

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 27.06.2017

CORAM

THE HONOURABLE MR. JUSTICE M.SATHYANARAYANAN

SA.No.718/2016

K.Yogeswaran

..Appellant/Appellant/Plaintiff

Versus

1. A.D.Surendar,
S/o.Dhasartha Mudaliar,
No.23A, Rajaji Street,
Tharamani, Chennai - 600 113

2. A.D.Mohanraj,
Son of Dhasaratha Mudaliar,
No.3, Krishnappa Mudali Street,
Chennai - 600 084 ..Responents/Respondents/Defendants

Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree passed in AS.No.469 of 2011, on the file of the II Additional City Civil Court at Chennai, dated 22.12.2015, in confirming the Judgment and decree in OS.No.3988/2010 on the file of the XIII Assistant Judge, City Civil Court, Chennai dated 08.03.2011.

For Appellant : Mr.M.Muruganatham

For Respondents: NA for R1

Mr.P.Sivamani for R2

JUDGMENT

By consent, the Second Appeal is taken up for final disposal. The appellant who lost before the Courts below is the appellant herein.

2 The appellant / plaintiff filed O.S.No.3988 of 2010 on the file of the XIII Assistant Judge, City Civil Court, Chennai, praying for permanent injunction restraining the respondents / defendants from interfering with the peaceful possession and enjoyment of the same. It is averred by the appellant / plaintiff that the suit property admeasuring to an extent of 730 Sq.ft bearing old No.18, New No.4, Kulandhi Gramani Street, Pursaiwakkam, Chennai was allotted to him by his

wife namely Smt.Y.Prameela by way of Settlement Deed dated 18.02.2010 (Ex.A2) and originally, the suit property was allotted in her favour as per the final decree passed on 29.01.2008 in I.A.No.22747 of 2007 in O.S.No.4153 of 1997 (Ex.A1) and her Brother-in-law's namely the respondents herein were also allotted respective shares in the suit properties.

3 It is further averred by the plaintiff that the 1st defendant / 1st respondent has encroached upon the properties and tried to put up superstructure and in the light of the allotment of the final decree proceedings in favour of his wife and she in turn executed a deed of registered settlement deed in his favour (Ex.A2), he his having right, title and possession of the property and the defendants should be restrained to interfere with the peaceful possession of the suit property.

4 The 1st defendant has filed the written statement refuting the allegations made in the plaint and would state that the final decree proceedings which is culminated with the order dated 29.01.2008 (Ex.A1) has been put to challenge in A.S.No.178 of 2010 before the 2nd Additional Judge, City Civil Court, Chennai and since the proceedings have not been reached finality and prays for dismissal of the suit.

5 The 2nd defendant also took the very same stand as that of the 1st defendant.

6 The Trial Court, on consideration of pleadings has framed the following issues :-

- Whether the plaintiff is in possession of the suit property?
- Whether the plaintiff is entitled to the relief of permanent injunction as prayed for?
- Whether the plaintiff's entitled to the relief of mandatory injunction as prayed for?

7 During the course of trial, the plaintiff examined himself as PW1 and Ex.A1 to Ex.A6 were marked and on behalf of the defendants, no oral and documentary evidence was let in.

8 The Trial Court on a consideration of pleadings and on appreciation of oral and documentary evidence, found that the final decree is yet to reach the finality on account of pendency of A.S.No.178 of 2010 before the Lower Appellate Court and on factual aspects had recorded the findings that there is no proof by the plaintiff to show that the physical possession has been with him and there is no recital in the Ex.A2 - Settlement Deed as to the handing over the possession of the

property and he is only in possession of the property and citing the said reasons, the Trial Court has dismissed the suit vide Judgment and decree dated 08.03.2011. The plaintiff aggrieved by the dismissal of the suit filed an appeal in A.S.No.469 of 2011 on the file of II additional, City Civil Court at Chennai.

9 The Lower Appellate Court on perusal of the Memorandum of Grounds of Appeal and other materials has formulated the following points for determination:-

- Whether the appellant / plaintiff has right and possession of the suit property?
- Whether the appellant / plaintiff is entitled to the relief of permanent injunction?
- Whether the appellant / plaintiff is entitled to the relief of mandatory injunction?
- Whether the judgment and decree of the trial court is not in accordance with law?
- To what relief the appellant / plaintiff is entitled?

10 The Lower Appellate Court on going through the contents of Ex.A2, found that after passing final decree, the sharers did not file any execution proceedings for possession of their allotted share and though the wife of the plaintiff has been allotted to her share in the said final decree passed, since, finality has not been reached and the appeal is pending, the plaintiff cannot claim any right over the suit property on the basis of settlement deed. Insofar as the possession of the property is concerned, the Lower Appellate Court noted that the wife of the plaintiff is yet to take possession of the share allotted to her. Hence, the Plaintiff has no right over the settlement deed and the defendants having attempted to deny her right, it cannot be the cause of action for the suit and therefore, by citing the said reasons, dismissed the judgment and decree dated 22.12.2015 . The plaintiff aggrieved by the dismissal of the appeal by the Lower Appellate Court in confirming the decree passed by the Trial Court has filed this Second Appeal.

11 In the Memorandum of Grounds of Appeal, the following substantial questions of law are raised for consideration:-

- Whether the Courts below justified in dismissing the suit under section 10 of the CPC, when the power given under the section is only to stay the proceedings of the subsequent the suit?
- Whether the Courts below right in applying section 10 of the CPC, when the relief sought in both the suits are different?

- Whether the Courts below are right in dismissing the suit, when the right of the appellant's settlor, crystallized by the decree of the Court, and as much as, his title of the properties remains undisputed?

12 Mr.M.Muruganantham, the learned counsel appearing for appellant has drawn the attention of this Court to the typed set of documents filed in S.A.228 of 2017 which is also listed along with the present appeal and would submit that the A.S.No.178 of 2010 filed by the 2nd respondent herein was also dismissed by the Lower Appellate Court on 22.12.2015 and the Second Appeal in SA.No.228 of 2017, challenging the legality of the same was also dismissed by this Court, which is prior to the hearing of this Second Appeal and as such, the findings recorded by the Trial Court in the absence of reaching finality in the final decree proceedings, the plaintiff has no right in so far as the handing over the possession of the suit property is concerned in the light of the dismissal of A.S.No.178 of 2010 by the Lower Appellate Court, the wife of the plaintiff has every right, title and possession and under execution of settlement deed (EX.A2), she had delivered the property in his favour and the plaintiff is having right, title and possession over the property and as such the impugned judgments passed by the Courts below requires modification and prays for decreeing of the suit as prayed for. Alternatively, it is further submitted by the learned counsel appearing for the appellant / plaintiff, since the plaintiff's wife has right, title and possession over the property, there cannot be any interest on his part to take separate application to execution of the final decree against the 2nd respondent for getting possession of the suit property and therefore, prays for appropriate orders.

13 Per contra, Mr.P.Sivamani, the learned counsel appearing for 2nd respondent would submit that the Courts below has recorded the concurrent findings, that the plaintiff is in possession and enjoyment of the suit property and admittedly to execute the final decree, neither the wife of the plaintiff nor the plaintiff had filed any application for execution and as such the submissions made by the learned counsel appearing for the appellants lacks merits. Since the findings of the Courts below are concurrent in nature, the same cannot warrant interference and prays for dismissal of the second appeal.

14 This Court has considered the rival submission and also perused the materials placed before it.

15 At the time of pendency of A.S.No.469 of 2011 before the Lower Appellate Court, the A.S.No.178 of 2010 filed by the 2nd respondent herein staying the final decree proceedings was pending before the 2nd Additional City Civil Court, Chennai and

vide judgment and decree dated 22.12.2015, the said appeal was dismissed confirming the order passed by the Lower appellate Court as to the mode of division. The 2nd respondent herein made a challenge to the Judgment and decree passed by the Lower Appellate Court in A.S.178 of 2010 filed Second Appeal in S.A.228 of 2017 and the said appeal was also listed along with this present second appeal. This Court in a separate judgment, passed today has dismissed the said second appeal and therefore, the mode of division passed by the Lower Appellate Court under the final decree proceedings has become final. Therefore, the findings of the Lower Appellate Court that in the light of the pendency of the appeal in A.S.No.178 of 2010, the right of the appellant / plaintiff in respect of the suit property warrants no interference.

19. In the light of the above said subsequent development, this Court is of the view the plaintiff is having right and title in respect of the suit properties. Insofar as the possession of the suit property is concerned, admittedly the 2nd respondent is in possession of the suit property and the Trial Court has also noted the fact that there is no recital in Ex.A2 Settlement Deed as to the handing over the possession by the wife of the plaintiff to him and he is not in constructive possession of the property. If at all the plaintiff wants to get in possession, in the light of the subsequent development, it is open to him to levy a execution petition to get actual possession of the suit property and admittedly, as on today he is not in possession of the suit property.

20. Since the appellant / plaintiff is not in actual possession of the property though he is having right, title in respect of the suit property, the prayer sought for by the appellant / plaintiff restraining the defendants / respondents from interfering with the possession and enjoyment of the suit property, as a vacant land, cannot be granted. There are no substantial questions of law arise for consideration in this second appeal. Therefore, the second appeal is dismissed. In the light of the dismissal of SA.No.228 of 2017, it may open to the appellant / plaintiff to file execution petition to get possession of the suit property and as and when such petition being filed, the Lower Court entertain the same and give a disposal as expeditiously as possible in accordance with law.

Sd/-
Assistant Registrar(CS II)

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Sub Assistant Registrar

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To

1. XIII Assistant Court,
City Civil Court, Chennai.
2. II Additional Court,
City Civil Court, Chennai.

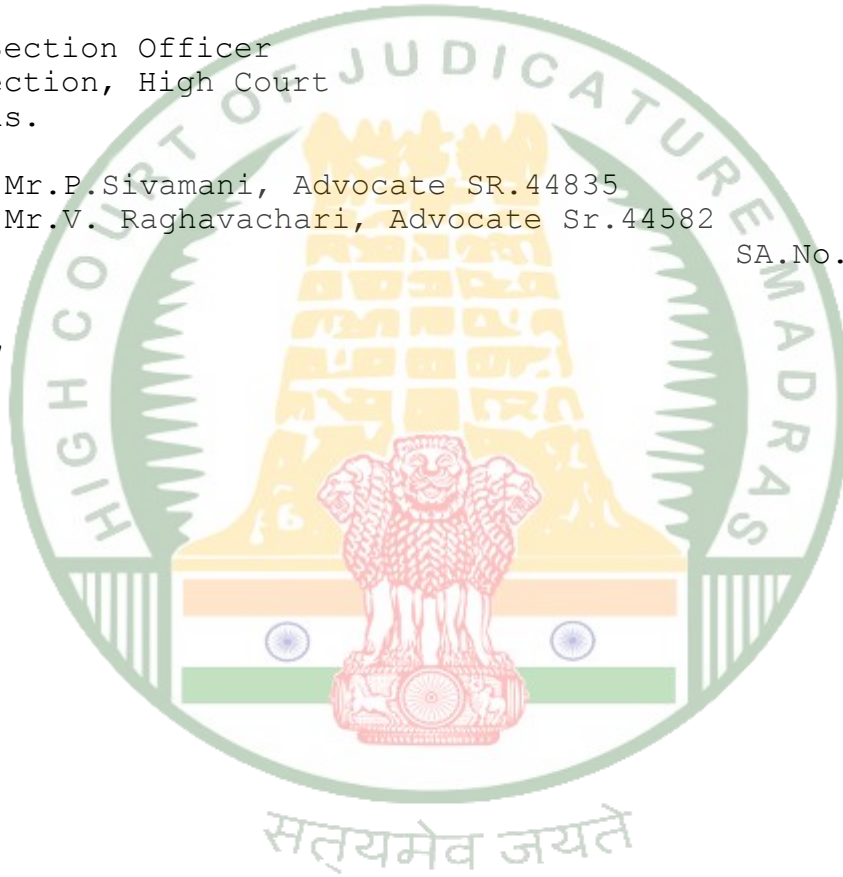
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The Section Officer
VR Section, High Court
Madras.

- + 1 cc to Mr.P.Sivamani, Advocate SR.44835
- + 1 cc to Mr.V. Raghavachari, Advocate Sr.44582

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