

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.07.2017

CORAM :

THE HONOURABLE MR.JUSTICE D. KRISHNAKUMAR

Second Appeal No. 307 of 2015

and

M.P. No.1 of 2015 & C.M.P Nos. 575 & 576 of 2016

1. Sellammal
2. Santhi .. Appellants/Respondent/Plaintiff

Vs.

1. Shanmugam
2. Malathy
3. Manoharan ... Respondents/Appellant/Defendant

PRAYER : This Appeal is filed under Section 100 C.P.C., against the decree and Judgment dated 30.01.2015, made in A.S.No. 39 of 2014 on the file of the Additional Subordinate Judge, Namakkal reversing the Judgment and Decree dated 03.04.2014 passed in O.S.No. 172/2011 on the file of the District Munsif cum Judicial Magistrate Court, Paramathi.

For Appellants : Mr. V.K. Vijayaragavan
For Respondents : Mr. N. Manoharan for R1 to R3

J U D G M E N T

This Second Appeal arises out of the Judgment and decree dated 30.01.2015, made in A.S.No. 39 of 2014 by the Additional Subordinate Judge, Namakkal, reversing the Judgment and Decree dated 03.04.2014 passed in O.S.No. 172/2011 by the District Munsif cum Judicial Magistrate Court, Paramathi.

2. Brief facts of the case is as follows :-

The appellants are the plaintiffs in the suit. The 1st appellant is the mother of the 2nd appellant and the 1st respondent is the son of the 1st appellant. The 2nd respondent is the wife of the 1st respondent and the 3rd respondent is the proposed purchaser of the suit property. The appellants/plaintiffs have filed the suit in O.S. No. 172 of 2011 before the District Munsif cum Judicial Magistrate, Paramathy, seeking for declaring the release deed dated 09.08.2006 obtained by the 1st respondent/ 1st defendant, as null and void and further to declare that the plaintiffs are entitled for 2/3 share in the

suit property and for consequential injunction restraining the defendants from in any way disturbing the peaceful possession and enjoyment of the suit property.

3. According to the plaintiffs, the suit property is situated in Nallur Village Survey No.87/1, in a total extent of 1680 sq.ft. The aforesaid suit property was purchased by one Rangasamy, the husband of the 1st plaintiff, father of the 2nd plaintiff and 1st defendant and father-in-law of the 2nd defendant, on 27.03.1991. The said Rangasamy died on 01.11.1996. Thereafter, both the plaintiffs and the 1st defendant jointly constructed a house in the said suit property. Later, the 1st and 2nd defendants, stating that they need to obtain loan from the Bank, requested the plaintiffs to execute a release deed in favour of the 1st defendant Shanmugham. Hence, the plaintiffs executed a release deed on 09.08.2006. On 10.10.2011, the 1st defendant sought the plaintiffs to vacate the property, based on the release deed dated 09.08.2006. Aggrieved by the same, the plaintiffs filed the suit, seeking the aforesaid prayer.

4. The 3rd defendant filed the written statement denying all the averments made in the suit. He further contended that the suit was conducted by Boopathyrāja, son of the 2nd plaintiff and as such the plaintiffs are not aware of the proceedings of the suit. As stated in the plaint, Boopathyrāja was the only educated person in the family and that only on 10.10.2011 they were aware of the release deed, the said Boopathyrāja is a necessary party in the suit. It is further contended that as the 1st defendant is entitled for 1/3 share in the suit property, there cannot be any injunction, against the co-owner. When the plaintiffs have admitted the execution of the release deed, they cannot seek to declare the same as null and void. Hence, prayed for dismissal of the suit.

5. The trial Court based on the pleadings framed necessary issues. During the course of trial, the 2nd plaintiff examined herself as P.W.1 along with two other witnesses and marked Exs.A1 to A19. The release deed was marked as Ex.A2. On the side of the defendants, the 1st defendant examined himself as D.W.1 and did not mark any documents. The Trial Court on consideration of the pleadings, oral and documentary evidence and relying on the document filed by the plaintiffs to prove that they are in possession of the properties, dismissed the suit, granting permanent injunction restraining the defendants from in any way disturbing the possession of the plaintiffs, except under due process of law. Aggrieved by the permanent injunction granted by the lower Appellate Court, the defendants preferred an appeal in A.S.No.39 of 2014 on the file of Additional Subordinate Judge, Namakkal. Admittedly, the plaintiffs have not preferred any appeal against the rejection

of their other reliefs.

6. The lower Appellate Court after formulating necessary points for determination found that the judgement and decree of the trial court is liable to be set aside. The lower Appellate Court has considered the document marked as Ex.A2, the release deed executed in favour of the 1st defendant/ 1st respondent, by stating that although the trial court has rejected the contention of the appellant/ plaintiff, based on the genuineness of the said document had granted the relief of permanent injunction. The lower Appellate Court has held that once the title of the property has been rejected, the prayer of the appellant/ plaintiff to grant injunction, is not proper as per law. However, the lower Appellate Court also has observed that a person who is in settled possession cannot be thrown out from the property except complying the due process of law. Considering the decision rendered by the Hon'ble Supreme Court in the case of Maria Margarida Sequeira Fernandes & Ors. vs. Erasmo Jack de sequeira, reported in (2012) 5 SCC 370, the lower Appellate Court held that the possession of the plaintiffs can be termed only as permissive possession. Therefore, the lower Appellate Court allowed the appeal filed by the defendants and consequently, dismissed the suit vide Judgment and Decree dated 30.01.2015. The plaintiffs, challenging the same, have preferred the second appeal.

7. This Court at the time of admission, on 24.04.2015, formulated the following substantial questions of law :

" Whether the Appellate Court has committed error and illegality in setting aside the decree of injunction granted to the plaintiffs by the trial Court when it found that the appellants were in possession of the suit property ? "

8. The learned counsel for the appellants herein would submit that the lower Appellate Court has wrongly interpreted the term 'permissive possession' of the appellants and there is no pleading to that effect, by the defendants/ respondents. Further, the respondents have not filed any counter claim for recovery of the suit property. Therefore, the judgment and decree passed by the court below ought to have been confirmed. Further, no opportunity was granted to the appellants to put forth their contention.

9. The learned counsel for the respondents would submit that the lower Appellate Court has considered the case of the appellants and have passed the judgment and decree on merits. The learned counsel for the respondents would submit that a mere reading of the judgment of the trial Court would clearly show that the decree has been passed without properly considering the case of the defendants. The learned counsel

also relied upon the judgement of the Hon'ble Supreme Court in the case of A. Shanmugam vs. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam rep. by its President, reported in (2012) 6 SCC 430.

10. In the present Second Appeal, the appellants have raised the substantial questions of law for the non appearance in the appeal suit. On the basis of the substantial questions of law raised by the appellants, this Court has framed the substantial question of law. The lower Appellate Court has relied upon Ex.A2 wherein it has been clearly stated that,

“ கீழ்க்கண்ட சொத்தில் எங்களுக்கோ எங்கள் முதலிய வாரிசுகளுக்கோ எவ்வித பாத்தியமும் இல்லை. கீழ்க்கண்ட சொத்தினையும் இன்றே உன் சுவாதினத்தில் விட்டு விட்டோம். பட்டாவும் உன் பெயருக்கு மாற பட்டா மாறுதல் மனுவிலும் கையொப்பம் செய்து கொடுத்து விட்டோம் ”

In view of the above lines stated in Ex.A2 release deed dated 09.08.2006, the permanent injunction granted by the trial court in favour of the appellants herein has been rejected by the lower Appellate Court. However, the lower Appellate Court has come to a conclusion that the appellants possession will be termed as ' permissive possession ' and relying upon the decision of the Hon'ble Supreme Court cited supra, has come to a conclusion that the appellants possession is only a permissive possession on the basis of the relationship between the parties.

11. In view of the above, this Court rejects the contention of the appellants and comes to a conclusion that the possession of the appellants are only permissive possession. Therefore, the question of law is answered against the appellants.

12. The Second Appeal is dismissed accordingly. It is open to the respondents 1 and 2 to work out their remedy in the light of decisions of the Hon'ble Supreme Court in the cases of Maria Margarida Sequeira Fernandes & Ors. vs. Erasmo Jack de sequeira, reported in (2012) 5 SCC 370 and A. Shanmugam vs. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam rep. by its President, reported in (2012) 6 SCC 430. (cited supra). Consequently, the connected Miscellaneous petitions are closed. No order as to costs.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

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To

1. The Additional Subordinate Judge,
Namakkal
2. The District Munsif cum
Judicial Magistrate Court, Paramathi.

+1 CC to Mr.V.K. Vijayaraghavan, Advocate sr 51687.

+1 CC to Mr.N. Manokaran, Advocate sr 51704.

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GJII (CO)
sp (27/10/2017)



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