

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON : 25.01.2017
PRONOUNCED ON : 27.02.2017
CORAM
THE HONOURABLE MR. JUSTICE T.RAVINDRAN
S. A.No.566 of 2011
&
M.P.No.1 of 2011

S.Anjala ... Appellant/Plaintiff
Vs.

1.Jalakandan
2.Kanniammal
3.Rajammal ... Respondents/Defendants

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and decree dated 23.07.2010 made in A.S.No.39 of 2008 on the file of the Subordinate Court, Gudiattam, reversing the Judgment and Decree dated 16.04.2008 made in O.S.No.213 of 2003 on the file of the District Munsif Court, Gudiattam.

For Appellant : Mr.N.Nithyanandam

For Respondents : Mr.T.Dhanya Kumar

JUDGMENT

Challenge in this second appeal is made by the plaintiff against the Judgment and decree dated 23.07.2010 made in A.S.No.39 of 2008 on the file of the Subordinate Court, Gudiattam, reversing the Judgment and Decree dated 16.04.2008 made in O.S.No.213 of 2003 on the file of the District Munsif Court, Gudiattam.

2.The Second Appeal is admitted and the following substantial question of law is formulated for consideration in this Second Appeal:

(a)Whether the judgment and decree of the first appellate court in dismissing the suit filed by the plaintiff are misdirected against the evidence on record and based upon the perverse findings and conclusions?

3.The suit has been laid by the plaintiff for declaration, permanent injunction and possession. The plaintiff claims title to the suit property under the Sale Deed dated 01.08.1996,

which has been marked as Ex.A1. From the evidence adduced in the matter, it is found that the entire property in S.No.1/8B of a total extent of 1.63 acres including the service connection No.48 originally belonged to one Chella Gounder and his sons had orally partitioned the above said properties in the year 1982, wherein, each of the sons had been allotted 5 cents of land in the property for constructing a house and further, in the remaining extent, 8 cents of land was left out as common in which a well, 5 HP Motor pump set and the service connection is situated and as regards the further remaining extent of 1.30 acres, Krishna Gounder was allotted 28 cents, Velu Gounder and the first defendant Jalakandan were allotted 25 cents each, the other two sons namely Margabandhu and Sadhasivam had been allotted 26 cents each. It is also found that the above said oral partition had been subsequently reduced into writing by way of a Koorchit on 26.01.1992 and the same has been marked as Ex.A6.

4.As regards the above facts, there is no dispute. Now according to the plaintiff, he had purchased the share allotted to Margabandhu and Sadhasivam in the suit survey number under Ex.A1. Thus the plaintiff claims title to the plaint schedule property. That the plaintiff has purchased the suit property under Ex.A1 is not controverted by the defendants. It is found that the trial court has found that the plaintiff has title to the suit property by virtue of Ex.A1.

5.As adverted to earlier, the plaintiff has also claimed the relief of permanent injunction and possession. Now according to the plaintiff, though he had purchased 62 cents of land described in item No.1 of the plaint schedule properties, she is in the possession of only 40 cents and the remaining 22 cents are in the possession of the defendants. This has been spoken to by the plaintiff during her cross examination and also spoken to by her husband PW2. It is therefore found that the defendants are in the possession of the property purchased by the plaintiff under Ex.A1. The defendants are not claiming any right over the property in the suit survey number other than that which had been allotted in the oral partition effected amongst the sons of Chella Gounder, during the year 1982. It could therefore be seen when it is specifically admitted that the plaintiff had purchased the shares allotted to Margabandhu and Sadhasivam under the above said partition and when it is the specific case of the plaintiff that she is in possession of only 40 cents and the remaining 22 cents are in the possession of the defendants, the trial court accepting the above evidence of the plaintiff accordingly, granted the relief of possession sought for by the plaintiff by directing the first defendant to measure and hand over the 22 cents of land in his possession to the plaintiff.

6.It is thus found that the trial court had decreed the suit

as prayed for by the plaintiff. The defendants took up the matter on appeal and the first appellate court has also based upon the evidence adduced by the respective parties has clearly found that the plaintiff is entitled to an extent of 62 cents in the suit survey number under Ex.A1. It has been clearly held by the first appellate court that the plaintiff has right, title and possession over the 62 cents of land. Further, the first appellate court has also noted that the plaintiff and her husband has tendered evidence that the 22 cents of land belonging to them in the suit survey number had been encroached by the defendants. After accepting the title of the plaintiff of the property purchased by her under Ex.A1 in the suit survey number and also noting that the plaintiff has given evidence that the defendants have encroached her 22 cents of land in the suit survey number, the first appellate court has set aside the judgment and decree of the trial court and thereby dismissed the suit laid by the plaintiff. The only reason given by the first appellate court for rejecting the plaintiff's suit is that the plaintiff has not specifically pleaded in the plaint that the 22 cents of land belonging to her had been encroached by the defendants.

7. On the other hand, as adverted to earlier, the plaintiff has also sought the relief of possession of the property belonging to her in the suit survey number from the defendants. That apart, the plaintiff has also given evidence that it is only the defendants, who had encroached her 22 cents in the suit survey number and thereby, they should be directed to hand over the possession of the same to her. Accordingly, the trial court has granted the relief of possession in favour of the plaintiff. When the relief of possession has been sought for by the plaintiff for the property, to which she is legally entitled to, when the defendants have also accepted the title of the plaintiff under Ex.A1 and when it is found that under Ex.A1, the plaintiff has purchased 62 cents of land in the suit survey number and when it is the specific case of the plaintiff that only 40 cents of land in the suit survey number are in her possession and the remaining 22 cents had been encroached by the defendants, during the course of their evidence and further when it is not the case of the defendants that they have title to the 22 cents of land purchased by the plaintiff under Ex.A1, other wise and when the defendants have also not established that they had perfected their title to the above said extent of 22 cents in the manner known to law by adducing acceptable and reliable evidence, it is found that the first appellate court has erred in rejecting the suit filed by the plaintiff in its entirety.

8. The plaint averments would only go to show that inasmuch as the plaintiff is not in the possession of the property purchased by her under Ex.A1 has also sought the relief of

recovery of possession from the defendants. It is the case of the plaintiff that the defendants are perpetually interfering with the possession and enjoyment of the property purchased by her under Ex.A1. Accordingly, the trial court on the basis of the evidence adduced in the matter had granted the relief of possession and the other reliefs in favour of the plaintiff. In such view of the matter, merely because there is no specific pleadings in the plaint about the encroachment made by the defendants in respect of 22 cents of land purchased by the plaintiff under Ex.A1, the contention projected by the defendants that the plaintiff's case should fail as such, cannot be accepted.

9.The defendants' counsel contended that at the time of effecting partition of the property in the suit survey number, the boundaries were fixed in respect of the respective shares and the plaintiff knowing about the same, cannot seek the recovery of possession of 22 cents of land in the suit survey number purchased under Ex.A1 from the defendants. When the title of the plaintiff under Ex.A1 has not been denied, when it is found that the plaintiff is in the possession of only 40 cents, the trial court is justified in granting the relief of possession of the remaining extent of 22 cents, by giving a direction to the first defendant accordingly. In such a situation, the first appellate court has completely erred both legally and factually in rejecting the plaintiff's case completely on the only footing that there is no specific plea made in the plaint about the encroachment of 22 cents of the property belonging to the plaintiff purchased under Ex.A1. When the relief of possession is sought for, it is obvious, as rightly argued, that the plaintiff is seeking the recovery of possession only as regards the property encroached by the defendants belonging to her. Therefore, the trial court has erred in disbelieving the plaintiff's case, particularly, when the defendants are not making any particular legal claim over the 22 cents of land in respect of which the trial court had granted the relief of possession in favour of the plaintiff.

10.In the light of the above facts, it is held that the first appellate court has based upon the perverse findings and conclusions and also on a misdirection of the evidence on record, wrongly dismissed the suit laid by the plaintiff and thereby also erred in setting aside the well considered reasonings and findings of the trial court for upholding the plaintiff's case.

11.Accordingly, the substantial question of law is answered in favour of the plaintiff and against the defendants.

12.In fine, the Judgment and decree dated 23.07.2010 made

in A.S.No.39 of 2008 on the file of the Subordinate Court, Gudiattam are set aside and the Judgment and Decree dated 16.04.2008 made in O.S.No.213 of 2003 on the file of the District Munsif Court, Gudiattam are confirmed. Accordingly, second appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1.The Subordinate Judge,
Gudiyatham

2.The District Munsif Court
Gudiyatham

+1 cc to Mr.T.Dhanyakumar Advocate sr 12788

+1 cc to Mr.N.Nithyanandam Advocate sr 12340

S. A.No. 566 of 2011

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