



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: **18.11.2016**

C O R A M

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THE HONOURABLE MR. JUSTICE S.S.SUNDAR

Second Appeal (MD) No.513 of 2011

Mohamed Ali : Appellant/Appellant/Defendant

Vs.

Mustafa : Respondent/Respondent/Plaintiff

Prayer: - Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908, against the Judgment and Decree in A.S.No.80 of 2007 dated 18.12.2009 on the file of the sub-Court, Sivagangai, confirming the Judgment and Decree in O.S.No.25 of 2002 dated 31.08.2005 on the file of the District Munsif Court -cum- Judicial Magistrate, Elayangudi.

For Appellant : Mr.A.Sivaji

For Respondent : Mr.S.Srinivasa Raghavan

J U D G M E N T

The defendant in the suit in O.S.No.25 of 2002 on the file of the District Munsif Court, Ilayankudi, is the appellant in the above second appeal.

2. The respondent/plaintiff filed a suit in O.S.No.25 of 2002 for declaration and consequential permanent injunction in respect of an extent of 7 cents in Survey No.108/5 in Thuraiyan Pachherri Village, Ilayankudi Taluk, Sivagangai District. The suit property has been described with reference to specific boundaries.

3. The respondent/plaintiff claimed title on the basis of two sale deeds dated 16.06.1888 and 11.09.1890 obtained by his grandfather one Beer Mohamed. The appellant has not pleaded title on the basis of any title document or title accrued to any of his ancestor.

4. The case of the defendant as could be gathered from the written statement filed by the appellant, is regarding the discrepancies in the extent found in Survey Nos.108/5 and 108/15. Apart from contending that the sale deed relied upon by the plaintiff do not relate to the suit properties, the appellant has



no other defence on the basis of any independent title set up by him.

5. The trial Court decreed the suit and the appellate Court confirmed the same in the appeal filed by the appellant in A.S.No.80 of 2007 on the file of sub-Court, Sivagangai.

6. Both the Courts below have concurrently found that the plaintiff has established his title on the basis of documents of title relied upon by the appellant and his continuous enjoyment. The plaintiff has also found to be in possession and enjoyment of the suit properties on the basis of documents filed by the plaintiff including the patta. One of the issues that was raised by the appellant, is that the suit is barred by Order 2 Rule 2 of Code of Civil Procedure.

7. It is admitted that the plaintiff had earlier filed a suit in O.S.No.26 of 2000 in respect of the same properties and after pointing out that there were some discrepancies in the suit properties therein, he got the earlier suit withdrawn with a liberty to file a fresh suit on the same cause of action.

8. Since the present suit has been filed after getting the leave of the Court, the objections raised by the appellant, relying upon Order 2 Rule 2 of Code of Civil Procedure, have no substance.

9. The following questions of law have been raised by the appellant in the Memorandum of grounds:-

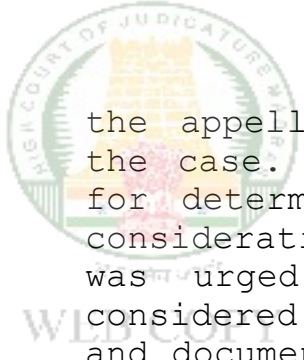
"1) Are the Courts below right in law in decreeing the suit against the defendant on the peculiar facts and circumstances of this case?

2) Has not the Lower Appellate Court committed (an error) in law in dismissing the appeal without framing the proper points for consideration as required under Order 41 Rule 31 C.P.C?

3) Is not the present suit hit by Order 2 Rule 2/ *res judicata* on account of the very same plaintiff's request for amendment of plaint was refused and then filing the present suit with leave of the Court?

4) Are the Courts below right in law in decreeing the suit on the presumption that the title deeds under Exs.A1 and 2 prove the plaintiff's claim when the revenue records do not correlate the suit property?"

10. Although, there is no substance in the first question of law and it is too vague to answer as no peculiar circumstance is pointed out. No argument was advanced by the learned Counsel for



the appellant regarding the peculiar facts and circumstances of the case. The appellate Court though has not framed the points for determination with reference to the issues, that arose for consideration, the judgment clearly reveals that every point that was urged by the appellant before the appellate Court was considered with reference to the pleadings, documents both oral and documentary. There is application of mind and the findings of the appellate Court are also based on materials and supported by reasons.

11, In these circumstances, the second question of law relying upon the provisions under Order 41 Rule 31 CPC, has no legal force.

12. The third question of law is relating to Order 2 Rule 2 CPC. As pointed out, the present suit has been filed after getting the permission of the Court in the earlier occasion. Order 2 Rule 2 CPC reads as follows:-

"2.Suit to include the whole claim:- (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) **Relinquishment of part of claim.-** Where a plaintiff omits to sue in respect of or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished."

13. Order 2 Rule 2 Code of Civil Procedure clearly shows that it has no application in this case, as it is not a case of relinquishment of claim or failure to include all the relief that the plaintiff is entitled to. The earlier suit was withdrawn with liberty to file a fresh suit on the same cause of action. Order 23 Rule 1(3) enables the Court to permit a plaintiff to withdraw the suit or part of any claim with liberty to institute a fresh suit in respect of the subject matter of suit arising out of same cause of action. Hence, the third question of law raised by the appellant also fails.

14. Having regard to the concurrent findings of the Courts below that the title deed relied upon by the plaintiff under Exs., A1 & A2 are in respect of the suit properties and that the plaintiff has produced the revenue records to show his title and enjoyment. In the case with original documents of title deeds, there is no merit in the fourth question of law and this Court has,



therefore, no other option but to dismiss the appeal.

15. Accordingly, the Second Appeal is dismissed. No costs.

Sd/-

Assistant Registrar (RTI)

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/True Copy/

Sub Assistant Registrar

gsr

To

1.The Subordinate Judge,
Sivagangai.

2.The District Munsif Court -cum- Judicial Magistrate,
Elayangudi.

+1cc to Mr.S.Srinivasa Rahavan, Advocate Sr.No. 71414

JAM/23.12.16/SS 2/4p-4c

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