



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 14.02.2017

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CORAM:

THE HONOURABLE MR. JUSTICE M. DURAISWAMY

S.A. (MD) No. 217 of 2014

and

M.P. (MD) No. 1 of 2014

1. Devendrametha
2. Manju Metha
3. Anil Metha
4. Kamala Metha .. Appellants/Respondents/Defendants

Vs.

1. R. Sakkaraiappan
2. R. Arumugam .. Respondents/Appellants/Plaintiffs

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree passed in A.S.No.3 of 2012 by the Subordinate Court, Sivakasi on 27.07.2012 in reversing the judgment and decree in O.S.No.67 of 2009, dated 05.09.2011, on the file of the District Munsif Court, Sivakasi.

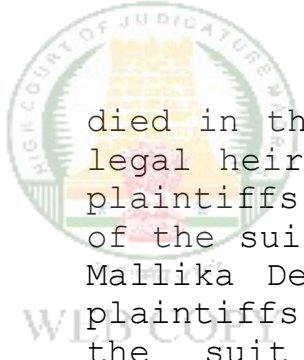
For Appellants : Mr. R. Boomirajan
For Respondents : Mr. D. Nellaiappan

JUDGMENT

The above Second Appeal arises against the Judgment and Decree passed in A.S.No.3 of 2012, on the file of the Subordinate Court, Sivakasi, reversing the Judgment and Decree passed in O.S. No.67 of 2009, on the file of the District Munsif Court, Sivakasi.

2. The defendants are the appellants and the respondents are the plaintiffs in the suit. The plaintiffs filed the suit in O.S.No.67 of 2009 for permanent injunction restraining the defendants from preventing the plaintiffs from enjoying the suit property by putting up fence and construction in the suit property. The brief case of the plaintiffs is as follows:

According to the plaintiffs, the suit property and other properties originally belonged to their father Ramalingam by virtue of a partition deed of the year 1920. The said Ramalingam



died in the year 1956 and after his death, the plaintiffs as his legal heirs are enjoying the property. The elder brother of the plaintiffs viz., Essakkiapillai died 25 years prior to the filing of the suit leaving behind Ramalingam, Natarajan, Sivasankaran and Mallika Deivanai as his legal heirs. The other brother of the plaintiffs viz., Ramachandran died 13 years prior to the filing of the suit leaving behind Gomathi, Kamalam, Ramalingam and Ambalavanan as his legal heirs. On 04.12.2008, when the first plaintiff went to the suit property, he saw the defendants digging pits for putting up fence. However, the first plaintiff prevented the defendants from putting up the fence and at that time, the defendants informed the first plaintiff that they purchased the property from one Radhakrishnan and that they are going to put up fence in the suit property. On enquiry, the plaintiffs came to know that one Radhakrishnan purchased the suit property from the legal heirs of Essakkiapillai on 30.01.2004. Further according to the plaintiffs Late Essakkiapillai and his legal heirs had only 1/5th share in the suit property and the plaintiffs are entitled to 4/5th share in the suit property. In these circumstances, the plaintiffs filed the suit.

3. The brief case of the defendants is as follows:

According to the defendants, the plaintiffs are not entitled for the relief sought for in the suit. Radhakrishnan purchased the suit property from the original owners in the year 1994 and he has been in enjoyment of the same. In the year 2004, the said Radhakrishnan sold the suit property and other properties to the defendants and also put them in possession of the same. Since the date of purchase, the defendants are in possession and enjoyment of the suit property. The defendants are entitled to the entire property. Since the proceedings are pending under Section 47(A) of the Stamp Act, the defendants have not received the registered sale deed. The plaintiffs are not entitled to the suit property. In these circumstances, the defendants prayed for dismissal of the suit.

4. Before the trial Court, on the side of the plaintiffs, P.W.1 was examined and 8 documents viz., Exs.A.1 to A.8 were marked and there was no oral and documentary evidences on the side of the defendants. The trial Court, after taking into consideration the oral and documentary evidences let in by the plaintiffs, dismissed the suit. Aggrieved over the same, the plaintiffs preferred an appeal in A.S.No.3 of 2012 and the lower Appellate Court reversed the judgment and decree of the trial Court and decreed the suit. Aggrieved over the judgment and decree of the lower Appellate Court, the defendants have filed the above Second Appeal.

5. In this appeal, Mr. R.Boomirajan, learned Counsel appearing for the appellants and Mr.Nellaiappan, learned Counsel appearing for the respondents.



6. The appellants have raised the following Substantial Questions of Law in the Second Appeal:

"(A) Whether the partition deed is valid under law?

(B) Whether the plaintiff has proved the case by the oral and documentary evidence or not?

(C) Whether the suit is bad in law for non-joinder of the necessary party or not?

(D) Whether the suit is maintainable under law or not?

(E) Whether the document can be accepted as evidence before the Court of law, even though the document has not be registered under Section 17 of the Registration Act?

(F) Whether the suit filed by the plaintiffs against the appellants is maintainable or not?"

7. The learned Counsel appearing for the appellants submitted that the trial Court has rightly dismissed the suit filed by the plaintiffs finding that the suit filed by the plaintiffs for permanent injunction is not maintainable without a prayer for declaration. The learned Counsel further submitted that when there is no dispute between the parties with regard to the title of the suit property, the plaintiffs should have filed the suit for declaration and injunction.

8. Countering the submissions made by the learned Counsel appearing for the appellants/defendants, the learned Counsel appearing for the respondents/plaintiffs submitted that there is no dispute with regard to the title, hence the suit filed by the plaintiffs for permanent injunction is very much maintainable. Further the learned Counsel submitted that the non-examination of the defendants is fatal to the case of the defendants. In support of his contention, the learned Counsel relied upon the following judgments:

(i) In **Anathula Sudhakar Vs. P.Buchi Reddy (dead) by LRs & Others** reported in **2009-2-L.W.546**, the Honourable Apex Court held as follows:

"17(d) Whether there are necessary pleadings regarding title and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and



cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case."

(ii) In **Vidhyadhar Vs. Mankikrao and another** reported in **1999-3-L.W.576**, the Honourable Supreme Court held that under Section 114 of the Evidence Act, presumption has to be drawn against a party, who did not enter into the witness box.

(iii) In **Rau Padma and Others Vs. Gayatri Devi and Others** reported in **(2011)4 MLJ 459**, the Division Bench of this Court held that when the subject property is a vacant site, the question of title assumes importance even to decide the issue regarding possession in view of the settled position that possession follows title.

(iv) In **Venugopal Vs. Chandrakasa Padayachi (deceased) and Others** reported in **2003-3-L.W.255**, this Court held that when a party as a transferee acquires a right or share in the suit property and is entitled to be in joint possession, the remedy open to him is to have separate possession by way of enforcing an action for partition of the property and not otherwise.

9. On a careful consideration of the materials available on record, the submissions made by the learned Counsel appearing on either side and also the judgments relied upon by the learned Counsel appearing for the respondents/plaintiffs, it could be seen that the points that have to be considered in this Second Appeal are whether the suit filed by the plaintiffs for permanent injunction without a prayer for declaration is maintainable and whether the non-examination of the defendant is fatal to the case of the defendants.

10. Admittedly the defendants have not entered the box. There was neither oral nor documentary evidences on the side of the defendants. Therefore, the averments stated in the written statement alone cannot be taken into consideration, without the said averments being proved by the oral and documentary evidences. However, the present suit has been filed by the plaintiffs for permanent injunction without a prayer for declaration. On a perusal of the plaint averments, it could be seen that in paragraph No.9, the plaintiffs have stated that they came to know about the purchase of the suit property by the defendants from one Radhakrishnan on 30.01.2004 under document No.538/2004. They have also stated that the defendants are not entitled to the entire suit property and that the defendants are entitled only to 1/5th share in the suit property. Further the plaintiffs have stated that they are entitled to 4/5th share in the suit property.

11. On a reading of the averments stated in paragraph No.9, it is very clear that there is a dispute with regard to the title of the property. Even if the averments stated in the written statement are ignored, the plaint averments itself would clearly



establish that the defendants have purchased the entire suit property from one Radhakrishnan on 30.01.2004, which the plaintiffs are disputing by stating that the defendants are entitled only to 1/5th share in the suit property. In paragraph No.7 of the plaint, the plaintiffs have stated that they were informed by the defendants on 04.12.2008 that they purchased the suit property and that they are going to put up fence and construction in the suit property. When the plaintiffs had knowledge about the purchase made by the defendants, they should have filed the suit for declaration. The plaint averments itself would clearly establish that there is a dispute with regard to the title of the property. From the plaint averments, it is clear that the defendants are claiming title over the entire suit property, whereas the plaintiffs are contending that the defendants are entitled only to 1/5th share in the suit property and that the plaintiffs are entitled to 4/5th share in the suit property. The plaintiffs should have filed the suit for declaration and established their right over the suit property. Since the plaintiffs have not established their case, the trial Court rightly dismissed the suit. For the reasons stated above, the lower Appellate Court should not have reversed the judgment and decree of the trial Court and decreed the suit. The lower Appellate Court had erroneously decreed the suit which is liable to be set aside.

12. Though there is no dispute with regard to the ratios laid down in the judgments relied upon by the learned Counsel appearing for the respondents/plaintiffs, since the facts and circumstances are completely different, the said judgments are not applicable to the case on hand.

13. In these circumstances, the Substantial Questions of Law (D) and (F) are decided in favour of the appellants/defendants. The judgment and decree of the lower Appellate Court are set aside and the judgment and decree of trial Court made in O.S.No.67 of 2009 are restored. The Second Appeal is allowed. There shall be no order as to costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-II)

/True copy/

Sub Assistant Registrar

To

1. The Subordinate Court, Sivakasi.

2. The District Munsif Court, Sivakasi.

+1 CC to M/s.A.HAJA MOHIDEEN, Advocate, SR No.8136

+1 CC to M/s.R.BOOMIRAJAN, Advocate, SR No. 8421

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