

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.07.2017

CORAM :

THE HONOURABLE MR.JUSTICE D. KRISHNAKUMAR

Second Appeal No. 409 of 2015

and

M.P No. 1 of 2015

1. Nedunchezian
2. Murugavel .. Appellants/Defendants 1 & 2

vs.

1. Amsavalli
2. Veeramani
3. Gandhi .. Respondents 1 to 3/Plaintiffs
4. The Sub Registrar
Sub Registrar Office
Ullikkottai Village
Mannargudi Taluk
Tiruvavur District.
5. The District Collector
Collectorate
Tiruvavur District. ... 4th & 5th Respondents/
3rd & 4th Defendants

PRAYER : This Second Appeal is filed under Section 100 C.P.C., against the Judgment and decree, passed in A.S.No. 19 of 2014 dated 28.10.2014 on the file of Sub Court, Mannargudi reversing the Judgment and Decree passed in O.S.No. 163/2011 dated 22.03.2013 on the file of the District Munsif Court, Mannargudi.

For Appellants ... Mr. A.Ilango

For Respondents ... Ms. P.T.Ramadevi for R1 to R3

Mr.T.Jayaramraj for R4 & R5

Government Advocate (Civil Side)

J U D G M E N T

This Second Appeal arises out of the Judgment and decree passed in A.S.No. 19 of 2014 dated 28.10.2014 on the file of Sub Court, Mannargudi reversing the Judgment and Decree passed in O.S.No. 163/2011 dated 22.03.2013 on the file of the District Munsif Court, Mannargudi.

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

The appellants herein are defendants in the suit. The

suit properties belonged to one Ganesa Thevar. The 1st plaintiff is the wife of Ganesa Thevar and the 2nd and 3rd plaintiffs and the 1st defendant are their sons. The 2nd defendant is the son of the 1st defendant. All of them were in joint possession of the suit property. Thereafter, since the 1st appellant/ 1st defendant denied the rights of the respondents 1 to 3/ plaintiffs, the 1st plaintiff filed a suit in O.S.No.46 of 2006 before the District Munsif Court, Mannargudi for partition and allotment of 1/4th share to her. The said suit was decreed in favour of the 1st plaintiff and subsequently final decree passed. Following the orders passed in E.P. No.5/2008, the 1st plaintiff took possession of her share, in the suit property. Subsequently, when the 1st plaintiff applied for change of patta, they came to know about the settlement deed executed by the 1st appellant/ 1st defendant in favour of the 2nd appellant/ 2nd defendant. Aggrieved by the same, the respondents 1 to 3/ plaintiffs 1 to 3, filed the suit in O.S. No.163 of 2011 before the District Munsif Court, Mannargudi, for the relief of declaration to declare the settlement deed registered as Doc. No. 109/2009 dated 12.02.2009 executed by the 1st appellant/ 1st defendant, in favour of the 2nd appellant/ 2nd defendant, as null and void and not binding on the plaintiff and prayed consequent relief of mandatory injunction directing the 4th respondent/3rd defendant to delete the entries from the records. It is the case of the plaintiffs/ respondents that the suit properties are family properties and as such the 1st appellant/1st defendant has no separate right or title in the properties.

3. Denying the averments made in the suit, the appellants/ defendants 1 & 2, have filed the written statement, stating that the suit properties are self acquired properties of the 1st appellant/ 1st defendant and so he has the right to execute the settlement deed to his son, the 2nd appellant/ 2nd defendant. He had further stated that from the date of settlement deed, the 2nd defendant has been in possession and enjoyment of the suit properties.

4. The trial Court framed issues, based on the pleadings. During the course of trial, the 2nd plaintiff examined himself as P.W.1 along with two other witnesses and marked as Exs.A1 to A6. On the side of the defendants, the 1st defendant examined himself as D.W.1 and marked documents as Exh.B1 to B11. After adducing oral and documentary evidences of both sides, the court below has held against the plaintiffs, relying upon the document produced as Ex.A1, which is an endorsement made by the senior bailiff for handing over the suit properties in favour of the 1st plaintiff. No other documents have been placed before the court below, to establish the plaintiff's title over the property. Therefore, the trial Court considering the documents filed by the defendants in Ex.B3,

Ex.B4 and Ex.B7 in the suit, dismissed the claim of the plaintiffs. Challenging the said judgment and decree, the respondents 1 to 3/ plaintiffs filed an appeal suit in A.S. No.19 of 2014, before the lower Appellate Court.

5. The lower Appellate Court after formulating necessary points for determination found in the Appellate Suit, after considering the contention of both parties, allowed the appeal suit, by holding that non-production of the judgment and decree passed in O.S. No. 46 of 2006 is not fatal to the case of the plaintiffs, further considered Ex.A1, the endorsement made by the senior bailiff. On the basis of the witnesses and documents adduced by both sides, the lower Appellate Court accepted the claim of the plaintiffs and set aside the judgment and decree passed by the trial Court. Assailing the judgment and decree passed by the Appellate Court, the defendants 1 & 2 have filed the present Second Appeal before this Court.

6. This Court has admitted the Second Appeal, framing the following substantial questions of law :

" a. Is it not the suit not maintainable in law since no statutory notice under Section 80 of CPC has been issued when especially relief for mandatory injunction is sought for as against the 3rd defendant, Sub Registrar and 3rd and 4th defendants are being Public Officer/ Government consequently is it not the suit should have been dismissed ?

b. Whether the judgment of Sub-Court is correct in declaring the settlement deed document as null and void without first deciding or declaring the right and title to the property of the plaintiff based on document or derivation of title by the plaintiff and merely on the basis of Exh.A.1 delivery of possession alleged to have been given by Amin which is contrary to the evidence of plaintiff PW3 who states that the respondents 1 to 3/ plaintiffs are not in possession of the suit property?

c. Is it not the Sub-Court erred in allowing the appeal by wrongly fixing the burden of proof on the appellants/ defendants when especially the respondents 1 to 3 / plaintiffs have to prove the case as the burden of proof lies on the plaintiff under Section 101 of Indian Evidence Act ? "

7. The learned counsel for appellants herein would submit that she is not pressing the first substantial question of law framed by this Court. It is the contention of the learned counsel for the appellants that the respondents 1 to 3/ plaintiffs, have failed to prove their right and title of the suit properties, by not producing copy of the judgment and decree passed in the suit, in O.S.No.46 of 2006 passed by the District Munsif Court, Manargudi. According to the appellants/ defendants 1 & 2, after considering the oral and documentary evidences, the trial Court has held that the plaintiffs/ respondents 1 to 3, have not produced documents to prove the title of the suit property. The plaintiffs have failed to discharge the burden of proof and so no relief was granted in favour of the plaintiffs/ respondents 1 to 3. Further, the trial Court has rightly held that the plaintiffs/ respondents 1 to 3 have not filed the copy of the judgment and decree passed in O.S. No.46 of 2006 passed by the District Munsif, Manargudi. But the lower Appellate Court has erroneously held that non-production of the judgment and decree passed in O.S. No. 46 of 2006 is not a ground to dismiss the case of the plaintiffs. The learned counsel would further submit that the lower Appellate Court has not properly framed the points for determination in the Appeal suit and though the plaintiffs/ respondents 1 to 3 have not established their right and title of the property, has merely accepted the Ameen Report filed by the plaintiffs/ respondents 1 to 3 in Exh.A1, for delivery of possession in favour of the 1st plaintiff/ 1st respondent. Without considering the contention of the appellants herein/ respondents 1 & 2, the lower Appellate Court has erroneously set aside the judgment and decree passed by the trial Court.

8. The learned counsel for the respondents 1 to 3/ plaintiffs would submit that as per the judgement and decree passed in O.S. No. 46 of 2006, 1/4th share has been allotted to the 1st plaintiff in the earlier suit and the same has also been taken possession, through Ameen. Eventhough a copy of the judgment and decree has not been produced, as per the said decree, the respondents 1 to 3/ plaintiffs are entitled to get their share and therefore the judgment and decree of the earlier suit is binding on the appellants/ defendants 1 & 2. Therefore, the lower Appellate Court is right in allowing the appeal and that no interference is warranted.

9. On the basis of the substantial questions of law raised by the appellants, this Court has framed the following substantial questions of law at the time of admission :

- a) It is not the suit not maintainable in law since no statutory notice under Section 80 of CPC has been issued when especially relief for mandatory injunction is sought for as against the 3rd defendant, Sub Registrar and 3rd and 4th defendants

are being Public Officer/ Government consequently is it not the suit should have been dismissed ?

- b) Whether the judgment of Sub Court is correct in declaring the settlement deed document as null and void without first deciding or declaring the right and title to the property of the plaintiff based on document or derivation of title by the plaintiff and merely on the basis of Ex.A.1 delivery of possession alleged to have been given by Ameen which is contrary to the evidence of plaintiff PW3 who states that the respondents 1 to 3/ plaintiffs are not in possession of the suit property ?
- c) Is it not the sub court erred in allowing the appeal by wrongly fixing the burden of proof on the appellants/ defendants when especially the respondents 1 to 3/ plaintiffs have to prove the case as the burden of proof lies on the plaintiff under Section 101 of Indian Evidence Act ?

The plaintiffs have filed the suit for declaration, declaring the settlement deed dated 12.02.2009, executed by the 1st appellant /1st defendant executed in favour of the 2nd appellant/ 2nd defendant as null and void and not binding on the plaintiff and for consequent mandatory injunction directing the 4th respondent/ 3rd defendant to delete the entries from the records. Considering the pleadings, oral and documentary evidences, the trial court dismissed the suit. However, the lower Appellate Court has allowed the appeal, without considering the findings of the trial court, but merely accepting the submissions of the respondents 1 to 3/ plaintiffs and has allowed the appeal only on the basis of Ex.A1 documents. Based on the decree, passed in the previous suit in O.S. No. 46/2006, the 1st respondent/ 1st plaintiff has got 1/4th share of the suit property and as stated in the plaint, the same has taken possession, through the Ameen. The aforesaid fact is not disputed by the learned counsel for the appellants/ defendants 1 & 2. So far as the 2nd and 3rd plaintiffs, who are respondents 2 & 3 in the second appeal, have not filed any application for execution of the decree passed in the said suit. The respondents 1 to 3/ plaintiffs have not filed the copy of the judgment to decide the issues involved in the said suit. The burden of proof lies only on the plaintiffs/ respondents 1 to 3, to establish the right and title of the suit property, on the basis of the earlier judgment and decree passed by the trial court. The lower Appellate Court without deciding the said issue, merely accepting the document produced as Exh.A1, had granted the relief to the respondents 1 to 3/ plaintiffs, is erroneous and unsustainable in law. The learned counsel for the respondents also admitted that copy of the said

judgment was not produced before the court below. However, it was submitted that in the event of this Court coming to a conclusion, to provide an opportunity, the same shall be filed before the lower Appellate Court to establish their right and title of the suit property, after framing appropriate issues for determination.

10. The appellants are not pressing this Second Appeal against the first respondent. In so far as it relates to second and third respondent, judgment and decree passed by the learned Sub Judge, Mannargudi in A.S.No.19 of 2014, dated 28.10.2014 is set aside and the appeal is remanded to the lower appellate Court, to decide A.S.No.19 of 2014 in accordance with law after providing opportunities to the parties concerned and dispose the appeal as expeditiously as possible preferably within a period of six months from the date of receipt of a copy of this judgment. It is open to the parties concerned to raise all the grounds before the appellate Court. The substantial questions of law are answered accordingly.

11. In view of the above, the judgment and decree passed by the lower Appellate Court in A.S.No. 19 of 2014 dated 28.10.2014 is set aside and the Second Appeal is allowed with above terms. Consequently, the connected Miscellaneous petition is closed. No order as to costs.

Sd/-
Assistant Registrar (CS-VI)

//True Copy//

Sub Assistant Registrar

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To

1. The Sub Judge, Mannargudi.
2. The District Munsif, Mannargudi.

Copy to:

The Section Officer,
V.R. Section, High Court, Madras. (2 copies)

+1cc to Mr.A.ILANGO, Advocate, S.R.No. 53916
+1cc to Mr.P.T.RAMADEVI, Advocate, S.R.No.54660
+1cc to the Government Pleader, S.R.No. 61841

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BR (CO)
TR(07/02/2018)