, the trial Court, after scrutinising the evidences, has come to the conclusion that the appellants/defendants had never proved their claim of joint possession.

46.Mr.S.V. Jayaraman, has mainly based his arguments on Ex.B.4. Ex.B.4 is the adangal relating to Fasli year 1373. Fasli Calendar or Fasli era, which is an Arabic word imported to Urdu language (As per Wikipedia, the free encyclopedia). Fasli year means a period of 12 months from July to June. To find out the Gregorian Calendar year, 590 to be added with the Fasli year. Accordingly, the corresponding Gregorian year for Fasli year 1410 was from July 2000-June 2001.

47.Likewise, for Fasli year 1373, the corresponding English Calendar year is 1963, (i.e., $1373 + 590 = 1963$).

48.In this connection, the trial Court has observed that as per the evidence of D.W.1 his father Balu Achari had absconded or unheard for about 33 years. Even though Ex.B4 appears to have stood in the name of Balu Achari, it is highly suspicious to find the name of the absconding person for about 33 years in Ex.B.4 Adangal.

49.Further, no satisfactory evidence is adduced by the appellants/defendants to prove that the suit 'A' Schedule house was put up with the funds provided by his father Balu Achari.

50.On the other hand, in the notice, dated 30.11.1984, which was marked as Ex.A.29 sent to the appellants/defendants, it is stated that they were given permission to occupy the 'B' Schedule property and that they were put on notice to vacate and surrender the vacant possession of the 'B' Schedule property.

51.As observed by the learned trial Judge, the appellants/defendants had not issued any reply to the said notice and therefore, it is presumed that they were given

licence to reside in the 'B' Schedule property and since the licence was revoked by the notice under Ex.A.29, they were bound to vacate and surrender vacant possession of the 'B' Schedule property.

52.The first appellate court has also mainly dealt with Ex.B.4, which is the true copy of the adangal.

53.As observed by the first appellate court, in Ex.B.4 Adangal, it is stated as Chengai Anna District, Saidapet Taluk. The first appellate court has gone deep in this connection and observed that the Chengai Anna District had been created in the recent past. In the year 1963 it should have been stated in Ex.B4 as Chengalpattu District. Since it has been stated as Chengai Anna District, Saidapet Taluk, the first appellate court has also disbelieved this document.

54.Based on the evidence of P.W.1 as well as the documentary evidences marked on her behalf, this Court has endorsed the concurrent findings of the courts below by placing the following answer to the first substantial question of law.

"It is proved that the deceased first respondent/plaintiff had given licence to the appellants/defendants to stay in the suit 'B' Schedule property and, as the respondents 2 to 7 are the legal heirs of one Saraswathiammal as she being the purchaser of an extent of therefore, the appellants/defendants are liable to vacate and surrender vacant possession of 'B' Schedule property to the respondents within a period of one month from the date of receipt of a copy of this Judgment 2482 sq.ft. comprised in S.No.338 from the deceased first respondent/plaintiff."

In the result, the second appeal is dismissed confirming the judgment and decree of the lower appellate Court, dated 12.6.1991 and made in A.S.No.60 of 1990. Considering the relationship of the parties, there is no order as to costs. One month time is given for handing over the vacant possession.

rnb

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

To

1. The Subordinate Judge, Poonamallee.

2. The District Munsif, Poonamallee.

Copy to:

The Section Officer,
V.R.Section,
High Court, Madras

+ 1 cc to Mr.T.Thiagarajan,Advocate, SR 7898

+ 1 cc to M/s.T.Srinviassa Raghavan,Advocate, SR7523

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S.A.No.1899 of 1991



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