

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 22.06.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

S.A.No.564 of 2014

T.Ramachandran .. Appellant/Appellant/Defendant

Versus

1. T.Jagannathan
2. R.Rajeswari
3. R.Venkatesan
4. R.Ethiraj
5. Kamalakannan

.. Respondents/Respondents/Plaintiffs

Second Appeal is filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 28.02.2012 made in A.S.No.440 of 2011 on the file of V Additional Judge, City Civil Court, Chennai, against the judgment and decree dated 23.06.2011 in O.S.No.7830 of 2006 on the file of III Assistant Judge, City Civil Court, Chennai.

For Appellants : Mr.K.V.Anantha Krishnan  
for Mr.S.Sabarish

For RR1 : Mr.H.Adaikala Arockiaraj

RR2 to 5 : given up, vide memo dated 14.03.2017

JUDGMENT

The unsuccessful defendant before the Courts below, has filed this Second Appeal, challenging the judgment and decree dated 28.02.2012 made in A.S.No.440 of 2011 on the file of the V Additional Judge, City Civil Court, Chennai, affirming the judgment and decree dated 23.06.2011 in O.S.No.7830 of 2006, on the file of the III Assistant Judge, City Civil Court, Chennai.

2. The case of the plaintiff is that the 1<sup>st</sup> plaintiff, one late T.Radhakrishnan and the defendant are brothers. The plaintiff 2 to 5 are the legal heirs of late Radhakrishnan. The first item of the suit properties consist of ground, first, second and third floors and the second item being the rear portion of item 1. One of the brothers, viz., T.Radhakrishnan was in possession of ground and 3<sup>rd</sup> floor portions and he died on 03.09.2006. After his death, his legal heirs, viz., the plaintiffs 2 to 5 were in possession and occupation of the ground and 3<sup>rd</sup> floor portions. The 1<sup>st</sup> plaintiff is in possession and occupation of the 2<sup>nd</sup> floor of the first item of the suit property and also in possession of

the rear side portion of the item-1 of the suit property. The defendant is in occupation of the 1<sup>st</sup> floor of the item 1 of the suit property. The plaintiffs alleged that when the defendant started to give problem to the plaintiffs, on 02.08.2004, the deceased T.Radhakrishnan issued lawyer notice to the defendant, calling upon the defendant to come for a partition. The defendant, inspite of the lawyer notice, was repeatedly giving trouble to the plaintiffs, with the sole intention to grab the entire property from the plaintiffs. Hence, the plaintiffs have filed the above suit.

3. The defendant averred that the 1<sup>st</sup> plaintiff alone is staying in the suit property and the plaintiffs 2 to 5 are not residing in the suit properties. The plaintiffs and the defendant possess nearly 15 items of properties as HUF and partition in respect of the suit properties alone is claimed by the plaintiffs, which is merely a partial partition, which cannot be permitted. The ground and 3<sup>rd</sup> floors of the item 1 of the suit property are kept locked and under the possession of the defendant. The defendant had permitted the 1<sup>st</sup> plaintiff to remain in the 2<sup>nd</sup> floor. The entire properties belong to the family, which have to be divided by metes and bounds. The taxes and charges of the suit properties are being paid by all. Unless and until partition is made for the entire properties belonging to the joint family, a claim to a particular portion will not arise and the plaintiffs, as members of the Hindu coparcenary family, cannot claim separate and absolute ownership in respect of any joint family property. The defendant is entitled to 1/3 share in the properties kept in the hands of the plaintiffs, apart from the ancestral properties, which were purchased by them utilising the joint family funds. Hence the suit may be dismissed.

4. Before the trial court, on the side of the plaintiff, the first plaintiff examined himself as PW1 and Exs.A1 to A24 were marked. On the side of the defendant, the defendant was examined as DW1 and Exs.B1 to B9 were marked.

5. On a consideration of the above pleadings and oral and documentary evidence, the trial court decreed the suit, against which, the defendant has preferred the First Appeal before the first appellate court, which dismissed the appeal confirming the decree of the trial Court, against which, the present Second Appeal appeal is filed by the defendant.

6. The Second Appeal was not yet admitted and only notice was ordered on 27.01.2017. Now, the Second Appeal is taken up for final disposal and is being disposed of by this judgment.

7. The defendant is the appellant and the respondents are the plaintiffs. The brother of the appellant herein has filed the present suit for permanent injunction restraining the appellant/defendant from interfering with the peaceful

enjoyment and possession of the suit properties.

8. According to the appellant/defendant, he is in enjoyment of the suit properties and is in joint possession of the same. He contended that the suit for injunction against the co-sharers is not maintainable. But during the pendency of the suit, there was partition among the brothers in respect of the suit properties and the the appellant/defendant is in possession of the first floor of the first item of the suit properties. On the basis of the partition in respect of the suit properties, the same was effected among the brothers based on the undertaking given by the appellant/defendant that he will hand over the possession to the respondents/plaintiffs within 6 months after the title deed is given, and based on the said undertaking, the suit was decreed.

9. The partition was made after the suit was filed, and the said partition was effected in 2008 after the suit was filed. The partition was marked as Ex.A21 and the undertaking given by the defendant was marked as Ex.A22. According to the appellant/defendant, the said exhibits would form the basis of the decree granting relief as sought for by the plaintiffs and in paragraph 14, the trial court observed as follows:

"The defendant participating himself in the partition is estopped from saying that the partition has no effect. The remedy available to the defendant is that to take steps to get the partition deed in respect of his properties, the partition is marked as Ex.A21, the suit property in whole was allotted to the share of the plaintiff's and by the undertaking given by the defendant is marked as Ex.A22, in which the defendant had agreed to vacate from the suit property and to hand over the vacant possession to the plaintiffs within 6 months from the date of partition. Hence, the defendant without vacating and handing over the suit premises to the plaintiffs is interfering with his peaceful possession and enjoyment of the suit property. Hence, the plaintiffs are entitled to the relief of permanent injunction as prayed for. Accordingly, these issues are answered."

10. Aggrieved by the judgment and decree of the trial Court, the defendant filed appeal is A.S.No.440 of 2011 and the lower appellate Court, while recording the undertaking and the partition deed, held that the defendant had not settled any possession and he is not entitled for injunction. Learned counsel for the appellant/defendant submitted that admittedly, he has not sought for injunction and he was impleaded as defendant in the suit. The observation made by the Courts below that the plaintiffs are entitled to injunction and that the appellant should not be protected in

view of the partition that had taken place among the brothers, is totally made on non-application of mind and that the judgment and decree of the Courts below have to be interfered with.

11. In reply, the learned counsel for the respondents/plaintiffs made a sharp and crisp submission, contending that, in view of the decision of the Apex Court reported in 2008 (4) SCC 791 (Tanusree Basu Vs. Ishani Prasad Basu), the Court is empowered to grant injunction in respect of the co-sharers. That apart, after partition among the brothers, the question of co-sharer does not arise. It is lastly argued that in terms of Exs.A21 and A22 mentioned supra, particularly when the suit for possession in O.S.No.4792 of 2010 on the file of the XVIII Assistant City Civil Court, is pending and that even though the appellant/defendant is in possession of the first floor, in terms of partition, the plaintiffs are entitled for their respective shares, which had been denied to them.

12. Taking note of the fact that the lower appellate court has granted relief, when the connected suit in O.S.No.4792 of 2010 is pending with regard to the possession of the property based on the partition deed and the undertaking filed Ex.A21 and A22 respectively, this Court leaves it open to both the parties to raise all the issues in the said suit (possession suit) which is pending, and hereby interferes with the concurrent findings of the Courts below and grant relief in favour of the defendant, on the basis of the merits of the matter. The pendency of the Second Appeal all along shall not be quoted against the parties, if the issues are raised by them in the pending proceedings. Since the findings of the Courts below are erroneous on the merits of the matter, this Court interferes with the impugned judgments and decrees of the Courts below.

13. The concurrent findings of the Courts below do not warrant any interference by this Court under Section 100 CPC. It is settled law from a catena of decisions of the Supreme Court and this Court that the findings of facts concurrently recorded by the trial court, as also by the lower appellate court, could not be legally upset by this Court, sitting in Second Appeal under Section 100 CPC, unless it is shown that the findings are perverse, being based on no evidence or that on the evidence on record, no reasonable person could come to that conclusion. Further, the scope for interference with the concurrent findings of fact, while exercising jurisdiction under Section 100 CPC, is very limited, and re-appreciation of evidence is not permissible, and if the trial court and the first appellate court misdirected themselves in appreciating the question of law or placed the onus on the wrong party, certainly, there is a scope for interference under Section 100 CPC. This Court finds perversity in the concurrent findings of both the Courts below, and hence, this Court is interfering

with the concurrent findings of both the Courts below.

14. Accordingly, the judgments and decrees of the Courts below are set aside, and the appeal is allowed, leaving it open to the parties to raise all the issues in the said suit pending before the City Civil Court which has to be decided one way or other, though this Court confirms the findings with regard to the aspect of the possession. No costs.

-s/d-  
Assistant Registrar(CS-II)

True Copy

Sub-Assistant Registrar

pvs

To

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

2. The III Assistant Judge  
City Civil Court, Chennai

+1 CC to Mr.H. Aadaikala Arockiaraj, Advocate sr 44156.

S.A.No.564 of 2014

GJ(CO)  
sp(10/08/2017)

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